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# Application of Standard Tow Terms: Notice, Actual Knowledge & Intent

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The standard form contract is a document that many are familiar with. From purchasing a ski-lift ticket to dropping clothes off at the dry cleaners, standard form contracts have become quite prevalent in modern commerce. Rather than negotiate and draft separate contracts for each transaction, businesses often employ the use of their standard forms containing their own pre-set terms that are intended to govern their business transactions. Colloquially, these are sometimes referred to as the "fine print" at the bottom or the backside of a document.

The use of standard form contracts is a practice that is regularly employed by many in the towboat industry. Customers who approach a towboat owner for its services are often presented with some "document" that purports to set out the conditions upon which the towboat owner will conduct a tow. These standard terms are sometimes communicated prior to the tow, such as in a pre-voyage contract, and at other times, after the tow, such as in an invoice. Although the specific terms in any given contract may vary significantly between towboat owners, they are frequently one-sided limiting the rights of the owner of the goods and enhancing the protections of the towboat owner.

The term most often seen is one that excludes the towboat owner, its master or its employees of liability for any damage to goods being towed regardless of how such damage occurs. This exclusion of liability clause attempts to place the risk of damage on the owner of the goods and precludes the owner of the goods from recovering against the towboat owner notwithstanding its negligence during the tow. Naturally, when a tow proceeds without incident, this clause has no significance; instead, it is when goods are damaged in tow where the applicability of this exclusion clause comes to the forefront. The question that ensues is whether the "fine print" governs the respective rights between the parties.

The purpose of this paper is to examine the law governing standard form contracts from a general perspective and then to discuss how the courts have specifically approached standard form contracts in the towboat industry.

More specifically, the paper examines contract rules that must be met for Courts to apply standard form contracts, the fact that standard practice in the towboat industry fails to meet those standard rules, and some additional factors that may still allow towboat companies to rely on their standard terms despite the fact that the towboat companies are operating in breach of standard rules of contract.

**Standard Form Contracts – Generally**

Standard form contracts are governed by general contractual principles; therefore, in order to be enforceable, one must still show offer, acceptance and consideration in order for there to be a valid agreement between the parties. Unlike traditional contracts, however, there is typically no negotiation of the terms and conditions in a standard form contract. It is a "take it or leave it" situation for the customer. Because of this unique dynamic, the critical point of consideration in disputes over standard terms is whether the parties assented, either expressly or implicitly, to such terms.

Where an express agreement is demonstrated, upholding the standard terms becomes an easy task. Evidence in support of an express agreement may include:

1. a statement of agreement, whether orally or in writing, to the terms by the affected party;

2. a signature confirming that the affected party read, reviewed and understood the standard terms; or

3. whether the affected party obtained legal advice prior to the agreement.

Each of the above may show that the customer understood the bargain that it was entering into.

The situation becomes more complicated where the customer alleges that the standard terms did not form part of the agreement. This may occur where the standard terms are:

1. provided after the agreement (e.g. in an invoice);

2. not brought to his or her attention; or

3. illegible (e.g. very small print).

Under these circumstances, proving that the party adversely affected by the standard terms knew of and agreed to the standard terms at the time of the agreement can be challenging. The task is to show that the affected party had actual or constructive knowledge of the standard terms and agreed to them either expressly or implicitly by conduct at the time of the agreement.

It is important to highlight that the law on the interpretation of standard form contracts is quite extensive and complex going beyond the scope of this paper. However, in assessing whether the standard terms form part of an agreement, two primary considerations include the adequacy of notice of the standard terms and the timing of such notice. These factors were discussed at length by the Ontario Court of Appeal in *Trigg v. MI Movers International Transport Services Ltd.*, 1991 CarswellOnt 135 (C.A.).

In *Trigg*, the plaintiff and the defendant entered into a written agreement for the transport of two automobiles to Ireland. The plaintiff signed a standard form contract, on the back of which contained a limitation of liability clause. The automobiles were damaged during transport and the primary issue before the court was whether the defendant was entitled to rely on the limitation clause.

