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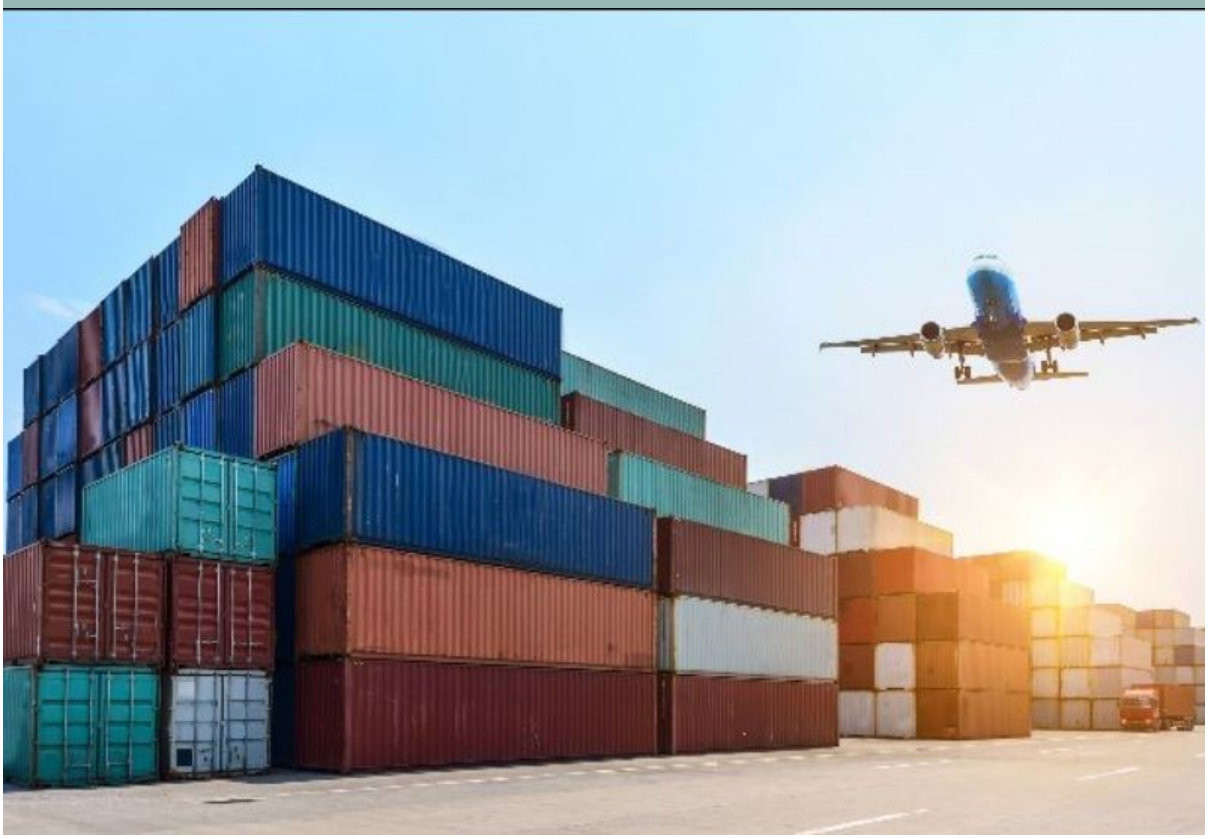

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Fine print at the footer of an email – When it forms parts of the contract

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It is common to now see wording at the footer of an email that claims all business is according to the sender's terms and conditions of trade. We are often asked whether this wording to mean that the sender's terms and conditions form part of the contract between the email sender and the recipient. The County Court of Victoria ruled on this issue in a recent case involving an Australian freight forwarder and its customer. The outcome – email footers can act to incorporate the senders terms and conditions into the contract.

Key takeaways

- Email footers can on their own be sufficient to bind the recipient to the sender's terms and conditions.
- An important issue will be whether the emails were contractual documents. If they are, the **whole** of the email is the relevant document, including the footer
- Email footers will be most effective where they specifically refer to limitations of liability or other onerous clauses
- avoid the unintended operation of email footers by expressly rejecting terms and conditions by return email and/or having the agreement set out in a signed agreement

Technology Swiss Pty Ltd v Famous Pacific Shipping (Vic) Pty Ltd [2019]
The facts of the case are relatively simple. Technology Swiss required equipment to be transported from Australia to Thailand and engaged Famous Pacific Shipping to do so. Famous did not correctly secure the freight, it was damaged during transport and could later only be sold as scrap. Famous was liable to Technology Swiss unless the parties had contractually agreed otherwise.

While Famous had standard terms and conditions, it had not provided these to Technology Swiss and the parties had not signed any documents relating to the services. There was agreement between the parties that an email From

Famous providing a quote (**Quote Email**), and the subsequent reply from Technology Swiss formed part of the written contract between the parties. The Quote Email, and all other emails sent by Famous, included the following footer:

"*All business transacted is subject to the company's Standard Trading conditions of Contract, a copy of which is available on request and which, in certain circumstances, exclude the Company's liability and include indemnities which benefit the Company"* (**Email Footer**)

The body of the Quote Email also included the line:

'The above is subject to the following:
Fps standard trading terms and conditions" (**Additional Reference**)

Arguments for ignoring the Email Footer

Technology Swiss argued that the Email footer should be given no weight as a reasonable business person would be unlikely to read or take any notice of the sentence because of its location, it was in all correspondence and its wording was vague and generic.

