CLIENT ALERTS & INSIGHTS

Watch Your T&Cs! When Done Right, Terms and Conditions are Both Viable-And Valuable

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The era of the paper/hard copy bill of lading and/or rate confirmation is fading fast. Hard copies and paper *do* live on in various shipment schematics; however, increasingly, and at a very rapid rate, transactions between shippers, carriers, brokers and forwarders are conducted by, and memorialized in, electronic form via email, interactive website access and response, and-more and more-AI mechanisms. This electronic transactional flow assists in making the shipment booking, tracking, contracting and even claims processes more efficient and more easily preserved for both business and evidentiary purposes. A recent case involving just such a shipment confirmed the validity of an interactive, electronic T&C website shipment process, and also provided a handy road map to do it right.

In *ALG Worldwide Logistics v. Serenity Technologies, Inc*. (Ill. Ap. 2024; 18th Ill Judicial Dist.), Serenity brought an action against ALG for freight loss and damage to a large piece of machinery. Serenity made claims both under contract and the Carmack Amendment, the federal statute that provides such remedies for interstate transport of cargo. Serenity alleged that ALG had a contractual and statutory duty to properly transport and store the machinery, and that it failed to do so. Serenity sought in excess of $750,000 in damages related to the machinery.

ALG filed a motion for summary judgment, asserting that the contract at issue specifically prohibited Serenity's claims against ALG. The evidence showed that Serenity had signed a Credit Application and an Agreement that bound the parties as to the transport. Both the Credit Application and the Agreement incorporated by express reference ALG's "Rules and Regulations." Those Rules and Regulations could be found, *if the recipient looked for them*, at an ALG website that was identified in both the Application and the Agreement. The Agreement also expressly noted that a printed copy of the Rules and Regulations would be made available to the putative customer upon request to ALG. The evidence was also clear that the principal of Serenity, Dr. Suneeta Neogi, confirmed that yes, she *did* sign the Credit Application that contained that incorporation by reference language. The Rules and Regulations contained specific provisions that noted that ALG would not be liable for *any* loss or damage that might occur during the shipment. ALG also evoked evidence from Dr. Neogi that she knew how to use a website and was capable of searching the URL incorporated in the Credit Application. She also admitted that she did not review the Terms and Conditions until *after* learning of the damage to the machinery. Also, she did not request a hard copy of the terms and conditions, as was offered in the Agreement, and the incorporated Rules and Regulations. Consequently, ALG asserted that, in light of this schematic, Serenity had no claim for breach of contract and no claim against ALG under the Carmack Amendment.

The court first analyzed plaintiff's claims under the Carmack Amendment, noting that a motor carrier *can*

properly limit its liability under the Amendment if it gives the shipper a reasonable opportunity to choose between two or more levels of liability. The court then clarified a principle underlying tenet of the Carmack Amendment: i.e., that the Amendment applies only to motor carriers, railroads or freight forwarders, for *inter*state shipments. The court found that ALG was a transportation broker and not a common carrier. This fact had been admitted by Serenity. Therefore, Serenity had no claim under the Carmack Amendment, regardless of levels of liability.

Serenity contended that it was not made aware of the terms and conditions regarding liability restrictions, and that therefore, the court should not uphold them. The court found that there was no genuine issue of material fact that the Credit Application specifically included a provision stating that the applicant-here Serenity-agreed to the Terms and Conditions in the Rules and Regulations (tariff) document. The court noted that Credit Application even included the hyperlink to the Terms and Conditions and offered the written copy to be available. Dr. Neogi's admissions reinforced that the shipper had had the opportunity to click on the hyperlink to read and understand the Terms and Conditions. Serenity contended that in spite of this schematic, the Rules absolving ALG of all liability were unconscionable under state law.

The court rejected these contentions by the shipper plaintiff, finding that the law was very clear that if a contract shows an intent to incorporate another document by reference, the "additional provisions become as much a part of the contract as if they were expressly written in it," *citing Wilson v. Wilson* 217 Ill. at 3rd 844, 853 (1991); *W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. at 3rd 752 (1st Dist. 2004) ("the parties to a contract may incorporate by reference another document if that intention is clearly shown on the face of the contract"). The court then noted that the Terms and Conditions explicitly referenced the Rules and Regulations and provided the hyperlink, and thus: "It was made abundantly clear that the Rules and Regulations were to be made a part of the Agreement and had the hyperlink provided to allow accessibility to those Rules, indicating that Serenity was properly notified of the existence and incorporation of the Rules and Regulations *and should have read those terms prior to agreeing to them*." (emphasis added).

