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Kelsey L. Swaim

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ALTERNATIVE DISPUTE RESOLUTION AND SOCIAL MEDIA: HOW MANDATORY ARBITRATION CLAUSES IMPACT SOCIAL NETWORKING

Kelsey L. Swaim *

I. INTRODUCTION

Instagram, initially created by Kevin Systrom and Mike Krieger in October 2010, and later acquired by Facebook in September 2012, has become a leading social media network for sharing photos on the Internet.¹ Over the course of Instagram's brief history, the social networking service has logged over 100 million active users.² The Instagram application allows Android and iPhone users to add filters and other effects to their photo before posting them on the Instagram site itself, as well as other social networking sites including Facebook and Twitter.³

On December 17, 2012, Instagram announced the release of updated Terms of Use ("Terms" or "Instagram's Terms"), effective January 16, 2013.⁴ These updated Terms indicated Instagram reserved the right to sell its users' photos to third parties for use in advertising without providing the user with notification or compensation.⁵ After substantial public backlash and a class action lawsuit filed in the U.S. District Court for the Northern District of California, Instagram revised the new provision regarding advertising by deleting the language about "displaying photos without compensation"; however, Instagram maintained the provision allowing it to place users' photos in advertisements.⁶ In addition to the provision regarding advertising, the updated Terms included a mandatory arbitration clause forcing users to resolve any disputes with Instagram through "binding, individual arbitration."⁷

Following in the footsteps of eHarmony and Pinterest, Instagram's mandatory arbitration clause provides that any dispute between a user and Instagram "will be resolved by binding, individual arbitration under the American Arbitration Association's

* Kelsey L. Swaim is an Associate Editor of the Yearbook on Arbitration and Mediation, and a 2014 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

¹ See Instagram, *FAQ*, <http://instagram.com/about/faq> (last visited Mar. 11, 2013).

² See *id.*

³ See *id.*

⁴ See Instagram, *Privacy and Terms of Service Changes on Instagram* (Dec. 17, 2012), <http://blog.instagram.com/post/38143346554/privacy-and-terms-of-service-changes-on-instagram> (last visited Mar. 11, 2013).

⁵ See Jenna Wortham & Nick Bilton, *What Instagram's New Terms of Service Mean for You*, N.Y. TIMES BLOG, (Dec. 17, 2012), <http://bits.blogs.nytimes.com/2012/12/17/what-instagrams-new-terms-of-service-mean-for-you/?smid=tw-nytimes> (last visited Mar. 11, 2013).

⁶ Dan Levine, *Instagram Furor Triggers First Class Action Lawsuit*, Yahoo! Finance (Dec. 24, 2012), <http://finance.yahoo.com/news/instagram-furor-triggers-first-class-181048764.html> (last visited Mar. 11, 2013); see also Instagram, *Thank You, And We're Listening* (Dec. 18, 2012), <http://blog.instagram.com/post/38252135408/thank-you-and-were-listening> (last visited Mar. 11, 2013). Instagram CEO Kevin Systrom addressed the public concern that Instagram was going to sell users' photos without compensation by stating "it is not our intention to sell your photos. We are working on updated language in the terms to make sure this is clear."

⁷ Instagram, *Terms of Use*, <http://instagram.com/about/legal/terms/updated> (last visited Mar. 11, 2013).

rules for arbitration of consumer-related disputes.”⁸ As such, Instagram users waive any right to resolve disputes before a jury, except for the three categories of disputes which users are able to opt-out of arbitration.⁹ Additionally, the arbitration clause contains a class action waiver, prohibiting users from participating in “class action or class-wide arbitration” regarding any disputes.¹⁰

While the imposition of a mandatory arbitration clause in Instagram’s Terms did not create the public upheaval that the advertising provision created, the future impact of this mandatory arbitration clause could be monumental on the furtherance of social networking. Unlike the advertising provision, users have likely not fully grasped the long-term impact of Instagram’s mandatory arbitration clause because of the recent social media trend toward mandatory arbitration and the relatively young age of most social media users. The average user, simply by registering for an account with social networking services, signs away his or her right to a jury trial, and often his or her right to engage in class action litigation, without fully understanding the consequences.¹¹

This article will analyze Instagram’s updated Terms of Use, discuss the implications of imposing mandatory arbitration upon Instagram users, and compare the terms of several other social media and social networking services employing similar mandatory arbitration provisions. Specifically, Part II will discuss the plain language of the mandatory arbitration clause found in Instagram’s Terms. Part II will also address the mandatory arbitration clauses included in the terms and conditions of other popular social media and social networking sites. Part III will address the rise of mandatory consumer arbitration, as well as the classification of social media users as consumers. Finally, Part IV will examine the implications, both positive and negative, of Instagram’s mandatory arbitration clause.

