ALERT MEMORANDUM

The Conversation Continues: Second Circuit Grapples with Consumer Arbitration Agreements

March 26, 2025

On March 13, 2025, a divided Second Circuit in *Davitashvili v. Grubhub Inc.* affirmed in part and reversed in part a decision by the U.S. District Court for the Southern District of New York denying three major food delivery platforms' motion to compel arbitration of a putative antitrust class action of users and non-users of the food delivery sites.[1] In a majority opinion by Judge José A. Cabranes, the Court weighed in on issues relating to consumers' consent to arbitrate in online "clickwrap" agreements, as well as the arbitrability of certain claims. The majority also considered the often-vexed question of who decides arbitrability – the court or the arbitrator – when an arbitration agreement is challenged as unconscionable.

The majority found that while Grubhub, Inc.'s Terms of Use clearly stated that questions of arbitrability were for a court to decide, the arbitration agreement did not cover the antitrust claims alleged by Grubhub customers because there was an insufficient causal relationship between the agreement and those claims. The majority did, however, require arbitration of those same antitrust claims against Uber Technologies Inc. and its subsidiary Postmates Inc., finding that the clause delegating threshold questions of arbitrability to the arbitrator and rejecting as waived plaintiffs' arguments (raised in a footnote in the district court) that such delegation was unconscionable.

The decision – together with the concurrence by Judge Myrna Pérez and partial concurrence and partial dissent by Judge Richard J. Sullivan – demonstrates the complexities that can occur in the consumer arbitration context. The dialogue among the panel members provides helpful guidance on issues that companies should consider when drafting arbitration agreements in consumer-oriented contracts.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

NEW YORK

Carmine D. Boccuzzi, Jr.
+1 212 225 2508
cboccuzzi@cgsh.com

Ari D. MacKinnon
+1 212 225 2243
amackinnon@cgsh.com

Lina Bensman
+1 212 225 2069
lbensman@cgsh.com

Boaz S. Morag
+1 212 225 2894
bmorag@cgsh.com

Katie L. Gonzalez
+1 212 225 2423
kgonzalez@cgsh.com

Shaniqua C. Shaw
+1 212 225 2267
sshaw@cgsh.com

[1] *Davitashvili v. Grubhub Inc.*, No. 23-521-cv (L), 2025 WL 798378, at *2, *7 (2d Cir. Mar. 13, 2025) ("*Davitashvili II*").

Background

Davitashvili v. Grubhub Inc. is the latest example of disputes that may arise when customers seek to bring class action litigation, notwithstanding having agreed to individual arbitration in the governing Terms and Conditions, Terms of Use, or other consumer-facing contract. A company's recourse to enforce the arbitration agreement may be to move to compel arbitration (as was the case in *Davitashvili*), which often raises thorny questions of arbitrability and who decides arbitrability (the court or an arbitrator).

Procedural History

This case arises from a dispute in which three putative classes of restaurant customers ("Plaintiffs") initiated a purported class action against Grubhub, Inc. ("Grubhub"), Postmates, Inc. ("Postmates"), and Uber Technologies, Inc. ("Uber," and together with Grubhub and Postmates, the "Defendants") in the United States District Court for the Southern District of New York. Plaintiffs alleged violations of Section 1 of the Sherman Antitrust Act and various state antitrust laws due to no-price competition clauses ("NPCCs") in which Defendants allegedly agreed that restaurants using their platforms would not sell food at a lower price through a different platform.

Defendants moved to compel arbitration based on arbitration clauses in the Defendants' respective Terms of Use that customers agreed to by using the Defendants' websites or applications to order food.

On March 16, 2023, the district court (Kaplan, J.) denied Defendants' motion to compel arbitration, holding that (1) Grubhub's "broad" arbitration clause delegating "issues related to the scope, validity, and enforceability . . . [to the] court was sufficient to demonstrate that the arbitrability of Plaintiffs' claims against Grubhub would be decided by the court" but arbitrability for Uber and Postmates "were delegated to the arbitrator;" (2) Plaintiffs' "convincing challenge," arguing that the arbitration agreement in Uber's and Postmates' Terms of Use was unconscionable, "is sufficient to make the issue of arbitrability one for a federal court;" and (3) Plaintiffs' claims "lacked any nexus" to all Defendants' arbitration agreements.[2] Defendants appealed under 9 U.S.C. § 16, which allows interlocutory appeals from orders denying motions to compel arbitration.[3]

