

Another Arrow in the Transportation Intermediaries' Quiver: Using the Uniform Electronic Transactions Act to Enforce Online Terms and Conditions

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In today's market, many transportation intermediaries seek to control their liability and establish contracts with their customers by referencing or incorporating terms and conditions of service through hyperlinks. With this practice, it is important to know the effects and legal validity that online terms and conditions of service can have when incorporated into a written agreement as an electronic record by the Uniform Electronic Transactions Act ("UETA").¹ While documents referred to by a hyperlink may be incorporated by reference in a contract, the UETA's recognition of terms and conditions stored on a website as a valid electronic record may bolster a contracting party's position to enforce those terms and conditions. This article will focus on the effect the UETA may have on terms and conditions of service, and their contents, when referenced by a hyperlink in invoices, bills of lading, and the like.² Not only could the UETA be a useful tool for the litigator, but the express assent to the UETA laws in a transportation intermediary's terms and conditions or onboarding process could add another layer of the effectiveness to agreements in electronic format.

Conducting business electronically is commonplace today, and transportation intermediaries, whether on the international or domestic side, often direct their customers to the terms and conditions of service by reference to a hyperlink. This includes insertion of hyperlinks in an intermediary's e-mail correspondence with customers,³ the face of a bill of lading,⁴ the

bottom of an invoice,⁵ and in credit applications and powers of attorney. An electronic course of dealings is beneficial to intermediaries when enforcing terms and conditions of service. Courts across the country have held that terms located at a hyperlink incorporated by reference in a contract are enforceable.⁶ Although many courts have upheld such terms and conditions of service referenced in shipping documents, both for international intermediaries⁷ and domestic property brokers,⁸ the issue is still regularly disputed in litigation.

The UETA was drafted by the National Conference of Commissioners on Uniform State Laws in 1999. The proposal of the UETA was to help lessen the rigid barriers the statute of frauds and document retention statutes have on electronic commerce, and to help facilitate electronic transaction by legally recognizing electronic records and signatures.⁹ Currently, the UETA has been adopted by 49 states, the District of Columbia and the U.S. Virgin Islands.¹⁰

The UETA states that "[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form."¹¹ An electronic record is defined as "a record created, generated, sent, communicated, received, or stored by electronic means." For the purposes of a property broker's terms and conditions located at a specific hyperlink, the electronic record condition may be met because they are "stored by electronic means." The hyperlink further retains the electronic record for production at any time, which, generally, can be printed for tangible retention.

However, the inquiry should not stop there. The UETA "only applies to transactions between parties each of which has agreed to conduct transactions by electronic means."¹² Section 5 of the UETA further states, "[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct."¹³ Satisfying this element may be the most crucial when determining if the UETA will strengthen a property broker's position to enforce terms and conditions located at a hyperlink.

In *Progressive Advanced Ins. Co. v. Corekin*, the United States District Court for the District of Maryland found that the parties agreed to conduct business by electronic means by looking at the surrounding circumstances and conduct of the parties.¹⁴ The plaintiff insurance company brought a declaratory action against the defendant insured to limit the policy amount.¹⁵ The court was to determine whether the defendant agreed to transact business electronically under the Maryland Uniform Electronic Transactions Act ("MUETA"), thus ruling on the validity of a waiver provision in the insurance policy.¹⁶ The defendant created an online account and completed an online application for the insurance policy

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with the plaintiff.¹⁷ During the application process, the defendant checked a box electing to subscribe to a lower coverage under the policy, thus waiving extra coverage, and typed his name in the signature space.¹⁸ The defendant paid all policy premiums, communicated with the plaintiff, and received copies of documents electronically.¹⁹ After the defendant submitted a claim to the plaintiff, the defendant received a disbursement in the lower coverage amount.²⁰ The defendant argued that under the MUETA the contract was void because he never agreed to conduct business electronically.²¹ The court stated that Maryland law has provided a means to determine whether parties have consented to conduct business electronically by looking to “the context and surrounding circumstances, including the parties’ conduct.”²² The court reasoned that both parties’ conduct established a course of dealings that showed consent to conducting business electronically by creating an online account, receiving electronic copies of documents, communicating between one another electronically, and applying online.²³

The Eastern District of California was faced with a similar issue in *Stover-Davis v. Aetna Life Ins. Co.*: to determine the validity of an electronic signature and whether the parties agreed to an arbitration clause by electronic means.^{24,25} In *Stover-Davis*, the plaintiff sued her former employer for wrongful termination, among other causes of action.²⁶ The defendant employer filed a motion to compel arbitration based on an arbitration agreement contained in the employee handbook.²⁷ The court ruled that the arbitration agreement was valid, and citing California’s Uniform Electronic Transactions Act, stated that the “context of the surrounding circumstances, including the parties’ conduct” shows the parties agreed to transact business electronically.²⁸ The surrounding circumstances supporting the agreement to conduct business electronically were the plaintiff completing new hire paperwork online, creating an employee login and password for the company’s “e-service” to review company policies, and acknowledging online that the plaintiff reviewed the arbitration clause with her “e-service” employee login.²⁹

