Introduction to Contracts

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Most commercial outlines and many casebooks begin the study of contract law with a focus on **formalities**: the legal requirements for the formation of a binding contract. The formal requirements of a contract are stated as **offer**, **acceptance** and **consideration**. These are legal terms of art: the words have specific meaning for lawyers that they do not have in everyday life. Non-lawyers may use the word "offer" to mean a number of different sorts of act. I may offer to drive a friend to lunch, for example (how is this offer different from the sort of offer made to a prospective passenger via the uber app?). But when a lawyer considers whether words spoken or written by a person constitute an "offer" the acceptance of which can create a contract, she is using the word in a very specific way.

Lawyers need to learn to be very careful about what words they use because some words have very specific legal meanings (using a word with a specific legal meaning wrongly could disadvantage your client), and because **ambiguity** (the use of words that have uncertain or multiple possible meanings) creates opportunities for litigation. A contracting party who wants to get out of a contractual obligation by invoking the idea of ambiguity, and who succeeds in persuading a court to interpret the contract in her favor may be happy about the ambiguity. But litigation is costly, and a legal system which was prepared to see many contractual provisions as ambiguous might discourage contracting.

While the legal term "offer" has a specific meaning, different lawyers may have different views on whether a given set of spoken or written words actually does constitute an "offer." And figuring out whether a set of words constitutes an "offer" involves thinking not just about the words (contract law is not about magic incantations) but also about the circumstances in which they were spoken or written. Stewart Macaulay (one of the authors of our casebook) has written: "The more you know about language, the less comfortable you are with ideas that any collection of words has but

one complete and clear meaning apart from context."[2]

Different possible views about how to think about the words and their **context** are the basis for lawyers to make arguments. In thinking about contract formation issues we want to distinguish between the sort of promises a court will enforce as a binding contract and words which either do not constitute promises at all, or which do not constitute the sort of promises the law will enforce as a binding contract.

Even where the legal formalities of offer, acceptance and consideration are satisfied, and the lawyers for both sides recognize there is no scope for dispute about these issues, there may not be a binding contract. If two people agree to do an **illegal** act[3] the agreement will not be treated as a binding contract. If one person lies to persuade another to enter into an agreement the **fraud**[4] will prevent a court from enforcing the agreement as a binding contract. If one person pressurizes another into making an agreement a court may find that the pressure (the "**duress**") means that the agreement should not be enforced as a binding contract. We will consider issues of this type (involving issues of "public policy") at the end of the semester. For now you do not need to know anything about the details of illegality, fraud or duress, but it is a good idea to bear in mind at the outset that there are some **public policy** limits to the ability to contract.

Lawyers do need to know about the formalities of contract creation (and we are going to begin with a brief examination of some of these formation issues). But disputes about contracts that give rise to litigation are often about **interpretation** of the contract rather than about whether a contract exists, or about what remedies are available where there is a breach of a contract. The Casebook we are using begins with a lengthy discussion of how the authors think about contract law and an explanation of what they are trying to achieve in the book. You will be or have been a party to many contracts:

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[2] Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MODERN LAW REVIEW 44, 48 (2003).

[3] An act is illegal if the law prohibits it. For example a contract to buy and sell illegal drugs would be an illegal, and therefore unenforceable (as a matter of law), contract. Obviously bargains are frequently made and kept which do not rely on the formal legal system for their enforcement.

[4] Fraud in the inducement is an intentional misstatement of a material fact to induce another to enter into a contract. Notice that this is a legal test with multiple parts: a (1) misstatement of (2) a fact which is (3) material and which is (4) made intentionally and (5) made to induce another to enter into a contract.

ongoing contracts like leases or cellphone contracts or agreements for student loans, or one-off contracts for the purchase of goods. You may or may not have thought much about these transactions and relationships as contractual. Now you will. For the first weeks of the semester most of our time will be spent on thinking about remedies for breach of contract (rather than on the perhaps more traditional issues relating to offer and acceptance and consideration). As a general matter we could say that we cannot really understand the law if we do not understand what sanctions may be imposed on those who break the law or what remedies may be sought by those whose legal rights are infringed. Understanding how contract remedies work is important in order to understand contracts. Figuring out what it means to say that a contract exists involves understanding what are the consequences of breach of that contract.

