Online Terms and Conditions: Are They Enforceable, Can They Be Changed, and What Should You Look Out For in Your Contractual Relationships?

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In an increasingly digital business world, more and more companies are providing their standard terms and conditions of sale or purchase online for review by suppliers and customers. While incorporating online terms and conditions by reference can result in consistency of terms across contracts and purchase orders, and provide counter-parties with easy access to such terms, such a practice raises a number of questions about enforceability, especially where online terms are subsequently modified with little or no notice to the counterparty. This article summarizes relevant legal issues and provides some pointers to help avoid common pitfalls related to online “T’s & C’s.”

CONTRACT FORMATION

Before examining the enforceability of online terms and conditions, it is helpful to briefly review the contract formation process.

An enforceable contract requires an offer, acceptance, consideration, and, in some cases, a writing.

In some instances, there is no long-term agreement in place and each purchase order (offer), and supply of goods and invoice (performance) constitutes its own contract. Typically, either the purchase order or invoice (or both) will include terms and conditions, or will reference terms and conditions that are maintained online.

In other instances, the relationship is governed by a master agreement, signed by both parties, that constitutes the “contract” and the purchase orders and invoices are simply the means used to facilitate performance under the contract. The master agreement will, almost always, contain terms and conditions in the written document or “incorporate by reference” terms and conditions that are maintained online.
It is important to note that legal disputes that arise under each of these scenarios, particularly the “order by order” contract situation, often involve other issues that are beyond the scope of this article, for example “statute of frauds” (whether a writing is required) and “battle of the forms” (which contract terms control). (Under the UCC, if the parties’ writings differ, the “contract” will include the terms on which the parties’ writings are consistent, together with any additional terms supplied by the UCC.)

ARE ONLINE TERMS AND CONDITIONS ENFORCEABLE?

Generally speaking, courts will enforce terms and conditions that are incorporated by reference into a written contract but are only available online. A 2009 decision by the U.S. District Court for the Eastern District of Michigan is instructive; however, as with many issues of contract interpretation, a case-by-case, fact-specific analysis is required.

In *Spartech CMD, LLC v. Int’l Auto. Components Group N. Am., Inc.*, 2009 U.S. Dist. LEXIS 13662 (E.D. Mich. 2006), defendant International Automotive Components Group’s purchase orders incorporated by reference terms and conditions found on its website. Plaintiff Spartech disputed the enforceability of the terms and conditions, particularly an arbitration clause, arguing, among other things, that it could not be bound by an arbitration provision in a set of terms and conditions that it never received.

The court disagreed, finding that under Michigan law a written contract could incorporate by reference an ancillary document or terms – including online terms. “Michigan law permits a party to incorporate terms or documents from other writings.” *Id.* at *13 (citations omitted). Spartech’s failure to review the online terms was no defense. “Furthermore, failing to inquire about terms and conditions referenced in an agreement is no defense: ‘the parties are bound by those additional terms even if they have never seen them.’” *Id.* (citations omitted).

The Spartech decision seems to be the rule, rather than the exception. There appears to be a trend in courts across the country to enforce online terms and conditions as incorporated into many different forms of commercial contracts. A few examples include:

- *Fadal Machining Centers, LLC v. Compumachine, Inc.*, Case No. 10-55719 (9th Cir., Dec. 15, 2011): In an unpublished opinion, the U.S. Court of Appeals for the Ninth Circuit upheld a district court decision to enforce the online terms and conditions at issue rather than the parties’ written agreement where the online terms and conditions expressly stated that they governed in the event of a conflict.

- *International Star Registry of Illinois v. Omnipoint Marketing*, LLC 2006 WL 2598056 (N.D. Ill. Sept. 6, 2006): Online terms and conditions incorporated into seller’s invoice enforceable “if the contract describes the document and expresses the parties’ intent to be bound by its terms.”

- *In re National Steel Corp.*, 316 B.R. 287 (Bankr. N.D. Ill. 2004): “It is undisputed that the Price Proposal, Purchase Order and Terms and Conditions [available on buyer’s website] created a contract.”

There are decisions in which courts have refused to enforce online terms and conditions. In such cases, courts often find that there was a lack of notice to the party seeking to avoid being bound by the terms. In *Manasher v. NECC Telecom*, 2007 U.S. Dist. LEXIS 68795 (E.D. Mich. 2007), a case interpreting Michigan contract law,
the U.S. District Court for the Eastern District of Michigan considered whether to enforce online terms and conditions that one party attempted to incorporate by reference into a contract.

In refusing to enforce an arbitration clause in the defendant’s online terms and conditions, the court held that an ambiguous reference to the terms found at the bottom of the second page of the defendant’s invoice was insufficient to put the plaintiff on notice that the terms were to be incorporated into the parties’ contract. “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.

**CAN UPDATES TO ONLINE TERMS AND CONDITIONS MADE AFTER A CONTRACT IS FORMED BIND THE COUNTER-PARTY?**

One of the benefits of maintaining terms and conditions online and incorporating them by reference into written agreements is the ability to maintain consistency and uniformity of contractual language across invoices, sales receipts and/or purchase orders. But terms and conditions often need to be updated, and the question arises as to whether the counter-party can be bound by such unilateral updates.

While there are few court decisions that deal directly with this issue, the answer seems to be that such updates will be enforced as long as the party to be bound was made aware of the existence of or possibility of updates, even if actual notice was not provided. This issue, too, requires a case-by-case analysis.

*In Briceno v. Sprint Spectrum, L.P., 911 So. 2d 176 (Fla. Ct. App. 2005)*, the court ruled that a customer who was informed of, but did not read, updates to terms and conditions that were found on Sprint’s website, was bound by such updates. The court did not require that the actual amended terms and conditions be sent to the customer, but rather held that it was sufficient that Sprint noted on its invoices that its terms and conditions were periodically updated and identified two ways to access and review changes.

*Briceno* involved a consumer and large corporation. One would expect a court to apply an even lower standard in a case involving sophisticated commercial parties. While it is not entirely clear that a party would be bound by unilateral changes to terms and conditions after a contract is entered into, there is a strong likelihood that, as in *Briceno*, such updates would be enforced if the underlying contract clearly states that such terms may change over time.

**HOW SHOULD THIS ISSUE BE DEALT WITH IN THE REAL WORLD?**

Parties seeking to incorporate by reference and enforce online terms and conditions should:

- Conspicuously state on all purchase orders, master agreements, invoices and other relevant written contracts that such documents and agreements are governed by the company’s standard terms and conditions, that such online terms and conditions are “incorporated by reference” into the relevant document or agreement, and provide specific, direct instructions on how to access the terms and conditions on the company’s website.
Include a provision in long-term purchase or supply agreements that the online terms and conditions are subject to change, and that the terms and conditions in effect at the time of each new order or delivery shall be those on the website at the time of such order or delivery.

Notify counter-parties of any changes to online terms and conditions, either on subsequent purchase orders or by other means.

In order to prove what terms and conditions were in effect at a particular point in time, maintain records of changes to online terms and conditions, including when they were made, and archive prior versions of terms and conditions.

Counter-parties to such a contract should:

- Review contract “boilerplate,” as well as provisions of purchase orders and invoices, very carefully for language that attempts to “incorporate by reference” online terms and conditions. By not identifying and objecting to such provisions, a party may find itself bound to terms and conditions it never anticipated.

- If a document or contract provides instructions to access online terms and conditions, they should be accessed and reviewed by legal counsel.

- Invoices and purchase orders should also be reviewed for notification of updates to existing online terms and conditions.