

Contracting on the Internet: Avoiding potential pitfalls under New York law

Most jurisdictions, including New York, enforce online contracts.¹ However, New York courts do not enforce these agreements where a consumer shows that she did not have adequate notice of the terms of the contract; that she did not assent to the terms of the contract; or that the terms are unconscionable. This article analyzes these three central issues: notice, assent, and unconscionability.

Notice requires that the terms of an online agreement be reasonably communicated to the consumer.² As a general rule, adequate notice exists where the terms of the agreement are set forth on the computer screen



**David A.
Scheffel**

in view of the user.³ However, adequate notice does not exist where the contractual terms are available to the user only where she must go to another link or scroll down the webpage to another screen.⁴

Assent requires a consumer to affirmatively agree to the terms of an online agreement.⁵ For example, where the consumer clicks an "I Accept" or "I Agree" icon after displaying the terms of an agreement prominently on the program user's computer screen, the

assent prerequisite is satisfied.⁶ And, a consumer assents to the terms of an agreement where the product and agree-

ment are shipped to her and she retains the product beyond the date specified in the terms of the agreement.⁷

Unconscionability is a basis not to enforce an online agreement. To invoke this defense, a consumer must show that the agreement was procedurally and substantively unconscionable.⁸ This requires the consumer to show that she did not have a meaningful choice in entering into the contract, and that its terms unreasonably favored the other party.⁹

As for the procedural requirement, a court must analyze the steps taken to form the contract to decide whether one party did not have a meaningful choice in entering into the agreement.¹⁰ The relevant

See PITFALLS, Page 19

PITFALLS ...

Continued From Page 5

factors are: "the setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained 'fine print,' whether the seller used 'high-pressured tactics' and any disparity in the parties' bargaining power."¹¹ This requirement is not satisfied where an online agreement was seven and a half pages, written in easy to read font, and the user was under no external pressure to accept the terms of the agreement.¹²

As for the substantive requirement, a court must analyze whether the contractual terms unreasonably favor one party.¹³ If such a showing is made, this alone may be sufficient to render a term unenforceable.¹⁴ For example, one court refused to enforce an arbitration clause which would have forced a purchaser of computers and software to arbitrate her claim in Chicago, Illinois before the International Chamber of Commerce (ICC) which required advanced fees of \$4,000 – more than the cost of many products – of which \$2,000 was nonrefundable.¹⁵

Analysis of the above authority demonstrates that New York courts will likely enforce online contracts where they provide the consumer with reasonable notice of the terms of the agreement; require the consumer to affirmatively assent to the agreement; and do not contain any unconscionable terms.

David A. Scheffel is an associate with the firm of Farrell Fritz, P.C. He is a former law clerk to U.S.D.J. Arthur D. Spatt of the Eastern District of New York.

1. *Zurakov v. Register.com, Inc.*, 304 A.D.2d 176, 178-79 (2d Dep't 2003) (enforcing online contract to register domain name under New York law); *Moore v. Microsoft Corp.*, 293 A.D.2d 587, 587 (2d Dep't 2002) (enforcing software agreement where terms were displayed prominently on computer screen before software could be installed and where user had to indicate assent by clicking "I agree"); *DeJohn v. The .TV Corp. Int'l*, 245 F. Supp. 2d 913, 918 (C.D. Ill. 2003) (enforcing online contract to register domain name under New York law). For a general discussion of online contracting, see Towle, *Legal Devs. in Electronic Contracting*, 712 PLI/Pat 557 (July 2002) and Towle & Dengler, *Contract Formation: Electronic Contracts and Online Terms*, 600 PLI/Pat 131 (April/May 2000).
2. *Motise v. Am. Online, Inc.*, 346 F. Supp. 2d 563, 564 (S.D.N.Y. 2004) (stating that for notice to be adequate, terms must be reasonably communicated to the consumer).
3. *Id.* at 565 (citing *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 32 (2d Cir. 2002)).
4. *Id.* (citing *Specht*, 306 F.3d at 32).
5. *Specht*, 306 F.3d at 28-29 (requiring consumer of online contract to communicate assent to contractual terms).
6. *Moore*, 293 A.D.2d at 587 (stating that where terms of license agreement were prominently displayed on computer screen and consumer was required to click "I agree" icon before downloading software, the assent requirement was satisfied).
7. *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 251 (1st Dep't 1998) ("By the terms of the Agreement at issue, it is only after the consumer has affirmatively retained the merchandise for more than 30 days—within which the consumer has presumably examined and even used the product(s) and read the agreement—that the contract has been effectuated.").
8. *See Brower*, 246 A.D.2d at 253 ("As a general matter, under New York law, unconscionability requires a showing that a contract is "both procedurally and substantively unconscionable when made.") (quoting *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988)).
9. *Id.* (citing *Matter of State of New York v. Avco Fin. Servs.*, 50 N.Y.2d 383, 389 (1980)).
10. *Id.*
11. *Id.* (citing *Gillman*, 73 N.Y.2d at 11).
12. *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 451-52 (E.D.N.Y. 2004). *See also Brower*, 246 A.D.2d at 253 (noting contract not procedurally unconscionable where a consumer has 30 days to examine a shipment's contents, including the agreement terms, and the agreement was 4 pages and 16 paragraphs, appearing in the same size print).
13. *Brower*, 246 A.D.2d at 254 (citing *Gillman*, 73 N.Y.2d at 12).
14. *Id.* (citing *Gillman*, 73 N.Y.2d at 12).
15. *Id.* at 249, 254.