

What if Consumers Could Change the Terms of Online Contracts?

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WHO WE ARE

The authors are [Zev J. Eigen](#) and [Florencia Marotta-Wurgler](#). We are law professors at Northwestern University School of Law and New York University School of Law respectively. We both teach contract law and empirically study online form-contracts. Our research explores how people behave, and focuses less on how they *should* behave. (Click [HERE](#) to see Zev's current research, and [HERE](#) to see Florencia's current research.) In this vein, we are not here to express our opinion on what companies or individuals *should* do with respect to form-contracts. Indeed, there are strong arguments that individuals should be able to edit otherwise un-editable form-contracts drafted by organizations, and equally strong arguments that individuals should *not* be able to do so. We will resist the temptation to take up these arguments, and stick to the task at hand:

We have been asked to opine on a hypothetical situation¹ that raises some fascinating issues of contract law. The hypothetical situation represents a twist on a typical online exchange between a company and an individual. We first summarize that typical exchange, then explain the twist, and then talk about the law:

A COMMON STORY OF AN ONLINE SALE

A company ("GenCo.") sells widgets online. They advertise the widgets for sale at a price of \$19.99 on the company's website. An individual, John Doe, sees the purchase price and the product description, clicks a button labeled, "PURCHASE" and enters his credit card information in the blanks provided. A button at the bottom of the form-filling screen begs to be checked—without the check, the transaction will not occur (assumedly). Next to this button are the words, "*By clicking this box, you agree to these Terms & Conditions.*" The words, "Terms & Conditions" are hyperlinked to an 8-paragraph, 4-point font contract drafted by GenCo. The contract contains numerous clauses, one of which is an arbitration agreement, requiring the purchaser to bring any and all disputes arising out of the transaction to final and binding arbitration in Minnesota, thus requiring Mr. Doe to waive his right to sue GenCo. in court. Mr. Doe clicks the box, but does not click the hyperlink, and so never sees the Terms & Conditions. The transaction is complete, GenCo. ships Mr. Doe the widget and life goes on.

ONLINE TERMS HIDDEN IN FORM-CONTRACT FINE PRINT ARE USUALLY ENFORCEABLE

If a dispute arises, and Mr. Doe wishes to sue GenCo., has he waived his right to go to court? That is, is the arbitration clause in the Terms & Conditions enforceable against Doe even though Doe never saw the contract or the clause? Most courts will answer this in the affirmative. Even though Doe never saw the contract, GenCo. put him on "inquiry notice" that there was a contract governing the transaction. By requiring Doe to click "I agree," the company gave him notice of the contract as well as an opportunity to read it before assenting to the transaction. Mr. Doe was as free to read the contract as he was to ignore it, but he couldn't

¹ Nothing contained herein should be construed as legal advice.

say that he didn't know it was there because of the notice provided by GenCo. So, GenCo. would most likely prevail on its argument that Doe did in fact *objectively* assent to the terms of the agreement, even if he *subjectively* didn't. This accords a fundamental principle in contract law—one is responsible for his outward, objective manifestation of intent, even if his real, subjective intent is inconsistent with this outward manifestation.

For the most part, courts will enforce fine print as long as consumers are given sufficient notice and an “opportunity to read” terms. Courts have generally held that by requiring consumers to unambiguously click on “I agree”, “clickwrap” contracts provide sufficient notice. Moreover, the act of clicking “I agree” constitutes assent to the terms. In this case, Doe manifested his intent to be bound by clicking the box next to the words, “*By clicking this box, you agree to the Terms & Conditions.*” For the most part, this ends the inquiry.²

This way of entering transactions is commonplace online. Some consumers have become frustrated by their inability to negotiate or change any of the thousands of terms they must agree to before being able to do business with online vendors. In this way, business online is just like business in non-cyber domain: boilerplate is boilerplate and it can't really be negotiated or changed, with rare exceptions. The reasons are numerous, but the most salient one is that boilerplate allows transacting parties to save a lot of time and money in negotiating individual contracts.

THE NEW TWIST ON THE ONLINE SALE

Okay, so far, so good. Now for the really cool twist. What if the transaction between GenCo. and John Doe were exactly the same as described above, except for one little thing. What if, before clicking the box next to the text, “*By clicking this box, you agree to these Terms & Conditions*” Doe digitally edited the words to say something else. For instance, what if he used TOSAmend to replace the original text with something like this: “*By clicking this box, I reject the proposed terms and conditions, and counter-offer that the transaction be governed by the applicable default rules and consumer protection laws.*” OK, that was a lot of legal-sounding words, but basically, that says that Doe expressly rejects GenCo.'s proposed contract terms, but wants to buy the widget anyway. What if, Doe submitted this revised form to GenCo. electronically, along with an email putting the company on notice of his counter-proposed terms, giving the company a reasonable opportunity to reject the counter-offer and cancel the sale?

So, again, let's say GenCo. charges Doe's credit card \$19.99, and ships him the widget. Later, a dispute arises. Would Doe be bound by the arbitration clause, or would he be allowed to sue GenCo. in court?

