SJC-12883

CHRISTOPHER P. KAUDERS & another[1] vs. UBER TECHNOLOGIES, INC., & another.[2]

Suffolk. September 10, 2020. - January 4, 2021.

Present: Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[3]

Arbitration, Appeal of order compelling arbitration, Appropriateness of judicial proceedings, Confirmation of award. Uniform Arbitration Act. Contract, For services, Offer and acceptance, Arbitration.

Civil action commenced in the Superior Court Department on July 12, 2016.

A motion to compel arbitration was heard by Douglas H. Wilkins, J.; a motion for reconsideration, filed on November 28, 2018, was heard by him; and a motion to confirm the arbitration award was also heard by him.

Felicia H. Ellsworth for the defendants.
W. Paul Needham for the plaintiffs.
The following submitted briefs for amici curiae:

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[1] Hannah Kauders.

[2] Rasier, LLC.

[3] Justice Lenk participated in the deliberation on this case prior to her retirement.

Bruce H. Stern, of New Jersey, Jeffrey R. White, of the District of Columbia, Kathy Jo Cook, Thomas R. Murphy, Kevin J. Powers, Kristie A. LaSalle, Lauren G. Barnes, & Michael J. McCann for Massachusetts Academy of Trial Attorneys & another.

Ben Robbins & Martin J. Newhouse for New England Legal Foundation.

Archis A. Parasharami, of the District of Columbia, & Steven P. Lehotsky for the Chamber of Commerce of the United States of America.

Karla Gilbride, of the District of Columbia, Rhea Ghosh, of New York, & Stuart Rossman for Public Justice, P.C., & another.

KAFKER, J. Plaintiffs Christopher Kauders and Hannah Kauders commenced a lawsuit against defendants Uber Technologies, Inc., and Rasier, LLC (collectively, Uber),[4] in the Superior Court, claiming, among other things, that three Uber drivers, in violation of G. L. c. 272, § 98A, refused to provide Christopher Kauders with rides because he was blind and accompanied by a guide dog. Each of the plaintiffs registered with Uber through its cellular telephone application (app). Citing a provision in its terms and conditions, Uber sought to compel arbitration. The plaintiffs opposed arbitration on various grounds, including that there was no enforceable arbitration agreement. The judge granted Uber's motion, and the parties arbitrated their dispute in early 2018. On June 4, 2018, the arbitrator issued findings and a decision, ruling in favor of Uber on all of the plaintiffs' claims.

[4] Rasier, LLC, is a wholly owned subsidiary of Uber Technologies, Inc.

On June 25, 2018, the United States Court of Appeals for the First Circuit issued a decision in Cullinane v. Uber Techs., Inc., 893 F.3d 53, 62 (1st Cir. 2018) (Cullinane II), concluding that Uber's registration process did not create a contract because it did not provide reasonable notice to users of the terms and conditions. Several months later, after Uber moved to confirm the arbitration award, the judge who had granted the motion to compel arbitration allowed a motion for reconsideration and reversed his earlier decision, concluding that there was no enforceable contract requiring arbitration. In this appeal, Uber contends that the judge had no choice but to confirm the arbitration award once the plaintiffs failed to challenge the award within thirty days.

We conclude that the issue of arbitrability[5] was preserved for appeal. We also conclude that Uber's terms and conditions did not constitute a contract with the plaintiffs. The app's registration process did not provide users with reasonable notice of the terms and conditions and did not obtain a clear manifestation of assent to the terms, both of which could have been easily achieved. Indeed, a review of the case law reveals that Uber has no trouble providing such reasonable notice and

[5] We use the term "arbitrability" to refer to the legal determination as to whether an enforceable arbitration agreement exists.

requiring express affirmation from its own drivers. Here, in remarkable contrast, both the notice and the assent are obscured in the registration process. As a result, Uber cannot enforce the terms and conditions against the plaintiffs, including the arbitration agreement at issue here.[6]

1. Background. We recite the undisputed facts as alleged in the complaint and as alleged by the parties in their filings on Uber's motion to compel arbitration.

a. Uber's registration process. Uber describes itself as a technology company that allows its users to request transportation services from drivers in their geographic area through its app. Before they can request trips, users must register with Uber. Users can register by means of their cellular telephones by using the app.

Christopher Kauders's registration process via the app involved three steps, with each step involving a separate screen. The first screen was titled "CREATE AN ACCOUNT." This title appeared in a gray bar at the top of the screen. The rest of the screen was a dark color. In the middle of the screen, there was white text that stated, "We use your email and mobile

[6] We acknowledge the amicus briefs submitted by the Massachusetts Academy of Trial Attorneys and the American Association for Justice; the New England Legal Foundation; the Chamber of Commerce of the United States of America; and Public Justice, P.C., and the National Consumer Law Center.

number to send you ride confirmations and receipts." Below the text, a keypad appeared by which the user could enter the required information. On this screen, the user was required to enter an e-mail address, a mobile telephone number, and a password. Once the user entered this information, a button in the top right corner of the screen that stated "NEXT" was enabled. All of the information was provided on a single screen; there was no need for the user to scroll to review any information. The user was required to press (or "click") "NEXT" to move to the second screen.

The second screen was titled "CREATE A PROFILE." The title again appeared in a gray bar at the top of the screen. On this screen, which has a similar dark background, the user was required to enter a first and last name and had the option to add a photograph. In the middle of this screen, white text stated, "Your name and photo helps your driver identify you at pickup." As with the first screen, a keypad appeared with which the user could enter the requested information. Also like the first screen, a button in the top right corner that stated "NEXT" was enabled once the user entered the required information.

The third screen was titled "LINK PAYMENT." Like the first two screens, the third screen had a dark background with a gray bar across the top. Under the gray bar, there was a white,

rectangular field in which the user was required to enter a credit card number. Under the box, white, boldface text stated "scan your card" and "enter promo code." In the middle of the screen, below the word "OR" in white text, there was a large, dark button labeled "PayPal" that provided another mechanism for entering payment information.[7]

At the bottom of the screen, there was white text that stated, "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy." This text was oddly divided into two parts. The first part of the sentence, which informed the user, "By creating an Uber account, you agree to the," was far less prominently displayed than the words "Terms & Conditions and Privacy Policy," which followed. The second part of the sentence -- "Terms & Conditions and Privacy Policy" -- was in a rectangular box and in boldface font. According to Uber, this presentation was used to indicate that the box was a clickable hyperlink. If a user clicked this box, the user would be taken to a screen that contained other clickable buttons, labeled "Terms & Conditions" and "Privacy Policy." Once at this linked screen, if the user clicked the "Terms & Conditions" button, the terms and conditions would appear on the screen.