In *VT Holdings LLC v. My Investing Place LLC*, the Court of Appeals of Utah found that the parties agreed to conduct business electronically in much lesser circumstances – a request by e-mail from one party prompting action by the other.³⁰ A lender brought a judicial foreclosure action against a property owner. The lower court found the parties agreed to conduct business electronically, thus a reconveyance to the property owner was valid.³¹ In response to the owner’s request for reconveyance, the lender signed, notarized and faxed a reconveyance to the owner.³² The owner e-mailed the reconveyance to the title company, which recorded and mailed a copy of the reconveyance to the lender, and the lender released its interest in the subject property.³³ The lender subsequently filed a lawsuit seeking judicial foreclosure, and challenged the validity of the reconveyance because the parties did not consent to conduct business by electronic means.³⁴ The court of appeals affirmed the lower court’s ruling stating that surrounding circumstances supported a finding that the parties agreed to conduct the transaction by electronic means.³⁵ The appellate court reasoned that the lender accepted an e-mail with the attached request for reconveyance from the owner by signing and notarizing the document.³⁶ “[T]he lack of a valid reason why everyone would go to the trouble of preparing [the Request for Reconveyance], get it signed, get it notarized, and arrange to return it [electronically], for no legal effect,’ is the ‘primary weakness of the [appellee].”³⁷

In contrast, the Court of Appeals of Minnesota determined that the parties did not intend to enter into or conduct a transaction by electronic means in *SN4, LLC v. Anchor Bank, FSB*.³⁸ In *SN4*, a group of buyers were informed by a bank that a listing of foreclosed properties were available for sale.³⁹ In a series of e-mail communications between the bank and the buyers, the buyers sent the bank an e-mail with a hand signed agreement.⁴⁰ The buyers requested that the bank sign a hard-copy of the agreement and return by e-mail or hard-copy mail.⁴¹ The lower held that there was no evidence that would suggest the parties consented to transact by electronic

means.⁴² The appellate court affirmed the decision stating that under the UETA, in order to determine whether the parties agreed to conduct business electronically, the court would need to look at the “context and surrounding circumstances, including the parties’ conduct.”⁴³ The court further reasoned that while the parties e-mailed back and forth, the agreement was signed by hand, and the buyer requested a hard-copy signature of the agreement.⁴⁴ “Here, there was no express agreement between the buyers and the bank to electronically subscribe to the purported agreement... [m]oreover, their conduct does not evidence an implied agreement to do so.”⁴⁵

While the cited cases do not involve transportation intermediaries, the case law is illustrative for determining if the parties have agreed to conduct business by electronic means. Many intermediaries conduct much of their business online through their websites by requiring customers to create an online account, transacting by booking shipments online, or prompting customers to request quotes online, and through e-mail communication. While courts differ on the requisite conduct to infer party consent to conduct transactions electronically, the nature of registering for online accounts with transportation intermediaries, requiring online booking through websites, and extensive electronic communication strongly imply transportation intermediaries and their customers agree to conduct business by electronic means. While such course of dealings suggests assent to such electronic transactions, the inquiry is fact intensive as to whether the UETA will apply, and provisions of the UETA can even be waived by agreement.⁴⁶ However, the implementation of an express assent to UETA laws between transportation intermediaries and their customers for all electronically transmitted dealings⁴⁷ – i.e. e-mail correspondence, issuing bills of lading and invoices incorporating terms and conditions by way of hyperlink – may weigh in favor of the conclusion that the parties agree to conduct business electronically, further supporting the notion that a transportation intermediary’s terms and conditions located at a hyperlink are enforceable. Additionally, the UETA may

very well bolster current case law that has affirmed the validity of additional terms of a contract incorporated by reference through

a hyperlink. In any event, when it comes to the enforcement of online terms and conditions, the UETA may prove beneficial

to transportation intermediaries who conduct business online, and their litigators.

