

# Mitigating Risk in Website Terms and Conditions

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Companies with any measure of online presence are exposed to a myriad of legal risks by promoting and making representations about their businesses on their websites or mobile applications, even if these platforms are not used to sell goods or services.

Properly drafted terms and conditions that are tailored to the operations of companies and reflective of changes in emerging case law can offer effective protection against claims that may arise from users of websites or mobile applications. This article offers practical insights on how to draft and present terms and conditions to help mitigate risk.

## **Consider the Nature of the Website's Transactions in Determining the Terms and Conditions**

Terms and conditions generally specify the rules governing the use of a website or mobile application. Since every website is different, custom-drafted terms and conditions are necessary to protect a particular business. Well-crafted terms and conditions might address issues such as payment, taxes, refunds, gift certificates, accounts, disclaimers, warranties and limitations on liability.

The website or mobile application should also include a privacy policy, which is a statement that discloses how a customer's personal information will be collected, stored and disclosed to third parties and used on the site. Privacy policies are required in certain states and industries.

In determining what provisions to include in the terms and conditions, the nature of transactions that occur on the website should be thoughtfully considered. For example, a California retailer who sells goods nationwide may want to include a jurisdiction clause that designates California as the forum in the terms and conditions.

In addition, even when no purchases of goods occur online, terms and conditions can restrict the visitors' use of the website and protect the company's intellectual property, such as the website's text, design, graphics, data and layout. Restrictions may include barring the use of robots or the copying of data available on the website.

While existing intellectual property laws provide some measure of protection for website content, the scope of such protection may be limited (e.g., compiling pieces of factual information from websites may not be prohibited). Terms and conditions are an effective method of filling in those gaps.

To maximize the protection of intellectual property on the website, the terms and conditions should describe the intellectual property protected, cover every area of intellectual property — whether registered or not — to the greatest extent possible, and extend to every jurisdiction where business is conducted.

## **Ensure the Enforceability of Terms and Conditions**

Properly drafted terms and conditions provide protections against potential claims that may arise from website users, as long as a court is willing to enforce them. The key issue in enforcing terms and conditions is whether a valid contract has been formed between the company and the website user.

Courts will enforce the terms and conditions if they find that the necessary elements for contract formation are satisfied— e.g., did the user have notice of the terms, and did the user assent to them? Below are practical tips for drafting and presenting effective terms and conditions.

### ***Ensure reasonable notice by displaying the terms and conditions clearly***

The enforceability of terms and conditions may turn on whether they are displayed on the website in a way in which a reasonable user could be expected to notice them.

“Browsewrap” and “clickwrap” agreements are two primary methods for setting forth terms and conditions. In “browsewrap” agreements, the terms and conditions are accessible on the website in case the user wishes to review them, but the user assents simply by using the website.

“Clickwrap” agreements, on the other hand, require the user to expressly assent by clicking a button displayed next to or below a statement asking the user to accept the contract. Because there can be doubt with browsewrap agreements as to whether there is actual or constructive notice to users of their terms, clickwrap is a preferred method.

The terms and conditions must be presented in a manner that provides adequate notice to the user, focusing on the design and content of the website and terms and conditions page.[1] Simply posting the terms and conditions on the website is not enough.

Businesses should critically analyze the conspicuity of their sites' notices of the terms and conditions, their accessibility and the timing of the notices. To maximize the likelihood of enforcement, the terms and conditions should not be buried in a hyperlink at the bottom of a webpage or require the user to click through a multi-step process to access them.

Instead, the terms should be clear and conspicuous, easily accessible and displayed in a sufficiently large viewing window to provide the user an adequate opportunity to review the terms, thereby eliminating any doubts that a reasonable user would have noticed them.[2]

### ***Consider requiring the user to take action***

The argument that the user received adequate notice is most persuasive if the user was required to take affirmative steps to express assent to the terms and conditions.

Courts have been more willing to find notice of terms and conditions communicated through clickwrap agreements that require the user to affirmatively accept, provided that the text preceding the acceptance button makes clear that the user is accepting contractual terms and not merely requesting the user's readiness to proceed to the next step in the transaction.[3]

### ***Consider including a class action waiver and an arbitration provision to reduce exposure***

One way to reduce a company's exposure to these risks is to include an arbitration clause and class action waiver in the website's terms and conditions, prohibiting users from litigating en masse. Arbitration agreements require the parties to resolve disputes out of court, often via a more streamlined procedure.

A class action waiver limits lawsuits to the particular parties in the transaction and can avoid the risk that a single class action will result in substantial damages to the company. Those with an online presence can include an arbitration provision that limits the arbitration to the particular parties in the transaction, which can avoid the risk that a single class action jury verdict will result in substantial damages.

In recent decisions like [AT&T Mobility LLC v. Concepcion](#), 563 U.S. 333 (2011) and [DirecTV Inc. v. Imburgia](#), 136 S. Ct. 463 (2015), the [U.S. Supreme Court](#) has confirmed that class actions waivers in arbitration provisions are enforceable.

Recent decisions make clear that the placement of the arbitration provision is essential to providing the user notice in order form a binding arbitration agreement.[4] The terms and conditions can ensure sufficient notice of the arbitration agreement by:

- Alerting users of the existence of the arbitration clause by including a statement up front, or an arbitration notice stating that the terms and conditions contain a binding arbitration clause that will impact the users' rights about dispute resolution
- Describing what arbitration is and its limited scope and stating unequivocally that the parties have agreed to binding arbitration
- Explaining how an arbitration proceeding can be commenced
- Informing users of their right to bring claims in small claims court in lieu of arbitration under certain circumstances
- Providing users an opportunity to opt out of the arbitration agreement and informing them that by not doing so, they are agreeing to the arbitration clause

### ***Tailor terms and conditions for the financial services industry to the CFPB's new rule on arbitration agreements***

In addition to the guidance above, providers of consumer financial products or services should consider whether and how their existing website terms and conditions should be modified to reflect recent regulatory changes.

On July 10, 2017, the U.S. [Consumer Financial Protection Bureau](#) issued a new rule prohibiting providers of certain consumer financial products and services from including class action waivers in pre-dispute arbitration agreements. The rule also requires such providers to include specific language in the agreement informing consumers that the arbitration agreement does not restrict their right to bring a class action.

Importantly, while companies within the CFPB's jurisdiction will no longer be able to use arbitration agreements to require consumers to waive litigating as a class, they may still require customers to bring their claims through arbitration. As such, before the rule becomes effective in eight months, companies should review their existing consumer agreements to ensure that an arbitration provision is included and well-drafted to guard against any attacks on its enforceability.

## **Conclusion**

Terms and conditions are an important tool for limiting a company's exposure to the various legal risks inherent in conducting business online. However, simply posting terms and conditions on a website is not enough to reap their benefits. Rather than resorting to terms and conditions that contain boilerplate provisions, companies should critically consider the nature and needs of the business and the transactions that may occur on their websites to determine what types of provisions will be beneficial.

Furthermore, as the emerging case law illustrates, the placement of the terms and conditions on a website is paramount, as the enforceability of their provisions will turn on whether the website users received adequate notice and demonstrated assent based on the design and content of the website and the terms and conditions page.

By implementing these guidelines, companies can significantly reduce the legal risks entailed in maintaining an online presence.