



Takeaway:

The Second Circuit recently affirmed a district court decision denying enforcement of an arbitration clause because it found that Subway's website was "cluttered" and that the terms and conditions were not clear and conspicuous. The decision emphasizes that terms and conditions must be easily located. On September 15, 2020, a three-judge panel of the U.S. Court of Appeals for the Second Circuit issued a decision affirming the denial by the U.S. District Court for the Eastern District of Long Island of Subway's motion to compel in *Arnaud v. Doctor's Associates, Inc., d/b/a Subway*. In the underlying Telephone Consumer Protection Act (TCPA) class action at the district court level, the plaintiff alleged that he received unsolicited text messages from Subway. Subway moved to compel arbitration, arguing that the plaintiff agreed to arbitrate any claims when he entered in

his phone number on a promotional page of Subway's website and then clicked a button labeled "I'M IN" in order to receive a free sandwich. According to Subway, that action "constituted assent to the terms and conditions contained on a separate webpage that was accessible via a hyperlink on the promotional page—terms and conditions that included an agreement to arbitrate." The district court judge denied Subway's motion, finding that, because Subway's website was "cluttered, did not use a conspicuous size or font for the terms and conditions link, and did not provide language informing the user that by clicking 'I'M IN' the user was agreeing to anything other than the receipt of a coupon, the user would not have been on inquiry notice of the arbitration provision." Subway appealed the ruling, but the Second Circuit agreed with the district court that the agreement to arbitrate was not binding because the link to it was too difficult to locate on Subway's "cluttered" website. The court also said the terms and conditions were not "reasonably clear" and thus did not convey to the plaintiff that by entering his phone number to receive a promotion, he was agreeing to arbitration.

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