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ARTICLE

Consent and Dispute Resolution Clauses

Nancy S. Kim

Chicago-Kent College of Law, Chicago, IL, USA
Email: nkim25@illinoistech.edu

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Abstract

Dispute resolution provisions are routinely found in the boilerplate section of all types of contracts, ranging from negotiated paper agreements to website Terms of Service. The law permits the parties to a contract to change the default rules that would otherwise govern their transaction, including how any disputes will be resolved. The ability of the parties to change default rules demonstrates the deference of contract law to individual autonomy and private ordering. Consent is central and essential to both. Despite the legal significance of consent, its meaning is elusive. In one sense, the "meaning of consent" refers to its implications and the legal and moral consequences that derive from consent. In the other, and more complex sense, the "meaning of consent" refers to its very nature. Drawing upon my previous work on consent and contracts, this Article discusses these two meanings of consent and how they are interdependent. It will also examine consent specifically in the context of dispute resolution clauses.

Keywords: Consent; dispute resolution clauses; boilerplate; adhesive terms; adhesive form contracts; contracts; consumer contracts; standard form contracts

A. Introduction

The law generally permits the parties to a contract to change the default rules that would otherwise govern their transaction, including how to handle disputes. The default rules are the product of the collective deliberation of courts, policymakers, and lawmakers; that the parties have the power to alter them demonstrates the deference of the law to individual autonomy and private ordering. In this Article, I apply my prior work on consent and contracts to dispute resolution clauses.[1]

Consent is central and essential to both autonomy and private ordering. Yet, despite the legal significance of consent, its meaning eludes definition.[2] This is because consent is both a conclusion

[1]Consent is a topic that I have contemplated and discussed extensively, particularly as it relates to contracts. *See, e.g.*, NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS (2019) [hereinafter CONSENTABILITY]; NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013) [hereinafter WRAP CONTRACTS]; Nancy S. Kim, *Relative Consent and Contract Law,* 18 NEV. L. J. 165 (2017) [hereinafter *Relative Consent*].

[2]Many scholars have tackled the meaning of legal consent and its complexities. *See*, *e.g.*, Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent,* 96 WASH. UNIV. L. REV. 1461 (2019); Orit Gan, *The Many Faces of Contractual Consent,* 65 DRAKE L. REV. 615 (2017); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis,* 132 HARV. L. REV. 1135 (2019); Chunlin Leonhard, *The Inconsistencies of Consent*, 71 CATH. U. L. REV. 669 (2022); Daniel J. Solove, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law,* 104 B. U. L. REV. 593 (2024); THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT (Andreas Müller & Peter Schaber, eds., 2018); Mark P. Gergen, *Contract as an Object of People's Will*, 70 AM. J. JURIS. 1 (2025); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Heidi Hurd, *The Moral Magic of Consent,* 2 LEGAL THEORY 121 (1996); Tom Dougherty, *Yes Means Yes: Consent as Communication,* 43 PHIL. & PUB. AFFS. 224 (2015).

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and a condition. In one sense, the meaning of consent refers to its implications and the legal and moral consequences that derive from consent. In another, more complex sense, the "meaning of consent" refers to its very nature and the factors and conditions that comprise the state of consent.[3] This Article references and incorporates my prior work analyzing the two meanings of consent[4] to examine consent in the context of dispute resolution clauses.

B. The Conditions of Consent

Consent is foundational to those societies that value autonomy. It is unique in the way that its importance extends across doctrines and defines conduct and consequences in different areas of the law. Yet, despite its pervasiveness, consent has been tricky to define.[5] Lawmakers, scholars, and philosophers have struggled with the meaning of consent but there is consensus that consent has transformative power. As Heidi Hurd noted, consent is "moral magic."[6] It is also legal magic. Many laws and policies make consent the dividing line between the permissible and the impermissible, the ethical and the unethical, and the lawful and the unlawful.[7]

The law draws boundaries around bodies and property, and consent allows us to redraw those boundaries as they pertain to our own bodies and our own property. For example, an act done with consent, such as a kiss or a hug, may be classified as a tort and a crime without it. One person's consent (or non-consent) may even recharacterize another person's legal status. A person entering into another's home with the homeowner's consent is a guest; one who enters without the homeowner's consent is a trespasser.[8] In some situations, consent is obvious even if implied instead of express. If I invite you to my home for dinner, I have consented to have you enter my home. But in some cases, the meaning of consent is ambiguous, particularly as the context changes. If I invite you to my home for dinner and you get progressively drunk and unruly, I may ask you to leave. At what point afterward do you become a trespasser?[9] What if you get sick and are unable to move from my couch? Consent may depend upon unspoken assumptions. What if I invite you to dinner at my home and you show up with a friend that I despise? When I let you in, I may have consented to have you and your friend enter my home, but my consent is not as enthusiastic as it would have been if you showed up alone. If you have to leave early due to an emergency during dinner, can your friend stay? Or is it implied that my consent to your friend entering my home is conditioned on your presence? The legal consequences of a conclusion of

[3] *See* discussion, *infra* at pp. 174–77.

[4] *See* CONSENTABILITY, *supra* note 1; *Relative Consent, supra* note 1.

[5] *See* Solove, *supra* note 2, at 596 (observing that consent "has proven to be a contentious and difficult issue wherever it is involved" in the law).

[6] *See* Hurd, *supra* note 2, at 121.

[7] *See* Lombard v. Nobre, 398 So.3d 1, 10 (2024) (noting that under Louisiana law, plaintiff must prove "all *prima facie* elements of the tort, including lack of consent to the invasive conduct."); Janelsins v. Button, 102 Md. App. 30, 37 (1993) (noting "[t]he general rule—that a person cannot recover damages where he has consented to the wrong—applies in civil battery actions."); Yount v. Johnson, 915 P.2d 341, 346 (1996) ("Consent is a defense for intentional torts like assault and battery."); *see also* Brian H. Bix, *Consent and Contracts, in* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT, *supra* note 2, at 223 (noting that "consent makes actions permitted that would otherwise be forbidden . . . ."); Tatjana Hörnle, *Rape as Non-Consensual Sex, in* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT, *supra* note 2, at 235 (noting that in "contemporary liberal societies, agreement is growing that the crucial criterion for assessing the moral and legal permissibility of sexual conduct should be consent."); Solove, *supra* note 2, at 596 ("Consent plays a profound role in nearly all privacy laws. With the consent of individuals, a wide range of data collection and processing is permissible.").