The court next analyzed whether it was unconscionable for ALG to contract away its liability in this manner. The court noted first that parties *may* generally contract away liability for their own negligence, but that agreements of this type are strictly construed against the party whom they benefit, and are subject to a fair and reasonable interpretation, based upon consideration of all the language and provisions. The court observed that typically, though, if there is no fraud or willful negligence, such contracts *will* be valid unless there is a substantial disparity in the bargaining position of the parties, which would militate against upholding the clause. The court found that their rationale for this Rule was that the courts should not interfere with the right of two parties to contract with one another if they freely and knowingly enter into a contractual arrangement.

The court then made some seminal findings as to the broker-shipper relationship. The court found that there is no "special relationship" between these parties, of any kind: "The role is property broker and shipper, which does not result in a relationship that would qualify as a 'special' such as an employer/employee relationship or a common carrier/passenger relationship." The court explained that there was really no disparity in the bargaining position of the parties, since they were both commercial entities. Thus, they are both viewed as being contractually sophisticated, rather than susceptible of being taken advantage of, like in a relationship between a commercial entity and an individual. Obviously, this is an important holding because it is applicable to all commercial entities,

regardless of their size. The court then found that public policy permitted this type of exculpatory clause eliminating liability, since it was not used to invalidate a claim involving fraud, willful or wanton conduct or strict liability. The court concluded that: "So long as the provisions themselves are not found unconscionable, the provisions exculpating ALG from liability are enforceable because even when strictly construed against ALG, the provisions are valid and there is sufficient evidence that Serenity had the opportunity to find out such terms, *but blatantly chose not to do its due diligence, which is not a proper defense*." (emphasis added).

The court then drilled down into the Terms and Conditions themselves. The court concluded that the Terms and Conditions were not made illegible but were pointed out in clear, legible wording. Also, the font was the same size as all other provisions in the Agreement and the Application. That similar font eliminated any argument that the provision was in small print and unable to be found or easily seen. The court also observed that there were clear headings within the Rules and Regulations themselves that would have alerted Serenity, and other shippers, to the limits of liability, including headings that stated "General Claims Liability" and "Liability Not Assumed." The court also observed that there were eight additional sections specifically limiting liability that were contained in underlined text, that would have provided adequate notice to Serenity of the liability limitations. The court found that nonetheless: "Serenity chose to forego reading the Terms and Conditions that were clearly pointed out and conspicuous." Consequently, there was no unconscionability regarding the Terms and Conditions and the liability limitations.

The court concluded that there are many cases that uphold limitations of liability such as this one in business relationships. As long as the provisions themselves are not unconscionable, then they are enforceable even when strictly construed against the drafter-here the transportation broker. The court closed with a stinging rebuke of the shipper Serenity: "There is sufficient evidence that Serenity had the opportunity to find out such terms, but blatantly chose not to do its due diligence, which is not a proper defense."

Practice Pointers/The Road Map

This case, and others like it across the country of late, provide an excellent didactic road map for shippers, brokers and carriers to use electronic interactive means to simultaneously provide easy access to contractual information while also providing a means to legitimately, and transparently, limit liability. The case also provides firm interpretive judicial support for the notion that commercial entities, regardless of their size, are bound by terms and conditions to which they are provided access. Finally, the case places a heavy burden on the recipients of commercial contracts of all kinds-to actually read them! So, the junctions of the road map are: (1) font size of liability limitations should be clear and legible and should be of similar font as the rest of the contractual terms; (2) within the contractual document itself, liability limitations should be called out throughout, with headings, captions, and also with italics, underlines or boldface. These practices guarantee that *procedural issues* will not impinge upon the liability limitations; (3) there should be a very clear incorporation by reference clause in any rate confirmation or contact, with a very clear, and easily accessible-and usable-hyperlink/link to any underlying rules, regulations or tariffs; (4) there should also be an opportunity provided to the recipient to request and receive a copy of any pertinent rules and regulations/tariffs/terms and conditions via email, hard copy or other means; and (5) the overall goal of this interactive schematic should be to make it user friendly, both to facilitate the commercial

transaction and its transparency, and for that liability limitation or exculpation clause to stand up in court.

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