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[7] PayPal is an Internet payment service. See Cullinane II, 893 F.3d at 58 n.5, citing United States v. Frechette, 583 F.3d 374, 377 n.1 (6th Cir. 2009), cert. denied, 562 U.S. 1053 (2010).

If the user interacted with the rectangular field at the top of the third screen, a number keypad appeared in the bottom half of the screen. The user could use the number keypad to enter credit card information. Once this keypad appeared, the white text and the link from the bottom of the screen moved to the middle of the screen between the rectangular box and the keypad. After a user filled in the credit card information, a button labeled "DONE" became clickable in the top right corner. Once the user clicked "DONE," the user completed the account creation process.

Using this process, Christopher Kauders registered with Uber through the app on June 27, 2014. He used a cellular telephone to do so. Hannah Kauders registered with Uber sometime around October 2015.[8]

b. Uber's terms and conditions.[9] Uber's terms and conditions are extensive and far reaching, touching on a wide

[8] There is nothing in the record indicating that Hannah Kauders's registration process differed in any way from the process described above. We therefore assume that both plaintiffs registered with Uber through the same process.

[9] Because the plaintiffs registered at different times, and because of when the alleged incidents occurred, there are multiple versions of the terms and conditions in the record before us. Our discussion of the terms and conditions focuses on the version that was in effect when Christopher Kauders first registered with Uber through the app, as this version would have been the version that would have been available to Christopher Kauders had he attempted to review them during the registration

variety of topics. Uber can amend the terms and conditions whenever it wants and without notice to the users that have already agreed to them. In fact, under the terms and conditions, the burden is on the user to frequently check to see if any changes have been made.[10] Yet, even if a user somehow detects a change, there is no way for the user to object to or contest any of the changes, as the changes are automatically binding on the user.

The terms and conditions contain numerous provisions, many of which are extremely favorable to Uber. There is a broad limitation of liability provision. This provision purports to release Uber from all liability for

> "ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING PERSONAL INJURY, LOSS OF DATA, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE). [UBER] SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR INJURY WHICH MAY BE INCURRED BY YOU . . . . YOU EXPRESSLY WAIVE AND RELEASE [UBER] FROM ANY AND ALL ANY [sic] LIABILITY, CLAIMS OR DAMAGES ARISING

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process. Most of the provisions discussed above appear in each of the versions in the record.

[10] We note that the United States Court of Appeals for the Ninth Circuit has held that a provision in terms of use providing for unilateral changes without notice to the other parties is unenforceable. See Douglas v. United States Dist. Court for the Cent. Dist. of Cal., 495 F.3d 1062, 1066 (9th Cir. 2007) (per curiam), cert. denied sub nom. Talk America, Inc. v. Douglas, 552 U.S. 1242 (2008) ("a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so. . . . Even if [a user's] continued use of [a] service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes").

> FROM OR IN ANY WAY RELATED TO THE THIRD PARTY TRANSPORTATION PROVIDER."

As the judge below recognized, this provision "totally extinguishes any possible remedy" against Uber.[11]

Uber also seeks to separate itself entirely from the drivers providing the ride services. The terms and conditions state in capital letters:

> "[UBER] DOES NOT PROVIDE TRANSPORTATION SERVICES, AND [UBER] IS NOT A TRANSPORTATION CARRIER. IT IS UP TO THE THIRD PARTY TRANSPORTATION PROVIDER, DRIVER OR VEHICLE OPERATOR TO OFFER TRANSPORTATION SERVICES WHICH MAY BE SCHEDULED THROUGH USE OF THE APPLICATION OR SERVICE. [UBER] OFFERS INFORMATION AND A METHOD TO OBTAIN SUCH THIRD PARTY TRANSPORTATION SERVICES, BUT DOES NOT AND DOES NOT INTEND TO PROVIDE TRANSPORTATION SERVICES OR ACT IN ANY WAY AS A TRANSPORTATION CARRIER, AND HAS NO RESPONSIBILITY OR LIABILITY FOR ANY TRANSPORTATION SERVICES PROVIDED TO YOU BY SUCH THIRD PARTIES."

The terms and conditions also include a strict no-refund policy. They disclaim all warranties "to the maximum extent permitted by law," including any warranties as to the "reliability, safety, timeliness, [or] quality" of any services Uber provides. There is also a broad indemnification provision, under which a user must indemnify Uber for all costs Uber incurs arising out of a user's "violation or breach of any term of this Agreement or any applicable law or regulation," "violation of

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[11] The judge also held that this provision was unenforceable insofar as it released or waived the right to recover the type of statutory damages sought by Christopher Kauders. This part of the order is not before us in this appeal.

any rights of any third party," or the "use or misuse of the Application or Service."[12]

A user must also provide Uber with "whatever proof of identity [it] may reasonably request." Uber can monitor user access to or use of its service or the app, and it can provide law enforcement or a government agency with whatever user information it chooses. Additionally, a user cannot "use the Service or Application to cause nuisance, annoyance or inconvenience."

The "Dispute Resolution" section appears near the end of the terms and conditions. It provides that "any dispute, claim or controversy arising out of or relating to this Agreement . . . will be settled by binding arbitration." The terms and conditions describe the procedures to be used in the arbitration. The terms and conditions also mandate that "[t]he arbitrator's award damages must be consistent with the terms of the 'Limitation of Liability' section above as to the types and the amounts of damages for which a party may be held liable."

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[12] Uber invoked the indemnification provision in this case. In arbitration, Uber brought a counterclaim for breach of contract against the plaintiffs, alleging that they committed a breach of the terms and conditions by commencing a lawsuit and pursuing litigation in court against Uber. Through this counterclaim, Uber sought to recover the "substantial unnecessary costs and fees" it incurred litigating the plaintiffs' lawsuit.