[8] *See*, *e.g.*, United Food and Commercial Workers Intern. Union v. Wal-Mart Stores, Inc., 228 Md. App. 203, 234, 137 A.3d 355, 374 (2016) (explaining that under Maryland state law, trespass is interference of possessory property interest by force without consent of property owner).

[9] *See* 75 AM. JUR. 2d *Termination or revocation of consent to trespass* § 80 (2024) ("Although consent to entry is generally a defense to an action for trespass, consent may later be revoked."); *see generally* Movrich v. Lobermeier, 905 N.W.2d 807 (Wis. 2018).

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consent might lead one to think of it as a line to be crossed but it is more appropriately considered as context dependent and part of an inter-relational and social dynamic.[10]

In the second, more complex sense, the "meaning of consent" is a philosophical inquiry: How do we know that a party has consented? This "meaning of consent" refers not to its legal consequences, but to its very nature, meaning its essential conditions.[11] What are the minimal or maximal emotional, cognitive, and physical states that are required in order to find that someone consented. *How* do we determine that the party consented in order to reach that legal determination? This is not to suggest that these two meanings of consent are unrelated. On the contrary, the fairness of the legal consequences of consent depends upon the legitimacy of the conclusion that there was consent.[12]

Consent typically requires three conditions: a manifestation of consent, knowledge, and voluntariness.[13] In other words, in order for consent to be legitimate, someone must manifest through words or deeds that they are consenting, and that they are doing so voluntarily and with knowledge or understanding of what the act entails.

Although there is general agreement that consent requires these three conditions, there is little consensus about how to assess and weigh each of the conditions. What type of action is required to constitute a "manifestation of consent"? How much knowledge is required? Must the consenting party understand *all* the terms or even *any* of the terms in order to meet the "knowledge" condition? And how much desire or volition is required to meet the "voluntariness" condition?[14]

C. The Consentability Framework

The most difficult issue about consent is how to determine the requisite robustness of each consent condition in any given scenario. In my book, *Consentability*, I developed a framework that requires assessing the potential impact of a given act on the consenter's future autonomy/capabilities.[15] The greater the threat to the consenter's future autonomy (meaning the more the act might diminish the consenter's capabilities), the more robust each of the conditions (manifestation of consent, knowledge, and voluntariness) must be in order for consent to be valid. For example, the consent required of a patient to open heart surgery must be very robust because the surgery involves bodily integrity and the risk of great harm.[16] By contrast, the consent required of a person who wants to buy a $20 toaster does not need to be as robust because the transaction implicates only minimal property/economic interests. In the first scenario, the surgery

[10]*See* Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification,* 61 CASE. WES. RSRV. L. REV. 17, 19 (2010) (noting that "in actual practice," consent "ebbs and flows by degrees.").

[11]*See generally supra* note 2; *see also* CONSENTABILITY, *supra* note 1, at 7–17.

[12]*See* Nancy S. Kim, *Contract's Adaptation and the Online Bargain,* 79 UNIV. CINN. L. REV. 1327, 1328 (2011) (noting that "mass consumer contracts are facing a crisis of legitimacy."); Brian H. Bix, *Foreword to Symposium,* 66 LOY. L. REV. 1, 1 (2020) ("Consent is supposed to be part of a positive, uplifting, happy story" but "[t]oo often, consent is something more imposed or projected upon, rather than something we offer."); Nancy S. Kim, *Author Response to Symposium: What Does Consent Mean?,* 66 LOY. L. REV. 145, 145 (2020) (noting that some acts are so harmful or distasteful that "[w]e believe that something went awry in the decision-making process."); Matt Zwolinski, *Exploitation and Consent, in* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT, *supra* note 2, at 153 ("At its best, then, consensual interaction is both a token of respect and an engine of mutual benefit."); Randy E. Barnett, *. . . and Contractual Consent,* 3 S. CALIF. INTERDISC. L. J. 421, 444 (1994) (explaining "lurking beneath our law of contract is a tacit understanding that obligations should not, except in extraordinary situations, be imposed on persons without their consent."). *But cf.* Steven A. Burton, *Default Principles, Legitimacy, and the Authority of a Contract,* 3 S. CALIF. INTERDISC. L. J. 115, 118 (1993) ("Contract law, like all law, should have legitimacy" but that legitimacy derives from "a certain view of fairness" unlike consent).

[13]*See* CONSENTABILITY, *supra* note 1, at 9 (discussing the three conditions of consent and noting that these conditions mirror the requirements proposed by other scholars).

[14]These questions have been asked by many other scholars. *See, e.g., supra* note 2.

[15]*See* CONSENTABILITY, *supra* note 1, at 53–90 (introducing said framework).

[16]*See* CONSENTABILITY, *supra* note 1, at 74–85.

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exposes the patient to death or bodily injury that could be permanent and substantially diminish their future autonomy (meaning their ability to do things for themselves). In the latter scenario, the purchaser risks only $20 which may not hinder their future autonomy at all.

My consentability framework is both normative and descriptive in that it expresses and clarifies what the law already requires in many situations, and also provides guidance for future consent scenarios. In the scenario involving the heart surgery, the patient is required to give *informed consent*, which means that the knowledge condition must be very robust.[17] The manifestation of consent condition is often very robust as well. But the voluntariness condition, while existent, is likely weak—it is a rare individual who *desires* to undergo heart surgery. The patient is required to undergo surgery, not because the doctor (or someone else) is forcing the patient, but because of the circumstances. The circumstances are coercive and dilute the voluntariness condition.