Further, Technology Swiss noted that the Email Footer did not state where the terms and conditions could be inspected or whether they were accessible via Famous' website. Technology Swiss submitted that there should have at least been a link to the terms and conditions in the Email Footer.

Court rules that the email footer formed part of the contract

The Court held that the wording of the Email Footer could not have been clearer and that Technology Swiss elected to take a commercial risk in contracting without reviewing those terms and conditions. This risk could be clearly understood as the Email Footer did refer to the terms and conditions having the effect of limiting Famous' liability.

The Court saw no justification in ignoring the Email Footer simply because of its location, especially due to the Additional Reference. The Court also could see no reason to dismiss the Email Footer due to its "generic language". As for its repetition, the Court felt that this actually strengthened the position of Famous.

An argument was put forward that the terms were so onerous that no one would anticipate them to form part of the commercial contract. The Court held that onerous exclusion clauses were standard in shipping contracts. However, it should be noted that the Court did interpret the exclusion clause in a way that favoured the shipper and had the effect that the exclusion clause was not particularly onerous.

Ultimately the Court held that the Famous terms and conditions did form part of the contract between the parties. Unfortunately the decision does not make clear the extent to which the Additional Reference was important.

Other issues – Issuing of the house bill of lading

The email footer issue may not have been significant if Famous could have relied on the terms of its house bill of lading. Most BOLs include terms that expressly limit liability and also act as a shipping document with the effect that liability is limited under international conventions.

In this case Famous provided Technology Swiss with the front page of its house BOL 6 days after the vessel carrying the goods had departed. The house BOL referred to the "terms overleaf". However, only the front page of the BOL was provided and not the back page with the "terms overleaf".

The Court held that the terms of the BOL did not form part of the contract for the following reasons:

1. the actual "terms overleaf" were not provided to Technology Swiss and it was not incumbent on Technology Swiss to seek out those terms;

2. it was reasonable for Technology Swiss to assume that the "terms overleaf" were the same as the Famous standard terms and conditions; and
3. the house BOL was provided after the contract had already been concluded and the goods had been shipped.

An argument was put by Famous that the terms of the BOL were incorporated by operation of Famous' standard terms and conditions which stated that any terms of a BOL issued by or on behalf of Famous would take priority over its standard term and conditions. This argument was rejected by the Court. One of the reasons was the that house BOL was not clearly issued by the defendant (Famous Pacific Lines (Vic) Pty Ltd). This was because the house BOL simply described the carrier as "Famous Shipping Lines". The Court held that it could not be determined that "Famous Shipping Lines" was the alter ego of the defendant. As a result, the house BOL was not taken to be a BOL issued by Famous.

Ultimately the Court held that the contract was formed in October 2014 and Famous did not have the right to unilaterally alter the terms and conditions by issuing a house BOL after the goods had been shipped in December 2014.

Application of the Famous terms and conditions

While Famous was successful in its argument that it terms and condition applied, the application of those terms and conditions did not go entirely as it would have hoped. The terms and conditions had the expected clauses limiting liability for loss or damage to a small portion of the value of the goods. However, the terms and conditions contained an additional clause that expressly stated that compensation shall be calculated by reference to the invoice value of the goods plus freight and insurance (**Invoice Value Clause**). This clause was directly contrary to the other clauses that drastically limited Famous' liability and the clause seems to have the purpose of calculating the value of goods, not the liability limits.

<u>Standard exclusions of liability make "commercial nonsense"</u>

There was much argument concerning the construction of the contract. In finding that the Invoice Value Clause set a higher liability limit the Court noted:

1. the contract must be interpreted so as to avoid making commercial nonsense;
2. limiting liability as argued by Famous (about 3% of the invoice value of the goods) would make commercial nonsense.

This is a significant finding as most transport contracts seek to significantly limit liability of the service provider or carrier. If these limitations of liability do in fact make commercial nonsense it will be crucial for the service provider to obtain written acceptance of the terms.

A Court is likely to look hard for reasons to prevent a freight forwarder escaping liability for their negligence and this can include unfavourable interpretation of any vague provisions of a contract.

Exclusion of consequential loss (loss of profit, storage, delay)

The Court was, however, prepared to accept a limitation of liability that capped loss at the value of the goods plus freight. This effectively capped liability for pure economic loss, loss of profit, delay and deviation. In this case the costs of related legal expenses and storage exceeded $400,000 and were effectively excluded.

Lessons for freight forwarders

- Incorporate a standard email footer that refers to your terms and conditions and draws specific attention to limitations of liability
- Provide the terms of the BOL before the goods have shipped
- Make sure your house BOL correctly identifies your company and does not use the trading name of the global group
- Have your terms and conditions accepted in writing. This will avoid arguments regarding the application of onerous exclusion clauses

- Have your terms and conditions reviewed to ensure the limitation of liability clause effectively work together

Please contact us to discuss your use of email footers and how you contract with your customers or service providers.

Contact Russell to find out more

About the Author

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Russell is a customs and global trade specialist with a strong focus on helping clients proactively manage customs risks and opportunities. Russell helps importers, exporters, customs brokers and freight forwarders with customs concessions (including Free Trade Agreements), customs compliance, commercial agreements and resolving disputes between parties involved in international trade.

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