1. *Introduction*

Online shopping had a 44.0% growth in 2020, with around $851.12 billion spent online by consumers. [[1]](#footnote-1)Most Americans now do some business over the Internet—whether making purchases or participate in a community at the pleasure of a forum host. When we do, we are almost always presented (clearly or opaquely) with contractual terms governing our use of the site.[[2]](#footnote-2)

Online agreements are increasingly common and clickwraps have routinely been upheld since ProCD.[[3]](#footnote-3)

Most, if not all, of these contracts’ consumers are forming every day include a clause for arbitration. Now days it’s almost impossible to apply for a credit card, buy a cell phone, get internet service, or shop online without agreeing to private arbitration and arbitration has been linked to an effort from companies to put a ban on class action suits.[[4]](#footnote-4) In 2011, the United States Supreme Court, in AT&T Mobility v. Concepcion, U.S 563. 333 (2011), ruled that the Federal Arbitration Act of 1925 preempts state laws that prohibits contracts from disallowing class wide arbitration. As a result, businesses that include arbitration agreements with class action waivers can require consumers to bring claims only in individual arbitrations, rather than in court as part of a class action. The decision was a real game-changer for class action litigation. Some scholars argue the result was a mass production of arbitration clauses, ought to be seen as unconstitutional as states enforced dispute resolution is outsourced to private services, with insufficient oversight of the processes, as open courts are the venues designated under the constitution to respond to claims.[[5]](#footnote-5) Judge Weinstein's ruling recognized the reality of online contract formation, nobody really reads wrap contract terms. His decision casts serious doubt on the validity of online forms, forcing companies (and their counsel) to re-examine the enforceability of their online, device or mobile applications' terms and conditions. There is an enormous amount of U.S. population using the internet for purchases. And almost in all instances these consumers are accepting contracts of adhesion. I attempt to discuss and evaluate latest court decisions when evaluating the enforceability of an arbitration clause on e-commerce terms and conditions agreements. I will focus on contract requirement of mutual assent and the reasonable opportunity business are providing consumers to provide an informed assent to adhesion contracts online.

Can a single click bind a user to an arbitration clause?

1. *Contracts in General*

A contract is an agreement that creates an obligation arising from the acceptance of the terms of an offer by the party to whom it’s extended. It obligates a person to do, or to permit, or not to do something expressed or implied by the agreement. Contracts are mainly governed by state statutory, common, and private law and in terms of arbitration clause; deciding if an arbitration agreement has been formed is governed by state law.[[6]](#footnote-6) Interstate transactions of business are governed by the Uniform Commercial Code (UCC). The UCC is not a federal law but a uniformly adopted state law, thus in the determination of whether parties are bound by a contract, courts involve interpretation of state law when considering contract formation.[[7]](#footnote-7) It has been generally decided that essential elements of a contract include an offer and acceptance, consideration, and mutual assent to terms essential to the formation of a contract.[[8]](#footnote-8) E-commerce have changed the way we contract, however, traditional contracting principles have not “fundamentally changed”.[[9]](#footnote-9) Once an offeree accepts a contract, he or she is bound by the terms of the contract, regardless of whether he/she has read them beforehand or not.[[10]](#footnote-10)

* 1. Assent

For there to be a contract, the parties must mutually assent to its terms,[[11]](#footnote-11) is a well-known condition for the creation of a contract. Whether governed by the common law or by Article 2 of the Uniform Commercial Code, a transaction, to become a contract, requires a manifestation of agreement between the party. [[12]](#footnote-12) Mutual assent consists of offer and acceptance and was described as the “touchstone of contract” by now Supreme Court Justice Sotomayor in *Specht v. Netscape Communications Corp.,* 306 F.3d 17, 29 (2d Cir.). “The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act”, however, it would not be effective unless the party has the intention to engage and knows or has a *reason to know* that the other party may infer from his conduct that he assents. [[13]](#footnote-13) It seems there that, for a contract to be effective, “meeting of the minds” is a necessity. Meeting of the minds is no other thing that a subjective manifestation that occurs where there are expressions sufficient to have a party understand, or make it unreasonable not to understand, that the performance offered is a full satisfaction of the parties’ intention to agree.[[14]](#footnote-14) Having a meeting of the minds is not enough, common law uses an objective approach to the manifestation of mutual assent, it must be manifested by over acts which might be indicated by performing any act requested by the promisor in a unilateral contract.[[15]](#footnote-15) In Puerto Rico, an agreement can be binding if the parties have a ‘meeting of the minds’ even if no documentation exists, as long as negotiations have concluded .[[16]](#footnote-16) Judge Perez-Gimenez for the District of Puerto Rico in *Satellite Broadcasting Cable, Inc. v Telefonica de España, S.A.,* 807 F. Supp. 210 (1992) explained that a contract can be perfected by mere acceptance of the offer if there is meeting of the minds “where the offer is definite and which contains all elements of a contract deemed necessary.” A clear and definite acceptance of all terms contained in the offer is still a requirement. There cannot be mutual assent or meeting of the minds if the party to which the offer is being made is unaware of the contract’s terms and conditions, notification must be evident. Assent does not need to be expressed in words, both acts and word can have a meaning to which a party knows or reasonably ought to know that the other party might reasonably infer an assent to contract.