I distinguish four types of consent-scenarios. The first is *consent* where each of the conditions is robust in light of the threat to autonomy. The second is *defective consent*, where the individual has manifested consent but one or both of the other conditions are insufficiently robust in light of the threat to autonomy. For example, while the patient may manifest consent to the surgery, the consent is defective because the voluntariness condition is insufficiently robust in light of the great threat to bodily integrity.[18] The third is *no consent* where there is no manifestation of consent. I will discuss the fourth, *extinguished consent,* in the next section.[19]

Generally, contract law does not require robust consent conditions because most of the transactions are commercial, economic exchanges.[20] A person (X) does not need to be ecstatic or even enthusiastic about closing a deal in order for a court to find that X entered into the transaction voluntarily; nor does X need to understand all the contract terms. But where the contract involves personal services or relationships, such as prenuptial agreements and surrogacy contracts, courts may scrutinize the circumstances of the exchange more carefully for consent defects. Moreover, these types of exchanges tend to be regulated[21] and the regulations contemplate consent problems.[22]

The assessment of the conditions of consent focuses on the consenter but they are affected by the actions of the other party, the consent-seeker.[23] Consent does not and cannot exist in a vacuum; it exists only in relation to another person or persons and only with respect to a particular activity. Consent, in other words, is relative.[24] Its validity depends upon the context, including the relative blameworthiness of the parties and the context of the transaction.[25] For example, the doctrine of duress requires that the factfinder consider whether the actions of the consent-seeker

[17]*See* Consentability, *supra* note 1, at 83–84, 208.

[18]*See* Consentability, *supra* note 1, at 162–67.

[19]I introduced these four scenarios and the three consent conditions in Nancy S. Kim, *Relative Consent and Contract Law,* 18 Nev. L. J. 165 (2017); *see also* Nancy S. Kim, Consentability: Consent and its Limits (2019).

[20]*See* Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn't Worry Too Much About Boilerplate and Other Puzzles,* 83 Brook. L. Rev. 215, 249 (2017) (arguing that consent has a "decidedly secondary role" in contract law and that "[i]f we see contracts as a way of using legal obligations to solve various problems in the marketplace, then the important thing about contract law is not that it is voluntary but that it is decentralized and creative."); Nathan B. Oman, The Dignity of Commerce 160 (2016) (stating that contract is "quintessentially the law of the marketplace and by enforcing contracts we strengthen and extend markets.")

[21]*See, e.g.*, Cal. Fam. Code § 7960–62 (2020) (governing gestational contracts); Cal. Fam. Code §§ 1610–17 (1994) (governing prenuptial contracts).

[22]*See* Sharon Thompson, *Using Feminist Relational Contract Theory to Build Upon Consentability: A Case Study of Prenups,* 66 Loy. L. Rev. 55, 56 (2020) (applying the consentability framework to prenuptial agreements and noting that "consentability is a particularly useful concept in the context of agreements made in intimate contexts like marriage.").

[23]*See Relative Consent*, *supra* note 1, at 175.

[24]*See Relative Consent*, *supra* note 1, at 169.

[25]*See Relative Consent*, *supra* note 1, at 169 (proposing an approach to assess the validity of consent "relative to the situation" and including a sliding scale which "depends upon the relative blameworthiness of the parties" and "their relationship, third party effects, and societal impact.").

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constituted coercion. As one court has stated, duress is "that degree of restraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness."[26] It is a mistake to consider in the abstract, rather than in context, whether a particular action manifests consents. For example, the "ordinary firmness" inquiry depends not only on the victim, but also on the other party and the nature of the transaction. We are less likely to find that someone had "ordinary" firmness if the other party's action were not threatening—to us or to our imagined reasonable person.[27]

D. Consent and Contracts

Contract law does not require the maximal or most robust state of each condition unlike tort and criminal law. Those areas of the law deal with fundamental rights, actions that risk bodily injury and important dignitary harms.[28] The law requires more robustness in order to show consent to an activity that implicates these significant interests. By contrast and as mentioned earlier, contracts generally deal with commercial exchanges that do not involve personal or bodily interests. Accordingly, if a party consents to a contract, then the contract is enforceable absent invalidating circumstances.[29] But even that question—whether a party consents to a contract—raises additional questions. Must one consent to all the terms in the contract? If not, are there *any* specific terms that a party must consent to before a conclusion of consent is reached?[30]

In a commercial setting, contracts and consent have a symbiotic relationship. Contracts are how consent is expressed, and consent is also a prerequisite to contract formation.[31] Generally, statutes require that consent to a contract must be free, mutual, and communicated to each other.[32] Because consent is both the input and the output, consent is constructive rather than actual. This means that the parties are deemed to have consented to a contract if, based on their outward, objective manifestations, a "reasonable person" would have concluded that they intended to be bound by the contract.[33]

Although contracts and consent have a symbiotic relationship, they are not interchangeable. As I explain in my book, *Consentability,* one significant area where they diverge involves time.

[26]*See* Carrier v. William Penn Broad. Co., 233 A.2d 519, 521 (Pa. 1967).

[27]Restatement (Second) of Conts. § 175 cmt. b (A.L.I. 1981) ("It is sometimes said that the threat must arouse such fear as precludes a party from exercising free will and judgement or that it must be such as would induce assent on the part of a brave man or a man of ordinary firmness.")

[28]*See* Consentability, supra note 1, at 53–90 (introducing framework and application to consenting scenarios).

[29]Susan Block-Lieb and Edward J. Janger, *Fit for its Ordinary Purpose: Implied Warranties and Common Law Duties For Consumer Finance Contracts,* 59 Hous. L. Rev. 551, 581–99 (2022) (discussing various doctrinal "half measures" that might invalidate a contract or excuse performance).

