

Enforceability of Online Terms and Conditions Incorporated into a Written Contract

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In an increasingly digital and cost-conscious business environment, many companies may desire to provide their standard terms and conditions of sale or purchase to vendors and customers electronically by posting those terms on the Internet, rather than providing a separate paper copy or printing terms and conditions on the reverse side of invoices, sales receipts, or purchase orders. This practice may also enable businesses to achieve better consistency of terms across contracts and provide their constituents with easier access to key terms. This article summarizes a growing body of case law addressing whether parties can be bound by terms that were not printed in or attached to the parties' written agreement but simply made available via one party's Web site.

As explained in Part I below, the strong trend in this case law is toward enforcement of online terms and conditions incorporated by reference into a written contract. There are exceptions to this trend, however, and jurisdictional differences may arise as the case law develops. So far, no North Carolina court has ruled on the enforceability of online terms and conditions incorporated by reference into a written contract. However, in light of the trend in other jurisdictions, it seems likely that online terms and conditions would be enforced by a North Carolina court, so long as the written contract makes clear and express reference to the online terms.

Drawing from facts deemed pertinent by courts in other jurisdictions in deciding whether to enforce terms and conditions posted on a party's Web site, Part II provides some recommendations for businesses to consider before providing standard terms and conditions exclusively or primarily through their Web sites.

Existing Case Law on Enforcement of Online Terms and Conditions.

Generally speaking, the existing cases trend toward enforcement of terms and conditions that are incorporated by reference into a written contract but accessible exclusively or primarily via the Internet.¹ Courts have enforced online terms and conditions when incorporated by reference into numerous forms of commercial agreements:

- Into a written agreement signed by both parties, see *Micrometl Corp.*, 2008 WL 2356511, at *2;
- Into a written order confirmation to which the buyer did not object, see *Oceanconnect.com, Inc.*, 2008 WL 194360, at *2;

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- Into a seller's invoice for information sold and services rendered, see *Int'l Star Registry of Ill.*, 2006 WL 2598056, at *1;
- Into a buyer's purchase order, see *Spartech CMD, LLC*, 2009 WL 440905, at *1; and
- Into an oral agreement, where the seller's representative directed the buyer to the seller's Web site to obtain a copy of the seller's privacy policy which was part of a broader Terms of Use accessible online, see *Greer*, 2007 WL 3102178, at *1.

Although many of the applicable cases involve parties' attempts to incorporate online terms and conditions through purchase orders, order confirmations, and invoices, there appears to be no distinction in the enforceability of online terms based on the nature of the document into which the terms are incorporated.²

Many courts have simply assumed without analysis that online terms and conditions incorporated by reference into a written agreement are enforceable as part of the written agreement. See, e.g., *Spartech CMD, LLC*, 2009 WL 440905, at *5 (noting that "Michigan law permits a party to incorporate terms or documents from other writings" and that "failure to inquire about terms and conditions referenced in an agreement is no defense"); *In re National Steel Corp.*, 316 B.R. 287, 294 (Bankr. N.D. Ill. 2004) ("It is undisputed that the Price Proposal, Purchase Order and Terms and Conditions [available on the buyer's website] created a contract ... between the parties."). Where the courts have discussed at length whether online terms and conditions are enforceable, the analysis has generally focused on whether the party seeking to avoid enforcement of the online terms had adequate notice of those terms. For example, in *International Star Registry of Illinois v. Omnipoint Marketing, LLC*, No. 05 C 6923, 2006 WL 2598056 (N.D. Ill. Sept. 6, 2006), the court stated that a document may be incorporated by reference into a contract "if the contract describes the document and expresses the parties' intent to be bound by its terms" and if the language providing for incorporation is "clear and specific." *Id.* at * 3; see also *Micrometl*, 2008 WL 2356511, at *4 ("[I]n order for a document to be incorporated into a contract, the parties must have clearly and specifically intended incorporation."). Notably, in at least one case, online terms and conditions have been enforced even though the document incorporating those terms and conditions did not provide the web address where the terms could be accessed. See *Micrometl*, 2008 WL 2356511, at *2.