On the adequacy of notice, the Court adopted the words of G.H.L Fridman, *The Law of Contracts in Canada*, 2d ed. (Toronto: Carswell, 1986):

> … 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 terms of which the offeree is ignorant.

The court concluded at paragraph 10:

> Thus, the general rule is that a limitation or exemption clause is not imported into a contract unless it is brought home to the other party so prominently that he or she must be taken to have known it and agreed to it, see, (e.g., *Mendelssohn v. Normand Ltd.*, [1970] 1 Q.B. 177…)

At paragraph 14, the Court continued its discussion on timing of notice:

> Once the issue is framed so that the adequacy of the notice determines whether the clause was imported into the agreement, then the timing of the notice becomes crucial. Essentially, a term cannot be included in an agreement unless it was contemplated at the time that the agreement was concluded, or was added thereto by a proper variation or modification. As stated in Chesire, Fifoot and Furmston's *Law of Contract*, 11th ed. (New Zealand; Butterworths, 1986), at p. 152:
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> > The time when the notice is alleged to have been given is of great importance. No excluding or limiting term will avail the party seeking its protection unless it has been brought adequately to the attention of the other party before the contract is made. A belated notice is valueless.

Ultimately, the Court of Appeal upheld the trial judge's decision that the respondent was not aware of the limitation clause at the time of the contract and therefore, it did not limit the appellant's liability.

The facts in *Trigg* involved an isolated transaction; however, standard forms are also often used in ongoing business relationships (as in the two boat industry). In an ongoing business relationship, different considerations arise and the adequacy of notice and timing of notice may be established through a prior course of dealings or through custom or usage in the industry.

Briefly, past dealings refer to dealings between the same parties, whereas custom or usage in the industry refer to dealings with or amongst other third parties in the industry. In this regard, Madam Justice Fitzpatrick, in *Repap British Columbia Inc. v. Electronic Technology Systems Inc.*, articulated a summary of some further legal principles governing the use of standard form contracts as follows:

(a) The use of standard forms of contract is regarded as one of the most important developments in the sphere of contract during the last hundred years. Many commercial contracts are entered into on the basis of a standard form of contract. The courts have applied ordinary principles of the law of contract to alleviate against unfair exemptions from certain common law liabilities by require certain standards of notice on onerous terms. See: W.R. Anson, *Anson's Law of Contract*, 27th ed. (Oxford: Oxford University Press, 1998) at 159-160.

(b) If a standard form document is not signed but is merely delivered to the other party, the terms upon which the delivering party wishes to rely must be brought to the notice of the contracting party before or at the time the contract is made. If it is not communicated until afterwards, it will be of no effect. See Anson, at 61, and *Levison v. Patent Steam Carpet Cleaning Co Ltd.,* [1978] Q.B. 69.

(c) Previous dealings between contracting parties may be relevant **if they prove actual knowledge and consent to the terms to be imposed**. A term cannot be implied against a party if the term was unknown to them. In *Western Processing & Cold Storage Ltd. v. Hamilton Const. Co. Ltd.* (1965) 51 D.L.R. (2d) (Man. C.A.), the court held that clauses on an acknowledgement of order form could have no effect unless, through a course of well-established prior business conduct, the party affected knew that it was bound by the form. In so holding, the court approved at 250 the passage in *McCutcheon v. David MacBrayne, Ltd.*, [1964] 1 All E.R. 430 at 437:

> In my opinion, the bare fact that there have been previous dealings between the parties does not assist the respondents at all. The fact that a man has made a contract in the same form ninety-nine times (let alone three or four times which are here alleged) will not itself affect the hundredth contract, in which the form is not used. Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them. If a term is not expressed in a contract, there is only one way in which it can come into it and that is by implication. No implication can be made against a party of a term which was unknown to him. If previous dealings show that a man knew of and agreed to a term on ninety-nine occasions, there is a basis for saying that it can be imported into the hundredth contract without an express statement. It may or may not be sufficient to justify the importation, - that depends on the circumstances; but at least by proving knowledge the essential beginning is made. Without knowledge there is nothing.