[30]Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 370 (1960) (noting that "assent" to boilerplate clauses "is not assent at all. What has in fact been assented to, are the few dickered terms, and the broad type of transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms."); *see also* Block-Lieb & Janger, supra note 29, at 581 (criticizing U.S. contract doctrine's presumption that "[f]ormal assent to the transaction carries with it a strong presumption of assent to the terms . . . ."). These are questions I have addressed in previous work. *See* Kim, *Contract's Adaptation and the Online Bargain,* supra note 12; Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes,* 84 Nebraska L. Rev. 506 (2005).

[31]*See* Cal. Civ. Code § 1550 ("It is essential to the existence of a contract that there should be: (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) A sufficient cause of consideration."); Southeast Grading, Inc. v. City of Atlanta, 324 S.E.2d 776, 779 (Ga. Ct. App. 1984) (stating that "the law requires that the parties consent to the formation of a contract."); Gamble v. Sears, 160 P.3d 537, 543 (Mont. 2007) ("The parties must give their consent to enter into a contract."); Am. Prairie Constr. Co. v. Hoich, 594 F.3d 1015, 1023 (8th Cir. 2010) (noting that, under South Dakota law, consent is a necessary element for the formation of a contract) (citing S.D. Codified Laws § 53-1-2).

[32]*See* S.D. Codified Laws § 53-3-1 (1939); N.D. Cent. Code § 9-03-01 (1943); Mont. Code Ann. § 28-2-301 (1947).

[33]*See* Olsen v. Johnston, 301 P.3d 791, 794 (Mont. 2013); Winograd v. Am. Broad. Co., 80 Cal. Rptr. 2d 378, 382 (Cal. Ct. App. 1998) ("The question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe.").

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A contract is an exchange of promises and promises always pertain to the future. Thus, contracts involve two distinct time periods: contract formation and contract performance. Contract formation references the time when the promise was made, and contract performance references the time when that promise will be kept.[34]

Consent, on the other hand, is dynamic and always involves the present. As circumstances evolve, consent which existed at the time of contract formation may no longer exist at the time of performance. Consent may thus be viewed as having two stages—consent construction and consent destruction.[35] Contract law typically requires performance even if a party no longer wants to perform because that party had consented at an earlier time *and* because the other party had a reasonable expectation that the promise would be kept.

Given the relational nature of consent, the role of the consent-seeker is pivotal, yet too often omitted from discussions of consent. Both parties to the contract consented at the time of formation. If at the time of performance, one of the parties no longer wishes to perform, that party must still perform *because* the other party has relied or expected that the promise would be performed. The bilateral nature of contracts means that it takes two to make a contract and two to unmake it.[36]

While consent may be withdrawn without legal consequence in most situations, it may not be so easily withdrawn under contract law because of the bilateral nature of contracts. Contract law cares about autonomy, but that does not mean that each individual may act without regard for how that individual's actions affect another person. The autonomy interest protected by the law, and contract law specifically, belongs not to a given individual, but to *all* individuals.[37] One person's autonomy interest does not—should not—take precedence over another's.

The type of contract and the type of transaction matter for purposes of evaluating consent. Consent is often correlated to contracting form. Parties typically sign negotiated paper contracts. They often, but not always, sign adhesive paper contracts as well. They do not sign digital adhesive terms or what are known as wrap contracts: clickwrap, scrollwrap, browsewrap, et cetera. A click on a mouse or a tap does not have the same signaling effect as signing a document with a pen.[38]

Consent is a prerequisite of all contracts, but it is not a standalone doctrine. I believe that, even if not expressly stated, that consent is an integral part of *all* contract doctrines. The same action can mean consent in one context but not in another. A signature on a page could mean consent to a transaction after the parties have negotiated terms but it could also mean something entirely different. If, for example, X signed a document without realizing it was a contract, the signature on the page would not indicate X's consent to the contract. Similarly, if X knew it was a contract but signed because Y was holding a gun to X's head, then X's signature also would not mean X consented. In both cases, the contract would be considered *void*.

In the first example, the contract is void due to fraud in the factum, as opposed to fraud in the execution. The law does not excuse all performance when the signer lacks knowledge. To the contrary, the duty to read presumes that a signatory to a contract understood what the contract said. Fraud in the factum voids the contract because the nature of the deception by the other party is so great that the knowledge condition is absent. The deception goes to the "essential nature" of

[34]*See* CONSENTABILITY, *supra* note 1, at 106–16.

[35]*See* CONSENTABILITY, *supra* note 1, at 9–17.

[36]Sellers v. JustAnswer, LLC, 289 Cal. Rptr. 3d 1, 12 (Cal. Ct. App. 2021) (noting that if there is no manifestation of assent to the same thing, "then there is no mutual consent to contract and no contract formation."); Matthews v. S.A. Martin & Martin Motors, 394 So.2d 943, 944 (Ala. 1981) ("It is settled law . . . that rescission occurs only where the acts of one party are fully acquiesced in by the other. The same requisites that form the test for a binding contract form the test for mutual rescission. Otherwise stated, a mutual rescission consists of the same elements as a legal contract.").

[37]I use the term "collective autonomy" to capture the idea of autonomy as a societal value; according, all members of society collectively have autonomy interests. *See* CONSENTABILITY, *supra* note 1, at 87–88.

[38]*See* Juliet Moringiello, *Signals, Assent and Internet Contracting,* 57 RUTGERS L. REV. 1307, 1309 (2005) (arguing that courts "must account for the fact that individuals perceive paper and electronic communications in different ways.").

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the document.[39] In the second example, the voluntariness condition is absent because of the aggressor's extremely reprehensible and forceful conduct.[40] In both examples, the other party acted in an extreme and socially undesirable manner.

Earlier, I referred to four types of consent scenarios: consent, no consent, defective consent, and extinguished consent.[41] Extinguished consent means that the party consented at an earlier time but now no longer wishes to perform the activity. Extinguished consent scenarios are the most problematic for contract law.

