On-Line and Website Contracting for the Towing Industry

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Incorporation of website posted Terms & Conditions.

1. **Battle of the Forms** – Common Law vs. UCC
   - Services only
   - Goods & services
   - Goods only, UCC § 2-207
   - See, e.g., Battle of the Forms diagram at http://picjur.com/wp-content/uploads/2013/09/BOTF1.jpg. Similar helpful battle of the forms flowcharts are available online.
   - See e.g., *Crowley Marine Services, Inc. v. Vigor Marine LLC*, 17 F. Supp. 3d 1091 (W.D. Wa. 2014) (bid for repair services is an offer, acceptance of which formed contract; the contract did not include the indemnity clauses in the earlier solicitation for bids.)
2. **Requirements for Enforceability**.

Sufficient Notice:

- Web terms must be <u>specifically referenced</u> and <u>identified</u> beyond a reasonable doubt in base contract.
- "Specific and Conspicuous"

Knowledge and Assent:

- It must be clear that parties had knowledge of and assented to the incorporated terms.

Affiliated FM Ins. Co. v. Bridge Terminal Transp. Servs., 2015 U.S. Dist. LEXIS 19373 (SDNY 2015). Carrier sought to enforce arbitration clause contained in its online terms

and conditions, following damage to a container containing clothing. Shipper had shipped containers with Carrier on at least 10 prior occasions. On each shipment, Carrier provided Shipper with delivery receipts that included "BTT's services are subject to the terms, conditions and limitations of liability stated in BTT's Rules Tariff that are available upon request from BTT, or at http://bttinc.com."

Shipper argued that the delivery receipts were not part of the shipping contracts because they only given to Shipper on receipt of shipments, not before the shipments. The Court noted that terms repeatedly included in written confirmations between two parties could become part of subsequent contracts between the same parties. Here, the Shipper accepted the goods and the receipts, and never objected to the incorporated terms. The receipts specifically referenced and identified the Rules Tariff. The receipts and Rules Tariff became part of the shipping contract through course of dealings.

3. **Courts Favor Enforceability**. Courts view as basic contract law incorporation by reference (*Rest. (Second) of Contracts §132*). If sufficient notice and opportunity to find web based terms, courts will probably enforce.

- *One Beacon:* Sufficiently specific & conspicuous <u>even though:</u>
  - Web link referenced was not direct (4 steps to get to terms & conditions)
  - Website font – 4 pt.

4. **Course of dealing:** Terms repeatedly included in written confirmations may apply for subsequent transactions between parties.

Examples: *One Beacon* – oral contracts repeatedly followed by repair service orders incorporating web terms

Affiliated FM Ins. Co. – delivery receipts repeatedly incorporating web terms

One Beacon the Insurance Co .v, Crowley Marine Services, Inc., 648 F.3d 258, 2011 AMC 2113 (5th Cir.). Crowley contracted for barge repairs with a repair contractor, Tubal-Cain. During the repairs, an employee of Tubal-Cain's subcontractor was severely injured, and the workers sued Crowley. Crowley claimed Tubal-Cain's insurance applied to the lawsuit, and that Tubal-Cain breached its contractual obligation to add Crowley as an additional insured as required by the Crowley online purchase order terms.

Crowley had contracted with Tubal-Cain eight prior times, each under a Crowley issued repair service order that outlined scope of repairs but included no pricing and were not signed. Each included the following notice: "THIS RSO IS ISSUED IN ACCORDANCE WITH THE PURCHASE ORDER TERMS & CONDITIONS ON WWW.CROWLEY.COM/DOCUMENTS & FORMS, UNLESS OTHERWISE AGREED TO IN WRITING." The Crowley website terms and conditions included indemnity and insurance provisions. The parties never discussed the terms. Crowley did not provide Tubal-Cain a hard copy. Tubal-Cain's president testified he

never visited the website or investigated the reference to the terms, and the service order was sent after repair work had begun.

The *One Beacon* court noted that the parties had a history of business dealings and that standardized provisions became part of those dealings where they are accepted without objection. 2011 AMC at 2120. This principle has been applied in the context of the ship repair industry, where it is not unusual for parties to orally agree to repair work, with the repair contractor sending a purchase order or invoice containing terms and conditions after the repair work was begun or even completed. Id., at 2121-2122.