We said earlier that a court would likely find that Doe is bound by the arbitration agreement because he objectively manifested his assent to sufficiently disclosed terms by clicking the company's “I agree” box, even if he didn't read them. But with TOSAmend, he expressly

² The contract term has to be substantively fair under these circumstances too. If instead of an arbitration clause, which has been held to be enforceable so long as procedurally fair, it were a clause raising the price of the widget to \$500,000, Doe might succeed on an argument that this clause is not enforceable because it does not comport with his reasonable expectations of clauses governing the transaction. The clause might also be struck down because it is unconscionable.

rejected the Terms & Conditions. Will Doe's rejection or counter-offer effectively allow him to sue in court in case of a dispute? In the non-cyber world, whenever buyers and sellers have conflicting forms but engage in business anyway, those terms that conflict with one another (such as a seller's "arbitration in Minnesota" term and the buyer's "full default rights" term) are knocked out and only agreed upon terms govern the agreement. But does this hold up as well online?

DOES TOSAMEND PUT A COMPANY ON NOTICE OF THE COUNTER-PROPOSAL?

To answer this, we need to figure out a few things. First, we should determine whether GenCo. should reasonably be expected to have notice of (or even receive) the revised Terms and Conditions drafted by Doe. A critical question is therefore whether the modified language is something that only Doe sees on his computer screen, and maybe exists in cyberspace in a place on GenCo.'s servers that they could never be charged with being on inquiry notice themselves of Doe's rejection and counterproposal. If it's something that only Doe sees, and there is no reasonable expectation that anyone with authority to bind GenCo. contractually could become aware of it, then the edited language would be like a secret, subjective expression of intent, and again, Doe's objective manifestation of intent would still be that he agrees to GenCo.'s Terms & Conditions. If GenCo. processes orders automatically and is thus unable to "see" or receive Doe's conflicting terms, the amended terms most likely will not be part of the agreement.

If Doe's modified Terms & Conditions are transmitted to an agent of the company responsible for reviewing the information to fulfill the order by email, for instance, making it clear that the agent has the opportunity to reject the term within a reasonable time frame, Doe could argue that the revised language puts GenCo. on notice that he rejected their original Terms & Conditions, regardless of whether the agent actually read the terms or not. If the processing agent had authority to bind GenCo. contractually and nevertheless proceeded with the sale, it could not later complain about not knowing about Doe's rejection of the Terms & Conditions. In that case, there's a possibility that the arbitration clause would not apply, and Doe could bring his claim against GenCo. in court.

That is, the situation where an agent with authority proceeded with the transaction after having had an opportunity to review Doe's amended terms would be the same as the standard situation in the non-cyber world, described above, where conflicting terms knock each other out and only agreed upon terms (and contract default rules) would govern the agreement. In this case, the terms "arbitration in Minnesota" and "I wish to buy the widget without waiving any legal rights" would conflict and thus be knocked out of the agreement. The default remedies, which allow using courts to resolve disputes, would govern, so in our hypothetical situation, Doe would get his day in court.

CAN A COMPANY GET AWAY WITH CALLING, "NO BACKSIES?"

So far we've said that (1) as long as GenCo. receives Doe's counter-proposal in a way that allows GenCo. to see it and assent and (2) that GenCo.'s agent has authority to bind the company, then we like Doe's argument that he can avoid the arbitration clause. Oftentimes, however, large companies with many employees include terms in their agreements disclaiming their agent's abilities to bind the company beyond the written words of the contract. A typical clause reads:

“[a]ny and all representations, promises, warranties, actions, or statements by seller’s agents that differ in any way from the terms of this written agreement shall be given no force or effect.”

This might create some problems for Doe. Similarly, terms that restrict the agreement to the original term of the offer might also render Doe’s attempts ineffective. If the original Terms & Conditions make GenCo.’s performance strictly conditional on full adherence to its terms, the amended terms might not affect the obligations of Doe and GenCo. There are good arguments that Doe could make even if the company’s contract contains a clause with the equivalent effect of saying, “no backsies!” The strongest one perhaps is that a court may find a clause that unilaterally prevents any kind of modifications or counter-offers is unreasonable or unconscionable in a consumer setting. Courts look at fine print contracts with suspicion, and clauses that might shock the conscience of a reasonable consumer or cause unfair surprise might be struck down from the agreement. If that were the case, then Doe’s proposed terms would operate to modify the Terms & Conditions.

SUMMARY AND CONCLUSION

To summarize, we’ve said that as long as GenCo. receives sufficient notice of Doe’s counter-proposal, and an opportunity to reject the new terms within a reasonable period of time, Doe could make a strong argument that GenCo. proceeded with the deal in spite of its actual or constructive knowledge that Doe did not objectively manifest assent (affirmatively) to be bound by the arbitration clause in GenCo.’s original Terms & Conditions. We are less confident in our assessment of how courts will treat the case when GenCo.’s Terms & Conditions purportedly preclude the possibility of individual modification of the terms. This could vary by jurisdiction, the parties, and the type of transaction.