In the rare instances in which the courts have refused to enforce online terms and conditions that one party attempted to incorporate by reference, the courts have found that the party seeking to avoid the effect of the online terms did not have adequate notice of and access to the online terms. For instance, in *Manasher v. NECC Telecom*, No. 06-10749, 2007 WL 2713845 (E.D. Mich. 2007), the court refused to enforce an arbitration clause found in the defendant's online terms and conditions where the online terms were referenced only at the bottom of the second page of the

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defendant's invoice and in ambiguous language. Id. at *2. That passing reference in the defendant's invoice stated only that "[Defendant's] Agreement 'Disclosure and Liabilities' can be found online at www.necc.us." Id. In the court's view,

[This] language does not betray a clear intent that the Disclosure and Liabilities Agreement be considered part of the contract between the parties. Nothing in the statement clearly indicates that the

Disclosure and Liabilities Agreement applies to the service contract between the parties, that it forms any part of the agreement between the parties, or that it is intended to be incorporated into the agreement between the parties. Id. at *6.

Similarly, in *Feldman v. United Parcel Service, Inc.*, No. 06 Civ. 2490(MHO), 2008 WL 800989 (S.D. N.Y. Mar. 24, 2008), the court found an issue of fact existed as to whether the plaintiff had adequate notice of UPS's published tariff so as to be bound by a limitation of liability provision in the tariff. Id. at *17. In that case, the plaintiff – who was suing for the loss of a diamond ring valued at greater than \$50,000, which he had shipped via UPS – was instructed by a UPS employee to prepare a shipping label using a self-service computer kiosk in a UPS store. Id. at *1. The computer program the plaintiff used offered a link labeled "Terms of Service" but did not require the plaintiff to view the terms of service or opt out of viewing the terms of service in order to complete a transaction. Id. at *2. If the plaintiff had clicked on the "Terms of Service" link, the computer would have displayed a pop-up window, which would have stated that his shipment was subject to restrictions set forth in the UPS Tariff, and that the tariff is available on the UPS Web site or upon request from a UPS store employee. Id. Nothing in the record showed whether UPS employees actually had copies of the UPS Tariff to provide to customers on request.³ Id. at 14. Based on this evidence, the court found that a disputed question of fact existed as to whether the plaintiff "was given a reasonable opportunity to learn of the limitation in question" and therefore bound by it. Id. at *17.

Among the courts that have addressed the issue, the District Court of Appeal of Florida has taken the most restrictive view of incorporation of online terms into written agreements. In *Affinity Internet, Inc. v. Consolidated Credit Counseling Svcs., Inc.*, 920 So. 2d 1286 (Fla. Ct. App. 2006), the court refused to enforce an arbitration clause contained in a service provider's online terms and conditions where the written agreement between the parties stated that it was "subject to all of [the service provider's] terms, conditions, user and acceptable use policies located at [the service provider's website]." Id. at 1287. In the court's view, the "subject to" language of the contract did not constitute "clear language evidencing an intention of the parties to incorporate the terms of the collateral document." Id. at 1288. The court also noted that the terms and conditions were not attached to the parties' agreement and that the plaintiff "was never at any time subsequent to the

signing of the contract given a copy of the collateral document or the information contained therein.” Id.⁴

Although there are no published decisions in North Carolina addressing the enforcement of online terms and conditions, North Carolina courts have recognized that the terms of external documents may be incorporated by reference into a written contract, provided that the contract specifically refers to the document to be incorporated. See, e.g., *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921-22 (2008); *House v. Stokes*, 66 N.C. App. 636, 639, 311 S.E.2d 671, 674 (1984). Based on this case law, it appears likely that a North Carolina court addressing the issue would find online terms and conditions to be enforceable, so long as the written agreement clearly and explicitly stated that the online terms were incorporated by reference.

Recommendations

As illustrated above, most courts that have addressed the issue have found that terms and conditions posted on a Web site and incorporated by reference into other purchase and sale transaction documents, such as written contracts, purchase orders, confirmations, and invoices, are enforceable. There are, of course, exceptions to this trend, and jurisdictional variations in this area may develop over time. The following measures may help to increase the probability that a business’s online terms and conditions will be enforced:

1. The written agreement (or invoice, purchase order, or the like) should state in a conspicuous location that it is governed by and subject to the company’s standard terms and conditions of sale, which are accessible at the company’s Web site. Consider placing this language in all capital letters or boldface type, as with a disclaimer of warranties or waiver of jury trial or similar rights. See *Manasher v. NECC Telecom*, No. 06-10749, 2007 WL 2713845 (E.D. Mich. 2007).
2. The terms and conditions to be incorporated should be identified beyond doubt. For example, if the document contained on the company’s Web site is labeled “XYZ Corp. Standard Terms and Conditions”, the reference in the contract to the document to be incorporated should be identical. Likewise, the contracting party should be easily able to find and open the document on the company’s Web site, and the description of the document on the Web site should match the description in the contract.
3. If the document provided to the other party to the contract is to be executed by the other party, it should state clearly that by executing the document, the party acknowledges having read and agrees to and intends to be bound by the online terms and conditions. If the document will not be signed by the other party, it should state specifically that by purchasing

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goods/services from or selling goods/services to the company, the other party agrees to and intends to be bound by the company's online terms and conditions.