II. MANDATORY ARBITRATION CLAUSES IN SOCIAL MEDIA

A growing number of social networking and social media sites are incorporating mandatory arbitration clauses into their terms of service, particularly following the Supreme Court’s recent decisions in *AT&T Mobility*¹² and *Greenwood*,¹³ which amplified the trend for a broad enforcement of consumer arbitration agreements.¹⁴ Instagram joined the trend by releasing updated Terms in December 2012, effective January 19,

⁸ *Id.*

⁹ *See id.* Instagram allows users to opt-out of arbitration for disputes relating to intellectual property, violation of Instagram’s application programming interfaces terms of use, or violations of Instagram’s Basic Terms concerning transmission of viruses.

¹⁰ *Id.*

¹¹ *See* Michael L. Rustad, et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643 (2012).

¹² *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In *AT&T Mobility*, the Supreme Court addressed the issue of class action waivers in consumer adhesive arbitration contracts, holding void the California public policy which invalidated arbitration agreements containing class action waivers. In espousing this holding, the Supreme Court re-emphasized the federal policy favoring arbitration, particularly in the consumer context.

¹³ *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012). As part of its holding in *Greenwood*, the Supreme Court stated the Federal Arbitration Act required enforcement of the arbitration agreement’s terms contained in the credit card application.

¹⁴ *See* Rustad, *supra* note 11.

2013, which contained a mandatory arbitration provision.¹⁵ Two of the most popular social networking sites, Facebook¹⁶ and Twitter,¹⁷ do not establish a mandatory arbitration clause in their terms; however the terms of other social media sites, including Pinterest¹⁸ and LinkedIn,¹⁹ and online dating websites, including eHarmony²⁰ and Match.com,²¹ do contain mandatory arbitration provisions. In addition to the text of Instagram’s arbitration clause, the texts of the arbitration clauses contained in the terms of Pinterest, eHarmony, Match.com, and LinkedIn are examined below.

A. Instagram’s Terms of Use

As of January 19, 2013, Instagram users became bound by updated Terms²² which significantly expanded the previous Terms of Use.²³ While many of the terms and conditions were expounded upon in the updated Terms, the most significant provision added to the updated Terms is an arbitration clause.²⁴ Users who choose to review Instagram’s Terms are first given notice of the arbitration clause in the introductory paragraph. Conspicuously set out by its bolded and capitalized text, this arbitration notice states:

Arbitration Notice: Except if you opt-out and except for certain types of disputes described in the arbitration section below, you agree that disputes between you and Instagram will be resolved by binding, individual arbitration and you waive your right to participate in a class action lawsuit or class-wide arbitration.²⁵

The arbitration clause itself, however, is a significantly longer text contained near the end of the Terms. Set off by a bolded “Arbitration” heading, the arbitration clause states Instagram users “agree that all disputes between you and Instagram . . . will be resolved by *binding, individual arbitration* under the American Arbitration Association’s rules for arbitration of consumer-related disputes and you and Instagram hereby expressly waive trial by jury.”²⁶ The clause also provides that users may opt-out of arbitration for disputes relating to intellectual property (including trademarks, trade dress, domain

¹⁵ See Instagram, *Terms of Use*, <http://instagram.com/about/legal/terms> (last visited Mar. 11, 2013).

¹⁶ See Facebook, *Statement of Rights and Responsibilities*, <http://www.facebook.com/legal/terms> (last visited Mar. 11, 2013).

¹⁷ See Twitter, *Terms of Service*, <http://twitter.com/tos> (last visited Mar. 11, 2013).

¹⁸ See Pinterest, *Terms of Service*, <http://pinterest.com/about/terms> (last visited Mar. 11, 2013).

¹⁹ See LinkedIn Corp., *User Agreement*, http://www.linkedin.com/static?key=user_agreement (last visited Mar. 11, 2013).

²⁰ See eHarmony, Inc., *Terms of Service*, <http://www.eharmony.com/about/terms> (last visited Mar. 11, 2013).

²¹ See Match.com, L.L.C., *Terms of Use Agreement*, <http://www.match.com/registration/membagr.aspx> (last visited Mar. 11, 2013).

²² See Instagram, *supra* note 15.

²³ See Instagram, *Terms of Use*, <http://instagram.com/about/legal/terms/before-january-19-2013> (last visited Mar. 11, 2013).

²⁴ See Instagram, *supra* note 15.

²⁵ *Id.*

²⁶ *Id.* (emphasis added).

names, trade secrets, copyrights, and patents), violations of Instagram’s application programming interface (“API”) terms, or violations of Basic Terms 13 or 15 concerning the transmission of viruses.²⁷ As an alternative to the mandatory arbitration provision, Instagram allows users to bring a claim in a “small claims” court if permitted by the small claims court’s rules.²⁸

In addition to the mandatory aspect of the arbitration clause, a second important aspect concerns the prohibition of class arbitration. Consistent with the Supreme Court decision in *AT&T Mobility*,²⁹ Instagram’s arbitration clause incorporates a class action waiver that requires all users to bring claims against Instagram in his or her individual capacity.³⁰ Pursuant to the class action provision, users are not permitted to participate in a class action lawsuit or class-wide arbitration proceeding instituted against Instagram.³¹ Additionally, users are not permitted to participate in claims brought against Instagram by a private attorney general.³²