For there to be reason for a person to know a fact, means that person has information from which someone of ordinary intelligence would infer that the fact in question does or will exist. This is what courts call “actual notice” when the parties have information regarding a fact or information that would lead them to the fact upon investigation. Whilst constructive notice happens when a person is charged with notice by a statute or rule of law, irrespective of the information that person might have.[[17]](#footnote-17) First Circuit Appellate Court finds inquiry notice not to be a separate kind of notice but a corollary of both actual and constructive notice which “follows from the duty of a purchaser, when he has actual or constructive knowledge of facts which would lead a prudent person to suspect” and conduct further investigation.[[18]](#footnote-18)

In mutual assent, courts will center their analysis onto “whether the consumer had reasonable notice of the terms of service agreement.”.[[19]](#footnote-19) The UCC section 1-202 subsection (e) establishes that a person is considered to be dully notified when it has come to that person’s attention or notification was delivered in a *reasonable manner* under the circumstances through which the contract was made. Knowing or having reason to know is the determining factor when considering manifestation of assent under the reasonableness standard, contrary to its importance in modern commerce, section 65 provides with a vague explanation of reasonableness of medium of acceptance and the recent June 2021 update avoids providing guidance or illustrations to it when it comes to electronic commerce. Reasonableness remains a jurisdictional concept that is open for interpretation case by case, although some states have set forth their own provisions.

The recently drafted[[20]](#footnote-20) Consumer Contracts Restatement of the Law section 2 includes reasonable notice and reasonable opportunity to review the standard contract term as a requisite to formation of a contract ,“standard contract term” is defined as a term that has been drafted prior to the transaction and will be in use on multiple transactions between business and consumer, similarly to adhesion contract terms.[[21]](#footnote-21) It recognizes that some standard contract terms may not be explicitly acknowledged, however, as long as the consumer receives reasonable notice that they are intended to be part of the transaction and will be legally binding; and that the consumer had a reasonable opportunity to review them they will be adopted as the consumer manifests assent to the transaction.[[22]](#footnote-22) Even when the terms are presented after the manifestation of assent to the transaction, if the consumer receives reasonable notice before manifesting assent that additional standard terms will be presented afterwards and provides reasonable opportunity to review these terms and terminate the transaction without unreasonable cost, they will be adopted and legally binding. Restatement illustrates an electronic transaction and explains that if

there is a prominent, stand-alone notice in a central portion of the checkout page, in contrasting, large font, not blended with other notices, stating that the transaction is subject to Terms and Conditions that are noticeably linked for the consumer to access, all visible when the consumer clicks “I agree to purchase,” then the terms are adopted as part of the contract…[[23]](#footnote-23)

There is still confusion concerning the existence of contractual acceptance during an e-Commerce transaction. Generally, courts will find that, as long as the layout and language of the site gives the user reasonable notice that the consumer is assenting to an agreement a contract has been formed. [[24]](#footnote-24) That is, that notice was reasonably conspicuous, and the person was at least put on inquiry notice.[[25]](#footnote-25) Once this requirement is met, there is no need for the consumer to read the agreement. In *Beture v. Samsung Electronics America Inc.,* New Jersey District Court upheld an arbitration clause included in a phone carrier’s end user license agreement, which appeared during activation and had to be affirmatively assented before the phone could be used. Court decided that even when the carrier store representative clicked-through the agreement on behalf of the costumer, a smartphone user has reasonable notice that use of a device is subject to terms and conditions. In this case, conditions were displayed several times during activation, factory resets and made available through settings menu. Second Circuit Court of Appeals in *Hirsch v. Citibank*, N.A., 542 Fed.Appx35, 37 (2d Cir.2013) observed that while it is true that a party cannot avoid the terms on a contract on grounds that he or she failed to read them, an exception exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient.

On the other hand, First Circuit Judge Thompson in *National Federation of the Blind v. The Container Store Inc*.*,* 904 F3d 70 (2018)decided that no arbitration agreement was formed when plaintiffs were illiterate and therefore unable to read the terms and conditions. While agreeing that the inability to read is not a defense to contract formation, party must be made known or given a reason to know the basic terms of the offer, included the arbitration clause. Plaintiffs here were in store while signing the contract and were told of the existence of terms and conditions and given an opportunity to review them, however, defendant could not establish that the existence of an arbitration agreement was informed to plaintiffs by the store clerk. The fact that plaintiffs had no way of accessing the terms or arbitration agreement remained undisputed.

The question of what constitutes reasonable notice when a consumer is presented with an adhesion contract is yet to be determined, some of the latest decisions that might affect disputes brought to District Court for the District of Puerto Rico or U.S. Supreme Court onto what, is considered to be, reasonable notice will be discussed further on.

