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DC District Court holds that eBay can't compel arbitration based on later-amended terms

On 26 July 2018, the United States District Court for the District of Columbia ('the Court') ruled that eBay could not compel a user of its services to arbitrate a dispute, even though the user had agreed to and was therefore bound by eBay's User Agreement¹. That User Agreement stated that the company had a right to modify the terms, and eBay had later modified those terms to include an arbitration clause for the purposes of dispute resolution. Specifically, the Court held that eBay's act of posting the updated terms did not constitute sufficient notice, and that the company had not presented proof sufficient to show that it had notified the user via email. Although the result is troubling for many companies who approach changes to website terms in the same manner that eBay did, the decision does provide some hints for what companies can do to provide support for arguments that their changes are enforceable. Gonzalo Mon and Geoffrey Castello, of Kelley Drye & Warren LLP, dissect the case and comment on the lessons learned.

Background

On 9 July 2015, Patrick Daniel purchased what he thought was an authentic Audemars Piguet Royal Offshore Watch from Jack Ly via eBay's online marketplace, thinking that the watch was worth \$75,000. On 14 July 2015, Daniel learned that the watch was counterfeit, not 'authentic,' as marketed, and thus worth less than what he thought. Shortly afterwards, Daniel contacted Ly and arranged a meeting to return the watch. Ly never showed up to the meeting. Daniel then notified eBay, but the company allegedly refused to refund his money or to provide Ly's contact information. In August 2015, Daniel sued eBay for breach of contract, fraud, and unjust enrichment, among several other charges.

eBay argued that Daniel is required to arbitrate his claims against the company pursuant to its User Agreement. When Daniel registered as an eBay user in 1999, he was required to accept the User Agreement by clicking 'I accept' on an online form. Notably, eBay's User Agreement in 1999 did not include an arbitration clause. However, like many other companies, eBay included a standard clause stating that the company could 'amend this

Agreement at any time by posting the amended terms on our site.'

Pursuant to that provision, eBay amended its User Agreement in 2012 to include an arbitration clause. That clause stated that users and eBay agree that 'any and all disputes or claims that have arisen or may arise between you and eBay shall be resolved exclusively through final and binding arbitration, rather than in court.' The User Agreement allowed users to 'opt out' of the arbitration provision by mailing eBay a written opt-out notice within a certain amount of time. Daniel did not take advantage of his right to 'opt out.'

In June 2015, eBay amended its User Agreement again, and that version was in effect at the time Daniel purchased the watch from Ly a month later. The 2015 User Agreement contained an arbitration provision that is nearly identical to the 2012 version:

'You and eBay each agree that any and all disputes or claims that have arisen or may arise between you and eBay relating in any way to or arising out of this or previous versions of the User Agreement, your use of or access to eBay's Services shall be resolved

exclusively through final and binding arbitration, rather than in court [...] The Federal Arbitration Act [1926] governs the interpretation and enforcement of this Agreement to Arbitrate.'

eBay sent an email to registered users notifying them about the change to the User Agreement. Daniel, however, claimed that he neither received the 2012 email notification nor the 2015 email notification.

Magistrate report and recommendation

Based on the User Agreement, eBay filed a motion to compel arbitration. The company argued that in 1999, Daniel affirmatively agreed to the User Agreement that allowed eBay to 'amend this Agreement at any time by posting the amended terms on our site.' When eBay modified the terms in 2012, not only did the company post the amended terms on its site, it also notified registered users and gave them a chance to opt-out. Because Daniel did not do that, eBay argued that he agreed to the changes and, thus, that Daniel is required to submit his claim to arbitration.

Daniel's primary argument in response to eBay's motion was that he never agreed to the 2012 and 2015 arbitration

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clauses because he never received notification of the amended terms. eBay, he argued, "cannot offer credible evidence of [his] intent to be bound to arbitration²." Alternatively, Daniel argued that the arbitration agreement, if any, was unenforceable and does not encompass his claims against eBay over the watch.

The magistrate judge issued a report and recommendation recommending that the Court grant eBay's motion to compel arbitration for three key reasons: (1) the parties entered into a valid arbitration agreement; (2) the arbitration agreement is enforceable; and (3) the arbitration clause encompasses Daniel's claims³. Notably, the magistrate opined that by failing to opt out of the arbitration provision when eBay gave him the opportunity to do so, Daniel "manifested his assent to the terms of eBay's User Agreement and the arbitration clause therein⁴." The magistrate did not consider whether "Daniel could consent to the later-added arbitration provisions without personal notice of the changes or whether posting the amended User Agreements on eBay's website was sufficient notice⁵."

Although the parties disagreed about which state's law applied - eBay

argued for Utah or Texas, while Daniel argued for Louisiana - the Magistrate did not resolve that issue because they concluded that eBay's motion to compel arbitration should be granted pursuant to the law of each jurisdiction.

Analysis

In adjudicating a motion to compel arbitration, the Court stated that it "must determine (1) whether the parties entered into a valid and enforceable arbitration agreement; and, if so, (2) whether the arbitration agreement encompasses the parties' claims⁶." The Court started its analysis of the first point by looking at the basic principles of contract formation, namely that an agreement requires 'mutual assent' in order to be enforceable. Indeed, "the general rule of arbitration agreements is that one who has not manifested assent to an agreement to arbitrate cannot be required to submit to arbitration⁷." Moreover, a plaintiff is "not bound by the terms of [...] later-added arbitration clauses unless he consented to them, as a 'substantive change in the terms of a contract requires the consent of parties⁸.'"