Regarding the logistical aspects, the arbitration clause provides that the Federal Arbitration Act (“FAA”)³³ will govern dispute resolution.³⁴ Furthermore, any arbitration proceedings will be administered according the rules established by the American Arbitration Association (“AAA”).³⁵ In the event the AAA is unable or unwilling to hear the claim, Instagram reserves the right to elect to have the proceeding administered by the Judicial Arbitration and Mediation Services (“JAMS”).³⁶

B. Pinterest Terms of Service

Pinterest users may be surprised to discover the Pinterest Terms of Service (“Pinterest Terms”) contain an arbitration clause because users must scroll to the end of the Terms to discover the clause.³⁷ Pinterest’s Terms state that users must first contact Pinterest and attempt to informally resolve any dispute that may arise.³⁸ If informal dispute resolution is unsuccessful, users agree to resolve “any claim, dispute, or controversy . . . by binding arbitration.”³⁹ By agreeing to arbitrate disputes, users also agree to waive his or her right to a trial by jury.⁴⁰ The binding arbitration proceedings

²⁷ *Id.* In order to opt-out of arbitration, a user must notify Instagram, in writing, within thirty days of first becoming subjected to the arbitration provision. Therefore, individuals using Instagram prior to the January 19, 2013, arbitration clause implementation were required to notify Instagram of their desire to opt-out by February 18, 2013. Users joining Instagram subsequent to the January 19, 2013, implementation must notify Instagram of their desire to opt-out within thirty days of opening their account.

²⁸ *See id.*

²⁹ *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

³⁰ *See Instagram*, *supra* note 15.

³¹ *See id.*

³² *See id.*

³³ *See The United States Arbitration Act of 1925*, 43 Stat. 883, codified at 9 U.S.C. §§ 1-16 (2006) [hereinafter the “Federal Arbitration Act” or “FAA”].

³⁴ *See Instagram*, *supra* note 15.

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See Pinterest*, *supra* note 18.

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ *See id.*

will be administered according to the AAA's rules.⁴¹ Additionally, Pinterest's arbitration clause includes a class action waiver, which prohibits users from participating as a member in a class or representative proceeding and mandates users to bring individual claims in the instance of a dispute.⁴²

Pinterest's arbitration clause also addresses several logistical aspects of bringing a claim, including forum and costs. The arbitration clause states that the arbitration proceeding will be conducted in the county of the claimant's residence, unless the parties agree otherwise.⁴³ Regarding costs, the provision states each party will be responsible for paying the AAA filing fee, administrative fee, and arbitrator fees;⁴⁴ however, Pinterest agrees to cover these costs if the claim is not frivolous and does not exceed \$75,000.⁴⁵

C. *eHarmony Terms of Service*

Like Instagram and Pinterest, the popular online dating site, eHarmony, also subjects users to a mandatory arbitration provision.⁴⁶ In the introductory paragraph of eHarmony's Terms of Service ("eHarmony Terms"), a bolded sentence informs users that an arbitration provision is contained in Section 15.⁴⁷ However, this introductory paragraph does not provide an overview of the arbitration clause; rather it advises users to see the provision in Section 15 to be informed of their rights.⁴⁸

The Section 15 arbitration provision is divided into five specific paragraphs – Arbitration of Disputes, No Class Actions, Arbitration Procedure, Enforcement, and Limitation of Time Period to Commence a Dispute.⁴⁹ In the first paragraph, eHarmony informs users that "any dispute . . . will be subject to FINAL AND BINDING ARBITRATION," and the dispute will be governed by the FAA.⁵⁰ Users are also intentionally informed that agreeing to arbitrate means both eHarmony and its users are waiving their right to pursue a judicial action before either a judge or a jury.⁵¹ Furthermore, eHarmony reserves the right to choose to resolve intellectual property disputes in a forum other than arbitration.⁵²

In the second paragraph, eHarmony employs a class action waiver, and informs users that disputes must be brought individually.⁵³ Identical to Instagram's Terms, eHarmony prohibits users from participating in a class action or other proceeding regarding another party's dispute.⁵⁴ Additionally, eHarmony prohibits users from

⁴¹ *See id.*

⁴² *See Pinterest, supra* note 18.

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.* The clause states the claim's frivolousness will be determined pursuant to the standard set forth in Federal Rule of Civil Procedure 11(b). *See* FED. R. CIV. P. 11(b).

⁴⁶ *See eHarmony, supra* note 20.

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *Id.* (emphasis in original).

⁵¹ *See eHarmony, supra* note 20.

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See id.*

engaging in class arbitration or any other arbitration proceeding brought by a representative.⁵⁵ The third paragraph informs users that if a resolution to the dispute cannot be reached through informal means, the arbitration proceeding will be administered by the AAA.⁵⁶ The fifth and final paragraph provides for a one-year window from the date of the incident in order to file an arbitration claim against eHarmony.⁵⁷ If a user fails to file a claim within the one-year window, the user has waived his or her right to pursue a claim.⁵⁸

In addition to the arbitration clause, the third paragraph contains a hyperlink directing users to view supplementary information regarding the arbitration procedures.⁵⁹ The procedures establish additional details not contained in the arbitration clause, including the means for submitting a claim, selecting an arbitrator, conducting discovery, and paying for the arbitration proceeding.⁶⁰ Unlike Instagram's Terms or Pinterest's Terms, the additional procedural information provided by eHarmony allows users to be fully apprised of the process and the nuances of filing a claim with the AAA.