4. The document provided to the other party should state specifically that the online terms and conditions are "incorporated by reference" into the document delivered to the other party. See *Affinity Internet, Inc. v. Consolidated Credit Counseling Svcs., Inc.*, 920 So. 2d 1286, 1288 (Fla. Ct. App. 2006) (refusing to enforce arbitration clause in online terms and conditions because written contract stated only that it was "subject to" the online terms and did not state that the online terms were incorporated by reference in the written contract).
5. Although the courts have not required it in all cases, it would be wise to provide the full web address where the terms and conditions may be viewed or downloaded. This will limit the other party's ability to claim it did not have reasonable access to the terms and conditions. See *Feldman v. United Parcel Service, Inc.*, No. 06 Civ. 2490(MHO), 2008 WL 800989 (S.D.N.Y. Mar. 24, 2008). If it is anticipated that the Web address or link may change, the contract should also note that the Web address includes any successor Web site of the company.
6. Hard copies of the terms and conditions should be available and provided to the other party upon request. See *Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, No. 2:04-CV-592TC, 2005 WL 2206128 (D. Utah Sept. 12, 2005).
7. Any "Entire Agreement" or "Integration" clause should explicitly reference the document to be incorporated.
8. If it is contemplated that the terms and conditions may change over time, that should be clearly stated and agreed to by the parties in the underlying contract. Even so, it is not clear that the other party would be bound by any unilateral changes after the time the contract was made.
9. Problems of proof may arise in an after-the-fact contract dispute as to which set of terms and conditions was in effect at the time the contract was made. See *Fu Da Int'l Ltd. v. Kohl's Dep't Stores, Inc.*, No. 08 Civ. 5164, 2009 WL 151727 (S.D.N.Y. Jan. 21, 2009). To avoid this, the company should maintain, in the regular course of business, an archive of its standard terms and conditions that clearly identifies the period of time in which each version of its terms and conditions was in effect. The company should also keep track of any bugs or errors in its Web site that may temporarily limit access to the terms and conditions so as to counter potential claims that technical problems prevented contracting parties from accessing the online terms at the time of making the contract.

End Notes

1. A large portion of these cases arise from a party's attempt to compel arbitration or enforce a forum selection clause. See, e.g., *Spartech CMD, LLC v. Int'l Automotive Components Grp. N. Am., Inc.*, No. 08-13234, 2009 WL 440905 (E.D. Mich. Feb. 23, 2009) (arbitration); *Fu Da Int'l, Ltd. v. Kohl's Dep't Stores, Inc.*, No. 08 Civ. 5164(HB), 2009 WL 151727 (S.D.N.Y. Jan. 21, 2009) (forum selection); *Pentecostal Temple Church v. Streaming Faith, LLC*, Civil Action No. 08-554, 2008 WL 4279842 (Sept. 16, 2008) (forum selection); *Micrometl Corp. v. Tranzact Techs., Inc.*, No. 1:08-cv-0321, 2008 WL 2356511 (S.D. Ind. June 5, 2008) (forum selection); *Oceanconnect.com, Inc. v. Chemoil Corp.*, Civil Action No. H-07-1053, 2008 WL 194360 (Jan. 23, 2008) (arbitration); *Greer v. 1-800-Flowers.com, Inc.*, Civil Action No. H-07-2543, 2007 WL 3102178 (S.D. Tex. Oct. 3, 2007) (forum selection); *Int'l Star Registry of Ill.*, No. 05 C 6923, 2006 WL 2598056 (N.D. Ill. Sept. 6, 2006) (forum selection); *Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, No. 2:04-CV-592TC, 2005 WL 2206128 (D. Utah Sept. 12, 2005) (forum selection).

2. Purchase orders and invoices for goods may be the subject of a "battle of the forms" to be resolved under Section 2-207 of the Uniform Commercial Code. In that case, the question of whether online terms and conditions are incorporated into a buyer or seller's form would have to be determined prior to the resolution of the battle of the forms.

3. In other cases, courts have found that a party's practice of providing hard copies of online terms and conditions to customers who requested them supported incorporation by reference. See *Hugger-Mugger, L.L.C.*, 2005 WL 2206128, at *5.

4. The court in *Manasher* also cited the fact that the defendant's online terms and conditions containing the arbitration clause were never given to the plaintiff as a reason for refusing to enforce the arbitration provision.

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