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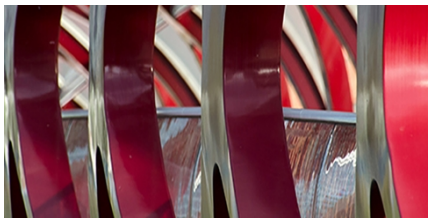

News & Types: Commercial, Competition & Trade Update

Boilerplate Bulletin: The Dangers of Unilateral Change-in-Terms Clauses

7/21/2020

Practices: Commercial, Competition & Trade

EXECUTIVE SUMMARY

Parties to commercial contracts are increasingly using unilateral modification or change-in-terms clauses to incorporate arbitration clauses into contracts without consent from the other party. Illinois courts will enforce arbitration clauses added under unilateral change-in-terms clauses where little or no notice is given, provided that the parties have agreed to such unilateral changes in advance. In light of the numerous risks resulting from a counterparty's ability to unilaterally change the contract to its advantage, including imposing arbitration for dispute resolution, parties should in all cases negotiate to require any changes to the contract to be made by mutual written agreement.

A common "boilerplate" clause in commercial contracts requires modifications or amendments to the contract to be made through mutual written consent of the parties. Depending on the situation, contracting parties may find it burdensome to go through the formal amendment process each time they want to modify the contract, and may consider allowing one party to unilaterally modify the contract for expediency instead. A recent ruling in a case currently pending in Illinois federal court highlights the potential traps for the unwary inherent in so-called unilateral "change-in-terms" clauses, especially when such clauses are used to impose requirements to arbitrate disputes on an unwitting party. The case, *Miracle-Pond et al. v. Shutterfly, Inc.*, Case No. 19-CV-04722, 2020 U.S. Dist. LEXIS 86083 (N.D. Ill. May 15, 2020), involves a suit brought by two Illinois residents against the online photo sharing and printing service Shutterfly, Inc. ("Shutterfly") for alleged violations of the Illinois Biometric Information Privacy Act. Shutterfly moved the court to compel arbitration per its services terms of use ("Terms of Use"). Applying Illinois law, the court found that the Plaintiff had agreed to arbitrate her claim through her continued use of the Shutterfly services and the court accordingly granted Shutterfly's motion to compel arbitration.

The threshold issue in the case was whether the Plaintiff had initially agreed to be bound by Shutterfly's Terms of Use. The Plaintiff opened an account with Shutterfly in August 2014, at which time she was presented with a so-called "clickwrap" agreement on her smartphone screen. The clickwrap agreement screen presented the Plaintiff with "Accept" and "Decline" buttons, and stated that by clicking "Accept", the Plaintiff agreed to use Shutterfly's services in accordance with the Terms of Use. The clickwrap agreement screen also included a button linked to the Terms of Use. The court found that Shutterfly's agreement was a valid clickwrap

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agreement under Illinois law, and because the Plaintiff affirmatively showed acceptance by clicking the "Accept" button, the Plaintiff agreed to be bound by Shutterfly's Terms of Use.

The court next analyzed whether the Plaintiff had agreed to Shutterfly's unilateral change to its Terms of Use in May 2015, which added an arbitration provision. The Terms of Use in effect as of August 2014 contained the following provision, stating that:

> [Shutterfly] may revise these Terms from time to time by posting a revised version. YOUR [CONTINUED] USE OF ANY OF THESE SITES AND APPS AFTER WE POST SUCH CHANGES WILL CONSTITUTE YOUR ACCEPTANCE OF SUCH CHANGES. IN [ADDITION], BY ORDERING PRODUCTS OR USING SERVICES, YOU ACKNOWLEDGE THAT YOU HAVE READ AND REVIEWED THESE TERMS IN THEIR [ENTIRETY], YOU AGREE TO THESE TERMS AND THE PRIVACY POLICY AND THESE TERMS CONSTITUTE BINDING AND ENFORCEABLE OBLIGATIONS ON YOU.

Shutterfly posted its amended Terms of Use containing the arbitration provision to its website in May 2015. The Plaintiff continued to access her Shutterfly account and ordered Shutterfly products past May 2015, having accessed her account most recently in April 2019. The court noted that Illinois law allows parties to agree to authorize one party to modify a contract unilaterally without notice, and also noted that Illinois courts have repeatedly recognized the enforceability of arbitration provisions added via a unilateral change-in-terms clause. The court found that because the Plaintiff agreed in August 2014 to allow Shutterfly to unilaterally change its Terms of Use without providing notice (other than through posting the modified terms on its website), and then continued to use the Shutterfly service and order Shutterfly products after the modified terms were posted in May 2015, the Plaintiff agreed to and was bound by the arbitration clause contained in the 2015 modifications to the Terms of Use. The court then granted Shutterfly's motion to compel arbitration.

A key takeaway of this case is that, under Illinois law, if parties agree to allow one party to unilaterally modify a contract without notice, the party then may modify the contract with little or no notice and courts will uphold the modification. As this case has demonstrated, such a modification clause can have severe consequences for the other party. One point to note is that courts in other jurisdictions have recently analyzed a unilateral change-in-terms clause in Hello Fresh's terms and conditions that requires notice to be given, and both have reached the opposite conclusion from the *Miracle-Pond* court. See *Engen v. Grocery Delivery E-Services USA Inc. d/b/a Hello Fresh*, No. 19-cv-2433, 2020 U.S. Dist. LEXIS 63658 (D. Minn. Apr. 10, 2020) (holding under New York law that a promotional email sent to customers that contained a link to updated terms and conditions containing an arbitration provision but did not contain an explicit notice of changes to the terms did not constitute sufficient notice to indicate acceptance by a customer to arbitrate disputes); *Murray v. Grocery Delivery E-Services USA Inc. d/b/a Hello Fresh*, No. 19-12608-WGY, 2020 U.S. Dist. LEXIS 87805 (D. Mass. May 19, 2020) (holding same under Massachusetts law). Although the courts sided with the customers in these two *Hello Fresh* cases to hold the arbitration clauses ineffective, parties with the leverage to negotiate terms should not leave it to the courts to protect them from the unforeseen consequences from unilateral changes-in-terms clauses. By sticking to a boilerplate clause requiring any modifications or amendments to the contract to be made through mutual written agreement, parties can avoid the hidden risks and potential loss of rights inherent in unilateral change-in-terms clauses.

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