D. *Match.com's Terms of Use Agreement*

A mandatory and binding arbitration provision is contained in paragraph twenty-three of Match.com's Terms of Use Agreement ("Match.com's Terms").⁶¹ Similar to Pinterest's Terms, Match.com does not notify users of this arbitration provision in the introductory paragraph, and therefore users must scroll to the end of the terms to become aware of the arbitration agreement.⁶² Subsection (a) of the arbitration provision informs users that "the exclusive means of resolving any dispute or claim . . . shall be BINDING ARBITRATION."⁶³ Subsection (b) allows notifies users that the mandatory arbitration provision indicates a waiver of the users' right to a jury trial.⁶⁴ Users are, however, permitted to take matters to a small claims court.⁶⁵ Regardless of whether Match.com users choose arbitration or a small claims court, the arbitration provision specifically prohibits users from commencing or participating in a class action, class-wide arbitration, or any other representative proceeding.⁶⁶ Regarding the logistics, subsection (a) states the arbitration proceeding will be administered by the AAA.⁶⁷ Subsection (d) states the arbitration agreement shall be governed by the FAA and that the dispute shall be governed according to the laws of the state of Texas.⁶⁸

⁵⁵ *See id.*

⁵⁶ *See eHarmony, supra* note 20.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See eHarmony, Inc., Arbitration Procedures*, <http://www.eharmony.com/about/terms/arbitration> (last visited Mar. 11, 2013).

⁶⁰ *See id.*

⁶¹ *See Match.com, supra* note 21.

⁶² *See id.*

⁶³ *See id.* (emphasis in original).

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See Match.com, supra* note 21.

⁶⁷ *See id.*

⁶⁸ *See id.*

E. *LinkedIn's User Agreement*

Unlike the typical mandatory arbitration provisions included in the terms of Instagram, Pinterest, eHarmony, or Match.com, the LinkedIn User Agreement dispute resolution clause accommodates both legal disputes and arbitration proceedings.⁶⁹ Contained in Section 8 of LinkedIn's User Agreement ("LinkedIn Terms"), users are presented with a paragraph describing the law for legal disputes and a paragraph describing the option for arbitration.⁷⁰ The primary dispute resolution provision for LinkedIn users is by "a state or federal court located in Santa Clara County, California."⁷¹ However, as laid out in the second paragraph of Section 8, users may opt to resolve disputes through arbitration for "any claim where the total amount of the award sought is less than \$10,000."⁷² Where a claimant is able to pursue arbitration, the dispute will be resolved "in a cost-effective manner through binding, non-appearance-based arbitration."⁷³

The arbitration option does not provide any specifics regarding the proceeding itself, but it does state that arbitration will be administered by a mutually agreed upon established alternative dispute resolution provider.⁷⁴ The clause does however provide three criteria with which the chosen alternative dispute resolution provider must comply, including (1) "the arbitration shall be conducted by telephone, online and/or be solely based on written submissions," (2) "the arbitration shall not involve any personal appearance by the parties or witnesses," and (3) "any judgment or award rendered by the arbitrator shall be final and may be entered in any court of competent jurisdiction."⁷⁵

III. SOCIAL MEDIA USERS AS CONSUMERS

A. *The Rise of Mandatory Arbitration for Consumers*

Mandatory arbitration in consumer transactions is a contractual provision whereby the company requires consumers "to agree to submit any dispute that may arise to binding arbitration."⁷⁶ Arbitration is "mandatory" in the sense that the Supreme Court has interpreted the FAA to empower lower courts to strictly enforce arbitration clauses by compelling parties to arbitrate disputes, even if one party wishes to litigate.⁷⁷ Mandatory arbitration agreements have become common in nearly every facet of a consumer's daily

⁶⁹ See LinkedIn, *supra* note 19.

⁷⁰ See *id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See LinkedIn, *supra* note 19.

⁷⁵ *Id.*

⁷⁶ Joshua T. Mandelbaum, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075, 1079 (2009).

⁷⁷ See David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (stating that Congress declared a "national policy favoring arbitration" in enacting FAA Section 2); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (stating that Section 2 of the FAA is "a congressional declaration of a liberal federal policy favoring arbitration agreements").

life as these adhesive clauses are generally included in vehicle and home loan documents, credit card terms, gym memberships, and cell phone contracts.⁷⁸ With the recent surge in social media sites mandating arbitration of disputes between users and the provider, mandatory arbitration encompasses the entire gamut of consumers. Despite the current overwhelming popularity with mandatory arbitration, the appeal of mandatory arbitration in consumer transactions is a relatively new phenomenon.⁷⁹

