



**MEETING VESSEL OWNERS' COMMERCIAL NEEDS IN THE 21ST CENTURY:
ENFORCING INTERNET TERMS AND CONDITIONS IN MARITIME CONTRACTS**

The Fifth Circuit recently articulated the standard for enforcing online terms and conditions, including self-exculpatory indemnity and additional insured provisions, in maritime contracts.¹ *One Beacon v. Crowley Marine Servs., Inc.* involved a shipowner's work order issued to a shipyard. The trial court held that online defense, indemnity and additional assured provisions were enforceable against a shipyard even though the vessel owner never physically delivered those terms and conditions to the shipyard and even though the vessel owner never obtained an express electronic acknowledgment expressing the shipyard's assent to be bound by the online terms and conditions. At trial, the shipowner was represented by Legge Farrow, who also successfully defended the trial court's ruling on appeal.

Factual and Procedural Background

Shipowner, Crowley Maritime, attempted to obtain defense and indemnity from Tubal-Cain, a ship repair facility, for a personal injury lawsuit brought by the employee one of Tubal-Cain's subcontractors. Upon notice of the claim, Crowley demanded defense and indemnity from Tubal-Cain and coverage as an additional insured from Tubal-Cain's insurer pursuant to Crowley's standard terms and conditions, which require contractual indemnification and additional insured coverage. The trial court held that the terms and conditions constituted a binding contract, and thus the shipyard owed defense, indemnity, and additional assured coverage. The trial court also held that because the shipyard had not explicitly asked its underwriter to have Crowley named on the policy, the policy was not required to provide coverage. It found this was also a breach of the shipyard's contractual obligation to procure the coverage.

¹ *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, No. 10-20417, ___ F.3d ___ (5th Cir. July 28, 2011).



Crowley's purchase order terms and conditions are only available on Crowley's website. Tubal-Cain argued that, because Crowley never mentioned its terms and conditions when Crowley and Tubal-Cain originally met to discuss repairs for the barge in question, that the terms and conditions could not bind Tubal-Cain. Both the district court and the Fifth Circuit disagreed with Tubal-Cain, and found that Tubal-Cain and Crowley's established course of dealing and the fact that Crowley's work order gave Tubal Cain reasonable notice of its online terms and conditions bound Tubal-Cain notwithstanding Tubal-Cain's assertion that it never read or knew what Crowley's terms and conditions contained.

Bound by the Record—Past Course of Dealing and the Subsequent Business Relationship

Tubal-Cain argued that Crowley and Tubal-Cain entered into an oral vessel repair contract when Crowley's port engineer met with Tubal-Cain representatives at the Tubal-Cain ship repair yard. Crowley argued that, although some of the contractual terms were agreed to orally at the shipyard, these oral terms were ultimately incorporated into a written work order which was followed up with Tubal-Cain's written invoice. This was the same procedure that Crowley and Tubal-Cain followed in the eight repair jobs preceding the transaction in question, and the fifteen repair jobs which followed. Considering the business relationship in its entirety, Crowley's position was that Tubal-Cain and Crowley contemplated the formation of their repair contracts through a series of interconnected transactions—an oral discussion of the work order, a work order, and a subsequent shipyard invoice referencing the work order.

Tubal-Cain supported its argument by stressing that Tubal-Cain and Crowley "walked the barge" together and agreed on the price term long before the work order was ever issued. In contrast, Crowley focused its evidence, not only on the repair job in question, but on all twenty-four vessel repair jobs Tubal-Cain did for Crowley. Crowley also demonstrated how the existing judicial acknowledgement, that it is "not unusual"² in the shipyard repair industry for work to commence before the shipyard actually receives a written work order or executes its invoice, applied to the commercial relationship between Tubal-Cain and Crowley. Every time a vessel was sent to Tubal-

² *B & B Schiffahrts GmbH & Co. v. Am. Diesel & Ship Repairs, Inc.*, 136 F. Supp. 2d 590, 594-95 (E.D. La. 2001); *M/V AMERICAN QUEEN v. San Diego Marine Constr. Co.*, 708 F.2d 1483, 1489 (9th Cir. 1983); *Hudson Waterways Corp. v. Coastal Marine Serv., Inc.*, 436 F. Supp. 597, 604 (E.D. Tex. 1977).



