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WHAT MAKES STANDARD TERMS AND CONDITIONS ENFORCEABLE?

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The enforcement of Standard Terms and Conditions is important, especially when involving "limitation" and "exclusion" clauses that mitigate the risks of doing business. A volume-based equipment vendor, for example, will rarely be in a position to sell at competitive rates unless its liability is contractually limited. It is often Standard Terms and Conditions that accomplish this goal, but even given their importance, Standard Terms and Conditions can often be overlooked by contracting parties as mere "boilerplate" or "legalese". Likewise, when multiple parties to a contract come to the table with competing Standard Terms and Conditions, it can often be unclear as to whose terms and conditions are actually included in the final contracts. With these difficulties in mind it is useful to consider how the courts view the enforcement of Standard Terms and Conditions.

At the most basic level, an enforceable contract requires (i) a "meeting of the minds" laying out the agreement between parties, and (ii) the exchange of "valuable consideration" between parties to secure the bargain that has been struck. Absent these elements, courts are generally unable to enforce an agreement. When it comes to Standard Terms and Conditions, however, do the courts require that a "meeting of the minds" involve a detailed review of each and every provision printed as small text at the bottom and reverse of standard forms? What view do the courts take when a party does not actually read Standard Terms and Conditions?

The short answer is that – generally speaking – two elements are required by the courts before they will enforce Standard Terms and Conditions: **Notice** and **Incorporation**. A contracting party must, first, have notice of Standard Terms and Conditions before the contract is entered into and, second, Standard Terms and Conditions must be properly incorporated into the contract itself. This newsletter explores the court's view of the first of these two elements.

Part 1: Notice

It would prove to be too cumbersome if, in the course of everyday business, each and every Standard Term and Condition had to be individually reviewed by all parties to a contract before a "meeting of the minds" could be said to have occurred. It would simply be too onerous, for example, if each and every sale of a standard piece of equipment involved a detailed discussion of all of the Standard Terms and Conditions between vendor and purchaser. On the other hand, because Standard Terms and Conditions often contain "limitation" and "exclusion" provisions that may prove to be particularly onerous for a contracting party, it would be unjust for the courts to enforce Standard Terms and Conditions automatically and without exception. As a result, the courts have taken a pragmatic approach to enforcement. Rather than requiring that contracting parties must actually turn their minds to each and every term in a contract, the courts have taken the view that a contract can be enforced so long as a party has **prior notice** of the Standard Terms and Conditions incorporated therein. As Professor G.H.L. Fridman[1] warns, however:

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1 G.H.L. Fridman, *The Law Of Contract*, 4th ed. (Toronto: Carswell, 1999) at 610.

> Unless a party has taken reasonable steps to draw the other party's attention to the contents, or some particular contents, of the proposed contract, the consent of the offeree to the offer will not be taken to extend as far as the term or terms of which the offeree is ignorant. The test is whether the offeree knew the proposed term or terms or had reasonable means of knowledge of the term or terms as a result of the offeror's actions.

In other words, for Standard Terms and Conditions to be enforceable, steps must be taken to ensure that the other party has "reasonable means of knowledge" of the terms and conditions during the time leading up to the execution of the contract. This has implications when Standard Terms and Conditions are sent and received in the typical course of day-to-day operations, and particularly when printed in small type at the bottom or reverse side of a form. Such a situation was considered by the courts in *Finning v. BHP Diamonds Inc.*.[2] In this case, important terms and conditions (including a limitation clause) were found on the reverse side of a series of "Daily Field Service Activity Reports" issued in relation to work completed under an overarching retainer agreement. As Justice Schuler stated:

> [Finning] argues that the Activity Report was like an offer made by Finning which BHP accepted without objection and the contents of which therefore bind BHP. The difficulty with this argument is that the evidence indicates that the Activity Reports were not tendered to BHP until after the work was done. Whether the limitation clause is effective surely must depend (at least in part) on whether BHP had notice of its existence prior to the work done by [Finning]. … In this case, it would appear that the work done by [Finning] was done under the main retainer agreement and the Activity Report submitted only after its completion.

As a result, Justice Schuler found that the parties did not have a "meeting of the minds" with respect to the limitation clause found on the reverse of the Activity Reports; the terms and conditions were **not** found to form a part of the contract between the parties. By the same token, however, Justice Schuler of the NWT Supreme Court said that:

> [T]his case bears more similarity to the ticket cases than it does, for example, to *Eagle Dancer Enterprises Ltd. v. Southam Printing Ltd.*.[3] In *Eagle Dancer*, the limitation clause was contained in the original purchase order or quotation which the plaintiff had accepted and the clause was therefore found to form part of the contract between the parties.

Accordingly, Justice Schuler's decision in *Finning* endorses the view that knowledge of terms and conditions on the back of a document, where the document was submitted **prior** to the formation of a contract, is sufficient to establish that those terms and conditions form a part of an overall contract. In the *Eagle Dancer* case, Justice MacDonnell of the B.C. Supreme Court found that an experienced businessman familiar with an industry practice of including terms and conditions on the reverse side of quotation forms was bound by those terms and conditions even though he may not have explicitly read them. In this sense, the courts deem knowledge of terms and conditions to exist on a very low threshold. In other words, the courts will accept that notice of Standard Terms and Conditions has been given, even if the notice is not explicit or dramatic.

Care should be taken, however, when dealing with consumers, as the courts are inclined to take a more restricted view when non-commercial parties are involved. In consumer contracts, courts are more likely to look beyond express words to interpret a contract to the favour of the consumer. Such was the case in the leading decision in *Tilden Rent-A-Car Co. v. Clendenning*.[4] In that case, a consumer who signed a car rental agreement in a hurry was not bound by an onerous standard term excluding insurance coverage. There, because the term was not explicitly brought to the attention of the consumer, it did not apply.

When dealing with contracts between commercial parties, however, the words of a contract are normally given effect by the courts on the presumption that the parties have agreed to the actual words that appear

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2 (1999), 46 C.L.R. (2d) 101 (N.T. S.C.)

3 (1992), 6 B.L.R. (2d) 45 (B.C. S.C.)

4 (1978), 83 D.L.R. (3d) 400 (Ont. C.A.)

in the contract documents. For example, in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*,[i] even though the facts were similar to the *Tilden* case, the outcome was opposite. As Justice Robins of the Ontario Court of Appeal stated:

> This is an ordinary commercial contract between business people … In this commercial setting, in the absence of fraud or other improper conduct inducing the plaintiff to enter the contract, the onus must rest upon the plaintiff to review the document and satisfy itself of its advantages and disadvantages before signing it. There is no justification for shifting the plaintiff's responsibility to act with elementary prudence onto the defendant.

In other words, in an ordinary commercial contract it is the responsibility of the business people making the agreement to review any Standard Terms and Conditions that they have been given notice of. The courts will take a dim view of such parties to a contract who thereafter claim ignorance of the terms, and will generally enforce a contract against such a party. Accordingly, in order for Standard Terms and Conditions to be enforceable, notice of those terms and conditions must be given by way of a "reasonable means of knowledge" for the contracting parties. This notice must be provided prior to the formation of the contract if the courts are to enforce an agreement. Care should be taken when dealing with consumer contracts, especially where particularly onerous terms are not brought to the explicit attention of a consumer. According to the courts, in an ordinary commercial context Standard Terms and Conditions are generally enforceable on the presumption that contracting parties have agreed to the actual words that appear in the contract documents.

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[i] [1997] 148 D.L.R. (4th) 496 (Ont. C.A.)