One of the first cases addressing arbitration in the consumer context arose in the Seventh Circuit in the late 1990s.⁸⁰ In *Hill*, the plaintiff-consumers purchased a computer from the defendant-manufacturer over the telephone.⁸¹ Upon shipment, the defendant-manufacturer placed terms and conditions in the box, one of which included an arbitration clause.⁸² In the plaintiff-consumers' suit for breach of contract and warranty, the court ruled the adhesive nature of the terms did not alter the validity of the arbitration clause.⁸³

A number of cases following *Hill* challenged the unilateral imposition of arbitration most commonly associated with consumer arbitration.⁸⁴ The main stumbling block in perfecting mandatory arbitration in consumer transactions rested on many courts' concern that the arbitration clause's adhesive nature did not adequately represent the weaker party's interests.⁸⁵ Nevertheless, the Supreme Court's holding in *AT&T Mobility*, upholding class action waivers contained in an arbitration clause, not only enforced the federal policy favoring arbitration, but also impliedly enforced adhesive contracts utilized in consumer transactions.⁸⁶ In his majority opinion, Justice Scalia

⁷⁸ See Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346 (2012); Mandelbaum, *supra* note 76.

⁷⁹ See Mandelbaum, *supra* note 76, at 1081.

⁸⁰ See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See, e.g., *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (holding that the adhesive arbitration clause itself was not unenforceable, but the requirement that the arbitration proceeding take place in Chicago under the rules of the International Chamber of Commerce was substantively unconscionable); *Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903 (Cal. 1997) (holding that the arbitration agreement was not per se unconscionable, but the evidence supported a finding that the health maintenance organization had fraudulently induced participants to agree to arbitrate disputes); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) (holding that a nonmutual requirement that employees arbitrate wrongful termination claims was substantively unconscionable); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002) (holding that the arbitration clauses in question were contracts of adhesion).

⁸⁵ See, e.g., *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19, 32 (Cal. Ct. App. 2011) (holding the arbitration provision procedurally unconscionable because the arbitration clause was overly harsh and one-sided in favor of the seller); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005) (holding the arbitration provision was procedurally unconscionable because the defendant, who was in a much superior bargaining position, mailed the terms to the plaintiff on a "take it or leave it" basis); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1177-81 (Ohio Ct. App. 2004) (holding the arbitration provision procedurally unconscionable in light of various factors illustrating "a huge disparity in bargaining power"); *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 565 (Cal. Ct. App. 1993) (holding ITT's arbitration contract was unenforceable because the adhesive contract was imposed and drafted by the "party of superior bargaining strength," leaving the weaker party "only the opportunity to adhere to the contract or reject it").

⁸⁶ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

addressed the nature of consumer transactions, particularly the historical practice of conducting business through adhesion.⁸⁷ As such, Justice Scalia indicated that since society has traditionally embraced the use of adhesive contracts in consumer transactions, the court was not in a position to disregard that historical practice.⁸⁸ Specifically, the Supreme Court stated adhesive consumer contracts, even adhesive consumer contracts containing an arbitration clause, were valid, irrevocable, and enforceable contracts pursuant to FAA § 2.⁸⁹

B. “Consumer” Defined

A consumer is conventionally defined as “a person who buys goods or services for personal, family, or household use.”⁹⁰ Modern day commerce is most typically defined by the use of standard-form contracting.⁹¹ In the typical transaction for a good or service, the business presents a standard-form contract to the consumer at the time of purchase.⁹² Regardless of whether the consumer actually read the standard-form contract or understood the terms contained therein, they are generally bound by its terms.⁹³ As discussed above, a common practice among many businesses has been to include mandatory arbitration clauses in these standard-form contracts, requiring that any dispute between the business and consumer be settled through final and binding arbitration.⁹⁴

While social media users are not actively signing a paper contract to utilize the services of these websites, users gain access to social media sites by agreeing to the terms of a license agreement.⁹⁵ To create an account with a social media site, users must agree to two click-wrap agreements⁹⁶: (1) a terms of use license and (2) a privacy policy.⁹⁷ However, social media sites frequently allow users to agree to these terms by simply checking a box on the sign-up page without actually reviewing the text of the terms.⁹⁸ Most often individuals agree to the terms of social media sites, including the mandatory arbitration clause, without any awareness of the terms’ ramifications or consequences. As a result of the process for creating a profile and accepting the social media provider’s terms, the user has essentially become a consumer of the website’s features.⁹⁹

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ BLACK’S LAW DICTIONARY (9th ed. 2009).

⁹¹ *See* Aaron Chiu, *Irrationality Bound: Terms of Use Licenses and the Breakdown of Consumer Rationality in the Market for Social Network Sites*, 21 S. CAL. INTERDISC. L.J. 167, 170 (2011).

⁹² *See id.* The standard-form contract can either be presented face-to-face or electronically. Regardless of whether the contract is presented in paper form or electronically, courts have upheld the validity and enforceability of such contracts.

⁹³ *See id.*

⁹⁴ *See* Mandelbaum, *supra* note 76, at 1079.

⁹⁵ *See id.* at 175.

⁹⁶ BLACK’S LAW DICTIONARY (9th ed. 2009). A click-wrap agreement, also referred to as a “point-and-click agreement,” is an electronic shrink-wrap license whereby “a computer user agrees to the terms of an electronically displayed agreement by pointing the cursor to a particular location on the screen and then clicking.”

