



When you need a ride and call an Uber, you are agreeing to arbitrate any disputes with Uber, including personal injury claims, that arise from your ride. That's what the Court of Appeals held this week, when it determined for the first time that a web-based clickwrap process for assent to Uber's terms of use formed a valid arbitration agreement between Uber and its riders. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

## COURT OF APPEALS

### CONTRACT LAW, ARBITRATION, CLICKWRAP ASSENT

[Wu v Uber Tech., Inc., 2024 NY Slip Op 05869 \(Ct App Nov. 25, 2024\)](#)

**Issue:** Does Uber's clickwrap process for assent to the terms of use for its app form a valid contract to arbitrate disputes?

**Facts:** "In July 2020, plaintiff Emily Wu requested a car using Uber's software application on her smartphone. An Uber-affiliated driver took her to an intersection in Brooklyn where, according to the complaint, the driver discharged plaintiff in the middle of the roadway. Upon exiting the car, plaintiff was almost immediately struck by another vehicle, sustaining injuries." Plaintiff commenced this personal injury action against Uber on a respondeat superior theory. Uber, relying on the terms of use of its app, to which every person who wants to hail an Uber must agree, moved to compel arbitration.

In particular, in January 2021, Uber updated its terms of use, which included a mandatory arbitration clause, and emailed notice to all of its users, as well as required assent to the changes by clicking an approval button within its app. The email to users notified, "We recommend that you review the updated Terms. Some of the updates include changes to the Arbitration Agreement, the terms related to access and use of the Uber platform, and procedures and rules for filing a dispute against Uber." And the changes to the Arbitration Agreement included the following provision: "**IMPORTANT: PLEASE BE ADVISED THAT THIS AGREEMENT CONTAINS PROVISIONS THAT GOVERN HOW CLAIMS BETWEEN YOU AND UBER CAN BE BROUGHT, INCLUDING THE ARBITRATION AGREEMENT (SEE SECTION 2 BELOW). PLEASE REVIEW THE ARBITRATION AGREEMENT BELOW CAREFULLY, AS IT REQUIRES YOU TO RESOLVE ALL DISPUTES WITH UBER ON AN INDIVIDUAL BASIS AND, WITH LIMITED EXCEPTIONS, THROUGH FINAL AND BINDING ARBITRATION (AS DESCRIBED IN SECTION 2 BELOW). BY ENTERING INTO THIS AGREEMENT, YOU EXPRESSLY ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND ALL OF THE TERMS OF THIS AGREEMENT AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT DECISION.**"

"The next time plaintiff logged into the Uber app on her smartphone, she was presented with an in-app blocking pop-up screen with the headline, 'We've updated our terms.' The uncluttered screen encouraged plaintiff to review the new terms of use and included a hyperlink to those terms indicated by underlined and blue text. Toward the bottom of the screen was a checkbox and, to its immediate right, bolded text stating: '**By checking the box, I have reviewed and agreed to the Terms of Use and acknowledge the Privacy Notice.**' Immediately beneath this was a large black button labeled 'Confirm.' It is undisputed that plaintiff checked the box and clicked the 'Confirm' button."

Supreme Court granted Uber's motion to compel arbitration, holding "that the company's communications put plaintiff on inquiry notice of the arbitration agreement in the January 2021 terms, and that plaintiff assented to that agreement through conduct which a reasonable person would understand to constitute assent." The Appellate Division, First Department affirmed.

**Holding:** The Court of Appeals, applying "centuries-old principles of contract law to a web-based 'terms of use' update containing an arbitration agreement," held that Uber's "clickwrap process . . . used to solicit plaintiff's assent resulted in the formation of an agreement to arbitrate. Moreover, a key term of that agreement expressly delegates to an arbitrator the exclusive authority to resolve all disputes as to the applicability and enforceability of the agreement." The Court explained that Uber's Arbitration Agreement is governed by the Federal Arbitration Act, and that such agreements are valid so long as the parties have assented. Thus, to form a valid contract to arbitrate, the Court held, it must examine whether, from an objective perspective, "the offeree was put on inquiry notice of the contractual terms. An offeree is placed on inquiry notice of contractual terms when those terms are clearly and conspicuously presented to the offeree as a contract and made available for review. It then becomes the responsibility of the offeree, before manifesting assent, to 'inquire' further by reading and assessing the proposed terms to determine whether they are acceptable. Under well-established law, a person who accepts a written contract without first undertaking this review generally bears the risk that the agreement may contain provisions they do not like or expect."