(d) A clause may be incorporated into a contract where each party has led the other reasonably to believe that it intended that their rights and liabilities should be ascertained by reference to a document that had been consistently used by them in previous transactions. See: Anson, at 61, and *Henry Kendall & Sons v. William Lillico & Sons Ltd.*, [1969] 2 A.C. 31 (H.L.).

(e) It is not necessary for trading terms to be specifically set out in order for them to be incorporated into a contract, provided that they are common or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and that they are available on request. See: *Circle Freight International Ltd. v. Medeast Gulf Exports* [1988] 2 Lloyd's Rep. 427 (C.A.) at 433.

(f) Where a clause is a usual one in the trade, **and the parties are of equal bargaining power**, the clause may be included in the contract in the absence of a consistent previous course of dealing. See: Anson, at 61; but also see *British Crane Hire Corporation Ltd. v. Ipswich Plant Hire Ltd.*, [1974] 1 All E.R. 1059 (C.A.). In *British Crane*, Lord Denning held, at 1062:

> …it is clear that both parties knew quite well that conditions were habitually imposed by the supplier of these machines: and both parties knew the substance of those conditions. In particular that, if the crane sank in soft ground, it was the hirer's job to recover it; and that there was an indemnity clause. In these circumstances, I think the conditions on the form should be regarded as incorporated into the contract. I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the plaintiffs' usual conditions.
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> As Lord Reid said in *McCutcheon v. David MacBrayne Ltd*, quoting from the Scottish textbook Gloag on Contract:
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> The judicial task is not to discover the actual intentions of each party: it is to decide what each was reasonably entitled to conclude from the attitude of the other.

The test is therefore an objective one.

…

In essence, knowledge and agreement to standard terms may be imputed on a party where its previous dealings have involved the same standard terms or where that party has extensive experience in the industry where such terms are habitually used.

**Standard Form Contracts in the Towboat Industry**

Turning specifically to the towboat industry, it is clear both that most tow companies use standard terms that they intend to apply to all contracts of carriage, and that virtually no towboat companies use their standard terms in a manner that complies with standard contract rules. Tow companies almost never provide copies of their standard terms before or at the time of carriage, they do not take steps to confirm acceptance of their standard terms through obtaining a signature before carriage, and they will struggle to establish proper notice of their terms. These issues arise because the common practice in the industry is to deliver standard terms only after a carriage or tow is completed, and to do so by attaching the terms to the back of invoices without any additional steps to emphasize those terms. Since it is clear that this procedure does not meet standard contract requirements, the Courts will struggle to determine whether towboat standard terms should form part of the relevant contract of carriage, and will need to turn to the following analysis:

- Whether notice of the standard terms was adequate and sufficient, and provided before or at the time the contract is made; and

- Whether a prior course of dealings and/or custom or usage in the industry can assist to establish **actual knowledge and consent** to the terms to be imposed between parties **of equal bargaining power**

In *A.I.M. Steel Ltd. v. Gulf of Georgia Towing Co. Ltd.*, [1964] B.C.J. No. 201 (S.C.), at issue was whether limitation of liability clauses found on letters exchanged by the parties (at irregular

intervals) prior to the tow formed part of the contract. In addition to the subject tow, the parties had three prior dealings.

Justice Verchere declined to import the limitation of liability clauses found on the letters as part of the towage contract holding at paragraphs 8 & 9:

> **This view is supported by Douglas' statement that he had not, before the accident in question here, been aware of the provision purporting to import the statute** and by Taylor's evidence that he was similarly not aware of its implications although he had written the letters, while the other was one which was a standard clause "common to our industry", mean by the last two words, as I understood them, the business of providing "towing service" to those requiring it. Undoubtedly, then, neither of the two persons concerned had these provisions in mind when the contract was made and the existence of letters previously written in the purported confirmation of prior similar undertakings does not satisfy me that various "standard" clauses, as Captain Taylor called them, should apply here in the absence of clear evidence that they were intended by both parties to do so here.
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> Mr. Harvey did not challenge Mr. Cunningham's submission that, in law, an unexpressed term can only be supplied by the Court when it will implement the parties' presumed intention and give "business efficacy to the contract". See Cheshire & Fifoot, *Law of Contract*, 6th ed., pp. 148 *et seq.*, where the doctrine contained in "*The Moorcock*" (1889), 14 P.D. 64, is discussed. On the evidence here, I find it impossible to say that when the contract in question was made the parties intended either or both of the above-recited clauses to apply, and clearly neither is required to give business efficacy to the admitted arrangement.