⁹⁷ *See* Chiu, *supra* note 91, at 195.

⁹⁸ *See id.* at 201.

⁹⁹ *See id.*

Although social media websites are traditionally lumped into the category of electronic commerce, the characteristics differ greatly from typical web-based services.¹⁰⁰ Social media websites are most commonly utilized as an online platform for the disclosure of personal information with friends.¹⁰¹ After creating a profile, users are able to communicate with friends through the posting of bulletins and private messaging.¹⁰² Users are wholly responsible for the management of their profiles;¹⁰³ the social media website simply provides the platform for users' disbursement of information.¹⁰⁴

IV. THE IMPLICATIONS OF MANDATORY ARBITRATION IN SOCIAL MEDIA

With over ninety million active monthly users, Instagram's new mandatory arbitration clause has the potential to pose significant and widespread implications.¹⁰⁵ Although the general benefits of arbitrating, as opposed to litigating, a dispute have aided the growth of arbitration as a viable dispute resolution mechanism, these benefits do not easily transfer into the context of mandatory arbitration of consumer-related disputes. In fact, it is arguable that the adhesive nature of consumer arbitration, particularly involving social media, has caused the negative consequences to outweigh the benefits.

A. *Positive Implications*

Arbitration has become a more popular form of dispute resolution based on its touted benefits – efficiency, lower costs, informality, and finality.¹⁰⁶ Of these benefits, individuals are most commonly attracted to arbitration because the parties are able to reach a much quicker resolution to their dispute.¹⁰⁷ The speed at which disputes are resolved also serves to reduce the amount of legal expenses.¹⁰⁸ The efficiency and associated cost of arbitration proceedings is especially valuable when the claim being disputed is for a small sum of money.¹⁰⁹ Plaintiffs that would not otherwise be able to bring a small claim against a business in court are empowered by the lessened expense to bring such a claim through arbitration.¹¹⁰ Not only are results rendered rather quickly, but also the finality of the arbitral award spares parties from enduring a lengthy and costly appeals process.¹¹¹

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See* Chiu, *supra* note 91, at 201.

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See* Instagram, *Instagram in Statistics* (Jan. 17, 2013), <http://instagram.com/press> (last visited Mar. 11, 2013); Matthew Lynley, *Now We Know How Many Active Users Instagram Really Has*, WALL ST. J. BLOG (Jan. 17, 2013), <http://blogs.wsj.com/digits/2013/01/17/now-we-know-how-many-active-users-instagram-really-has> (last visited Mar. 11, 2013).

¹⁰⁶ *See* Mandelbaum, *supra* note 76, at 1081.

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See* Farmer, *supra* note 78, at 2352-53.

¹¹⁰ *See id.* at 2353-54.

¹¹¹ *See id.*

However, these benefits are frequently questioned when arbitration is unilaterally imposed upon consumers.¹¹² Nevertheless, these benefits still accrue in the social media context, but more often than not these benefits tend to be one-sided in favor of the social media provider.¹¹³ By imposing a mandatory arbitration clause in its terms, social media providers are able to choose the decision-maker and control the nature of the proceeding.¹¹⁴ Four of the five arbitration provisions examined above indicate that the AAA would administer the arbitration proceeding.¹¹⁵ Instagram's Terms also indicated that in the event the AAA was unable to administer the arbitration proceeding, the proceeding would be administered according to JAMS rules.¹¹⁶ By indicating that either the AAA or JAMS would administer the proceeding, these social media providers are able to ensure that any arbitration proceeding will be run efficiently and in a cost-effective manner. Furthermore, by prescribing the use of the AAA, the social media provider also has the benefit of familiarity with the steps and rules of arbitration.¹¹⁷

In contrast to the typical consumer mandatory arbitration clause, Instagram's Terms and LinkedIn's Terms provide users an exception to the mandatory arbitration requirement that actually benefits the user. Instagram's Terms grants users an alternative to arbitration if they wish to bring their claim in a "small claims" court.¹¹⁸ The small claims alternative stems from the AAA's Consumer Due Process Protocol ("AAA Protocol"), which provides that a fair consumer arbitration agreement should "make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."¹¹⁹ Instagram's Terms and the AAA Protocol both recognize that claims involving small amounts of money are better suited for resolution by small claims courts.¹²⁰ As such, Instagram users wishing to bring a small monetary claim against Instagram maintain the option to litigate the claim in a convenient and expeditious judicial forum.

¹¹² See Mandelbaum, *supra* note 76.

¹¹³ See *id.*

¹¹⁴ See *id.* at 1082.

¹¹⁵ See *supra* notes 15, 18, 20, 21 and accompanying text.

¹¹⁶ See Instagram, *supra* note 15.

¹¹⁷ See American Arbitration Association, *Consumer-Related Disputes Supplementary Procedures* (2005), available at <http://adr.org/consumer>. The AAA applies these Consumer Procedures to arbitration agreements between individual consumers and businesses, where the business has "a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable." The Consumer Procedures establish the specifics of the entire arbitration proceeding, including the submission of a claim, the appointment of an arbitrator, the presentation of an award, and the fees.