The Second Circuit's Decision

Each judge of the three-panel member Second Circuit panel wrote on some or all aspects of the case. Judge Cabranes, writing for the majority, (i) affirmed the district court's ruling that the court needed to decide the threshold question of arbitrability concerning Plaintiffs claims against Grubhub, but that the arbitrator needed to decide that issue in the context of claims against Uber and Postmates (thus reversing that portion of the district court's decision); (ii) reversed the district court's finding that Plaintiffs had raised a colorable argument that Grubhub's arbitration agreement was unconscionable; and (iii) affirmed that Plaintiff's claims against all Defendants "lacked any nexus to the agreement[s] containing the clause.[4]

First, the Court considered whether Plaintiffs agreed to arbitrate at all. Acknowledging that "[n]o party disputes that Plaintiffs assented to the Terms of Use of Uber and Postmates" – which expressly delegate arbitrability to "only an arbitrator, and not any court" – the Court turned to the Grubhub Terms of Use, which provide that issues relating to arbitration "are for a court to decide."[5] The Court looked to the "design and content" of the Grubhub interface to determine whether the website and application provided sufficient "inquiry notice" of the arbitration agreement.[6] The majority applied its precedent in *Meyer v. Uber Technologies, Inc.*, a 2017 case that similarly considered a "clickwrap" agreement to arbitration, to observe three features of the hyperlink to Grubhub's Terms and Conditions on its website and application: (i) it appeared directly below the check-out button; (ii) it was "presented on the same screen 'at a place and time that the consumer will associate with the

[2] *Davitashvili v. Grubhub Inc.*, No. 20-cv-3000 (LAK), 2023 WL 2537777, at *2, *4, *9 (S.D.N.Y. Mar. 16, 2023).
[3] 9 U.S.C. § 16.
[4] *Davitashvili II*, 2025 WL 798378, at *8.
[5] *Id.* at *4.
[6] *Id*.

initial purchase or enrollment;'" and (iii) it used a "clear prompt" to notify users that they would be subject to Grubhub's contractual terms by registering.[7] Because "[t]hese features, taken together, are enough to provide inquiry notice [of the arbitration agreement] to a reasonably prudent web user," the Court found that there was a valid agreement to arbitrate between Plaintiffs and Grubhub.[8]

Second, the Second Circuit affirmed the district court's finding that the court, and not the arbitrator, must decide arbitrability with respect to claims against Grubhub, but reversed the district court's conclusion that arbitrability of disputes involving Postmates and Uber was for an arbitrator to decide.[9] The Court reasoned that "Grubhub's arbitration clause clearly and unmistakably states that 'issues related to the scope, validity, and enforceability of this Arbitration Agreement are for a court to decide.'"[10] As for Postmates and Uber, however, the Court rejected the district court's finding that the court decide the question of arbitrability, because their challenge to the delegation clause – which Plaintiffs made in a footnote – was likely not adequately raised or preserved for appellate review and "fail[ed] to challenge the clause with sufficient specificity . . . argu[ing] that arbitration *in general* would be unconscionable."[11] The Court found that because Plaintiffs' arguments amounted to a "general" attack that arbitration would be unconscionable, "Plaintiffs have not specifically challenged the delegation clause," and therefore "claims against Uber and Postmates should be sent to an arbitrator to determine whether those claims are arbitrable."[12]

Third, the Second Circuit reviewed whether Plaintiffs' antitrust claims were within the scope of the arbitration agreement in Grubhub's Terms of Use, which covers "all claims, disputes, or disagreements that may arise out of the interpretation or performance of this Agreement," among others, and found that they were not.[13] Because the Federal Arbitration Act ("FAA") covers only "agreements to arbitrate controversies that 'arise out of'" or that were "caused" by the contract, the majority reasoned that "NPCCs[] have nothing to do with Plaintiffs' individualized use of Grubhub's website or mobile application," so any role Plaintiffs played in "enabling Grubhub to act anticompetitively," "is both too speculative and too attenuated to qualify as a 'cause' of Plaintiffs' antitrust claims."[14] "Because Grubhub's arbitration provision does not apply to Plaintiffs' claims," the Court concluded that "the District Court—not an arbitrator—should adjudicate the merits of the complaint."[15]