1. *See* Fareeha Ali, *US ecommerce grows 44% in 2020* (Jan. 29, 2021), https://www.digitalcommerce360.com/article/us-ecommerce-sales/. (Last visited June 30, 2021) [↑](#footnote-ref-1)
2. Jessica L. Hubley, *How Concepcion Killed the Privacy Class Action*, 28 Santa Clara Computer & High Tech. L.J. 743, 749 (2012). [↑](#footnote-ref-2)
3. *See Smallwood v. NCsoft Corp*., F. Supp. 2d 1213, 1226 (D. Haw. 2010) [↑](#footnote-ref-3)
4. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804 (2015); Validity of Arbitration Clause Precluding Class Actions, 13 A.L.R.6th 145. [↑](#footnote-ref-4)
5. *See id.* at note 4 [↑](#footnote-ref-5)
6. Johnson v. Uber Techs., Inc., No. 16 C 5468, 2017 WL 1155384, at \*1 (N.D. Ill. Mar. 13, 2017). [↑](#footnote-ref-6)
7. *Specht v. Netscape Commc'ns Corp*., 306 F.3d 17, 26 (2d Cir. 2002). [↑](#footnote-ref-7)
8. 17 C.J.S. Contracts § 1. [↑](#footnote-ref-8)
9. *See Nguyen v. Barnes & Noble Inc.,* 763 F.3d, 1175 (9th Cir. 2014). [↑](#footnote-ref-9)
10. *See* *Guadagno v. E\*Trade Bank*, 592 F. Supp. 2d 1263 (C.D. Cal. 2008) (citing *A.V. v. iParadigms, L.L.C.,* 544 F.Supp.2d 473, 480 (E.D.Va.2008)). [↑](#footnote-ref-10)
11. *See* 17 C.J.S. Contracts § 47. [↑](#footnote-ref-11)
12. *See Specht v. Netscape Commc'ns Corp.,* 306 F.3d 17, 28 (2d Cir. 2002), at 28, citing: *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal.App.3d 987, 101 Cal. Rptr. 347, 350 (Cal. Ct. App. 1972). [↑](#footnote-ref-12)
13. Restatement (Second) of Contracts § 19 (1981). [↑](#footnote-ref-13)
14. *See Holland v. United States*, 621 F.3d 1366 (Fed. Cir. 2010). [↑](#footnote-ref-14)
15. *See* *Deputy v. Lehman Bros.,* 345 F.3d 494, 512 (7th Cir. 2003) (“It is black letter contract law, and also the law of the state of Wisconsin—the law governing the dispute in this case—that mutual assent “does not mean that parties must subjectively agree to the same interpretation at the time of contracting ....” *Management Computer Serv., Inc. v. Hawkins, Ash, Baptie & Co.,* 206 Wis.2d 158, 557 N.W.2d 67, 75 (1996)). (“Rather, mutual assent is judged by an objective standard, looking to the express words the parties used in the contract.” Id. at 76.”); *A.P.S., Inc. v. Standard Motor Prod., Inc.,* 295 B.R. 442, 453–54 (D. Del. 2003) (“However, a contract cannot be formed without a mutual intent to be bound, the determination of which is based upon the application of an objective standard.” *Four Seasons Hotels Ltd. v. Vinnik*, 127 A.D.2d 310, 317, 515 N.Y.S.2d 1 (N.Y. App. Div. [454] 1987); *Angelou v. African Overseas Union*, 33 S.W.3d 269, 278 (Tex. App. 2000).”). [↑](#footnote-ref-15)
16. *See Triangle Cayman Asset Co. 2 v. Prop. Rental & Inv., Corp*., 278 F. Supp. 3d 508 (D.P.R. 2017). [↑](#footnote-ref-16)
17. *See In re Ryan*, 851 F.2d 502, 506 (1st Cir. 1988), at page 507. [↑](#footnote-ref-17)
18. *Id.*at page 11. [↑](#footnote-ref-18)
19. *See* § 16B: 120.Enforceability of online contracts—Internet clickwrap—Shrinkwrap / browsewrap / scrollwrap contracts, 20A1 Minn. Prac., Business Law Deskbook § 16B:120, citing *Wilson v. Huuuge, Inc.,* 944 F.3d 1212, 1219 (9th Cir. 2019) (citing Nguyen, 763 F.3d at 1177; *Wilson v. Playtika, Ltd*., 349 F. Supp. 3d 1028, 1037 (W.D. Wash. 2018)). [↑](#footnote-ref-19)
20. (As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.) [↑](#footnote-ref-20)
21. *See* Restatement of the Law, Consumer Contracts § 1 at 8, TD (2019). [↑](#footnote-ref-21)
22. *See* Restatement of the Law, Consumer Contracts § 2 TD, at comment 4. (2019). [↑](#footnote-ref-22)
23. *Id.* at illustration 15. [↑](#footnote-ref-23)
24. *Sgouros v. TransUnion Corp.,* 817 F.3d 1029, 1033–34 (7th Cir. 2016). [↑](#footnote-ref-24)
25. (A person is on inquiry notice if a “reasonably prudent offeree would be on notice of the terms at issue”) Schnabel, 697 F.3d at 120; (“‘Inquiry notice’ is ‘actual notice of circumstances sufficient to put a prudent man upon inquiry’”), Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 27 n.14 [2d Cir. 2002]). [↑](#footnote-ref-25)