¹¹⁸ See *id.* Instagram's Terms also allow users to opt-out of arbitration for disputes relating to intellectual property, violations of the API terms, or violations of the Basic Terms regarding the transmission of viruses. However, for users who failed to provide Instagram with written notification, within thirty days of first being subjected to the arbitration clause, of their desire to opt-out of arbitration for these three types of disputes, disputes arising under these three categories must still be arbitrated. Therefore, while this opt-out provision may seem like a positive implication on the surface, only proactive users who timely notified Instagram will be able to take advantage of the benefit.

¹¹⁹ American Arbitration Association, *Consumer Due Process Protocol*, Principle 5 (1998), available at http://www.adr.org/aaa/faces/rules/codes?_afLoop=216448496721852&_afWindowMode=0&_afWindowId=qsdcahrl_1#%40%3F_afWindowId%3Dqsdcahrl_1%26_afLoop%3D216448496721852%26_afWindowMode%3D0%26_adf.ctrl-state%3Dqsdcahrl_37 (last visited Mar. 11, 2013).

¹²⁰ See *id.*; see also Instagram, *supra* note 15.

LinkedIn's Terms also differ from the typical consumer mandatory arbitration clause by providing users the ability to choose between litigation and arbitration.¹²¹ Pursuant to LinkedIn's Terms, the party seeking relief has the option to arbitrate any dispute if the claim is less than \$10,000.¹²² LinkedIn's Terms also mandates that the arbitration proceeding will be conducted either by "telephone, online, or solely through written submission."¹²³ Compared to the option to litigate, which requires users to resolve their dispute in the "state or federal court located in Santa Clara County, California," the arbitration option favors the user because the user can arbitrate his or her dispute with LinkedIn from home.¹²⁴ Therefore, LinkedIn's arbitration option may actually be the most cost efficient method for dispute resolution because of the nominal travel costs coupled with the traditional arbitration cost advantages.

B. Negative Implications

Mandatory arbitration clauses have become prevalent in consumer transactions, and now social media user agreements, partly because of the associated benefits for the imposing party. The consumers themselves, however, seldom experience the positive aspects of arbitrating disputes because the adhesive nature of consumer arbitration prevents the weaker party from bargaining for favorable provisions.¹²⁵ In fact, because of the unique characteristics of social media compared to other forms of commerce, the negative implications of mandatory arbitration are exaggerated when imposed upon social media users.

Choosing to arbitrate a dispute rather than litigate exemplifies the traditionally accepted principle of freedom of contract.¹²⁶ Yet, when a business imposes the requirement to arbitrate any dispute on the consumer, freedom of contract has been evaded and the consumer becomes the victim of unequal bargaining power.¹²⁷ The resulting social concern about mandatory arbitration is that the consumer will be unable to obtain a fair resolution to their dispute because of the layers of protection the business maintains by controlling the arbitration proceeding.¹²⁸ An Instagram (or other social media) user unhappy with the term's new arbitration clause have only one guaranteed remedy – delete his or her account.¹²⁹ As a result of the mandatory arbitration clause, users have automatically agreed to arbitrate any dispute that arises simply by sharing a photo or accessing Instagram's mobile application. The consequences are the same for users any of the other social media sites discussed above. Mandatory arbitration

¹²¹ See LinkedIn, *supra* note 19.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See Farmer, *supra* note 78, at 2355-56.

¹²⁶ See Chiu, *supra* note 91.

¹²⁷ See *id.*

¹²⁸ See Mandelbaum, *supra* note 76.

¹²⁹ See Mary Beth Quirk, *Don't Like Instagram's New Terms of Service & Privacy Policy? Quitting is the Only Way Out*, THE CONSUMERIST (Dec. 18, 2012), <http://consumerist.com/2012/12/18/dont-like-instagram-new-terms-of-service-privacy-policy-quitting-is-the-only-way-out> (last visited Mar. 11, 2013).

provisions in social media terms wholly evade the user's right to bargain for favorable terms because the only alternative is to cease use of the service.¹³⁰

Even though mandatory arbitration clauses strip users of the ability to structure the arbitration proceeding in a favorable manner, the ease and informality of arbitrating a dispute has caused arbitration to be referred to as the court for the average citizen.¹³¹ Social media users, however, are frequently unaware that social media websites include arbitration provisions in their terms.¹³² Most users are not required to actually view the site's terms in order to accept the terms and create an account.¹³³ Even if users were required to view the terms, social media providers often are not required to make the arbitration notice conspicuous.¹³⁴ Only two of the five arbitration provisions analyzed above – Instagram and eHarmony – provide users with a notice of the arbitration clause in the introductory paragraph.¹³⁵ Users of the other three services – Pinterest, Match.com, and LinkedIn – must scroll to the end of the respective terms in order to learn their disputes must be arbitrated.¹³⁶ Regardless of the conspicuousness of the arbitration notice, the onus is on users to familiarize themselves with the terms when creating a social media account to avoid later surprise by the requirement to arbitrate when a dispute arises.