If Uber makes changes to the dispute resolution section, the user has thirty days in which to object to the changes.[13]

c. Procedural history. The plaintiffs filed a complaint in the Superior Court in Suffolk County in 2016. They alleged that Uber, through its drivers, unlawfully discriminated against Christopher Kauders on the basis that he is blind and accompanied by a guide dog. Uber moved to compel arbitration in June 2017, relying in part on a Federal District Court decision in Cullinane that held that Uber's terms and conditions, and specifically the arbitration provision, were enforceable. See Cullinane vs. Uber Techs., Inc., U.S. Dist. Ct., No. 14-14750-DPW (D. Mass. July 11, 2016) (Cullinane I).[14] The plaintiffs opposed arbitration on various grounds, including that the terms and conditions were not enforceable against them because they neither received adequate notice of the existence of the terms

[13] These terms and conditions are apparently not uncommon in similar online contracts. See, e.g., Benoliel & Becher, The Duty to Read the Unreadable, 60 B.C. L. Rev. 2255, 2265-2266 (2019) (identifying common provisions); Hartzog, Website Design as Contract, 60 Am. U. L. Rev. 1635, 1642 (2011) (same). This is true even though some of these provisions have been held to be unlawful or unenforceable. See, e.g., Douglas, 495 F.3d at 1066. See also Preston, "Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?, 64 Am. U. L. Rev. 535, 555 (2015) ("Wrap contracts frequently include disclaimers that actually are unenforceable, and that the drafters know are unenforceable, but are included anyway").

[14] As explained infra, this decision would later be reversed by the First Circuit.

and conditions nor assented to them. The Superior Court judge granted Uber's motion to compel, omitting any discussion or analysis of the contract formation issue.[15]

The case proceeded to arbitration in early 2018, and the arbitrator issued the decision on June 4, 2018. Although the arbitrator concluded that Christopher Kauders was the victim of discriminatory acts by the drivers, the arbitrator, relying on agency principles, ruled for Uber on all of the plaintiffs' claims because the drivers were independent contractors, not employees, of Uber, and therefore, Uber was not liable for the drivers' actions. The plaintiffs did not attempt to vacate or modify the arbitrator's award under G. L. c. 251, §§ 12-13.

On June 25, 2018, the First Circuit reversed the District Court's ruling in Cullinane I and held that the same registration process at issue here did not create an enforceable contract under Massachusetts law between Uber and its users as to the terms and conditions. See Cullinane II, 893 F.3d at 64. Specifically, the First Circuit held that Uber failed to provide users with adequate notice of the existence of the terms and the hyperlink to those terms. Id. Despite the relevance of this

[15] The judge also explicitly "retain[ed] jurisdiction to consider whether any eventual arbitration award should preclude further litigation in this case, or whether it should be affirmed or vacated pursuant to G. L. c. 251."

decision to this case, the plaintiffs did not raise it with the judge until months later.

On September 4, 2018, Uber filed a motion to confirm the arbitrator's award, and the plaintiffs submitted a one-paragraph response to Uber's motion arguing that they "were forced to arbitration over their objections." On October 25, 2018, at the hearing on the motion to confirm, the plaintiffs reiterated their prior arguments against arbitration and raised the First Circuit's decision in Cullinane II for the first time. In response, the judge indicated to the plaintiffs that they would need to file a motion for reconsideration or a motion to vacate to pursue these arguments further. The judge did not rule on Uber's motion to confirm at that time but instead invited and scheduled briefing on the plaintiffs' forthcoming motion. The plaintiffs then filed a motion for reconsideration seeking to have the court vacate the July 2017 order compelling arbitration.

On January 2, 2019, over six months after the arbitrator issued his award, the judge granted the plaintiffs' motion and vacated the earlier order compelling arbitration on the ground that there was no enforceable agreement to arbitrate. The judge first observed that the original order failed to address the contract formation argument even though the plaintiffs had raised it in their opposition to the motion to compel. The

judge then concluded that, in light of the Appeals Court's decision in Ajemian v. Yahoo!, Inc., 83 Mass. App. Ct. 565, 575-577 (2013), S.C., 478 Mass. 169 (2017), cert. denied sub nom. Oath Holdings, Inc. v. Ajemian, 138 S. Ct. 1327 (2018),[16] and the First Circuit's recent decision in Cullinane II, the original order compelling arbitration was error and that no enforceable contract existed. As a result, the judge allowed the plaintiffs' motion for reconsideration, denied Uber's motion to compel arbitration, and denied Uber's motion to confirm the award.[17]

2. Discussion. Uber raises three issues on appeal. First, it argues that we should reverse the judge's order denying Uber's motion to confirm because the plaintiffs did not challenge the arbitrator's award within the thirty-day time frame as required by G. L. c. 251, § 11. Second, Uber argues that the judge lacked the authority to reconsider the earlier ruling because there was no change in fact or law that triggered the ability to reconsider the earlier ruling. Finally, Uber

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[16] In Ajemian, 83 Mass. App. Ct. at 575-577, the Appeals Court analyzed whether a forum selection clause and a clause limiting the statute of limitations period for bringing claims against Yahoo!, Inc., were enforceable. The court concluded that nothing in the record before it established that the terms of service were either reasonably communicated or accepted. Id. at 576.

[17] Uber appealed, and we transferred the case to this court sua sponte.

argues that we should reverse the judge's order denying Uber's motion to compel because the terms and conditions were an enforceable contract between the parties. We address each issue in turn, ultimately concluding that the arbitrability issue was properly preserved for appeal here. We further conclude that Uber's terms and conditions did not constitute an enforceable contract.

a. Motion to confirm the arbitration award. Uber argues that the judge erred by denying its motion to confirm the arbitration award. It contends that when the plaintiffs failed to move to vacate the award within thirty days, the judge had no choice but to confirm the award. Whether the arbitration award should have been confirmed and whether the statutory time frames in the Massachusetts Arbitration Act (MAA or the act)[18] for postaward challenges apply to the issue of arbitrability in the circumstances here -- where the plaintiffs originally challenged arbitrability and lost but did not revisit the issue in the thirty-day period after the award -- are questions of statutory interpretation, which we review de novo. Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 271 (2018). To answer these

[18] The official title of G. L. c. 251 is the "Uniform Arbitration Act for Commercial Disputes." See St. 1960, c. 374, § 1. We refer to this chapter, as do the parties, as the Massachusetts Arbitration Act or the MAA.

questions, it is necessary to go step by step through the MAA and consider its over-all structure and purpose.