Although Uber’s terms of use are an electronic contract presented within its ride-sharing app, rather than a written contract, the Court decided that “[t]here is no sound reason why the contract principles described above should not be applied to web-based contracts in the same manner as they have long been applied to traditional written contracts. Although this Court has not, until now, had the opportunity to offer substantial guidance on the question, state and federal courts across the country have routinely applied traditional contract formation law to web-based contracts, and have further observed that such law does not vary meaningfully from state to state.” The Court held that Uber’s clickwrap assent process within its app was a valid and binding agreement to arbitrate disputes because the email notice explained in plain language terms that the arbitration agreement had been updated, and that plaintiff should review before confirming her acceptance to the terms in Uber’s app. Within the app, the notice was similarly sufficient to give plaintiff a duty to inquire since it “clearly advised plaintiff that she was being asked to agree to a contract with Uber. The terms themselves were again made accessible by a hyperlink on the words ‘Terms of Use,’ which were formatted in large, underlined, blue text. A reasonably prudent user would have understood from the color, underlining, and placement of that text, immediately beneath the sentence “encourag[ing]” users to ‘read [the] updated Terms in full,’ that clicking on the words ‘Terms of Use’ would permit them to review those terms in their entirety. Finally, Uber provided plaintiff with an unambiguous means of accepting the terms by including a checkbox, ‘Confirm’ button, and bolded text expressly stating that, ‘By checking the box, I have reviewed and agree to the Terms of Use.’ It is undisputed that plaintiff checked and box and clicked the ‘confirm’ button.” Thus, the Court held, “Uber’s clickwrap process put plaintiff on inquiry notice of the January 2021 terms—including the prominently placed arbitration agreement—and she manifested her assent to those terms by both clicking on the box and pressing the ‘confirm’ button.”

## ADMINISTRATIVE LAW, JURISDICTION, DISCRIMINATION

*Matter of Ibhawa v New York State Div. of Human Rights, 2024 NY Slip Op 05872 (Ct App Nov. 26, 2024)*

**Issue:** Does the “ministerial exception” that flows from the First Amendment to the U.S. Constitution, which “protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,” deprive the State Division of Human Rights of jurisdiction over a complaint of discrimination by a minister against his or her church?

**Facts:** “In 2016, the Diocese of Buffalo hired Ibhawa—a Black, Nigerian Catholic priest—to serve as Parish Administrator of the Blessed Trinity Church in Buffalo. Ibhawa was reappointed in January 2019 to an additional three-year term, but on September 28, 2020, the Diocese prematurely terminated his employment.” Ibhawa filed a racial discrimination complaint against the Diocese with the New York State Division of Human Rights. The Diocese denied the complaint, and asserted that it was immune from suit under the ministerial exception of the First Amendment because the Diocese is a religious organization and the claims arose while Ibhawa was a minister. After considering the parties’ positions, DHR dismissed the complaint for “lack of jurisdiction,” reasoning that “Ibhawa ‘comes under the ministerial exception relative to the first amendment of the U.S. Constitution, and DHR cannot proceed as it lacks jurisdiction over this matter.’ The only explanation given for this result was an assertion that ‘[t]he ministerial exception grants a church/religion the right to choose (or terminate) ministers or persons who serve in a similar religious role without governmental interference, including discrimination claims.’”

In Ibhawa’s subsequent Article 78 proceeding, Supreme Court upheld the dismissal of Ibhawa’s unlawful termination claim, it noted that “there is a question as to whether the ministerial exception bars Ibhawa’s hostile work environment claim, and the relevant law is unsettled on that issue. The court concluded that the absence of controlling authority does not constitute a rational basis to determine that the ministerial exception barred review of Ibhawa’s hostile work environment claim, and, accordingly, that DHR’s determination on that claim was affected by an error of law. It thus reversed DHR’s order insofar as it dismissed the hostile work environment claim and remanded the complaint to DHR.” The Appellate Division, Fourth Department held that Supreme Court did not give DHR’s conclusion appropriate deference and reversed, holding that “DHR’s determination with respect to the hostile work environment claim is not arbitrary and capricious or affected by an error of law because there is no controlling precedent and the federal courts that have addressed the issue are divided on the extent to which the ministerial exception applies to such claims.”