Consent at the time of contract formation generally suffices to impose a legal duty to perform but not always. As I have explained in a previous work, *Relative Consent and Contract Law,* some doctrines that allow a party to avoid a contract, such as mistake, unconscionability, and fraud in the inducement, address the defective consent scenario.[42] Other doctrines that permit avoidance, such as frustration of purpose and impracticability, recognize the state that I refer to as extinguished consent. While the party may have consented at an earlier time, events or circumstances occurred afterwards so that the consent no longer exists. The doctrines that address extinguished consent and defective consent require some type of socially undesirable behavior on the part of the consent-seeker—coercion, deception, force, unreasonableness—and the absence of such behavior on the part of the party seeking to escape the contract. They also consider the effect on innocent third parties who may be affected by the transaction.

E. Consent and Dispute Resolution Clauses

Contract rules implicitly consider the complexity of consent and how it is affected by human relationships, the limits of human cognition and the unpredictability of the future.[43] But these rules are applied by factfinders who, I believe, have their own agendas, preferences, experiences, and cognitive biases. Judicial constructions of consent are often at odds with what an ordinary, average person would consider to be a "manifestation of consent." The *reasonable offeree* as imagined by modern courts is not the average, ordinary person.[44] The *reasonable offeree* clicks on hyperlinks to read fine print terms of service. By contrast, most consumers do not read the contracts to which they have constructively assented.[45]

Dispute resolution agreements are often found at the end of a contract in what attorneys refer to as the "boilerplate" section. The boilerplate section contains standard terms that are duplicated in many kinds of transactions as opposed to terms that are specifically negotiated.[46] Dispute resolution clauses, such as choice of law and mandatory arbitration clauses, cover how, where, and by whom disputes can be resolved.

If the law takes consent seriously, I believe that it must acknowledge that consumers do not consent to dispute resolution clauses. Because they involve rights, these clauses pose a greater threat to the autonomy interest than a temporary deprivation of property or economic rights.

[39]Evertson v. Sibley, 520 P.3d 157, 164–65 (Alaska 2022) (explaining that fraud in the factum is when the promisor is deceived as to the nature of the act or the "essential nature" of the document while fraud in the inducement "generally refers to a misrepresentation" of the transaction's "risks, duties, or obligations.").

[40]*See* Lewis v. Lewis, 234 A.3d 706, 714 (Pa. Super. Ct. 2020) ("Mutual assent is necessary to enter into a contract; mutual assent does not exist however, when one of the contracting parties elicits the assent of the other party by means of duress.").

[41]*See Relative Consent, supra* note 1, at 198 (discussing further these categories in the context of contract defenses).

[42]*Relative Consent*, supra note 1, at 195–218.

[43]*Relative Consent*, supra note 1, at 166–78.

[44]*See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 87 (2012) (arguing that the "objective theory of contract therefore is not applicable to boilerplate" and works "better for interpreting commercial contracts" between those who are participants in a particular trading community).

[45]This has been referred to as the "no-reading problem." *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law,* 66 STAN. L. REV. 545, 548 (2014).

[46]Because mass consumer form contracts consist only of fixed, non-negotiated provisions, academics often refer to standard form contracts as "boilerplate" contracts. *See generally* RADIN, *supra* note 44.

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I refer to these clauses as latent clauses because they are dormant unless there is a triggering event, in other words, a dispute. The optimism bias of the parties often means that they do not consider latent clauses carefully. If the circumstances continue as the parties planned, contract performance proceeds as they contemplated, and the latent clause is never triggered.

If there is a dispute, one of the parties may realize, too late, the importance of the clause and the likelihood that it would be triggered. A court will likely uphold the clause even if that party resists enforcement.[47] In a negotiated agreement between two equally situated parties, the cognitive limitations and the speculative nature of the clause afflict both parties and favor neither. But when the contract is a consumer contract, consent at the time of contract formation is likely to be defective. The consumer is unlikely to have read the form and so the knowledge condition is deficient. The voluntariness condition may also be deficient as consumers have no choice but to manifest consent to adhesive forms. They may be signing a form under time pressure or other conditions that are unsuitable for the careful deliberation required to assess the risks and benefits of relinquishing an important right. This is especially true online, where the manifestation of consent is typically a click on an icon with the word "Agree" and where the website design and the webflow may be configured in such a way as to downplay the importance of what it means to click.[48]

One might take the position that consumers should not click on an "Accept" icon if they do not agree to these terms, but this is an unrealistic position given the online contracting environment.[49] More reflective of reality, it would be fairer to say that the drafter did not want the consumer-adherent to read the dispute resolution term because it was presented in such an unobtrusive manner. Businesses present terms that they want website visitors to see in visible and attention-catching ways. The consumer's failure to read is directly correlated with the drafter's failure to draft clearly and concisely.[50]

The labeling of the click as a manifestation of consent is a legal fiction that imbues it with a meaning that the consumer did not necessarily intend. Adherents who later become plaintiffs in lawsuits often claimed that they did not recall clicking on an "Accept" icon even though they must have done so to proceed on the website.[51]

One might be skeptical of these claims, but the act of clicking has become so automatic and consumers have become so habituated to clicking on buttons that they may not even notice it. The manifestation of consent to the deprivation of important rights should require a more deliberate act than what is currently required online.

The voluntariness condition is also weak. While not physically forced to sign a contract or click on an Accept button, the consumer may be doing so reflexively or reluctantly, having no choice but to click as so many websites require that consumers "agree" to dispute resolution clauses.[52]

If the consent conditions are weak, and the autonomy interest at stake is relatively strong—as it is when you are relinquishing a right, such as the right to sue in a court of law—why do U.S. courts enforce dispute resolution clauses in consumer contracts? How can the legal fiction of constructive

[47] *See, e.g.*, Meyer v. Uber Techs., Inc., 868 F.3d 66, 81 (2nd Cir. 2017); Good v. Uber Techs., Inc., 234 N.E.3d 262, 268 (Mass. 2024).