General Laws c. 251 governs the enforceability and interpretation of arbitration agreements. Pursuant to § 2, a party can file a motion for an order compelling arbitration. See G. L. c. 251, § 2. The trial court judge must then determine whether an enforceable agreement to arbitrate exists. If the judge denies a motion to compel arbitration, the act permits the moving party to take an interlocutory appeal from that order. G. L. c. 251, § 18 (a) (1).[19] On the other hand, if the court grants the motion and compels arbitration, that order is not immediately appealable. See School Comm. of Agawam v.

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[19] General Laws c. 251, § 18, provides:

"(a) An appeal may be taken from:

"(1) an order denying an application to compel arbitration made under [§ 2 (a)];

"(2) an order granting an application to stay arbitration made under [§ 2 (b)];

"(3) an order confirming or denying confirmation of an award;

"(4) an order modifying or correcting an award;

"(5) an order vacating an award without directing a rehearing; or

"(6) a judgment or decree entered pursuant to the provisions of this chapter. Such appeal shall be taken in the manner and to the same extent as from orders or judgments in an action."

Agawam Educ. Ass'n, 371 Mass. 845, 847 (1977) ("The legislative purpose [of G. L. c. 150C] is clear that an arbitration proceeding should not be delayed by an appeal when a judge has concluded that there is an 'agreement to arbitrate' . . . . The issue of arbitrability under the terms of an agreement may be preserved and raised subsequently in a proceeding seeking to vacate the arbitrator's award"); Old Rochester Regional Teacher's Club v. Old Rochester Regional Sch. Dist., 18 Mass. App. Ct. 117, 118 (1984) (same).[20] Instead, a party wishing to challenge an order compelling arbitration must wait until the arbitration is completed and the award is confirmed before challenging the order compelling arbitration on appeal. See G. L. c. 251, § 18 (a) (3), (6).[21] See also Weston Sec. Corp. v. Aykanian, 46 Mass. App. Ct. 72, 76 (1998) (party can challenge order compelling arbitration on appeal under § 18).

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[20] General Laws c. 150C, §§ 1-16, the statute governing arbitration agreements in collective bargaining agreements, contains statutory provisions that are very similar to those provisions in the MAA. Our courts have interpreted the analogous provisions of G. L. c. 150C to those of G. L. c. 251 that are at issue in this case on several occasions. See, e.g., School Comm. of Agawam, 371 Mass. at 847; Old Rochester Regional Teacher's Club, 18 Mass. App. Ct. at 118. These decisions are instructive as we interpret the MAA in this case.

[21] The list of orders in § 18 from which an appeal can be taken under the MAA is exhaustive; there is no right to appeal from any order not listed. See Old Rochester Regional Teacher's Club, 18 Mass. App. Ct. at 118.

This dichotomy, allowing interlocutory appeals of orders denying a motion to compel arbitration but precluding such appeals of orders compelling arbitration, reflects the act's preference for expeditious arbitration once an initial decision on arbitrability is made. The MAA "expresses a strong public policy favoring arbitration as an expeditious alternative to litigation for settling commercial disputes." Miller v. Cotter, 448 Mass. 671, 676 (2007), quoting Home Gas Corp. of Mass., Inc. v. Walter's of Hadley, Inc., 403 Mass. 772, 774 (1989). See also Lumbermens Mut. Cas. Co. v. Malacaria, 40 Mass. App. Ct. 184, 192 (1996), quoting Lawrence v. Falzarano, 380 Mass. 18, 28 (1980) ("The overriding purpose behind the [MAA] is to provide for the expeditious resolution of disputes through a method 'not subject to delay and obstruction in the courts'").

Once the arbitration is completed and the arbitrator issues an award, the MAA sets the procedure for limited judicial review of the award itself. Either party can move to vacate, modify, or correct the award. G. L. c. 251, § 11. More specifically, § 11 provides that "[u]pon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in [§§ 12 and 13]." Both §§ 12 and 13 require that

any challenge be brought within thirty days of receipt of the award. G. L. c. 251, §§ 12 (b), 13 (a).

Section 12 (a) provides the grounds for vacating an award, and § 13 (a) provides the grounds for modifying or correcting an award. These grounds focus on problems with the arbitration and the award itself, such as fraud, partiality of the arbitrator, or miscalculations of figures, and not with whether the order compelling arbitration was appropriate. See G. L. c. 251, §§ 12 (a) (1)-(5) (grounds for vacating award), 13 (a) (1)-(3) (grounds for modifying or correcting award). The statutory language of § 12 is clear on this issue: the court shall only vacate an arbitration award on arbitrability grounds if "there was no arbitration agreement and the issue was not adversely determined in proceedings under [§ 2] and the party did not participate in the arbitration hearing without raising the objection" (emphasis added). G. L. c. 251, § 12 (a) (5). Here, the issue was adversely determined in proceedings under § 2. Consequently, the plaintiffs could not have moved to vacate the award on the issue of arbitrability because the issue had already been decided against them.

The act, as explained above, does not envision relitigation of the arbitrability issue in the trial court after the award is issued because it will further delay final resolution. Rather, it preserves the issue of arbitrability for the appellate courts

after confirmation of the award. Consequently, the judge should have confirmed the arbitration award while expressly stating that the issue of arbitrability was preserved.

Although somewhat unclear, Uber appears to contend further that once the plaintiffs agreed to participate in the arbitration they were bound to raise the arbitrability issue again within the thirty-day time frame or that issue could not be raised on appeal. For support, Uber relies on language in various Federal cases that have wrestled with the question whether participation in arbitration binds plaintiffs who have previously challenged arbitrability to the procedural rules set out in the Federal Arbitration Act (FAA). See, e.g., MCI Telecommunications Corp. v. Exalon Indus., Inc., 138 F.3d 426, 429-431 (1st Cir. 1998); Professional Adm'rs, Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639, 642-643 (6th Cir. 1987). As our statute contains different language, expressly precluding a second arbitrability challenge if it was previously adversely determined, we do not consider participation in the arbitration process as requiring revisitation of the arbitrability issue within the thirty-day time period. That issue is preserved for appeal.

b. Motion for reconsideration. Further complicating the procedural posture of this case is the judge's allowance of a motion for reconsideration on his original order compelling

arbitration six months after the award and several months after Uber filed its motion to confirm the award. We review a decision on a motion for reconsideration for abuse of discretion. See Piedra v. Mercy Hosp., Inc., 39 Mass. App. Ct. 184, 188 (1995).