Admiralty law generally follows common law of contracts in resolving maritime contract disputes. Maritime contracts may validly incorporate terms from a website in the same manner that they may incorporate by reference terms from paper documents. Crowley did not need to provide paper copies. Id. at 2127. Tubal-Cain was bound by the online terms because the service order made clear reference to the online terms and Tubal-Cain had knowledge of and assented to the incorporated terms. The notice of the incorporated terms was reasonable where a reasonably prudent person should have seen them. Tubal-Cain's president admitted he could have found the terms on the Crowley website (despite the small font and 4-layer click through needed to reach them). Id.

In re Moran Philadelphia, 175 F. Supp.3d 508, 2016 AMC 1260 (ED Pa.). While a Moran Towing tug shifted a crane barge for a Philadelphia area shipyard, Rhoads, the barge's crane allided with and damaged an antenna platform on the aircraft carrier USS John F. Kennedy. Moran had provided tug services to Rhoads on eleven prior occasions. Moran's invoices included a notice reading:

"ALL HARBOR TUG SERVICES ARE RENDERED SUBJECT TO MORAN'S CURRENT SCHEDULE OF RATES TERMS AND CONDITIONS IN EFFECT FOR THE PORT IN WHICH THE SERVICE IS PERFORMED, INCLUDING WITHOUT LIMITATION, TERMS PERTAINING TO LIMITATION OF MORAN'S LIABILITY AND THE NON-PROVISION BY MORAN OF PILOTAGE. ADDITIONAL COPIES OF MORAN'S APPLICABLE SCHEDULE ARE AVAILABLE ON REQUEST OR MAY BE ACCESSED DIRECTLY UNDER THE SERVICES TAB AT MORAN'S INTERNET WEB PAGE: WWW.MORANTUG.COM.:

The Moran website had the terms appended to a form of towage agreement that if signed by a customer, designated Moran as its exclusive tug service provider in the Port of Philadelphia. This is followed terms and conditions paragraphs which include a $200,000 per occasion limitation of liability. Moran had previously sent out the terms and conditions in a mass mailing to some 500 customers. Rhoads had not received this mailing, as it was not at that time a Moran customer. Rhoads used other area tug companies, some of which had online terms and conditions referenced in their invoices, others did not. Rhodes argued that because it had not agreed to an exclusive dealings towing contract, the website terms and conditions did not apply to this particular Moran job. It also argued that there was no course of dealing or industry custom applying online terms and conditions where those same terms were not actually mailed to the specific customer, here Rhoads.

The court noted that it was the common practice in the assist towing industry to contract for towing services by the tow owner calling the tug owner's dispatcher requesting service, with the

remaining terms to be spelled out based on previous dealings. 175 F. Supp.3d at518. The court found that Rhoads had assented to the limitation of liability terms through sufficient prior. Rhoads had received multiple invoices on prior jobs, each referencing the website terms, and Rhoad's failed to object.

"Course of dealing" cases have a long history in the towing industry predating the internet. The *In re Moran Philadelphia* court reviewed multiple cases involving terms applicable by course of dealing in ship assist contracting, particularly relating to pilotage clauses. Id., at 518-52. See, e.g., *Stevens Technical Services v. Mormac Marine Enterprises, Inc.*, 2004 U.S. Dist. LEXIS 26388, 2004 A.M.C. 2513 (E.D.N.Y.) (Moran's pilotage clause applied to tug services because at least nine prior invoices for tug services set forth the pilotage clause and incorporated separate terms and conditions by reference); *Consolidated Rail Corporation v. M/V Lagada Beach,* 1983 AMC 1242 (E.D. Pa.) (Pilotage clause applied to tug services based on course of dealing consisting of four prior occasions where master signed "ship movements slip" containing pilotage clause and based on general use of pilotage clauses in the Port of Philadelphia); *Sun Oil Co. v. Dalzell Towing Co., Inc.,* 55 F.2d 63 (2nd Cir. 1932) (towboat company had provided its well-known schedule of rates and terms to tow owner on three prior occasions; telephone order for tug service deemed to include rate schedule pilotage clause). But see, *Tankers & Tramps Corp. v. Tug Jane McAllister*, 358 F.2d 896, 1966 AMC 1205 (2nd Cir.) (Insufficient proof of prior dealings to justify inference that the pilotage clause applied, insufficient evidence regarding custom in the trade or tow owner's knowledge of the tug rate schedule).

5. **Incorporation**. "Any services used or requested by Conexant [Customer] after termination will be made available only on and subject to Conference America's [Provider's] standard terms, conditions, and prices effective at the time the services are rendered . . . Terms & Conditions is available at www.yourcall.com" In *Conference America, Inc. v. Conexant Systems, Inc*., 508 F. Supp.2d 1005 M.D. Ala. 2007), this online incorporation clause was used to support deactivation service charges after Customer gave notice to cancel a service agreement that did not specifically address deactivation charges. The written service agreement Inc. the service provider's online terms, where specific charges for deactivation services were found.