[48] *See id.*

[49] *See, e.g.*, Uri Benoliel & Samuel I. Becher, *The Duty to Read the Unreadable,* B.C. L. Rev. 2255 (2019); Tim R. Samples, Katherine Ireland, & Caroline Kraczon, *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use,* 39 Berkeley Tech. L. J. 47 (2024).

[50] Nancy S. Kim, *The Duty to Draft Reasonably and Online Contracts, in* Commercial Contract Law: A Transatlantic Perspective 188–89 (Larry DiMatteo, Keith Rowly, Severine Saintier, & George Zhou eds., 2012).

[51] *See, e.g.*, Meyer v. Kalanick, 200 F. Supp. 3d 408, 415–16 (S.D.N.Y. 2016) (noting that plaintiff did not recall noticing the Terms of Service hyperlink and does not believe he clicked on the hyperlink), *vacated and remanded*, 868 F.3d 66 (2d Cir. 2017)); Emmanuel v. Handy Techs., Inc., 992 F.3d 1, 5-6 (1st Cir. 2021) (plaintiff testified that she did not scroll through the terms of the Agreement and did not recall at first clicking the checkbox to agree to Terms of Use).

[52] *See generally* Andrea Boyack, *Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights,* 110 Iowa L. Rev. 497 (2025); Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 Case W. Rsrv. L. Rev. 341 (2014); Samples et al., *supra* note 49.

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assent bind consumers and force them to relinquish important rights? I believe that the answer may be found in another legal fiction, that of corporate personhood: The theory that corporations have legal rights includes the notion that they have autonomy interests, can consent, and may enter into contracts.

F. The Slippery Slope of Legal Fictions

Although it may be hard to believe in 2025, dispute resolution clauses used to be viewed by courts with great suspicion even in commercial contracts between sophisticated parties. Courts often found them to be unenforceable because they were contrary to public policy or because they usurped the role of the courts.[53]

The U.S. Supreme Court definitively addressed the enforceability issue in 1972 in *The Bremen v. Zapata Off-Shore Co.*,"[54] a dispute between an American corporation, Zapata, and a German corporation, Unterweser. The parties had entered into a contract to have Unterweser tow Zapata's drilling rig, *Chaparral*, from Louisiana to Italy. The contract contained a clause stating: "Any dispute arising must be treated before the London Court of Justice."[55] The contract also contained a clause exculpating Unterweser from liability for damages to the towed barge.[56] En route to Italy, the tug got caught in a storm that caused damage to *Chaparral*. Zapata sued in the U.S. District Court at Tampa; Unterweser moved to dismiss or stay Zapata's action for lack of jurisdiction, invoking the forum selection clause, then subsequently sued for breach of contract in London.[57] The District Court denied Unterwesser's motion, giving little weight to the forum selection clause. The Court of Appeals affirmed.[58]

The Supreme Court disagreed and held that the appellate court had given "far too little weight and effect" to the forum clause.[59] It noted that although the inhospitable view toward forum selection clauses "still has considerable acceptance," some courts were adopting a "more hospitable attitude"[60] and that the view that they were "prima facie valid and should be enforced" unless unreasonable under the circumstances.

In reaching its conclusion, the Court focused on the international nature of the transaction and the sophistication of the parties:

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[61]

[53]*See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) ("Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court.").

[54]*Id.*

[55]*Id.* at 2.

[56]*Id.*

[57]*Id.*

[58]*Id.* at 7.

[59]*Id.*

[60]*Id.* at 10.

[61]*Id.* at 8–9.

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The Supreme Court also focused on the "ancient concepts of freedom of contract" and the "expanding horizons of American contractors who seek business in all parts of the world" who seek a "neutral forum" with expertise in the subject matter.[62] The Court found that English courts clearly met the standards of both neutrality and expertise in admiralty litigation. Significantly, the Supreme Court emphasized that the choice of forum was made in an "arm's-length negotiation by experienced and sophisticated businessmen."[63] It noted the "legitimate expectations of the parties, manifested in their freely negotiated agreement":

> There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect ... There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.[64]

My interpretation of the *Bremen* decision is that the consent conditions were robust enough to justify enforcing the clause. The agreement was drafted and signed, evidencing an outward act of consent. Furthermore, the voluntariness condition was also robust as the Court notes when it states that the contract was "unaffected" by undue influence or overweening bargaining power, and both parties negotiated the provision. Finally, the knowledge condition was met for both parties as reflected in the court's statement that there was "strong evidence" that the clause was a "vital part" of the bargain by each party and affected the pricing for the transaction. Under these circumstances, the evidence shows that both Zapata and Unterwesser consented to the agreement and the forum selection clause.

Nearly fifty years later, the U.S. Supreme Court again addressed the issue of choice of forum clauses, but this time, in a consumer contract. The case was *Carnival Cruise Lines v. Shute*.[65] Unlike in *The Bremen*, only one of the parties was a business, and the agreement was not freely negotiated or even signed. The Shutes, residents of Washington State, had purchased their cruise tickets through a travel agent.[66] On the front of the tickets was language admonishing them to read the contract which contained 25 numbered paragraphs, with the forum selection clause in the 8th paragraph.[67] Mrs. Shute slipped on a deck mat and injured herself and sued.[68] Carnival Cruise moved for summary judgment, arguing that the Shutes were obligated to bring suit in Florida as required by the forum selection clause.[69] The appellate court had noted, unlike the parties in *The Bremen*, that the Shutes were not businesses and did not negotiate the terms of the forum selection clause.[70] The clause would also effectively deprive them of an opportunity to litigate their claims.[71] The Shutes had not manifested consent in any meaningful way, and while they entered into the transaction to purchase the cruise ticket voluntarily, they did not seem to understand or voluntarily agree to the forum selection clause. As the dissent points out, the relevant clause was in fine print on the back of the ticket and that "only the most meticulous passenger is likely to become aware of the forum-selection provisions."[72]

[62] *Id.* at 11–12.
[63] *Id* at 12.
[64] *Id.* at 12–14.
[65] *See generally* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
[66] *Id.* at 597 (Stevens, J., dissenting).
[67] *Id.* at 601 (Stevens, J., dissenting).
[68] *Id.* at 588.
[69] *Id.* at 588.
[70] *Carnival Cruise Lines*, 499 U.S. at 592.
[71] *Id.*
[72] *Id.* at 597 (Stevens, J., dissenting).