Uber argues that the judge abused his discretion in granting the motion for reconsideration because there was no change in fact or law and the motion for reconsideration was untimely. As a general matter, it is well established that a judge retains discretion to reconsider prior rulings and correct errors at any time until a final judgment is entered, regardless of whether there has been a change in fact or law. See, e.g., Hebert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 401 (2003); Riley v. Presnell, 409 Mass. 239, 242 (1991); Genesis Tech. & Fin., Inc. v. Cast Navigation, LLC, 74 Mass. App. Ct. 203, 206 (2009). We therefore reject Uber's arguments that the judge lacked the ability to reconsider his earlier ruling absent a change in law or fact.

The issue of untimeliness is more complicated. In evaluating whether the judge abused his discretion here, we recognize that the unique history of this case put the judge in a difficult position. The issuance of Cullinane II, a relevant and significant decision, after the parties completed arbitration but before Uber moved to confirm the award,

understandably led the judge to question whether the original ruling compelling arbitration was correct. At this point, however, the arbitration had been completed. Indeed, by the time it was brought to his attention and decided, six months had passed. Although a judge ordinarily may reconsider a prior decision until a final judgment, once the order to compel arbitration had been issued and the arbitration commenced, the arbitration should have continued without further involvement by the judge. The statute contemplates an initial decision by the judge and then expeditious arbitration for the reasons discussed above. We have made clear that we do not want judges injecting themselves once the arbitration has commenced. See, e.g., School Comm. of Agawam, 371 Mass. at 847. See also Cavanaugh v. McDonnell & Co., 357 Mass. 452, 457 (1970) ("arbitration, once undertaken, should continue freely without being subjected to a judicial restraint which would tend to render the proceedings neither one thing nor the other, but transform them into a hybrid, part judicial and part arbitrational").

At the time the judge decided the motion for reconsideration, he was even further constrained by statute. General Laws c. 251, § 11, expressly provides that "[u]pon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the

court shall proceed as provided in [§§ 12 and 13]." (emphasis added). The use of "shall" is mandatory. Katz, Nannis & Solomon, P.C. v. Levine, 473 Mass. 784, 791 (2016) ("shall confirm" in § 11 "carries no hint of flexibility" [citation omitted]).

Uber applied to confirm the award, and the plaintiffs had not, within thirty days, presented any grounds for vacating, modifying, or correcting the award. Moreover, as described above, § 12 (a) (5) also clearly precluded the plaintiffs from raising the issue of arbitrability again with the trial court, instead leaving that issue for appeal. In these circumstances, Uber was entitled to confirmation of the award, rather than a revisiting and unsettling of the order compelling arbitration by the trial court and the delay that accompanied that review. Requiring the judge to confirm the award in these circumstances results in an expeditious confirmation of the arbitration award that may be challenged on appeal.[22] We therefore conclude that allowing the motion for reconsideration was an abuse of discretion.[23]

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[22] In confirming the award, the judge could also have expressed his reservations, highlighting the issue on appeal despite the statutory constraints on his own ability to fix the problem.

[23] In the instant case, however, the only significance of allowing the motion for reconsideration is that it essentially made Uber the appealing party, rather than the plaintiffs. As

c. Enforceability of the terms and conditions. As described above, the enforceability of an arbitration agreement will often be decided by the trial court judge in the first instance and then reviewed on appeal. Because we conclude that the judge abused his discretion in granting the plaintiffs' motion for reconsideration, we ordinarily would remand the case to the Superior Court for further proceedings. In this case, the judge, upon remand, would be required to confirm the award, while at the same time ruling that the issue of arbitrability would be preserved for appeal. The plaintiffs would then undoubtedly appeal on that ground, and the case would be right back before us.

It makes little sense to delay appellate review of the order compelling arbitration in these circumstances. The parties have fully briefed and argued that issue, and it is one that the plaintiffs are entitled to have reviewed by an appellate court. In the interests of judicial economy, therefore, in lieu of a remand, we turn to the major online contract formation issue before us: whether Uber's terms and conditions constitute an enforceable contract with the plaintiffs.

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previously explained, the plaintiffs could still appeal the issue of arbitrability.

i. Legal standard for online contract formation. As the online contract here includes an arbitration agreement, we first recognize that the FAA establishes a "liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). But "this policy [does not] override[] the principle that a court may submit to arbitration only those disputes . . . that the parties have agreed to submit" and "courts may [not] use policy considerations as a substitute for party agreement" (quotation and citation omitted). Granite Rock Co. v. International Bhd. of Teamsters, 561 U.S. 287, 302-303 (2010). Indeed, "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract." Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010). "When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). See Schnabel v. Trilegiant Corp., 697 F.3d 110, 119 (2d Cir. 2012) ("Whether or not the parties have agreed to arbitrate is a question of state contract law"); Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co., 189 F.3d 289, 295-296 (2d Cir. 1999) ("[W]hile . . . the FAA preempts state law that treats arbitration agreements differently from any other contracts, it also preserves general principles of state

contract law as rules of decision on whether the parties have entered into an agreement to arbitrate" [quotation, citation, and footnote omitted]).[24] With these principles in mind, we turn to the enforceability of the online contract under Massachusetts law.

We have not previously considered what standard a court should use when considering issues of contract formation for online contracts. That being said, the fundamentals of online contract formation should not be different from ordinary contract formation. See, e.g., Sgouros v. TransUnion Corp., 817 F.3d 1029, 1034 (7th Cir. 2016). The touchscreens of Internet contract law must reflect the touchstones of regular contract law.

In evaluating whether provisions in an online agreement were enforceable, the Appeals Court in Ajemian used a reasonableness standard, focusing on whether the contract provisions at issue "were reasonably communicated and accepted." Ajemian, 83 Mass. App. Ct. at 574.[25] Under this standard, for

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[24] The United States Supreme Court recently reiterated: "We do not suggest that a state court is precluded from announcing a new, generally applicable rule of law in an arbitration case. We simply reiterate here what we have said many times before -- that the rule must in fact apply generally, rather than single out arbitration." Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1428 n.2 (2017).