During the semester we are going to see examples of issues relating to contract law that arise in some different contexts, such as agreements between family members (where the parties may not focus at all on issues of formalities), employment and franchising. But even in the context of commercial transactions the parties to the transactions may not think about the issues of contract law in the same way that a court does.

Uber Litigation: Cullinane v Uber

We are going to start the semester by thinking about contract formation in the context of a person deciding to begin to use Uber. We begin with the decision of the 1st Circuit in Cullinane v Uber.[5] The case is an example of litigation where a business is arguing (by means of a **motion to compel arbitration**) that a dispute should be resolved by arbitration rather than in court. The court faced with the motion has to decide whether there is a valid arbitration agreement that applies to the parties and to the dispute. The District Court of Massachusetts, a federal district court, granted the motion, but the 1st Circuit reversed the judgment. Read the decision of the 1st Circuit.

Here are some questions to think about: Do you use Uber? Are you a party to any other agreements which include arbitration agreements? Why do you think Uber wants to arbitrate disputes rather than go to court? Why do you think Cullinane does not want to arbitrate the dispute?

What is the legal test the Court applies in the case? Do you agree with how the

[5] The decision is available via a link on the class blog or here: http://media.ca1.uscourts.gov/pdf.opinions/16-2023P-01A.pdf . I am assigning this pdf version of the decision so you can see the pictures of what the Uber customers saw when signing up for the app.

Court applies this test?

Is there a contract between Cullinane and Uber? If so, how can we tell what the terms of the contract are?

In 2017 the CFPB, the Bureau of Consumer Financial Protection, which is a federal agency which has the responsibility to protect financial services consumers, published a final rule to limit the use of pre-dispute arbitration agreements by providers of financial services to consumers. The CFPB stated:

> Congress directed the Bureau to study these pre-dispute arbitration agreements in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd- Frank or Dodd-Frank Act). In 2015, the Bureau published and delivered to Congress a study of arbitration (Study). In the Dodd-Frank Act, Congress also authorized the Bureau, after completing the Study, to issue regulations restricting or prohibiting the use of arbitration agreements if the Bureau found that such rules would be in the public interest and for the protection of consumers. Congress also required that the findings in any such rule be consistent with the Bureau's Study. In accordance with this authority, the final rule issued today imposes two sets of limitations on the use of pre-dispute arbitration agreements by covered providers of consumer financial products and services. First, the final rule prohibits providers from using a pre-dispute arbitration agreement to block consumer class actions in court and requires most providers to insert language into their arbitration agreements reflecting this limitation. This final rule is based on the Bureau's findings-which are consistent with the Study-that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.[6]

The Dodd-Frank Act was enacted during the global financial crisis to improve financial regulation in the US. The Trump administration began to review financial regulation in the US with a view to deregulation.[7] The CFPB Arbitration Agreements

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[6] Bureau of Consumer Financial Protection, Arbitration Agreements, 82 Fed. Reg. 33210, 33210 (Jul. 19, 2017).

[7] *See, e.g.*, Presidential Executive Order on Core Principles for Regulating the United States Financial System (Feb. 3, 2017) (identifying as core principles, inter alia, "foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard

Rule is no longer valid as a result of action by Congress and the President under the Congressional Review Act.[8].

We are not focusing on financial regulation but the controversy over the regulation of arbitration agreements raises some quite fundamental questions about how we think about contracts and what role the state has and should have in controlling the contracts that people can create and enforce.

Uber Litigation: Meyer v Kalanick

The Second Circuit took a very different view of the Uber sign-up process, reversing the judgment of Judge Jed Rakoff[9] in the Southern District of New York. In this case, Spencer Meyer, an Uber customer, sued Travis Kalanick, who was at the time Uber's CEO,[10] arguing that Kalanick and Uber drivers were involved in a price-fixing conspiracy in violation of the anti-trust laws.[11] Although the suit was initially against Mr Kalanick, Uber subsequently became a party to the litigation. Uber investigated Mr Meyer and his lawyer, then denied it had done so, but subsequently

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and information asymmetry" and "advance American interests in international financial regulatory negotiations and meetings."

[8] Bureau of Consumer Financial Protection, Arbitration Agreements, 82 Fed. Reg. 55500 (Nov. 22, 2017).

