

How Instagram's Terms and Conditions violates French law¹

By Guillaume Belisle Fabre

ABSTRACT

Terms and Condition are the only formal contract that links all user of a social network such as Instagram. This contract - which is based on the company headquarter's state law - is the same for every user no matter the laws of the user's country and dictates how a dispute can be resolved. As a French citizen, it looks really hard to solve a dispute with Instagram regarding its Terms and Conditions. The dispute resolution process described offers solutions that would force a French citizen to come to California in order to have a dispute resolved. As it is opposed to the 6th article of the European Convention of Human Right, the binding dispute solution of Instagram can be recognized as "unfair" and the case can be judged in France. This solution can take years as some Facebook users experienced and this way Instagram is reducing the number of claims coming from outside the USA.

Key words: Conflict, Dispute, Social Network, Claim, Resolution, International Dispute Resolution, Terms and conditions, French law

INTRODUCTION

Driven by globalization, social networks are changing how society behaves at an outstanding pace around the world. Facebook, Twitter, Snapchat or Instagram represent several billion users around the world allowing them to interact easily and instantly. The only formal link between these billions of users is the Terms and Conditions of use they all agreed to access their functionalities. This contract - which is based on company's headquarters state law - is the same for every user no matter the laws of its country and dictate how a dispute can be solve. While Terms and Conditions (T&C's) rule the usage of all of our social network, only 9,6% of people read the T&C's when the opening is optional according to a recent survey (2016) conducted by European Commission.

Therefore, with its 800 million users (75% are non-American) and the optional opening of its T&C's, Instagram easily imposes rules to its users. As of January 2013, the last version of Instagram's T&C's was updated: one of the most significant provision added was an arbitration

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clause in bolded and capitalized text saying that every dispute between the company and a user has to be resolved with a binding arbitration.

As these T&C's are based under American rule, it makes really hard for a non-American to solve a dispute. Therefore, more than 600 million Instagram users are concerned with binding dispute resolution but only a few of them actually read this (9,6%).

Problem statement: For the purpose of this research we will answer to these questions on the basis of French users:

1. To which jurisdiction a French user is subjected when using Instagram which is based in California?
2. Can a French user solve a dispute against Instagram?
3. What are its options?

METHODOLOGY

In order to answer these questions, we will first analyse the T&C's of Instagram and describe their dispute resolution process. We will also take a look at how French law rules the use of such a service by taking the example of a trial between a French user and Facebook which had to change its T&C's recently.

For the purpose of this paper, written in English, it is important to say that the rules stated in the T&C's of Instagram are the same for every user i.e. translated in French, rules are the same.

Development of the feasible alternatives

1. **Arbitration** under the American Arbitration Association's rules
2. Local **"Small Claims" court**
3. State or Federal **Court of Santa Clara**, California
4. Bring the claim to a **French Court**

Even before the first « Basics Terms », Instagram highlights that all disputes have to be resolved with arbitration ruled by the AAA. Aside some exceptions (which can be resolved in the 3rd alternatives), arbitration is the main dispute resolution process possible. Theoretically, a French user can participate to the arbitration but he will have to go to California.

If they wish, Instagram users can bring claim to a local "small court". Usually, decisions are made very quickly but individuals cannot claim more than \$10,000 and again, the French user will have to come to California to solve the dispute.

A user can refuse the arbitration clause by simply sending a mail to Instagram. For these users and for the disputes that are not concerned by arbitration, the federal or state court of Santa Clara, California is competent to judge the claim.

Resolve the dispute in France may be an option for a French user but it is not written in the T&C's. It may take months or even years as a French Facebook user experienced in 2015. At that time, Facebook and Instagram had similar T&C's regarding disputes. It says that the governing law is based in California. Therefore, if the dispute is brought to court, it has to be "exclusively in a state or federal court located in Santa Clara, California". However, a French citizen can claim that it is not a "fair trial" as Frederic X. did in his trial against Facebook. Indeed, the 6th article of the European Convention of Human Rights says: « everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ». Thanks to the article 6, the French court decided on the 5 march 2015 that the arbitration clause was not "fair" for European citizen. Therefore, the claim was judged in the French Court of Paris after years of debating.

