Cryptocurrency Companies: Enforceable Terms of Use Matter

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It is not unusual for users of a platform or of software to challenge the enforceability of a company's terms of use if they take issue with the company's product or service and decide to bring suit. As most terms of use contain an arbitration clause (or mandated dispute resolution process) and disclaimers of liability, the questions of user assent to and the overall enforceability of the terms of use become central issues early on in litigation. In each case, judges adjudicating legal challenges to site terms generally examine the circumstances behind the online contracting process closely – scrutinizing the user interface, the presentation of the terms and the reasonableness of the relevant provisions governing the transactions or online accounts at issue. In some instances, courts have ruled that online terms were unenforceable for a variety of reasons, often owing to the non-conspicuous presentation of the terms or that the terms themselves were in some way unconscionable or otherwise unenforceable. In one recent case, however, a federal judge in Georgia rejected a challenge brought by users of cryptocurrency exchange platform Coinbase Global, Inc. ("Coinbase") and found Coinbase's terms enforceable. (*Kattula v. Coinbase Global, Inc.*, No. 22-3250 (N.D. Ga. July 6, 2023)).

In the putative class action lawsuit filed by Coinbase customers alleging that the company used inadequate cybersecurity measures that caused loss of account holdings, Coinbase moved to compel arbitration of claims based on the provisions in its standard user agreements. On July 6, 2023, the Georgia district court granted Coinbase's motion to compel arbitration.

The plaintiffs advanced a variety of arguments that Coinbase's terms and the arbitration clause were unenforceable. Plaintiffs generally contended that Coinbase failed to show the existence of an arbitration agreement applicable to each plaintiff and that the arbitration provisions were both substantively and procedurally unconscionable.

First, plaintiffs argued that Coinbase could not show the formation of a contract because, among other things, it "fails to verify a user's identity before allowing access to a Coinbase account." The court rejected this argument and said that "…there was no plausible evidence contradicting that these plaintiffs accepted the original terms of their user agreements when they created their Coinbase accounts, which included the contested arbitration provision here." One of the principles of an effective electronic contracting interface for an online company is that its terms are mandatory – that is, all users must accept the terms before creating an account and using the service. Here, the court was unpersuaded that Plaintiffs did not accept the terms before registering their Coinbase accounts and using the platform, as users could not use the platform until creating a Coinbase account (which requires acceptance of the terms).

Next, more specifically, the plaintiffs attempted to call into question the enforceability of the arbitration clause. They first argued that the relevant Coinbase's arbitration provisions are illusory and thus, unenforceable because the company could allegedly avoid its promise to arbitrate by amending the clauses. The judge once again sided with Coinbase on this issue, holding that "a unilateral modification provision does not, standing alone, render a contract illusory."

Similarly, the plaintiffs also argued that the arbitration provisions were unconscionable because they were allegedly contained in the appendix of the user agreements, among other reasons. As the court stated, the doctrine of unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Overall, the court rejected the Plaintiffs' arguments and held that the Plaintiffs failed to carry their burden showing unconscionability.

While the court found a "minimal degree of procedural unconscionability arising from the adhesive nature [of the applicable user agreements]," the court stated that nothing in the record suggests that Coinbase was the Plaintiff's only option for cryptocurrency services, thereby negating Plaintiff's argument. The court also stated that the user agreements disclose the existence of the arbitration agreement on the first page and even directs users to the appendix, negating Plaintiff's arguments that the arbitration provisions were "unfairly surprising."

As to substantive unconscionability, the court found that, among other thing, the arbitration provision of the 2022 user agreement does not lack mutuality and therefore was not unconscionable. In sum, the judge stated: “each plaintiff affirmatively agreed to a Coinbase user agreement containing a broad, mandatory agreement to arbitrate on an individual basis for disputes arising out of or relating to those user agreements and Coinbase’s services.”

It is evident from this ruling that basic online practices, such as having enforceable terms presented in a mandatory, reasonably-presented user interface and written to avoid basic unconscionability and “illusory” contract challenges, remain important for online companies – including crypto-related entities – in limiting litigation and liability risks.

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