[9] You may be interested to read this article by the judge: Jed S Rakoff, The Cure for Corporate Wrongdoing: Class Actions vs. Individual Prosecutions, New York Review of Books (Nov. 19, 2015) at http://www.nybooks.com/articles/2015/11/19/cure-corporate-wrongdoing-class-actions/

[10] In 2017 Travis Kalanick resigned as CEO of Uber after shareholders decided that a change in corporate culture was necessary at the firm. *See, e.g.*, Mike Isaac, Uber Founder Travis Kalanick Resigns as C.E.O., New York Times Jun. 21, 2017) ("The move caps months of questions over the leadership of Uber, which has become a prime example of Silicon Valley start-up culture gone awry. The company has been exposed this year as having a workplace culture that included sexual harassment and discrimination, and it has pushed the envelope in dealing with law enforcement and even partners. That tone was set by Mr. Kalanick, who has aggressively turned the company into the world's dominant ride-hailing service and upended the transportation industry around the globe.")

[11] The complaint argues violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 340 of the Donnelly Act, N.Y. Gen. Bus. Law § 340.

admitted the investigation.[12]

The complaint in the case stated:

> Kalanick designed Uber to be a price fixer. Kalanick has long insisted that Uber is not a transportation company and that it does not employ drivers. Instead, Uber is a technology company, whose chief products are smartphone apps. Those apps match riders with drivers. The apps provide a standard fare formula, the Uber pricing algorithm. Drivers using the Uber app do not compete on price. Rather, drivers charge the fares set by the Uber algorithm. Those fares surge at times to extraordinary levels, which are uniformly charged by drivers using the Uber app. Uber takes a cut of those price-fixed fares. Kalanick's business plan thus generates profit through price fixing... The price-fixing Kalanick has arranged among Uber drivers is an open secret. In September 2014, Uber conspired with hundreds of drivers to negotiate an effective hike in fares that would benefit them, collectively, at the expense of their riders. Uber had initially required drivers of SUVs and black cars to accept a lower fare for rides. Drivers, who should have been in direct competition with one another over price, instead banded together to ask Uber to reverse its decision and reinstitute higher fares. Uber colluded with those drivers and put the higher fares back in place. This collective agreement to fix prices among competitors illustrates Uber's essential role, as designed by Kalanick: to fix prices among competing drivers.

The rules which regulate price-fixing are part of a system of rules to regulate competition, including rules to limit cartels and monopolies.[13] These rules are examples of how public policy limits the freedom of businesses to contract: contracts which are designed to fix prices in violation of the anti-trust rules are prohibited. Violation of the rules can lead to criminal and civil liability. Consumers injured by price-fixing can sue for damages, and a successful claim can give rise to treble damages (damages which are calculated as a multiple of the harm caused by the violation). Treble damages (and attorney's fees) can incentivize lawsuits, and are meant to disincentivize price-fixing. We are concerned with contract law, rather than with anti-trust law, but the litigation

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[12] Michael Hiltzik, How sleazy is Uber? This federal judge wants to know, at http://www.latimes.com/business/hiltzik/la-fi-hiltzik-uber-rakoff-20160610-snap-story.html

[13] *See, e.g.*, US Department of Justice, Antitrust Enforcement and the Consumer, at https://www.justice.gov/atr/file/800691/download.

illustrates that how courts apply the rules of contract law has implications for the effectiveness of a range of laws that are designed to promote public policy. The anti-trust laws are designed to encourage litigation to enforce them, and the enforcement of arbitration agreements with class action waivers prevents this sort of enforcement.

Here is an excerpt from the decision of the 2nd Circuit in the case:

We review de novo the denial of a motion to compel arbitration. Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 26 (2d Cir. 2002). The determination of whether parties have contractually bound themselves to arbitrate is a legal conclusion also subject to de novo review...The factual findings upon which that conclusion is based, however, are reviewed for clear error...
The parties dispute whether the district court's determinations regarding the lack of reasonably conspicuous notice or an unambiguous manifestation of assent are findings of fact, subject to clear error review, or conclusions of law, subject to de novo review. Although determinations regarding mutual assent and reasonable notice usually involve questions of fact... the facts in this case are undisputed, and the district court determined as a matter of law that no reasonable factfinder could have found that the notice was reasonably conspicuous and the assent unambiguous... We therefore review the district court's conclusions de novo.