[25] We note that Ajemian involved a forum selection clause. Ajemian, 83 Mass. App. Ct. at 575-576. As we have explained

there to be an enforceable contract, there must be both reasonable notice of the terms and a reasonable manifestation of assent to those terms. See id. at 574-575, quoting Specht v. Netscape Communications Corp., 306 F.3d 17, 35 (2d Cir. 2002); Schnabel, 697 F.3d at 120. See also Conroy & Shope, Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions, 63 Boston Bar J. 23, 23 (Spring 2019) (Conroy & Shope) ("This two-part test is consistent with the approach taken by other courts around the country").

We conclude that this two-prong test, focusing on whether there is reasonable notice of the terms and a reasonable manifestation of assent to those terms, is the proper framework for analyzing issues of online contract formation. Setting out these general fundamental contract principles is not, however, the difficult part of analysis. "The trick here is to know how to apply these general principles to newer forms of contracting"

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elsewhere, forum selection clauses must meet higher standards than other contractual provisions. See, e.g., Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics, 433 Mass. 122, 130 (2000) (forum selection clause only enforced if fair and reasonable). We only adopt the reasoning of Ajemian to the extent it requires reasonable notice of the terms of a contractual provision and reasonable manifestation of assent to those terms. We do not require that the notice be "conspicuous," as required for certain types of contractual provisions or as required by other jurisdictions. See, e.g., Meyer v. Uber Techs., Inc., 868 F.3d 66, 74-75 (2d Cir. 2017) (under California law, user must have "[r]easonably conspicuous notice of the existence of contract terms").

over the Internet. Sgouros, 817 F.3d at 1034. We elaborate more on each prong infra. We also emphasize that the burden of proof on both prongs is on Uber, the party seeking to enforce the contract. See Canney v. New England Tel. & Tel. Co., 353 Mass. 158, 164 (1967).

A. Reasonable notice. The first prong requires that the offeree receive reasonable notice of the terms of the online agreement. Where the offeree has actual notice of the terms, this prong is satisfied without further inquiry. Miller, 448 Mass. at 680 (party bound by terms of contract regardless of whether party actually read terms). Actual notice will exist where the user has reviewed the terms. It will also generally be found where the user must somehow interact with the terms before agreeing to them.

Absent actual notice, the totality of the circumstances must be evaluated in determining whether reasonable notice has been given of the terms and conditions. See Sgouros, 817 F.3d at 1034-1035 (discussing reasonable notice, and relevant considerations, in context of contracting over Internet). This is "clearly a fact-intensive inquiry." Meyer v. Uber Techs., Inc., 868 F.3d 66, 76 (2d Cir. 2017). See Sgouros, supra. It includes consideration of the form of the contract. See, e.g., Polonsky v. Union Fed. Sav. & Loan Ass'n, 334 Mass. 697, 701 (1956) (terms may not be enforceable where document containing

or presenting terms to offeree does not appear to be contract); Sgouros, supra at 1035 (discussing how contracting over Internet is different from paper transactions and how reasonable users of Internet may not understand that they are entering into contractual relationship). In determining whether the notice is reasonable, the court should also consider the nature, including the size, of the transaction, whether the notice conveys the full scope of the terms and conditions, and the interface by which the terms are being communicated. Sgouros, supra at 1034 (in case involving contracting for credit scores over Internet, "we might ask whether the web pages presented to the consumer adequately communicate all the terms and conditions of the agreement"). For Internet transactions, the specifics and subtleties of the "design and content of the relevant interface" are especially relevant in evaluating whether reasonable notice has been provided. Meyer, supra at 75. See Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016).

In examining the interface, we evaluate the clarity and simplicity of the communication of the terms. Does the interface require the user to open the terms or make them readily available? How many steps must be taken to access the terms and conditions, and how clear and extensive is the process to access the terms? See Cullinane II, 893 F.3d at 62, quoting Ajemian, 83 Mass. App. Ct. at 575 (court should consider "the

language that was used to notify users that the terms of their arrangement . . . could be found by following the link, how prominently displayed the link was, and any other information that would bear on the reasonableness of communicating [the terms]"). Ultimately, the offeror must reasonably notify the user that there are terms to which the user will be bound and give the user the opportunity to review those terms.

B. Reasonable manifestation of assent. When considering whether the user assented to the terms of the online agreement, we consider the specific actions required to manifest assent. A user may be required to expressly and affirmatively manifest assent to an online agreement by clicking or checking a box that states that the user agrees to the terms and conditions. See, e.g., Emmannuel v. Handy Techs., Inc., 442 F. Supp. 3d 385, 389 (D. Mass. 2020) (user required to affirmatively indicate assent by clicking "Accept" button); Covino v. Spirit Airlines, Inc., 406 F. Supp. 3d 147, 152-153 (D. Mass. 2019) (enforcing agreement where user checked box acknowledging agreement with terms and conditions set forth in offeror's contract of carriage); Wickberg v. Lyft, Inc., 356 F. Supp. 3d 179, 181 (D. Mass. 2018) (screen required user to click box indicating that he "agree[d] to Lyft's terms of services" before he could continue with registration process). These are often referred to as "clickwrap" agreements, and they are regularly enforced.

See Conroy & Shope, supra at 23. See also Ajemian, 83 Mass. App. Ct. at 576; Wickberg, supra at 184; Note, The Electronic "Sign-in-Wrap" Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability, 50 U.C. Davis L. Rev. 535, 539 (2016) ("Clickwrap contracts require Internet users to affirmatively click 'I agree' when assenting to the terms and conditions on a website or making online purchases"). As one court has observed, "[w]hile clickwrap agreements . . . are not necessarily required . . . , they are certainly the easiest method of ensuring that terms are agreed to." Nicosia, 834 F.3d at 237-238. These are the clearest manifestations of assent.