Now Facebook has changed its T&C's and distinguish one version for American Citizen and another for non-American citizen; which is not the case yet for Instagram.

Selection of a criteria

According to these alternatives, some methods seems more adapted because of their correspondence to specific characteristics. The ones which were chosen for the analysis are:

- **Cost:** Here, costs include the fee given to the possible attorney and the cost of travel and stay for a French citizen to come to California.
- **Claim:** Each solution has a different possible amount of money users can ask.
- **Convenience:** It is the right balance between a 'fair trial' and the right jurisdiction to be applied according to the claim and the nationality of the user.
- **Time:** The time needed to solve the dispute. A faster solution with a positive result will always be preferable.

Attribute	Arbitration	Local Small Claim Court	Santa Clara Court	French Court
Costs \$	Medium	Medium	High	High
Claim	High	Very Low	Very High	Very High
Convenience	Poor	Poor	Poor	Excellent
Time	Fast	Medium	Long	Very Long

French Court > Arbitration Local > Santa Clara Court > Small Claim Court

According to this quick analysis, a solution appears as the preferable one regarding the green marks: Bring the claim to a French Court. Although the many red marks for the other alternatives, the four solutions will be analyzed and compared below.

FINDINGS

Analysis and comparison of the alternatives:

- **Arbitration:** The speed at which disputes are resolved clearly makes it the fastest solution. However, by imposing a mandatory arbitration clause in its terms, Instagram is able to choose the decision-maker and control the nature of the proceeding. This solution could be the preferable if time is the most important criteria.
- **Small Claim Court:** The problem here is: the balance between the investment of time and money and the amount of money that a user can claim. Time and money invested may outweigh the amount claimable (no more than \$10,000) and makes it the least desirable solution.
- **Santa Clara Court:** In US arbitration and small claim court procedures are close to the French ones but here, the unknown procedure can be an obstacle for a French citizen: this may be not the most convenient process to solve a dispute. In addition, the cost of an attorney is much more expensive than an arbitrator. Moreover, the cost of the stay may be very onerous as it can last for weeks or months.
- **French Court:** As the type of claim or dispute is handled by the “Tribunal de Grand Instance” (court of first instance), the user will be able to ask for big damages and repairs but the time of the procedure may be very discouraging: it can take months or years as some Facebook users experienced. If time is not a problem, then this solution is preferable. By choosing this solution, the French user will not have to pay for any travel or accommodation in the US.

 Undesirable = (Worst case - attribute value) / (Worst case - best case)

 Desirable = (Attribute value - worst case) / (best case - worst case)

Attribute	Value	Formula	Dimensionless value
Costs	Low	Relative rank (4-1)/3	1
	Medium	Relative rank (3-1)/3	0,67
	High	Relative rank (2-1)/3	0,33
	Very High	Relative rank = (1-1)/3	0

Claim	Very Low	Relative rank = (1-1)/3	0
	Low	Relative rank (2-1)/3	0,33
	High	Relative rank (3-1)/3	0,67
	Very High	Relative rank (4-1)/3	1
Convenience	Poor	Relative rank = (1-1)/3	0
	Fair	Relative rank (2-1)/3	0,33
	Good	Relative rank (3-1)/3	0,67
	Excellent	Relative rank (4-1)/3	1
Time	Fast	Relative rank (4-1)/3	1
	Medium	Relative rank (3-1)/3	0,67
	Long	Relative rank (2-1)/3	0,33
	Very Long	Relative rank = (1-1)/3	0

Cost		Claim		Convenience		Time	
Low	4	Very Low	1	Poor	1	Long	1
Medium	3	Low	2	Fair	2	Medium	2
High	2	High	3	Good	3	Fast	3
Very High	1	Very High	4	Excellent	4	Very Fast	4

Attribute	Arbitration	Local Small Claim Court	Santa Clara Court	French Court
Costs	0,67	0,67	0,33	0,33
Claim	0,33	0	1	1
Convenience	0	0	0	1
Time	1	0,67	0,33	0
Total	2	1,34	1,66	2,33

Selection of the preferred alternatives:

As a result of this table, bringing the claim to a French court is the best solution for a French citizen to solve a dispute with Instagram. It will take long time but in France, the user is not disadvantaged as he knows the procedures and he will save money from accommodation and travel to California.