Endnotes

- ¹ The final form of the UETA that was approved, as well as the UETA's history, can be found at <https://www.uniformlaws.org/viewdocument/final-act-21?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034&tab=librarydocuments>.
- ² It should be noted that the hyperlinks discussed in this article are not in the context of browse-wrap and click-wrap agreements. A click-wrap agreement requires a user to scroll through the contents of the agreement, then requires the customer to expressly click a tab signifying assent to the terms before completing the transaction. See *Jia v. Nerium Int'l LLC*, 2018 U.S. Dist. LEXIS 160090, at *9 (N.D. Tex. Sept. 18, 2018). In contrast, a browse-wrap agreement will have terms located on a website or external hyperlink, with no express assent to the terms. See *Hotels.com, L.P. v. Canales*, 195 S.W.3d 147, 155 (Tex. App. 2006).
- ³ *Tuscany South Am., Ltd. v. Pentagon Freight Sys.*, 2014 U.S. Dist. LEXIS 134867 (S.D. Tex. Sept. 24, 2014) (holding that reference to the liability limits by the Terms and Conditions of Service promulgated by the National Customs Brokers and Forwarders Association of America, Inc. were enforceable when the link to the NCB-PAA's website was incorporated into multiple e-mails from the freight forwarder to the customer).
- ⁴ *Cont'l Cas. Co. v. United Parcel Serv.*, 2005 U.S. Dist. LEXIS 24428 (N.D. Ill. 2005) (enforcing limitation of liability incorporated by reference on bill of lading and identified as being available on carrier's website).
- ⁵ *Ins. Co. of N. Am. v. NNR Cargo Service (USA), Inc.*, 201 F.3d 1111 (9th Cir. 2000) (ruling that invoice terms and conditions may supplement shipping agreements if there has been a sufficient course of dealing).
- ⁶ See, e.g. *One Beacon Ins. Co. v. Tubal-Cain Marine Svcs., Inc.*, 648 F.3d 258 (5th Cir. 2011). See also, *Rolls v. Packaging Corp. of Am. Inc.*, 2022 U.S. App. LEXIS 13441, at **17-19 (5th Cir. May 18, 2022); *NewPage Corp. v. Mayfield Creek Forestry Consultants, LLC*, 2014 U.S. Dist. LEXIS 177259 (S.D. Ohio Dec. 24, 2014); *Access Telecom, Inc. v. Numaxx World Merchs., LLC*, 2013 U.S. Dist. LEXIS 199860 (S.D. Fla. Nov. 25, 2013); *Infinity Fluids, Corp. v. Gen. Dynamics Land Sys., Inc.*, 2013 U.S. Dist. LEXIS 86042 (D. Mass. June 19, 2013).
- ⁷ See *Tuscany South Am., Ltd.*, 2014 U.S. Dist. LEXIS 134867 at *17; *Ins. Co. of N. Am.*, 201 F.3d at 1114.
- ⁸ See *Cont'l Cas. Co.*, 2005 U.S. Dist. LEXIS 24428 at **6-7.
- ⁹ UETA pref. note (1999).
- ¹⁰ New York and Puerto Rico have not adopted the UETA. <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034>.
- ¹¹ UETA § 7(a) (1999).
- ¹² *Id.* at § 5(b).
- ¹³ *Id.*
- ¹⁴ *Progressive Advanced Ins. Co. v. Corekin*, 2017 U.S. Dist. LEXIS 151269 *25 (D.Md. Sept. 18, 2017).
- ¹⁵ *Id.* at *1-*2.
- ¹⁶ *Id.* at *7.
- ¹⁷ *Id.* at *2.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.* at *3.
- ²¹ *Id.* at *7.
- ²² *Id.* at 21.
- ²³ *Id.* at 25.
- ²⁴ *Stover-Davis v. Aetna Life Ins. Co.*, 2016 U.S. Dist. LEXIS 63693 (E.D. Cal. May 12, 2016).
- ²⁵ See also, *Lopez v. Cequel Communs., LLC*, No. 2:20-cv-02242-TLN-JDP, 2021 U.S. Dist. LEXIS 213032, at *9-11, n. 5 (E.D. Cal. Nov. 2, 2021) (holding that a course of dealings was evident by payment of invoices with notices of acceptance of the terms and conditions of an agreement located at a hyperlink and the arbitration clause therein was enforceable, and also noting that the contract was not afoul of California's version of the UETA).
- ²⁶ *Stover-Davis*, 2016 U.S. Dist. LEXIS at *4.
- ²⁷ *Id.* at *1, *3.
- ²⁸ *Id.* at *12.
- ²⁹ *Id.*
- ³⁰ *VT Holdings LLC v. My Investing Place LLC*, 2019 P.3d 767 (Utah Ct. App. 2019).
- ³¹ *Id.* at 768.
- ³² *Id.* at 769.
- ³³ *Id.* at 770.
- ³⁴ *Id.*
- ³⁵ *Id.* at 773.
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ *SN4, LLC v. Anchor Bank, FSB*, 848 N.W.2d 559 (Minn. Ct. App. 2014).
- ³⁹ *Id.* at 562.
- ⁴⁰ *Id.* at 564.
- ⁴¹ *Id.* at 567.
- ⁴² *Id.* at 564.

TLA Feature Articles and Case Notes

⁴³ *Id.* at 566.

⁴⁴ *Id.* at 567.

⁴⁵ *Id.*

⁴⁶ Uniform Law Commission, Electronic Transactions Act,
<https://www.uniformlaws.org/committees/community-home?communitykey=2c04b76c-2b7d-4399-977e-d5876ba7e034#LegBillTrackingAnchor>.

⁴⁷ It may be advisable to expressly state in the terms and conditions of service that “the customer agrees to conduct business by electronic means within the meaning of the (state) Uniform Electronic Transactions Act, which includes any electronic correspondence, and all accompanying or referenced electronic documents and hyperlinks.” The relevant state’s bill number and year of adoption of the UETA can be found under the “Bill List” tab at:

<https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034#LegBillTrackingAnchor>.