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The Supreme Court disagreed and sided with Carnival Cruise, citing its *The Bremen* decision. The Supreme Court evaded the consent-related concerns raised by the appellate court, and noted that it was not addressing the question of whether respondents had "sufficient notice of the forum clause before entering the contract for passage" because the Shutes had not contested the incorporation of the clause and so had essentially conceded that they had notice.[73] By contrast, the appellate court had evaluated the clause under the "doubtful" assumption that the Shutes had knowledge of the clause.[74]

The Supreme Court acknowledged that the contract was not negotiated but that "the realities of form passage contracts" made the clause reasonable, including that a cruise line has a "special interest in limiting the fora in which it potentially could be subject to suit" and claimed that "passengers who purchase tickets containing a forum clause ... benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."[75] Concluding that the clause was fundamentally fair, the Supreme Court observed that Carnival Cruise did not select Florida as the forum to discourage lawsuits from cruise passengers:

> Any suggestion of such a bad-faith motive is belied by two facts: Petitioner has its principal place of business in Florida and many of its cruises depart from and return to Florida ports. Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching. Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity.[76]

Justice Stevens, joined by Justice Marshall, dissented, casting doubt on the likelihood that passengers received full and fair notice of the choice of forum clause printed in fine print on the back of the ticket.[77] To highlight this improbability, the dissent attached a "facsimile of the relevant text," noting that "only the most meticulous passenger is likely to become aware of the forum-selection provision."[78] Furthermore, the Shutes did not have the opportunity to read the relevant provisions until they had already purchased their tickets.[79]

I believe that the Supreme Court enforced the forum selection clause, not because the Shutes had consented to it, but because the Court believed that Carnival Cruise had a rational business reason for including it *and* its contracting behavior was not so reprehensible or egregious to warrant non-enforcement. In my opinion, the Court gave greater weight to the business interests of Carnival Cruise than to the autonomy interests of the Shutes. Consent was not the basis for enforcement of the clause. By contrast, I believe that in *The Bremen,* the contract reflected the consent of the parties and thus promoted the respective autonomy interests of the corporate entities, even if the entities were legal fictions. The business interests and the autonomy interests of the parties in *The Bremen* were the same because the parties were both corporate entities. Constructive consent to a contract promotes autonomy only if it reflects reality or a realistic approximation of what actual people *would* have done. Yet, in *Carnival Cruise* it did not, and the Supreme Court gave the contract a legitimacy it did not deserve.[80]

[73]*Id.* at 590.
[74]*Id.*
[75]*Carnival Cruise Lines*, 499 U.S. at 594.
[76]*Id.* at 595.
[77]*Id.* at 597 (Stevens, J., dissenting).
[78]*Id.*
[79]*Carnival Cruise Lines*, 499 U.S. at 597.
[80]*See* Solove, *supra* note 2, at 630 (explaining that because so many modern contracts lack "valid objective indicia of consent," these contracts "are based on fictions, which allow for the legitimacy and moral force of consent without the existence of consent.").

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Consent erodes with each iteration of consumer contracts. It seems a stretch to call a passenger ticket a contract but at least the ticket was tangible. Tangibility requires the consumer's attention—the piece of paper must be physically received and put somewhere. It also forces the drafter to be careful and succinct in drafting. By contrast, the intangibility of digital contracts, such as Terms of Service, makes it easier for them to escape the consumer's attention and enables drafters to add more terms and update them more frequently. Furthermore, the standard for internet contract formation requires only constructive or reasonable notice, and then some action that could be construed as assent to that notice.[81] The result is a fiction combined with a fiction, resulting in what Margaret Jane Radin has referred to as "normative degradation."[82]

The first issue to be resolved by a court is whether it has the authority and is the appropriate forum for resolving the other issues relating to the case. Juliet Moringiello and William Reynolds, who read dozens of cases for several years as part of their annual review of internet contracting cases for the American Bar Association's *The Business Lawyer*,[83] noted that "(m)ost electronic contracting cases in the past have involved challenges to choice-of-forum and arbitration clauses."[84] Subsequently, I took over the responsibility of providing an update of the law of digital contracts for the *The Business Lawyer* and reviewed dozens of cases in subsequent years. My research leads me to agree with their assessment that the overwhelming majority of digital contract cases involve dispute resolution clauses.[85]

The loose definition of assent for purposes of contract formation means that courts often enforce dispute resolution provisions without the consumer's robust consent. These provisions include mandatory arbitration clauses and choice of law clauses. Consumers typically do not recognize or understand the legal implications of these clauses.[86] The consumer's loss of control over the procedural rules often means that the consumer also loses their substantive rights.

For example, in a race discrimination lawsuit against Airbnb,[87] the company moved to compel arbitration pursuant to its Terms of Service. The plaintiff, Greg Selden, argued that the sign-up process did not adequately notify him that he was agreeing to mandatory arbitration.[88] The court acknowledged that only an "intrepid few" would actually read the terms and that "most of us" would sign up without even bothering to click on the link to the terms; yet it ruled in Airbnb's favor.[89] The court seemed to care little about the realities of the contracting environment and ordinary human behavior, doubling down on assent without consent:

> No matter one's opinion of the widespread and controversial practice of requiring consumers to relinquish their fundamental right to a jury trial—and to forego class actions—as a condition of simply participating in today's digital economy, the applicable law is clear: Mutual arbitration provisions in electronic contracts—so long as their existence is made

[81]Curtis E.A. Karnow, *The Internet and Contract Formation,* 18 BERKELEY BUS. L.J. 135, 137 (2021) ("As the internet developed, contracts were increasingly presented by *notice* of the terms, and assent marked by clicking a box associated in some way with accepting contract terms.").