*A.I.M. Steel* is a significant decision because it is a rare case where standard terms were actually provided **before** the tow, and not just provided with an invoice after completion of the contract of carriage. Interestingly, the Court refused to apply the standard terms despite this early delivery of correspondence referencing the terms, thereby emphasizing the significance of proper notice and evidence establishing actual knowledge, consent/acceptance and the intent of the parties.

In *Plumper Bay Sawmills Ltd. v. Jericho Towing Ltd.* [1980] F.C.J. No. 406, the plaintiff purchased booms of logs, which were to be towed by the defendant. The invoice (delivered after the tow) contained a limitation of liability clause. While being towed, the logs were lost due to poor sea conditions. Among the issues to be decided was whether the plaintiff was bound by the standard terms found in the invoice delivered after the tow.

Justice Walsh noted that the plaintiff used the defendant and other tugboat companies for similar tows. The Court observed that those other companies included similar types of clauses in their invoices. On this point, Justice Walsh stated at paragraph 8:

> …This raises legal problems since the limitation conditions only appear on the invoices rendered subsequently, and furthermore because of the number of intervening parties frequently involved. They do not appear on any invoice rendered directly by the Defendant to the Plaintiff as owners of the logs, against whom Defendant seeks to invoke

> them. They may well be a custom of the trade however, as Defendants claim, and I do not believe that the Plaintiff can claim ignorance of such conditions.

The Court found it significant that in the six months prior to the incident, the plaintiff arranged to have similar tows performed seven times – four by different companies and three by Golden Marine Service, to whom that the defendant subcontracted the subject tow. Each of these companies had similar clauses that were previously provided to plaintiff. Further, the evidence was that in the previous five or six years, the plaintiff regularly dealt with Golden Marine Service in coordinating its towing needs.

Ultimately, the Court concluded that the evidence established that such limitation of liability conditions were a custom of the trade and that the previous dealings without protest warranted the Court's inference that the plaintiff knew that the standard terms formed part of the contract. At paragraph 13, the Court held:

> The question which causes me some concern is whether a verbal contract, made without reference to any limiting condition can be modified with retroactive effect to the contract by a condition contained on the invoice. If this was the first time that the Plaintiff had seen any such conditions on towage invoices it might well be able to claim that it never accepted them and they were not binding on it. However, there is a constant course of conduct by the Plaintiff in its frequent dealings with towage companies and specifically in its dealings with Golden Marine to accept without protest such clauses when paying the invoices and it would be unreasonable not to infer that subsequent contracts entered into verbally with the same company could be subject to the same conditions found on the previous invoices. Moreover there is ample evidence to establish that such conditions are a custom of the trade…

Interestingly, *A.I.M. Steel* was considered by Justice Walsh in *Plumper Bay*; however, his Lordship distinguished it on the basis that neither party in *A.I.M. Steel* "had this limitation in mind although it had appeared in letters relating to prior similar undertakings". This holding seems to flow from his finding that the limitation must have been in the plaintiffs mind given the lengthy and constant course of conduct. The key factors that the Court relied on to establish actual knowledge, consent/acceptance and the intent of the parties through prior dealings and custom included:

- there was a **constant course of conduct** over the past five or six years with the tow company, particularly in the six months prior to the subject tow;
- the plaintiff would have seen the standard terms on the back of numerous invoices pertaining to prior tows while **regularly** contracting with the tow company;
- the plaintiff was **familiar with the tugboat industry**, with the plaintiff's president also testifying that he was familiar with the practice of subcontracting by tugboat companies; and
- the use of tugs for towing log booms seemed to be an **integral aspect of the plaintiff's business**, making it more likely that the plaintiff was aware of any custom of the industry.