Requiring a user to expressly and affirmatively assent to the terms, such as by indicating "I Agree" or its equivalent, serves several important purposes. It puts the user on notice that the user is entering into a contractual arrangement. This is particularly important regarding online services, where services may be provided without requiring compensation or contractual agreements, and the users may not be sophisticated commercial actors. Without an action comparable to the solemnity of physically signing a written contract, for example, we are concerned that such users may not be aware of the implications of their actions where agreement to terms is not expressly required. See Sgouros, 817 F.3d at 1035 ("a person

using the Internet may not realize that she is agreeing to a contract at all, whereas a reasonable person signing a physical contract will rarely be unaware of that fact"); Moringiello, Signals, Assent and Internet Contracting, 57 Rutgers L. Rev. 1307, 1316 (2005) ("In contract law, a written signature provides the traditional evidence of assent because when we are asked to sign something, we are conditioned to think that we are doing something important"). Requiring an expressly affirmative act, therefore, such as clicking a button that states "I Agree," can help alert users to the significance of their actions. Where they so act, they have reasonably manifested their assent.

Where no such express agreement is required by the offeror, we must turn to other less obvious manifestations of assent to the terms. This makes the task of the court more difficult. See Cullinane II, 893 F.3d at 62 ("We note at the outset that Uber chose not to use a common method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen"). In these cases, courts must again carefully consider the totality of the circumstances, and assent may be inferred from other actions the users have taken. Where the connection between the action taken and the terms is unclear, or where the action taken does not clearly signify assent, it will

be difficult for the offeror to carry its burden to show that the user assented to the terms.

ii. Application. Turning first to whether the plaintiffs had reasonable notice of the terms and conditions, we begin with the form and nature of the transaction. Users are registering through an app that will connect drivers and riders for future short-term, small-money transactions. The registration process expressly explained: "We use your email and mobile number to send you ride confirmations and receipts"; and "Your name and photo helps your driver identify you at pickup." Reasonable users may not understand that, by simply signing up for future ride services over the Internet, they have entered into a contractual relationship. See, e.g., Sgouros, 817 F.3d at 1035 (signing up for credit-score information over Internet not obviously contractual). It is qualitatively different from a large business deal where sophisticated parties hire legal counsel to review the fine print. It is also not comparable to the purchase or lease of an apartment or a car, where the size of the personal transaction provides some notice of the contractual nature of the transaction even to unsophisticated contracting parties.

It is also by no means obvious that signing up via an app for ride services would be accompanied by the type of extensive terms and conditions present here. Among those terms are those

that indemnify Uber from all injuries that riders experience in the vehicle, subject riders' data to use by Uber for purposes besides transportation pick-up, establish conduct standards for riders and other users, and require arbitration. Indeed, certain of the terms and conditions may literally require an individual user to sign his or her life away, as Uber may not be liable if something happened to the user during one of the rides.

In these circumstances, we must carefully consider the interface and whether it reasonably focused the user on the terms and conditions. That notice was essentially as follows. At the bottom of one screen in Uber's registration process, the following language appeared: "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy." This text was divided into two parts, with the first part -- describing the consequences of creating an account -- being less prominently displayed than the link to the terms and conditions and the privacy policy. The app also contained a button that led to a link to the terms and conditions. The question then becomes whether this type of notice was reasonable, particularly given the nature of the online transaction and the scope of the terms and conditions.

The notice of the terms was not reasonable for several reasons. Importantly, the interface did not require the user to

scroll through the conditions or even select them. The user could fully register for the service and click "done" without ever clicking the link to the terms and conditions. The connection between the creation of the account and the terms and conditions was also somewhat oddly displayed in the two-part format, with the significant information (i.e., that by creating the account, the user expresses his or her agreement) being displayed less prominently than other information.

This is in striking contrast to the interface of the app provided to drivers by Uber, as demonstrated by the case law. Our review of numerous cases demonstrates that Uber required its drivers, before signing up, to review the terms and conditions by clicking a hyperlink. For example, in one case involving the driver registration process in June 2014, the Uber app there carefully required drivers to consider the terms and conditions. See Singh v. Uber Techs., Inc., 235 F. Supp. 3d 656, 661 (D.N.J. 2017), vacated on other grounds, 939 F.3d 210 (3d Cir. 2019). "When [the driver] logged on to the Uber App with his unique user name and password, he was given the opportunity to review the [agreement] by clicking a hyperlink to the [agreement] within the Uber App." Id. "To advance past the screen with the hyperlink and actively use the Uber App, [the driver] had to confirm that he had first reviewed and accepted the [agreement] by clicking 'YES, I AGREE.' After clicking 'YES, I AGREE,' he

was prompted to confirm that he reviewed and accepted the [agreement] for a second time." Id. The app was also designed to allow the drivers ample time to review the terms and conditions. Id. (driver accepted terms three months after terms first made available for review). See Capriole vs. Uber Techs., Inc., U.S. Dist. Ct., No. 1:19-cv-11941-IT (D. Mass. Mar. 31, 2020) (registration required clicking "YES I AGREE" at least twice and informed registrant that "[b]y clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above"); Okereke vs. Uber Techs., Inc., U.S. Dist. Ct., No. 16-12487-PBS (D. Mass. June 13, 2017) (same).

The contrast between the notice provided to drivers and that provided to users is telling. As Uber is undoubtedly aware, most of those registering via mobile applications do not read the terms of use or terms of service included with the applications. See, e.g., Conroy & Shope, supra at 23 ("Most users will not have read the terms and, in some instances, may not have even seen the terms or any reference to them"). See also Ayres & Schwartz, The No-Reading Problem in Consumer Contract Law, 66 Stan. L. Rev. 545, 547-548 (2014) (describing empirical evidence showing number of Internet users who read terms is "miniscule"); Tentative Draft Restatement of the Law of Consumer Contracts, Reporters' Introduction (Apr. 18, 2019)

("The proliferation of lengthy standard-term contracts, mostly in digital form, makes it practically impossible for consumers to scrutinize the terms and evaluate them prior to manifesting assent"). Yet the design of the interface for the app here enables, if not encourages, users to ignore the terms and conditions. See Sgouros, 817 F.3d at 1035 (interface misleading user about existence of contractual terms weighed against enforcing terms).

