

CONTRACTS MIDTERM MEMO

General Comments

I said that if you were to take the midterm under exam conditions you should allow one hour. There is a lot to write about, and you would experience time pressure. I think it is useful to experience this for the first time when it doesn't matter, rather than in the final exam, when it does.

In answering a question like this you will not be able to tell me exactly what the answer is: the idea is to use the information you have learned as effectively as possible to analyze the issues.

Here is how I think about the hypothetical facts on the basis of what we have studied so far.

The Alpharobot terms and conditions include an arbitration agreement with a class action waiver and a very broad limitation of damages provision. The situations of the three customers are different because of the different ways they book the robots. A booking of a robot through the web page would seem to establish a binding contract under the Specht v Netscape test applied in Meyer v Kalanick (“[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms”). The web page contains a prominent statement that use of the web page constitutes agreement to be bound by the Terms of Use which are available via a hyperlink on the web page. Bookings through the web page would seem to be subject to the arbitration agreement and the limitation of damages.

In contrast the app does not contain the statement about agreement to the Terms of Use, and nor is it easy to notice or find the Terms of Use. In Meyer v Kalanick the terms were visible, but not very noticeable. The Second Circuit held that the terms there were binding, applying the Specht v Netscape test. The fact that the terms were not especially noticeable did not matter. The Court said:

“when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found. Turning to the interface at issue in this case, we conclude that the design of the screen and language used render the notice provided reasonable as a matter of California law.”

The Court also noted that the link to the terms and conditions was spatially coupled with the mechanism for assent, the register button, and that it was temporally coupled in that the customer saw it at the same time and “a reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account. That the terms of service were available only by hyperlink does not preclude a determination of reasonable notice.” The hypo merely states that “on the app it is not at all easy to

notice that there are Terms of Use, or to find them.” From this limited information it is difficult to tell whether there is the sort of notice of terms and assent to terms that the Second Circuit would accept as sufficient (it is not clear how like the facts are to those in *Meyer v Kalanick* because we don’t know much detail, and we don’t know how far the concept of the reasonably prudent smartphone user will reach).

Beta

Beta has no notice of the existence or content of the Alpharobots Terms of Use. Applying the *Specht v Netscape* test ([r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms”) there is no basis for thinking that the Terms of Use bind her. Therefore she would be able to sue Alpharobots for damages for breach of contract without worrying about the limitation on damages in the Terms of Use. Alpharobots has agreed to rent a robot to Beta for a week to take care of her dog. On the Monday Beta learns she will not get the Alpharobot and has to find an alternative carer. The alternative she finds is more expensive. The expectation value to Beta of the contract is having her dog looked after for a week for the contract price. Her damages should be the additional cost of the human carer, subject to the obligation to mitigate damages (if there were an easily available cheaper but adequate alternative source of care for the dog she might not be able to recover all of the additional cost, but she had limited time to make the arrangements because she seems not to have learned of the breach until the Monday morning. She should also be able to recover her \$500 deposit.

Gamma

Gamma uses the app to make the booking, so we cannot be sure whether the Terms of Use would be treated as binding on her. When her cat runs away Gamma, who is on vacation, makes arrangements to return and to find her cat, which she does successfully. She expected to have her cat cared for safely while she was on vacation for a week for a particular price: when Alpharobots failed to look after her cat properly she incurred extra expenses which can be seen as flowing from the breach: the cost of the limo and plane tickets to return home, and the cost of hiring the pet detective. I think you could argue these are direct rather than consequential damages as the contract was about looking after the cat and the expenses relate to looking after the cat when the contract is breached. But Gamma does have a duty to mitigate damages: she can’t incur large amounts of expense unnecessarily and expect to recover it all in damages (query: could she recover the cost of the pet detective but not the travel expenses on this basis?). Damages for emotional stress/distress are not generally recoverable for breach of contract (see, e.g., discussion in the Casebook after *Chung v Kaonohi*). Breach of contracts relating to weddings/funerals might give rise to such damages as they are within the contemplation of the parties: is pet care like a wedding related contract or not?

Alternatively, Gamma might want to focus on reliance damages with respect to the spoiled vacation. There is a question as to whether it makes sense to see the vacation expenses as being incurred in reliance on the contract to rent an Alpharobot. If she

booked the vacation before booking the robot there would not seem to be reliance. And Armstrong Rubber suggests foreseeability constraints on reliance damages. Even if a firm that provides pet sitting services understands that the customer has a need for the services that will have to be met in some way if it fails to provide the services that does not mean that it makes sense to impose liability with respect to the costs of an expensive vacation (we don't know in fact if the vacation was expensive or not). If the Terms of Use are binding on Gamma we need to consider whether the limitation on damages prevents the recovery of damages:

To the fullest extent permissible under applicable law, in no event shall Alpharobot be liable to you for any personal injury, property damage, lost profits or for any form of direct or indirect, special, incidental, consequential, exemplary or punitive damages.