In *McKenzie Barge & Derrick Co. Ltd. v. Rivtow Marine Ltd.*, [1968] Ex. C.J. No. 8 (Admiralty Ct.), the plaintiff's dispatcher (acting as agent for the plaintiff) retained the defendant to perform a tow. The plaintiff hired the defendant on one previous occasion and at that time, the defendant issued an invoice with an exclusion of liability clause. The subject tow was lost and its standard invoice was issued containing the defendant's standard terms.

The defendant, relying on the exculpatory language found in the invoice, argued that its contract with the plaintiff excluded it from any liability for the loss. However, the Court held that since the plaintiff's agent had not seen the prior invoice, it could not have been in his mind at the time of the contract with the plaintiff and the defendant. Additionally, because the invoice for the subject tow was issued after the accident, it, too, could not have been in the parties' mind at the time of the contact. Thus, the standard clause did not form part of the contract.

With regard to custom and usage in the maritime context generally, Justice Audette, on appeal, considered this issue in respect of salvage services in *Freiya (The) v. R.S. (The)*, [1922] 1 W.W.R. 409 (Ex. Ct.). The plaintiff claimed against the defendant for salvage services that it provided. The defendant alleged that it was the custom among those engaged in the cannery and fishing business in certain parts of the British Columbia coast, to render reciprocal services to each other in times of need without thereby creating any obligation on the part of the party to whom such services are rendered either by way of salvage or as a contractual liability. Although the defendant was active in the cannery business, the plaintiff, whose action was dismissed at trial, was not involved in the cannery business and was not aware of any custom of waiving salvage.

Justice Audette allowed the appeal **finding that even if the alleged custom or usage was valid and binding between cannery people, it did not extend to persons who did not fish** and, therefore, could not operate to the detriment of the positive rights enjoyed by those outside of the class of cannery people. In arriving at this conclusion, His Lordship explained at paragraphs 24 and 25:

> Every usage must have acquired, such notoriety in the business or amongst the class of persons affected by it that any person in that business, or amongst that class, who enters into a contract affected by the usage, must be assumed to have intended that usage should form part of the contract. …
>
> **No one who is ignorant of an alleged usage can be bound by it** if it appears to be unreasonable, and he can only be assumed to have acquiesced in a reasonable usage.

*Freiya (The)* is not a towboat case, but it is nevertheless persuasive authority as it is a maritime law case. An interesting point that has not been decided or commented upon at any length in the jurisprudence is who would fall within the class that is affected by usage of standard terms in the towboat industry such that it would be assumed to have intended such usage to form part of the tow agreement.

**Concluding Comments**

To enforce standard terms, the party attempting to rely upon same must establish both knowledge/notice and agreement to those terms. If the terms are communicated after the

contract, they will be of no effect. Standard terms must be brought to the attention of the contracting party.

Past dealings will not apply to import the standard terms into towing contracts unless both knowledge and intent can be established. It may be possible to establish both knowledge and intent through a constant course of conduct between the parties as long as actual knowledge can be demonstrated. If the parties did not have the terms in mind at the time of the contract, then those terms will not be imported into the contract despite custom and prior dealing.

Custom and prior dealings are only significant if they establish actual knowledge and agreement. Such a test may be easier to meet where towboat terms and practice form an **integral aspect of a party's business**. As a result, these standard terms are more likely to apply in disputes involving:

- parties that regularly hire towboats (i.e. logging industry); and
- subcontracts between tow companies.

There are steps that tow companies could take to enhance their ability to rely on standard terms, which steps would include:

- sending copies of their standard terms **before** a contract is finalized, and **before** the tow operation begins;
- posting standard terms on the tow company's website, and making reference to same through a standard footnote/signature in all emails and other written correspondence;
- ensuring that the standard terms are actually provided to customers, and that the front page only of documents are not faxed when the standard terms appear only on the backs of those documents;
- actually discussing the standard terms with customers when being hired, and confirm same in writing (i.e. through email or letter);
- keeping files containing all prior communications with a repeat customer respecting standard terms, and establishing all prior instances on which those standard terms were provided to that customer; and
- obtaining a signature from customers on documents that make reference to the standard terms.

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