A. Applicable Law
1. Procedural Framework
Under the Federal Arbitration Act (the "FAA"), "[a] written provision in · a contract · to settle by arbitration a controversy thereafter arising out of such contract · shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA reflects "a liberal federal policy favoring arbitration agreements," AT & T Mobility LLC v. Concepcion, 563 U.S. 333, 346, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)... and places arbitration ag reements on "the same footing as other contracts," ... It thereby follows that parties are not required to arbitrate unless they have agreed to do so...
Thus, before an agreement to arbitrate can be enforced, the district court must first determine whether such agreement exists between the parties. Id. This question is determined by state contract law...
Here, the question of arbitrability arose in the context of a motion to compel arbitration. Courts deciding motions to compel apply a "standard similar to that applicable for a motion for summary judgment."... On a motion for summary judgment, the court "consider[s] all relevant, admissible evidence submitted by the parties and contained in

‘pleadings, depositions, answers to interrogatories, and admissions on file, together with · affidavits”... and draws all reasonable inferences in favor of the non-moving party..
“[W]here the undisputed facts in the record require the matter of arbitrability to be decided against one side or the other as a matter of law, we may rule on the basis of that legal issue and ‘avoid the need for further court proceedings.” ... If a factual issue exists regarding the formation of the arbitration agreement, however, remand to the district court for a trial is necessary...
If the district court concludes that an agreement to arbitrate exists, “it should then consider whether the dispute falls within the scope of the arbitration agreement.” Specht, 306 F.3d at 26 ... In this case, the parties do not dispute that Mey er's claims would be covered by the arbitration provision of the Terms of Service.

2. State Contract Law
“State law principles of contract formation govern the arbitrability question.”... The district court applied California law in its opinion, but acknowledged that it “[did] not view the choice between California law and New York law as dispositive with respect to the issue of whether an arbitration agreement was formed.” ... Defendants have not challenged the district court's choice of law but state that “if this Court concludes that New York law differs from California law with respect to any determinative issues, it should apply New York law.”... We agree with the district court's determination that California state law applies, and note that New York and California apply “substantially similar rules for determining whether the parties have mutually assented to a contract term.” ... .
To form a contract, there must be “[m]utual manifestation of assent, whether by written or spoken word or by conduct.” Specht, 306 F.3d at 29. California law is clear, however, that “an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.”... “Thus, California contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.”... Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms. ... Whether a reasonably prudent user would be on inquiry notice turns on the “[c]larity and conspicuousness of arbitration terms,” Specht, 306 F.3d at 30; in the context of web-based contracts, as discussed further below, clarity and conspicuousness are a function of the design and content of the

relevant interface...
Thus, only if the undisputed facts establish that there is “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms” will we find that a contract has been formed. See Specht, 306 F.3d at 35.

3. Web-based Contracts
“While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”... “Courts around the country have recognized that [an] electronic ‘click’ can suffice to signify the acceptance of a contract,” and that “[t]here is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.”...
With these principles in mind, one way in which we have previously distinguished web-based contracts is the manner in which the user manifests assent—namely, “clickwrap” (or “click-through”) agreements, which require users to click an “I agree” box after being presented with a list of terms and conditions of use, or “browsewrap” agreements, which generally post terms and conditions on a website via a hyperlink at the bottom of the screen.... Courts routinely uphold clickwrap agreements for the principal reason that the user has affirmatively assented to the terms of agreement by clicking “I agree.” ... Browsewrap agreements, on the other hand, do not require the user to expressly assent.... “Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions.”...
Of course, there are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browsewrap categories. Some online agreements require the user to scroll through the terms before the user can indicate his or her assent by clicking “I agree.” ... Other agreements notify the user of the existence of the website's terms of use and, instead of providing an “I agree” button, advise the user that he or she is agreeing to the terms of service when registering or signing up...
In the interface at issue in this case, a putative user is not required to assent explicitly to the contract terms; instead, the user must click a button marked “Register,” underneath which the screen states “By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY,” with hyperlinks to the Terms of Service and Privacy Policy. We were first presented with a similar agreement in Schnabel, but the plaintiffs had not preserved the issue of whether they were on inquiry notice of the arbitration provision by a “terms and conditions” hyperlink on an enrollment form available before

enrollment.... Most recently in Nicosia, we held that reasonable minds could disagree regarding the sufficiency of notice provided to Amazon.com customers when placing an order through the website...
Following our precedent, district courts considering similar agreements have found them valid where the existence of the terms was reasonably communicated to the user. Compare Cullinane v. Uber Techs., Inc.,... (D. Mass. July 11, 2016) (applying Massachusetts law and granting motion to compel arbitration)[14]
Classification of web-based contracts alone, however, does not resolve the notice inquiry. ... Insofar as it turns on the reasonableness of notice, the enforceability of a web-based agreement is clearly a fact-intensive inquiry....Nonetheless, on a motion to compel arbitration, we may determine that an agreement to arbitrate exists where the notice of the arbitration provision was reasonably conspicuous and manifestation of assent unambiguous as a matter of law...