Cain for repairs, Crowley and Tubal-Cain first met and orally discussed the scope of work, Tubal-Cain would then commence work, soon thereafter Crowley issued its written work order which contained the same written notice of Crowley's online terms and conditions, Tubal-Cain next issued its invoice which always referenced a specific Crowley work order and reserved Tubal-Cain's right to object to any of Crowley's terms and conditions, and finally, Crowley would pay the invoice. Although Tubal-Cain disputed whether it ever agreed to Crowley's terms and conditions, when confronted with substantial evidence that Tubal-Cain had multiple opportunities to object or negotiate Crowley's terms and conditions, and repeatedly chose not to, the district court was convinced that Tubal-Cain should "lie in the bed that they themselves [had] made."³ The Fifth Circuit agreed.

Online Terms & Conditions—Proving Reasonable Notice

Tubal-Cain also argued that it was not sufficiently put on notice of Crowley's terms and conditions because only the work order, which Crowley issues in paper form and mails to its vendors, contained an incorporation clause referencing Crowley's website. Moreover, the website reference only indicates that Crowley's terms and conditions are available at Crowley's website, "www.crowley.com / documents & forms." According to Tubal-Cain, this notice failed the "specific and *conspicuous*" requirement for self-exculpating contractual indemnification terms laid down by the Fifth Circuit in *Orduna S.A. v. Zen-Noh Grain Corp.*⁴ Tubal-Cain argued that Crowley was obligated to at least provide its terms and conditions when it mailed the work order or include an exact hyperlink web-address to provide notice.

Instead of taking Tubal-Cain's invitation to articulate a bright line test for what notice is sufficient to validly incorporate online terms and conditions, the Fifth Circuit reiterated what it had

³ *Hudson Waterways Corp. v. Coastal Marine Serv., Inc.*, 436 F. Supp. 597, 607 (E.D. Tex. 1977).

⁴ 913 F.2d 1149, 1153 (5th Cir. 1990). For this proposition, the Fifth Circuit also cited *Theriot v. Bay Drilling Corp.* 783 F.2d 527, 540 (5th Cir. 1986) which requires contractual provisions extending "indemnification for an indemnitee's own negligence be clearly and unequivocally expressed," and implies that the language, "clear and unequivocal" and "specific and *conspicuous*," are two ways of expressing the same standard. Thus, the "specific and *conspicuous*" language in *Orduna* does not support the argument that the general maritime law requires the same type of conspicuousness that some states (*e.g.*, Texas) require before enforcing self-exculpatory indemnity provisions.



already suggested in *Orduna*—the standard is reasonable notice. Determining reasonable notice depends on the actual facts of each individual case. Here, Crowley sufficiently developed a record showing (1) Crowley’s terms and conditions were available on Crowley’s website and could be accessed in as few as three mouse clicks; (2) every work order Crowley sent Tubal-Cain included an identical notice of its online terms and conditions and every invoice Tubal-Cain sent Crowley referenced a specific Crowley work order; (3) Crowley’s terms and conditions never changed during the entire time Crowley sent vessels to Tubal-Cain for repairs; (4) Tubal-Cain’s representative understood that the notice printed on the work order directed Tubal-Cain to Crowley’s website; (5) the notice was not a hyperlink or web address intended to be typed directly into a web browser; (6) Tubal-Cain could have read Crowley’s terms and conditions with reasonable ease and chose not to; (7) Tubal-Cain had a procedure in place for reviewing contractual terms and conditions with its attorney and accountant that it could have applied to Crowley’s terms and conditions if it wanted to do so; and (8) had Tubal-Cain read Crowley’s terms and conditions it would have understood that they required contractual defense and indemnification. Based on this substantial record, the Fifth Circuit found that Tubal-Cain had reasonable notice of Crowley’s terms and conditions, regardless of whether Tubal-Cain ever read them.

Conclusion

As the Fifth Circuit noted, the internet has changed the way business is conducted. The Court recognized the internet plays an increasingly important role in commerce and presents relatively new legal considerations, however, “[the internet] has not fundamentally changed the principles of contract.” In short, the age-old principles of paper work orders and contracts “apply equally to the emergent world of online contracting.” As a proposition of law, the Court stated: “under the admiralty law . . . maritime contracts may validly incorporate terms from a website in the same manner that they may incorporate by reference terms from paper documents [and we] reject Tubal-Cain’s argument that the terms and conditions at issue here are unenforceable solely because they were never set down and delivered in paper format.” Vessel owners and shipyards who may have their terms and conditions posted on their websites are well-advised to insure reasonable notice of such internet-incorporated terms is given in accordance with the *One Beacon* guidelines.



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