

From Clickwrap to the Courtroom: Enforcing Online Arbitration Clauses

October 27, 2025

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In today's digital commercial society, consumer agreements are commonly established online. Often, a single click of a button confirms the relationship between parties, and online operators should ensure agreements are both drafted and presented in a way that courts will enforce.

The enforceability of these agreements, particularly certain provisions within them, depends heavily on proof of consent. When it comes to arbitration provisions specifically, courts will analyze what notice was provided to the consumer and how consent was obtained, including reviewing the presentation of the terms.

Courts are increasingly distinguishing between “clickwrap” agreements and “browsewrap” agreements, and the legal implications are demonstrably different. A “clickwrap” agreement requires consumers to affirmatively click a checkbox, or proceed only after users click to confirm their assent to the terms. In contrast, a “browsewrap” agreement posts terms on a website without a mechanism for explicit assent.

Clickwrap agreements provide evidence of the consumer’s affirmative contractual assent, which courts are more likely to enforce. Further, arbitration provisions should be presented clearly, in plain language, and should explain their implications. These include waiving the right to a jury trial and a requirement to pursue only individual claims, with no class action participation.

When businesses present clear and accessible terms and obtain a consumer’s active agreement—such as by requiring a checked box—courts are more inclined to uphold those agreements, which can direct disputes to arbitration rather than court.

Recent rulings . . . indicate that courts are carefully examining the enforceability of arbitration clauses, including whether consumers have consented to terms of use containing them.

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