Judge Pérez concurred in full with the Court's decision, but filed a separate opinion to "emphasize two important limits on merchants' ability to force consumers into arbitration": (1) merchants' narrow margin for error with respect to the clarity and conspicuousness required to put parties on inquiry notice of arbitration agreements in the online context; and (2) the "unanimous" agreement that the "arising out of" principle under the FAA does not encourage the arbitration of "claims that lack a requisite 'nexus' to the contract containing the arbitration clause."[16] As to the first point, Judge Pérez cautioned that Grubhub's interface "is likely the high-water mark for enforcement of arbitration agreements in [online] settings," meaning that any fewer or less conspicuous features would likely not be sufficient in providing reasonable notice of an arbitration agreement.[17] In Judge Pérez's view, if Grubhub's check-out page was "even marginally more cluttered, the outcome of this appeal would likely be different."[18]

[7] *Id.* (citing *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017)).
[8] *Id.* at *5.
[9] *Id*.
[10] *Id*.
[11] *Id.* at *6 (second emphasis added).
[12] *Id.*
[13] *Id.* at *7.
[14] *Id*. (citing *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 652 n.4 (2022)); *see also* 9 U.S.C. § 2 (referring to controversies "arising out of" arbitration contracts or transactions).
[15] *Davitashvili II*, 2025 WL 798378, at *8.
[16] *Id*. at *8-9.
[17] *Id*. at *10 (emphasis added).
[18] *Id*.

Judge Sullivan concurred in part and dissented in part. Judge Sullivan agreed that (1) Plaintiffs agreed to Grubhub's Terms of Service; (2) an arbitrator should decide the threshold questions of arbitrability of Plaintiffs' claims against Uber (and Postmates); and (3) a defendant generally may not compel arbitration of claims that are "completely unrelated" to the underlying contract containing the arbitration clause.[19]

Judge Sullivan disagreed, however, with the majority's "conclusion that Plaintiffs' antitrust claims here are unrelated to their use of Grubhub's platform."[20] According to Judge Sullivan, the FAA's "presumption of arbitrability" and the assurance that "parties may agree to arbitrate any dispute 'arising out of' an underlying 'contract or transaction' between them" – as was the with Grubhub's Terms of Use – requires "some meaningful nexus between the transaction and the subsequent dispute," but "does not necessarily require a 'caus[al]' relationship."[21] As a result, Judge Sullivan found a "sufficient nexus" between the claims and the underlying transaction, because the "crux of Plaintiffs' antitrust theory" – "Plaintiffs' use of Grubhub's platform [which] gave Grubhub the market power to commit the alleged antitrust violations" – "aros[e] out of" the arbitration agreement."[22]

Takeaways

The Second Circuit's decision in *Davitashvili v. Grubhub Inc.* – and the panel's dialogue regarding the various issues – demonstrates the complexity that may arise concerning the scope and coverage of arbitration clauses embedded within "clickwrap" contracts (*i.e.*, online contracts) in the consumer context, as well as the related question of who gets to decide – the court or the arbitrator – which can spawn litigation where companies otherwise intended for disputes to be resolved in arbitration.

The majority opinion – and, in particular, Judge Pérez's concurrence – provides insights into the outer bounds of when courts will find that consumers have notice of an agreement to arbitrate in the online context and whether claims "arise out of" arbitration agreements. The Court's discussion of arbitrability and the threshold question of who decides – the court or the arbitrator – demonstrates that merchants in the same industry that may be exposed to similar or common claims can diverge in their election of having a court or an arbitrator decide questions of arbitrability. It will also be interesting to see if arbitrators hearing these antitrust claims brought against Uber and Postmates will agree with the majority's decision as to their arbitrability, or with Judge Sullivan's dissent.

The decision also demonstrates that while arbitration agreements are prevalent in many consumer-facing contracts, arbitration may not be available in all cases if there is a more tenuous connection between the claim and the underlying transaction. While such connection may not depend on how an arbitration agreement is drafted, parties may be able to frame their claims in a manner that clarifies they "arise out of" the underlying contract or transaction, as the FAA requires. Regardless, this case may have an impact on how courts will consider arbitrability of antitrust or other statutory or tort claims, and whether they sufficiently "arise out of" the contract or underlying transaction.

To the extent claims are required to be arbitrated, consumers may seek in the arbitral proceedings to initiate class or collective claims against such companies – oftentimes supported by third-party litigation funders – thereby replicating some of the class action procedures more common in U.S. court. While such proceedings – often known as "mass arbitration" – are becoming increasingly common in consumer-initiated arbitration, mass arbitration claims can present unique challenges to defendants.

…

CLEARY GOTTLIEB

[19] *Id.* at *12.
[20] *Id.*
[21] *Id*. at *13.
[22] *Id*.