**Holding:** The Court of Appeals reversed and held that DHR’s determination was in fact affected by an error of law. The Court explained that DHR’s conclusion that the ministerial exception of the First Amendment deprived it of jurisdiction to consider Ibhawa’s complaint contravened the United States Supreme Court’s precedent holding that the ministerial exception is an affirmative defense, rather than a jurisdictional bar. Although DHR and the Diocese argued that the Court should simply have overlooked the distinction, the Court held firm that the distinction matters. “[B]ecause the question presented by the ministerial exception is whether the allegations the plaintiff makes entitle him to relief, not whether the court has power to hear the case, it is an affirmative defense, not a jurisdictional bar. Thus, once the Diocese raised the ministerial exception as one of several affirmative defenses, the question confronting DHR was not whether the exception limited its power to consider Ibhawa’s claim, but whether any of the Diocese’s affirmative defenses—including the two statutory defenses raised by the Diocese—established that the case could not proceed beyond its current stage. Because DHR erred in treating the ministerial exception as a jurisdictional bar rather than an affirmative defense, its determination was affected by an error of law. In reaching that conclusion, we express no view on whether any of the Diocese’s defenses are meritorious.”

## CONTRACT LAW, VENUE, AUTHENTICITY OF DOCUMENTS

*Knight v New York & Presbyt. Hosp.*, 2024 NY Slip Op 05870 (Ct App Nov. 25, 2024)

**Issue:** When a party challenges the authenticity of an electronic contract containing a mandatory venue provision, which party bears the burden of establishing the contract's validity?

**Facts:** After the plaintiff, decedent's son and administrator of her estate, brought a negligence, medical malpractice, and wrongful death suit against defendants, one of the defendants, Dewitt Rehabilitation and Nursing Center, moved to change venue from New York County to Nassau County pursuant to a "forum selection clause in two admission agreements electronically signed by decedent." Plaintiff disputed the authenticity of decedent's signature on the electronic admission agreement and included an example of decedent's signature with his opposition papers. Supreme Court granted the motion, holding that "the party seeking to enforce a forum selection clause has the initial burden to show that the choice of venue provision is applicable and enforceable, but that once it has satisfied that burden, the party opposing enforcement of the clause must establish that its enforcement would be unreasonable, unjust, or unconscionable." The Appellate Division, First Department reversed, holding instead that "the party seeking to enforce the provision must, in the first instance, establish that the purported writing is authentic, which may be effected by various means, including by certificate of acknowledgment, by comparison of handwriting, or by the testimony of a person who witnessed the signing of the document."

**Holding:** The Court of Appeals reversed, and clarified the proper allocation of burdens when a party seeks to enforce a contractual forum selection clause. Although the Court recognized that forum selection clauses were once disfavored, now, they are enforced according to their terms as a prima facie valid agreement between the parties. The Court then explained, "the party moving for a change of venue under CPLR 501 is in effect seeking to enforce a contractual provision. For that reason, we agree with the majority below that, when put in issue, the proponent of the motion bears the initial burden to establish the authenticity of the writing for purposes of a motion to enforce a contractual venue provision. This may be done through any of the recognized methods of authentication, including, but not limited to, the testimony of a witness who was present at the time of the signing, an admission of authenticity, proof of handwriting, and, as particularly relevant here, through circumstantial evidence."