*World Fuel Services Trading, DMCC, d/b/a Bunkerfuels v. Hebei Prince Shipping Company, Ltd.,*783 F.3d 507, 2015 AMC 929 (4th Cir.) is one of several recent cases dealing with bunkers order confirmations incorporating website terms and conditions, which attempt to invoke U.S. Maritime lien law or impose foreign arbitration requirements. Incorporation by reference of general terms into a contract is proper so long as the parties attain knowledge of the general terms or are given the opportunity to do so. . The 4th Circuit affirmed enforcement of a maritime lien against the owner's ship based on the district court's finding that plaintiff's bunker confirmation validly incorporated general terms, including a U.S. law clause, where it provided two means of obtaining them: (1) by asking for a copy, or (2) by direction to a website where it took two clicks to reach the text of the bunkers seller's sales terms.

6. **Oral contracts**. Incorporation by reference may be enforceable with evidence that sufficient notice of online terms was orally given.

7. **Changing web posted terms**. Mere posting of revised terms on website is insufficient notice. *Douglas v. U.S.D.C, Central Dist CA (Talk America Inc.),* 495 F.3d 1062 (9th Cir., 2007).

- For unilateral contracts, terms of service on website at time services rendered are only relevant terms.
  - Attempts to provide that the service provider can change posted website terms at any time without notice may not be enforceable as "illusory". *In re Zappos, Inc*., 893 F. Supp.2d 1058, 2012 U.S. Dist 14183 (Dist. Nev. 2102)
  - Can change terms and enforce on future sales of services. (*Conference America*)
- Clearly state how future modifications apply.
  - Example: State that terms may change and customer responsible to review terms before each order.
  - **Must archive written record of actual terms posted, showing dates changed and changes.**

8. **Contracting under the general maritime law**.

- Contract for repair of vessel is a maritime contract, governed by general maritime law. *Todd Shipyards Corp. v. Turbine Service, Inc.* 467 F. Supp. 1257, 1978 U.S.Dist. LEXIS 15735 (general state law rules apply to interpreting maritime contracts; bid letter "red letter clause" was properly incorporated into final contract).
- Common in maritime contracting to enter into oral agreement followed by purchase order with terms which effectively supplement, if there is evidence of prior course of dealing between parties. *Campbell v, Sonat Offshore Drilling*, 979 F.2d 1115, 1992 U,S, App. LEXIS 33726, 1993 AMC 1008 (5th Cir. 1992) (purchase order for offshore drilling support issued 13 days after project work started; P.O. indemnity and insurance clauses apply to subcontractor employee injury.).

9. **Maritime law applies principles from traditional contract law.**

- Clearest way to indicate intent is with signed contract.

  ". . . by my signature below, I certify that I have read and agree to the provisions set forth in this invoice and to the terms and conditions posted at http://www._____". *Int'l Star Registry of Ill. v. Omnipoint Mktg. LLC,* 2006 U.S. Dist LEXIS 68420 (No. D. Ill. 2006) (customer signature acknowledging online terms on invoices issued after services were provided is sufficient to incorporate arbitration clause in website terms.)

- Use clear incorporation language:
  - Browsewrap: terms and conditions are posted on website through hyperlink, customer must have notice that taking action or accepting services manifests assent.
  - "The terms and conditions posted at http://www.___ are incorporated by reference and made a part of the agreement between the parties."
  - Incorporation of separate terms must be clear. The doctrine of incorporation requires that there must be some expression in the incorporating document … of an intention to be bound by the collateral document. In *Affinity Internet, Inc. v. Consol. Credit Counseling Services*, 920 So. 1286, 2006 Fla. App. LEXIS 2783 (Fla. Ct. App. 2006) the court held that the incorporating document stating that it is "subject to" the collateral document was insufficient to incorporate the separate website terms containing an arbitration clause.
- Clickwrap: "Agree" / "Disagree" buttons – treated as signature. The software licensing and Internet service world has sparked a plethora of cases dealing with enforceability of clickwrap and browsewrap agreements or incorporated terms which can be helpful in determining proper incorporation of terms in maritime contract cases. A good starting point is *Hugger-Mugger, LLC v NetSuite, Inc.*, 2005 U.S. Dist. LEXIS 33003 (C.D. Utah 2005) (license agreement arbitration clause properly incorporated through clickwrap, whether customer actually read terms is irrelevant)