

# The COMPUTER & INTERNET *Lawyer*

Volume 39 ▲ Number 7 ▲ July-August 2022

Ronald L. Johnston, Arnold & Porter, Editor-in-Chief

## Florida Supreme Court Upholds Airbnb “Clickwrap” Arbitration Clause

By **Traci T. McKee** and **Emanuel L. McMiller**

In *Airbnb, Inc. v. Doe*,<sup>1</sup> the Florida Supreme Court aligned itself with nearly every federal circuit<sup>2</sup> in holding that a “clickwrap” agreement that incorporates arbitration rules expressly delegating arbitrability determinations to an arbitrator constitutes “clear and unmistakable” evidence of the parties’ intent to empower an arbitrator to resolve questions of arbitrability. Therefore, the court ruled that an arbitrator, not a court of law, should decide whether the claims against Airbnb are subject to binding arbitration.

### Background

The *Airbnb* case arose after two consumers decided to vacation in Longboat Key, Florida, and located a condo on the online platform Airbnb. Using Airbnb’s website, the couple booked a three-night stay in a condo unit owned by the co-defendant (an individual). After

learning that the condo owner purportedly installed hidden cameras in the unit and secretly recorded their stay, the consumers sued the unit owner and Airbnb in Florida state court.

Airbnb responded with a motion to compel arbitration, pointing to the arbitration provision in the “clickwrap” agreement (the “Terms of Service”) that the consumers had entered into when they first created their Airbnb accounts online.

The *Airbnb* case recites the relevant portions of the Terms of Service, which included the following introductory statement:

PLEASE READ THESE TERMS OF SERVICE CAREFULLY AS THEY CONTAIN IMPORTANT INFORMATION REGARDING YOUR LEGAL RIGHTS, REMEDIES AND OBLIGATIONS. THESE INCLUDE VARIOUS LIMITATIONS AND EXCLUSIONS, A CLAUSE THAT GOVERNS THE JURISDICTION AND VENUE OF DISPUTES, AND OBLIGATIONS TO COMPLY WITH APPLICABLE LAWS AND REGULATIONS.

---

**Traci T. McKee**, a partner at Faegre Drinker Biddle & Reath LLP, represents product manufacturers in product liability litigation. **Emanuel L. McMiller** is an associate in the firm’s office in Indianapolis. The authors may be contacted at [traci.mckee@faegredrinker.com](mailto:traci.mckee@faegredrinker.com) and [manny.mcmiller@faegredrinker.com](mailto:manny.mcmiller@faegredrinker.com), respectively.

The Terms of Service also included a “Dispute Resolution” clause, which stated, in part:

You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation of validity thereof, or to the use of the Services or use of the Site or Application (collectively, “**Disputes**”) will be settled by binding arbitration. . . .

The arbitration will be administered by the American Arbitration Association (“**AAA**”) in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the “**AAA Rules**”) then in effect, except as modified by this “Dispute Resolution” section.

Although the AAA Rules were not attached, the Dispute Resolution clause included a website link to the AAA Rules as well as a phone number for AAA. The court highlighted in Rule 7 of the AAA Rules:

The arbitrator shall have the power to rule on his or her own jurisdiction, including . . . the arbitrability of any claim or counterclaim.

## The Court’s Decision

Against this landscape, the court held that the AAA Rules became part of the parties’ agreement, and because those rules specifically empower the arbitrator to resolve questions of arbitrability, there is clear and unmistakable evidence that the parties intended to empower an arbitrator to resolve questions of arbitrability.

In reaching its decision, the court rejected the lower court of appeal’s majority opinion that the “broad, non-specific, and cursory” reference to the unattached AAA Rules did not clearly and unmistakably evidence the parties’ intent to delegate arbitrability questions to an arbitrator. The court sided with the lower court’s dissenting judge that the majority’s opinion was an “outlier in the jurisprudence of arbitration.”

The court identified three specific reasons why the parties’ intent was clear and unmistakable in this context:

1. The Terms of Service explicitly incorporated by reference the AAA Rules;
2. The Terms of Service provided a hyperlink to the AAA Rules and a phone number for the AAA; and
3. The express language of the incorporated AAA Rules specifically empowered the arbitrator to decide arbitrability.

## Conclusion

What is the takeaway from *Airbnb*? Companies in the consumer services industry who wish to avoid resolving consumer disputes in Florida courts should ensure their arbitration agreements include these three ingredients.

Better yet, companies should utilize the precise language cited by the court in Airbnb’s Terms of Service, which has now been blessed by Florida’s highest court.

## Notes

1. <https://www.floridasupremecourt.org/content/download/833892/opinion/sc20-1167.pdf>.
2. See *In re Checking Acct. Overdraft Litig.*, 856 F. App’x 238, 243 (11th Cir. 2021); *Blanton v. Domino’s Pizza Franchising LLC*, 962 F.3d 842, 845–46 (6th Cir. 2020); *Richardson v. Coverall N. Am., Inc.*, 811 F. App’x 100, 103 (3d Cir. 2020); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1248 (10th Cir. 2018); *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017), *abrogated on other grounds by Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207–08 (D.C. Cir. 2015); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Auwah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006), *abrogated on other grounds by Henry Schein*, 139 S. Ct. 524; *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005). The U.S. Court of Appeals for the Seventh Circuit has not ruled directly on the issue.

Copyright © 2022 CCH Incorporated. All Rights Reserved.  
Reprinted from *The Computer & Internet Lawyer*, July-August 2022, Volume 39,  
Number 7, pages 10–11, with permission from Wolters Kluwer, New York, NY,  
1-800-638-8437, [www.WoltersKluwerLR.com](http://www.WoltersKluwerLR.com)