Here, the Court concluded, Dewitt met its burden by submitting an affirmation from its executive director that explained the admission process, and showed how the documents were reviewed with the admitted resident and signed with the requisite mental capacity. That was sufficient circumstantial evidence that decedent had agreed to the admission contract and that her signature was authentic. Thus, the Court held, the "burden shifted to plaintiff to show why the venue selection provision should not be enforced. To do so here, plaintiff was then required to produce evidence sufficient to establish a genuine issue of fact regarding the authenticity of decedent's signatures. Although an expert opinion is not required to raise an issue of fact as to forgery, the movant must nevertheless offer something more than a bald assertion, and in this regard conclusory or self-serving affidavits are inadequate." Since the plaintiff failed to offer anything more than his own affidavit in response, he failed to raise a question of fact as to authenticity and Supreme Court had thus properly granted Dewitt's motion to change venue.

## SOVEREIGN IMMUNITY

*Colt v New Jersey Tr. Corp.*, 2024 NY Slip Op 05867 (Ct App Nov. 25, 2024)

**Issue:** When is a state-created entity entitled to absolute sovereign immunity from suit?

**Facts:** A "bus owned and operated by [New Jersey Transit Corp., an entity created by the State of New Jersey] allegedly struck and injured plaintiff Jeffrey Colt as he traversed a crosswalk on 40th Street in Manhattan. The bus was driven by defendant Ana Hernandez, an employee of NJT. Colt and his wife, plaintiff Betsy Tsai, commenced this action . . . , asserting causes of action for negligence, negligent hiring, and loss of consortium." NJT answered the complaint, asserting as an affirmative defense that the court lacked jurisdiction over NJT and that it was immune from suit, but did not specifically reference sovereign immunity. After more than two years of litigation, NJT moved to dismiss, relying on recent United States Supreme Court precedent on sovereign immunity to argue that it is absolutely immune from suit. The trial court denied the motion, holding that NJT had waived any immunity defense by participating in the litigation for so long before raising it. And the Appellate Division, First Department affirmed, in a split decision, holding that although NJT did not waive its sovereign immunity defense, "dismissal would be 'an affront to our sense of justice and cannot be countenanced'" because plaintiffs would otherwise be barred from bringing the suit in New Jersey and NJT would not be prejudiced by allowing the suit to proceed since it waited so long to raise the defense.

**Holding:** The Court of Appeals agreed with the Appellate Division majority held that the New Jersey Transit Corp. was not entitled to absolute sovereign immunity from the personal injury suit. The Court explained, "the United States Supreme Court recognized that the text and structure of the Federal Constitution not only preserved States' pre-ratification sovereign immunity, but compelled absolute recognition of that immunity in other States' courts as a matter of equal dignity and sovereignty," but has not addressed "how to determine whether a state-created entity is entitled to this immunity." Based on the Court of Appeals' review of the Supreme Court's precedent, it concluded that "the relevant inquiry is whether subjecting a state-created entity to suit in New York would offend that State's dignity as a sovereign." The Court explained that courts should examine three factors in undertaking this analysis: "(1) how the State defines the

entity and its functions, (2) the State's power to direct the entity's conduct, and (3) the effect on the State of a judgment against the entity. Courts need not give equal weight to each consideration, and the underlying indicia may vary by case and from one party to another."

Here, the Court concluded, the balance of these factors weighed against granting NJT sovereign immunity. Under the first factor, the Court noted that although New Jersey treats as a separate corporation from the state, it is simultaneously considered a state department that has the power to adopt rules and regulations with the force and effect of law, and provides an essential public service of transportation. This factor, therefore, weighed toward immunity. The second factor did not weigh on either side because NJT, by operation of New Jersey law, must operate independently from the state, but its Board and officers are appointed by the New Jersey Governor and are subject to removal. The final factor weighed heaviest here, the Court held. Under New Jersey law, NJT is liable for its own expenses and none shall be considered a debt of the State. Thus, the Court explained, "[t]he State has thus clearly disclaimed any legal liability for judgments against NJT, counseling against treating NJT as an arm of New Jersey. Additionally, defendants have not established that New Jersey would bear ultimate liability for a judgment against NJT. Balancing each consideration, we conclude that New Jersey's lack of legal liability or ultimate financial responsibility for a judgment in this case outweighs the relatively weak support provided by the other factors. Put simply, allowing this suit to proceed would not be an affront to New Jersey's dignity because a judgment would not be imposed against the State, and the entity that would bear legal liability has a significant degree of autonomy from the State."

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