The language here is so broad that it could be treated as precluding any right to damages. The language tracks the language of the Fedex limitation of damages in the Casebook (p. 114) except that there the limitation is tied to the declared value of the shipment (i.e. damages are limited to a dollar amount). If the Alpharobots contract limited damages to the total cost of the services under the contract, that would be similar. But to limit damages completely seems excessive, especially where, as here, there is some doubt as to whether the Term was adequately brought to Gamma's attention. This issue might lead to a conclusion that Gamma is not subject to the Terms of Use, or that she is but this particular Term is too broad to be enforceable against her (and the language of the clause stating it applies to the fullest extent permissible seems to recognize there may be issues).

Delta

Delta books the robot via the web page, and it seems that there is the strongest case for the Terms of Use to apply to her. However she communicates information about her business and her forthcoming business trips via the comments section of the booking form.

When Alpharobots breaches the contract Delta needs to cancel her trip and it seems that she will lose business as a result. This raises the consequential damages question: she has given Alpharobots notice of the risk of consequential damages, and she is in a position where she could probably make a reasonable case that the damages are not speculative (this is not new business for her; cf. *Chung v Kaonohi*). But she is also faced with the limitation of damages which clearly excludes liability for consequential damages. And, given the way the Terms of Use are presented on the web page it is hard for her to claim that she was not made aware of this limitation. However she may still be able to argue that it is not right for Alpharobots to exclude any liability for damages whatsoever, and that to the extent that she has incurred expenses in reliance on the contractually assured availability of the robot she should be able to recover reasonable reliance damages. Here the case that the trip is in reliance on the robot may be better and there certainly is the sort of notification to Alpharobots that makes this reliance foreseeable (cf. *Security Stove*).

The Question

Alpha is an inventor who has been working on the development of animal care robots that can walk dogs, and feed and care for dogs and cats while their people are at work or on vacation. She has built 4 Alpharobots so far and is already in the business of providing dog and cat care and she wants to expand her fleet of robots based on a new improved design.

People can book Alpharobots through a web page or through an app. The web page prominently displays the following statement: "By visiting this web page or by using the Alpharobot app you agree to be bound by the Alpharobot Terms of Use." This language does not appear on the app and on the app it is not at all easy to notice that there are Terms of Use, or to find them. On the web page, the words "Alpharobot Terms of Use" are hyperlinked to a document which contains the following provisions:

To help streamline the resolution of disputes, claims, and controversies under these updated Terms of Use, you agree that you and Alpharobot will be obligated to arbitrate disputes, claims, and controversies that arise out of or relate to your relationship with Alpharobot and that any such proceedings will be conducted only on an individual basis (and not as a class action) and under the Robot Arbitration Association's arbitration rules.

To the fullest extent permissible under applicable law, in no event shall Alpharobot be liable to you for any personal injury, property damage, lost profits or for any form of direct or indirect, special, incidental, consequential, exemplary or punitive damages.

Customers request bookings of Alpharobots through a booking form (either on the web page or in the app). At the time of the booking a payment of part of the total price for the Alpharobot rental is made.

Beta calls the Alpharobots office by telephone and books an Alpharobot to look after her dog, Spot, for a week during the day while she is at work. She makes the booking in conversation with Ivy, who has recently started working for Alpharobots and who does not communicate Alpharobots' Terms of Use to Beta during the conversation. Alpharobot No. 1 is assigned to Beta but it malfunctions on the Monday morning of the week for which Beta booked it. Beta needs to get to work, and quickly, because she has a very important meeting, so she hires a human dog carer to look after her dog for the week. This human dog carer is very much more expensive than an Alpharobot would have been, and more expensive than usual because of the last minute booking. Beta would like to recover the cost of the human carer from Alpharobots, and she would like to recover the deposit of \$500 she paid when she made the booking.

Gamma uses the app to book an Alpharobot to look after her beloved cat, Peanut, for a

week while she goes on vacation. While she is on vacation she receives a notification from Alpharobots that Peanut (who is a very expensive and sensitive cat) has run away. Gamma immediately makes arrangements to return home: she books a limo to get to the airport, and expensive last minute plane tickets. When she gets home she hires a pet detective to find Peanut, and, luckily, Peanut is soon found. But Gamma is upset about her ruined vacation, the additional expense she has incurred and the emotional stress she has suffered worrying about Peanut.

Delta books an Alpharobot to look after her dog, Mr. Tiddles, for a week via the web page so that she can go on a business trip. Delta is a successful clothing designer who sells her designs on business trips which she takes several times each year. In the past she has used the services of an agency which employs human animal carers and which has been very reliable, but she has always been interested in technology and thinks that robots are the future. When she books the Alpharobot Delta writes a detailed explanation about her business and her need for a reliable pet carer to enable her to make the business trips which are essential for her to sell her designs, in the comments section of the booking form. She gives some details of the valuable contracts she signed during her last business trip. On the day Delta is expecting the Alpharobot to turn up she is notified that it will not be arriving. She is unable to find anyone to look after Mr. Tiddles before she would need to leave for the airport to begin her trip.

Discuss the contracts law issues raised by these 3 situations, using the course materials.