Here, the Court determined that just because eBay could prove that Daniel

agreed to the 1999 User Agreement - which included the change-in-terms provision but not the arbitration clause - did not necessarily mean that he agreed to the subsequent addition of the arbitration clause. eBay also had to prove that Daniel agreed to the updated User Agreement. That required proof of two things: (1) that Daniel was notified about the arbitration clause; and (2) that he assented to the clause in some manner, such as by affirmatively agreeing to the new terms or by continued use of the service⁹.

eBay presented two arguments in support of its assertion that it had provided the required notice to Daniel. First, the 1999 User Agreement, which Daniel affirmatively accepted, included a provision stating that eBay could 'amend this Agreement at any time by posting the amended terms on our site.' The company did, indeed, post the amended terms on its site. However, the Court noted that eBay had not presented "any authority from any of the three jurisdictions for the proposition that such posts constituted notice sufficient to demonstrate an agreement to arbitrate¹⁰." Indeed, in Utah, eBay's preferred forum, a 'general' notice without evidence of 'personal' and 'actual' mailing to

1. *Daniel v. eBay, Inc.*, No. 15-1294 (D.D.C. July 26, 2018).
2. *Id.* at *11.
3. *Id.* at *8.
4. *Id.* at *10-11.
5. *Id.* at *11.
6. *Id.* at *10 (citations omitted).
7. *Id.* at *12 (quoting *Ellsworth v. Am. Arb. Ass'n*, 148 P.3d 983, 989 (Utah 2006)).
8. *Id.* (quoting *FIA Card Servs. v. Weaver*, 62 So.3d 709, 718 (La. 2011) and *Lanier v. Alenco*, 459 F.2d 689, 693 (5th Cir. 1972)).
9. *Id.* (citing *See FIA*, 62 So.3d at 718).
10. *Id.* at 15.
11. *Id.* at 15-16 (citing *McCoy v. Blue Cross & Blue Shield*, 20 P.3d 901, 905).
12. *Id.* at 16.
13. *Id.*
14. *Id.* at 17 (citing *McCoy*, 20 P.3d at 905).
15. *Id.* at 17.
16. *Id.* at 14 (citing *FIA*, 62 So.3d at 718 n.7).
17. *Id.* at 14.
18. *Marsh v. First USA Bank*, N.A., 103 F. Supp. 2d 909 (N.D. Tex. 2000).
19. *Id.* at 917.
20. *See*, e.g., *Daniel*, No. 15-1294 at 16 (noting that the form notice did not include any email address or date sent).

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affected customers was deemed insufficient to demonstrate consent¹¹.

eBay's second argument was based on the emails it sent to registered users about the updated User Agreement. The company presented its form emails informing consumers about the changes to its agreement, and asserted that its records show that Daniel was notified. The Court held this was not enough. "eBay relies on a form email that it states was sent to eBay users to notify them of updates to the 2015 User Agreement¹²." The form was addressed to 'USER' and did not include any email address or date sent¹³. Without evidence that Daniel received the notice, eBay could not prevail¹⁴. "In sum, eBay has failed to establish mutual assent to arbitrate because it failed to meet its burden of demonstrating that Daniel was personally notified of the 2012 or 2015 User Agreements containing the arbitration provisions¹⁵."

Lessons

What lessons should companies take away from this decision?

Although most website terms of use state that companies reserve the right to make changes simply by posting them on the site, that alone is unlikely to satisfy the notice requirements when it comes to something like an arbitration provision. The Court's holding in *Daniel* highlights the fact that any attempts to bind a consumer to an agreement,

especially agreements to arbitrate, must be based on sufficient notice to the consumer. Companies need to provide individualised notice when changes are made and which are intended to be enforceable in situations similar to what Daniel presented to eBay.

There are different options for providing that notice. If it's possible to get consumers to affirmatively indicate their consent, such as by checking a box, that would certainly put the company in a better position. However, the *Daniel* decision suggests that affirmative consent may not be mandatory.

Indeed, the decision suggests that eBay's email notice might have worked if the company had coupled it with proof that it actually sent the notice to Daniel. Importantly, the Court pointed out that this does not mean that eBay must prove that Daniel actually received the notice¹⁶. However, "eBay must show and the record must reflect that it undertook specific efforts to send notice of the new arbitration provisions to Mr. Daniel on a certain date¹⁷."

The Court contrasted the evidence that eBay presented with the record in a Texas case involving First USA Bank¹⁸. In that case, First USA Bank mailed customers a written notice adding an arbitration clause to the Cardmember Agreement. Although the bank could not prove "with absolute certainty" that the plaintiffs received the notice, the

record established that the bank had quality assurance controls designed to ensure that every customer received the notice¹⁹. For example, the bank assigned a code to each account, which identified the type of inserts a customer would receive with their monthly statement. The inserts were placed in the appropriate envelopes by machines, but individuals would randomly inspect statements to ensure that they were correct. Individuals would also verify inventory levels of particular inserts to ensure that all of the inserts had been sent.

Obviously, the type of proof that is relevant to sending notice through postal mail is different than the type of proof that would be relevant to sending a notice through electronic mail. Although the Court in *Daniel* did not specify what type of proof would be required in the latter scenario, the decision suggests that the Court may have come to a different decision if eBay had presented the form email, along with a list of email addresses to which it was sent and the dates on which it was sent²⁰.

One lesson is clear: courts are reluctant to hold consumers to arbitration provisions when there is no certainty that they accepted the term, and when it is uncertain whether notice was provided to the consumer that they must arbitrate their disputes. The more fulsome the notice and explicit acceptance of the terms, the more likely it is that a court would consider enforcing arbitration.