B. Application
Meyer attests that he was not on actual notice of the hyperlink to the Terms of Service or the arbitration provision itself, and defendants do not point to evidence from which a jury could infer otherwise. Accordingly, we must consider whether Meyer was on inquiry notice of the arbitration provision by virtue of the hyperlink to the Terms of Service on the Payment Screen and, thus, manifested his assent to the agreement by clicking "Register."
As an initial matter, defendants argue that Meyer is precluded from arguing that no contract was formed by an allegation in his complaint that "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions." ... We disagree. First, as the district court observed, the pleading is not obviously a concession in that it makes no reference to Meyer's knowledge.... Second, Meyer volunteered to amend his complaint on the record to delete the allegation at issue, an offer that was accepted by the district court. Third, regardless of the allegation or even the validity of Meyer's amendment, Meyer has attested that, at the time he signed up for an Uber account, he was not aware of the existence of the Terms of Service or the arbitration clause contained therein. Construing the facts in Meyer's favor, we decline to hold that he agreed to arbitration based on the purported concession in his complaint....

1. Reasonably conspicuous notice
In considering the question of reasonable conspicuousness, precedent and basic

[14] This is the decision reversed by the 1st Circuit decision you have read.

principles of contract law instruct that we consider the perspective of a reasonably prudent smartphone user.... ("[T]he touchstone of the analysis is whether reasonable people in the position of the parties would have known about the terms and the conduct that would be required to assent to them."). "[M]odern cell phones · are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." ... As of 2015, nearly two-thirds of American adults owned a smartphone, a figure that has almost doubled since 2011. ... Consumers use their smartphones for, among other things, following the news, shopping, social networking, online banking, researching health conditions, and taking classes.... In a 2015 study, approximately 89 percent of smartphone users surveyed reported using the internet on their smartphones over the course of the week-long study period... A purchaser of a new smartphone has his or her choice of features, including operating systems, storage capacity, and screen size.
Smartphone users engage in these activities through mobile applications, or "apps," like the Uber App. To begin using an app, the consumers need to locate and download the app, often from an application store. Many apps then require potential users to sign up for an account to access the app's services. Accordingly, 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 Payment Screen is uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account or to connect the user's pre-existing PayPal account or Google Wallet to the Uber account, and the warning that "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." The text, including the hyperlinks to the Terms and Conditions and Privacy Policy, appears directly below the buttons for registration. The entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service. Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined...This presentation differs sharply from the screen we considered in Nicosia, which contained, among other things, summaries of the user's purchase and delivery information, "between fifteen and twenty-five links," "text · in at least four font sizes and six colors," and several buttons and advertisements... Furthermore, the notice of the

terms and conditions in Nicosia was “not directly adjacent” to the button intended to manifest assent to the terms, unlike the text and button at issue here...

In addition to being spatially coupled with the mechanism for manifesting assent—i.e., the register button+the notice is temporally coupled. As we observed in Schnabel, inasmuch as consumers are regularly and frequently confronted with non-negotiable contract terms, particularly when entering into transactions using the Internet, the presentation of these terms at a place and time that the consumer will associate with the initial purchase or enrollment, or the use of, the goods or services from which the recipient benefits at least indicates to the consumer that he or she is taking such goods or employing such services subject to additional terms and conditions that may one day affect him or her... Here, notice of the Terms of Service is provided simultaneously to enrollment, thereby connecting the contractual terms to the services to which they apply. We think that 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.. Moreover, the language “[b]y creating an Uber account, you agree” is a clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms. As long as the hyperlinked text was itself reasonably conspicuous—and we conclude that it was—a reasonably prudent smartphone user would have constructive notice of the terms. While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice.

