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Want to Ensure Arbitration in an E-Commerce World? Time To Refresh Your Website's Terms of Service

By: [Wendy Lee](#), [Christina Morgan](#) and [David Liu](#)

Recent court decisions have raised the bar for enforceable arbitration provisions in website Terms of Service (ToS) agreements. E-commerce businesses must ensure their website architecture and ToS design meet current legal standards to effectively channel disputes to arbitration rather than litigation.

I. Crafting the Website and Terms of Service Architecture

Most e-commerce businesses feature a Terms of Service accessible by a hyperlink. For new customers, the ToS is incorporated into the account registration process. Returning customers see the ToS during account login. These interfaces are commonly known as "sign in wraps", "scroll through wraps" or "click wraps", depending on their design.

Arbitration provisions require consumers to resolve disputes through arbitration rather than court litigation. Many businesses prefer arbitration due to perceived cost advantages and reduced litigation burdens. However, ensuring these provisions are enforceable requires careful website design.

The recent Ninth Circuit decision in *Chabolla v. ClassPass* provides some guidance. For enforceable arbitration provisions, websites must:

- Provide conspicuous notice of the arbitration provision
- Use visually distinct buttons with larger, different colored fonts
- Require deliberate user action demonstrating agreement
- Create a design that shows unambiguous intent to arbitrate

II. Additional Strategic Considerations

Beyond basic design requirements, a business should consider:

- ❖ Strategic positioning of the arbitration provision within the ToS.
- ❖ Language choice that will withstand judicial scrutiny
- ❖ Addressing the risk of mass arbitration campaigns by plaintiffs' attorneys
- ❖ Incorporating arbitration providers' mass arbitration rules to mitigate challenges
- ❖ Including provisions requiring pre-arbitration or pre-lawsuit remedies.

Best practice is to consider a legal review (at least annually) to ensure these and other legal issues are covered and your business is protected as more case law develops in this area.



Buchalter's privacy and cybersecurity attorneys provide strategic guidance on website design and ToS development to navigate the evolving legal landscape at the intersection of law and technology. Our team can help you implement enforceable arbitration provisions while balancing business needs and legal requirements. If a disputes arise, our litigation team stands ready to defend your interests in arbitration or court, both individually and in class actions.

Contact our team today to ensure your provisions will stand up to legal challenges.



Wendy Lee
Shareholder
(206) 319-7037
wlee@buchalter.com



Christina Morgan
Of Counsel
(619) 219-6329
cmorgan@buchalter.com



David Liu
Special Counsel
(949) 224-6258
dliu@buchalter.com

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