[82]RADIN, *supra* note 44, at 15–31.

[83]Juliet M. Moringiello & William L. Reynolds, *Electronic Contracting Cases 2008–2009,* 65 BUS. LAW. 317, 323 n.79 (2009).

[84]*Id.* at 323.

[85]*See, e.g.*, Gutierrez v. FriendFinder Networks, Inc., No. 18-cv-05918-BLF, 2019 WL 1974900 (N.D. Cal. May 3, 2019); May v. Expedia, Inc., No. A-16-CV-1211-RP, 2018 WL 4343445 (W.D. Tex. July 19, 2018); Capriole v. Uber Tech., Inc., No. 1:19-CV-11941-IT, 2020 WL 1536648 (D. Mass. Mar. 31, 2020), *aff'd* 7 F.4th 854 (2021).

[86]Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, Yuxiang Liu, '*Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements,* 75 MD. L. REV. 1, 4 (2015) (finding that, of 668 consumers shown a credit card contract, only forty-three percent knew the contract contained an arbitration clause and of those, sixty-one percent did not understand the implications of the clause).

[87]*See generally* Selden v. Airbnb, Inc., No. 16-CV-00933 (CRC), 2016 WL 6476934 (D.D.C. Nov. 1, 2016), *aff'd*, 4 F.4th 148 (D.C. Cir. 2021).

[88]*Id.* at *3.

[89]*Id.* at *1.

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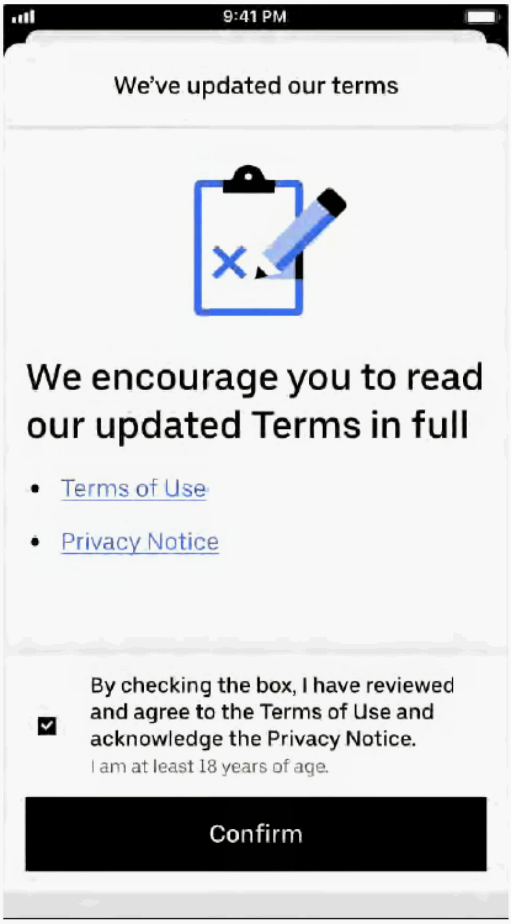


Figure 1: From Good v. Uber Techs., Inc.

> reasonably known to consumers—are enforceable, in commercial disputes and discrimination cases alike. And Airbnb's sign-up procedures were sufficiently clear to place Mr. Selden on notice that he was agreeing to the company's Terms of Service when he created the account.[90]

Acknowledging that the result "might seem inequitable to some," the court absolved itself of responsibility, claiming that it was "not the proper forum for policy objections to mandatory arbitration in online adhesion contracts."[91]

Dispute resolution clauses put roadblocks in front of plaintiffs, making it difficult for them to assert their rights. William Good used the Uber app to use the company's ride sharing service.[92] The driver got into a car accident and Good was instantly paralyzed and left quadriplegic. Because he had clicked to agree to Uber's Terms of Service, the court found that he had agreed to arbitrate his claims and waived his right to a trial by jury and to any class action.[93] Furthermore, the court

[90]*Selden*, 2016 WL 6476934 at *3–4.
[91]*Id.*
[92]Good v. Uber Techs., Inc., 234 N.E.3d 262, 268 (Mass. 2024)
[93]*Id.*

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concluded that the very issue of whether the arbitration clause was valid should be decided by the arbitrator.[94] Although Good may have had "reasonable notice" that terms governed the transaction, there was no notice of *what* the terms said; only a link to the Terms of Use was viewable. As Figure 1 (below) indicates, the screen indicated that the user was encouraged to read the Terms, and provided a link to the terms, but the terms themselves were not available on that page. There was nothing on the page where he clicked to "agree" that indicated that he was waiving his right to sue Uber in court in the event he was injured by an Uber driver. Given the nature of the rights he was waiving, the knowledge condition should have been more robust, and the waiver should have been viewable on the same page as the checkbox.

G. Conclusion

Dispute resolution provisions establish the procedural rules that control substantive rights and determine legal outcomes. Given their significance, consent to them requires that the consent conditions be robust. Unfortunately, in online consumer contracts, they are not. Courts gradually replaced the reality of assent with constructive assent and then replaced the requirement of mutual assent in the context of online contracts with constructive notice, compounding the fiction of assent with the fiction of notice. Consumers do not read fine print terms, and many would not understand the legal significance of dispute resolution clauses even if they did. They click from habituation rather than deliberation. Contracts require consent and consumers simply do not consent to dispute resolution clauses. Courts enforce these clauses but they are not promoting contract law's goal of furthering autonomy; rather, they are promoting business expediency. Courts use the rhetoric of consent to try to legitimize as a mutual agreement what is essentially a fiat by the drafting business.

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[94] *Good*, 234 N.E.3d at 288.

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