Finally, we disagree with the district court's determination that the location of the arbitration clause within the Terms and Conditions was itself a “barrier to reasonable notice.” ... Here, there is nothing misleading. Although the contract terms are lengthy and must be reached by a hyperlink, the instructions are clear and reasonably conspicuous. Once a user clicks through to the Terms of Service, the section heading (“Dispute Resolution”) and the sentence waiving the user's right to a jury trial on relevant claims are both bolded.

Accordingly, we conclude that the Uber App provided reasonably conspicuous notice of the Terms of Service as a matter of California law and turn to the question of whether Meyer unambiguously manifested his assent to those terms.

2. Manifestation of assent

Although Meyer's assent to arbitration was not express, we are convinced that it was unambiguous in light of the objectively reasonable notice of the terms, as discussed in

detail above. .. As we described above, there is ample evidence that a reasonable user would be on inquiry notice of the terms, and the spatial and temporal coupling of the terms with the registration button "indicate[d] to the consumer that he or she is · employing such services subject to additional terms and conditions that may one day affect him or her."... A reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not.

The fact that clicking the register button had two functions—creation of a user account and assent to the Terms of Service—does not render Meyer's assent ambiguous. The registration process allowed Meyer to review the Terms of Service prior to registration, unlike web platforms that provide notice of contract terms only after the user manifested his or her assent. Furthermore, the text on the Payment Screen not only included a hyperlink to the Terms of Service, but expressly warned the user that by creating an Uber account, the user was agreeing to be bound by the linked terms. Although the warning text used the term "creat[e]" instead of "register," as the button was marked, the physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that the linked terms pertain to the action the user is about to take.

The transactional context of the parties' dealings reinforces our conclusion. Meyer located and downloaded the Uber App, signed up for an account, and entered his credit card information with the intention of entering into a forward-looking relationship with Uber. The registration process clearly contemplated some sort of continuing relationship between the putative user and Uber, one that would require some terms and conditions, and the Payment Screen provided clear notice that there were terms that governed that relationship.

Here are some questions to think about: Does the 2nd Circuit apply the same legal test as the 1st Circuit? Why does the 1st Circuit reject the motion to compel arbitration whereas the 2nd Circuit grants it?

Meyer v Kalanick was remanded to the Southern District of New York. On remand, in March 2018, Judge Rakoff had this to say:

The American law of contracts in its common law origins presumed a promissory agreement freely negotiated between parties who reached a "meeting of the minds."..
That the agreement eventually became enforceable in a court of law (through the common law action known as "assumpsit") was an essential ingredient in the

development of the British and American economies...
But with the rise of giant corporations selling their products to masses of consumers, this contractual model became largely a figment of imagination, or nostalgia, at least so far as national retail markets were concerned. Increasingly, consumers purchasing a product were forced, as a condition of their purchase, to agree to a form contract drafted by the seller, replete with one-sided legalistically-worded provisions that the consumer had to accept if she wished to make the purchase. Such one-sided, take-it-or-leave-it form contracts were utilized by sellers in even otherwise competitive markets, because sellers saw no material competitive advantage in eliminating or negotiating any of these terms. Most consumers, for their part, did not even bother to read these small-print forms — not that most consumers would have been able to understand most of them if they had read them. These forms thus became the ubiquitous "contracts of adhesion."
In recent years, however, especially with the rise of internet merchandising, a new requirement has been imposed on consumers by these form contracts, to wit, a waiver of constitutional rights. In particular, consumers are now required, if they wish to purchase virtually any product or service via the internet, to waive their constitutional right to trial by jury — indeed, even their right to access to a court of law — and instead, submit to binding arbitration before a company-hired arbitrator.
One might have thought that such waivers were unenforceable on their face. The right to trial by jury, in civil as well as criminal cases, is a central feature, not only of the federal Constitution, but also of the constitutions of virtually every state... The right reflects the deep-seated view of the American people that the community is the best judge of justice.
But this, it appears, is not the view of the judiciary. Thus, while appellate courts still pay lip service to the "precious right" of trial by jury,.. and sometimes add that it is a right that cannot readily be waived,.. in actuality federal district courts are now obliged to enforce what everyone recognizes is a totally coerced waiver of both the right to a jury and the right of access to the courts — provided only that the consumer is notified in some passing way that in purchasing the product or service she is thereby "agreeing" to the accompanying voluminous set of "terms and conditions."
This being the law, this judge must enforce it — even if it is based on nothing but factual and legal fictions.

Question: What are the factual and legal fictions Judge Rakoff is referring to?