CONCLUSIONS

Initially, this paper was designed to answer the following questions:

1. To which jurisdiction is a French user subjected when using Instagram which is based in California?

Theoretically, if a French user has a dispute against Instagram, he has to solve it following the T&C's he agreed prior using its functionalities. As this contract is based on Californian law, he will have to follow a dispute resolution process designed in this state and for American citizen. He can go in California and follow the steps described in the Terms and Condition but as an European and French citizen he has the right to bring his dispute in a French court by proving that Instagram is breaking the 6th article of the European Convention of Human Right. Therefore, the claim will be judged in France under French jurisdiction.

2. Can a French user solve a dispute against Instagram?

Yes he can. As we saw, a French user has many options to solve a dispute against Instagram but almost all of them are really hard to implement. If he wants to do it in France, which looks like the most convenient, he first has to prove the Instagram is breaking European law. This procedure can take months or years and can discourage lot of European users. This way, Instagram is surely reducing the number of claims received from Europe.

3. What are the options?

As the T&C's of the app says, a French user can go for an arbitration, a small claim court or go on a trial in Santa Clara Court, California, depending on the claim, the time he has and on the budget he judges necessary to spend regarding his problem. Indeed, resolving a claim against Instagram as an American citizen can look pretty easy and not so expensive. On the contrary, resolving a dispute against Instagram from France is much more time consuming and expensive.

The other option that is not clearly written in the Terms and Conditions is to bring the claim to a French court. The user will be judged regarding French law, but the procedure can take years. If time is not a problem then this option is preferable.

BIBLIOGRAPHY

Conflict and the Advent of Social media in the Evolution of Society. (2017, May 12). Retrieved from <http://www.mediate.com/articles/JohnsonM1.cfm>

Social Media in the Workplace Advice & Guidance | Acas. (n.d.). Retrieved from <http://www.acas.org.uk/index.aspx?articleid=3375>

Terms of Use Instagram. (n.d.). Retrieved from <https://help.instagram.com/478745558852511>

Study on consumers' attitudes towards Terms and Conditions (T&Cs). (n.d.). Retrieved from http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf

Arbitration procedures and practice in France: overview. (n.d.). Retrieved from [https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

Facebook Terms of Service. (n.d.). Retrieved from <https://www.facebook.com/legal/terms>

Xavier@nextinpact.com. (n.d.). Action de groupe : Facebook tenu de répondre sous quatre semaines. Retrieved from <https://www.nextinpact.com/news/89094-des-milliers-d-europeens-reunis-dans-action-groupe-contre-facebook.htm>

Xavier@nextinpact.com. (n.d.). Conditions d'utilisations de Facebook ont changé. Retrieved from <https://www.nextinpact.com/news/93194-selon-etude-conditions-d-utilisation-facebook-violent-droit-europeen.htm>

Lipner, S. (2013, June 19). Is Arbitration Really Cheaper? Retrieved from <https://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost.html#6950e1414ed1>

European Convention ENG. (n.d.). Retrieved from http://www.echr.coe.int/Documents/Convention_ENG.pdf

A Lawyer Digs Into Instagram's Terms of Use. (2016, December 7). Retrieved from <https://petapixel.com/2016/12/07/lawyer-digs-instagrams-terms-use/>

MeasuringU: Do Users Read License Agreements? (n.d.). Retrieved from <https://measuringu.com/eula/>

About the Author



Guillaume Belisle Fabre

SKEEMA Business School
Paris, France



Guillaume Belisle Fabre is an MSc student in SKEMA Business School, Paris, France, majoring in Project and Programme Management & Business Development (PPMBD). He graduated from the Bayonne University in France and holds a Bachelor's degree in International Business. In 2015, he worked for KPMG as a Junior auditor in Paris. In the same year he helps foodora, a German start-up to develop in Bordeaux, France. He has both project management and business development background. He lives in Paris, and can be contacted at guillaumebelislefabre@gmail.com.