The average age of social media users increases the negative implications of imposing mandatory arbitration upon users. A recent study conducted by the Pew Internet & American Life Project analyzed the demographics of social media users, specifically including Instagram users.¹³⁷ According to the study, thirteen percent of internet users utilize Instagram's picture-sharing service.¹³⁸ Instagram users are more commonly female than male, and more commonly African-American or Hispanic than Caucasian.¹³⁹ Additionally, an overwhelming percentage of users are between the ages of eighteen (18) and twenty-nine (29), with a substantial number of users between the ages of thirty (30) and forty-nine (49).¹⁴⁰ Probably the most important statistic is that the majority of Instagram users are college-age or younger, because, even where users are aware the arbitration clause exists, younger users may not understand the intricacies of

¹³⁰ See Chiu, *supra* note 91.

¹³¹ See Farmer, *supra* note 78.

¹³² See Chiu, *supra* note 91.

¹³³ See *id.*

¹³⁴ See Margaret L. Moses, *Privatized "Justice,"* LOY. U. CHI. L.J. 535, 540 (2005); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). In *Casarotto*, the Supreme Court held that the FAA preempted a Montana law requiring a conspicuous notice of arbitration. The *Casarotto* holding specifically diverges from the typical requirement that certain provisions in a contract be conspicuous, and therefore places arbitration clauses on an entirely different footing than contracts generally.

¹³⁵ See Instagram, *supra* note 15; eHarmony, *supra* note 20.

¹³⁶ See Pinterest, *supra* note 18; Match.com, *supra* note 21; LinkedIn, *supra* note 19.

¹³⁷ See Maeve Duggan & Joanna Brenner, Pew Internet & American Life Project, *The Demographics of Social Media Users – 2012* (Feb. 14, 2013) <http://www.pewinternet.org/Reports/2013/Social-media-users/Social-Networking-Site-Users/Demo-portrait.aspx> (last visited Mar. 11, 2013). The study reveals that, overall, sixty-seven percent (67%) of internet users have at least one social networking account. Furthermore, as a general trend, social media websites are most appealing to young adult women between the ages of eighteen (18) and twenty-nine (29).

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.*

the terms.¹⁴¹ A user's inability to fully comprehend the terms leaves the user unable to accurately assess the risk of agreeing to arbitrate any dispute.¹⁴² Despite the naivety of the majority of social media users, the greatest consequence of mandatory arbitration is that the arbitration provision will be enforced regardless of the user's sophistication or understanding of the implications.¹⁴³

V. CONCLUSION

In January 2013, Instagram, following in the footsteps of Pinterest, Linked In, eHarmony, Match.com, and other social networking websites, implemented a mandatory arbitration provision into their Terms. Under this arbitration provision, users are required to submit any dispute against Instagram to final and binding arbitration. The consequences associated with imposing mandatory arbitration upon social media users highly outweigh the benefits. The greatest consequence is that each and every user, regardless of age or sophistication, is automatically required to arbitrate all disputes simply by creating an account. A user may not understand the implication of agreeing to arbitrate at the time they create their account, which accentuates the problem of mandatory arbitration. Although users do not anticipate having to arbitrate disputes when creating social media accounts, users need to begin considering those risks because once the terms are agreed upon arbitration is inevitable.

The five arbitration clauses analyzed in Part II, *supra*, are only a small assortment of the arbitration clauses actually in place. The number of social media websites utilizing mandatory arbitration clauses is larger than the number that do not, and it is only a matter of time before the remaining providers update their terms to include a mandatory arbitration clause. Currently the two most popular social media websites, Facebook and Twitter, do not have mandatory arbitration provisions in their terms. However, since Facebook purchased Instagram for one billion dollars in April 2012,¹⁴⁴ it is reasonably foreseeable that Facebook will update their Terms to include a mandatory arbitration clause once the success of Instagram's mandatory arbitration clause is assessed.

From a user perspective, the best advice is to become aware of the terms and conditions established by each social media website. Like the Instagram Terms and LinkedIn Terms, many social media arbitration clauses do not reflect the typical adhesive consumer arbitration clause. As such, users may have the option to opt-out of arbitration for certain claims, but users must be familiar with the terms and act timely to avoid arbitration. Despite the lack of consideration, using social media has transformed into a comparable practice to purchasing other goods or services. Social media users cannot

¹⁴¹ See Chiu, *supra* note 91.

¹⁴² See *id.*

¹⁴³ See *id.*; see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (stating that the sophistication of a party does not affect the enforceability of an adhesive bargain).

¹⁴⁴ See Eric Pfeiffer, *Facebook buys Instagram for \$1 billion*, Yahoo! News (Apr. 9, 2012), <http://news.yahoo.com/blogs/sideshow/facebook-purchases-instagram-photo-sharing-app-1-billion-182736026.html> (last visited Mar. 11, 2013). At the time of the sale, Facebook CEO Mark Zuckerberg announced Instagram would still operate independently, but that Facebook was hiring Instagram's employees.

take these services lightly because the lack of choice to resolve a potential dispute has greater implications than chatting with friends would suggest.