We also consider the specific placement in the app of the link to the terms and conditions. On all three screens that a user was required to fill out, the top of the screen was where the user was required to focus and fill in information. It was not until the third screen that any reference to the terms and conditions appeared. The hyperlink to the terms and conditions was also at the very bottom of this "LINK PAYMENT" screen. The purpose of the screen, as indicated by the title at the top, was for the user to enter payment information. The place to enter that information -- a white field set apart against a dark background -- was at the top of the screen. Under that field, there were two separate pieces of text in boldface, white font that related to the payment purpose of the screen. There was also a large button in the middle of the screen that provided another mechanism through which a user could link a payment. Nothing about this third screen, therefore, conveyed to a user

that he or she should open a link that would reveal an extensive set of terms and conditions at the bottom of the screen to which the user was agreeing. As discussed previously, the statement explaining the connection between creating the account and agreeing to the terms, which would encourage opening and reviewing the terms, was displayed less prominently than the other information on the screen.

Similarly, the title of the screen, as well as much of the information on the screen, focused on payment information, not the terms and conditions. Other words on the screen also appeared as prominently as the link, if not more so. For example, the phrases "scan your card" and "enter promo code" appeared to be in boldface as well as the same size as the link. Further, the PayPal button appeared in the middle of the screen in a different color and in what appeared to be a larger box than the terms and conditions link. Put succinctly, "the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink's capability to grab the user's attention." Cullinane II, 893 F.3d at 64.

We also observe that a user could complete the "LINK PAYMENT" screen and the account creation process without ever focusing on the link or the notice on the screen. Uber relies on the fact that the notice of and the link for the terms and

conditions "fall[] directly in the middle of the screen, where any reasonable user's eyes would naturally be drawn." This assertion is contradicted by Uber's own evidence, however, which shows that the notice and link only appear in the middle of the screen if the user interacts with the field where the user can enter credit card information and the number keypad appears. The limited record before us indicates that, unless this happens, the notice and link for the terms and conditions remain at the very bottom of the screen, while the white credit card field remains at the top and the PayPal button remains in the middle of the screen, where (as Uber puts it) "any reasonable user's eyes would naturally be drawn."

Moreover, while the record does not explain what happens if the user clicks "scan your card" or the PayPal button in the middle of the screen, it seems likely that, in either situation, the terms and conditions notice and link either remain at the bottom of the screen or disappear from view altogether. So, if a user uses either of these features rather than clicking the white box to enter a credit card number, the user may never even see the notice and the link at the bottom of the screen.[26] The

[26] For this reason, so-called "browsewrap" agreements have been held to be unenforceable. See, e.g., Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1179 (9th Cir. 2014). A "browsewrap" agreement is an agreement where "website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen." Hines v. Overstock.com, Inc., 668 F.

user's attention is simply never directed to the notice and the link; it is instead directed at the white rectangular box or the number keypad.

In sum, we do not consider the notice provided by this interface reasonable. In such a transaction, a user may reasonably believe he or she is simply signing up for a service without understanding that he or she is entering into a significant contractual relationship governed by wide-ranging terms of use. Instead of requiring its users to review those terms and conditions as it appears to do with its drivers, Uber has designed an interface that allows the registration to be completed without reviewing or even acknowledging the terms and conditions. In these circumstances, Uber has failed to show that it provided the plaintiffs with reasonable notice of the terms and conditions.

As we conclude that there was not reasonable notice of the terms, a contract cannot have been formed here. We nonetheless

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Supp. 2d 362, 366 (E.D.N.Y. 2009), aff'd, 380 Fed. Appx. 22 (2d Cir. 2010). These agreements are often unenforceable because there is no assurance that the user was ever put on notice of the existence of the terms or the link to those terms. See, e.g., Nguyen, supra at 1178-1179 ("where a website . . . provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on -- without more -- is insufficient to give rise to constructive notice. . . . [T]he onus must be on website owners to put users on notice of the terms to which they wish to bind consumers").

observe that the interface here also obscured the manifestation of assent to those terms. The interface did state in one sentence broken into two parts, one more prominent than the other, "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy." The words "Terms & Conditions and Privacy Policy" were more prominently displayed than what it meant to create the account. Uber claims this highlights the terms and conditions. A reasonable alternative interpretation is that it downplays the legal significance of creating the account.

What is clear is that a user could create an account without ever affirmatively stating that he or she agreed to the terms and conditions, or even opening those terms and conditions. Instead, the final step in the process was to input payment information and click "DONE." "DONE" is also different from, and less clear than, other affirmative language such as "I agree." Furthermore, there was nothing stating that "DONE" itself signified either creation of an account or acceptance of the terms. See Nicosia, 834 F.3d at 236-237 ("Nothing about the 'Place your order' button alone suggests that additional terms apply, and the presentation of terms is not directly adjacent to the 'Place your order' button so as to indicate that a user should construe clicking as acceptance"). The connection between the action and the terms was thus not direct or

unambiguous. Uncertainty and confusion in this regard could have simply been avoided by requiring the terms and conditions to be reviewed and a user to agree. By obscuring this process, the app invited questions about whether the interface was designed to enable a user to sign up for services without requiring him or her to understand that he or she was contractually bound. See Wilson v. Huuuge, Inc., 351 F. Supp. 3d 1308, 1317 (W.D. Wash. 2018), aff'd, 944 F.3d 1212 (9th Cir. 2019) ("The fact is, [the offeror] chose to make its Terms non-invasive so that users could charge ahead to play their game. Now, they must live with the consequences of that decision").

Again, Uber's own registration process for its drivers stands in striking contrast. As demonstrated by the case law, after clicking "'YES, I AGREE,' [the driver] was prompted to confirm acceptance a second time. On the second screen, the App state[d]: 'PLEASE CONFIRM THAT YOU HAVE REWIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS'" (citations omitted). Okereke, supra. Additionally, in that case "Uber received an electronic receipt following [the driver's] acceptance" and "[t]he receipt only could have been generated by someone using [the driver's] unique username and password and hitting 'YES, I AGREE' twice when prompted by the Uber App." Id. Other cases involving the driver registration process for Uber describe similar registration processes. See, e.g.,

Capriole, supra (registration required clicking "YES I AGREE" at least twice and informed registrant that "[b]y clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above"); Singh, 235 F. Supp. 3d at 661 (same). Clearly, Uber knows how to obtain clear assent to its terms. We therefore conclude that there was no reasonable manifestation of assent here.

3. Conclusion. For the foregoing reasons, we conclude that there was no enforceable agreement between Uber and the plaintiffs, and therefore the dispute was not arbitrable. The case is remanded for further proceedings consistent with this opinion.

So ordered.