

# A Technology Swiss Pickle – Freight Forwarder’s Reliance on Standard Terms

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Most freight forwarders have standard terms and conditions. Whether a freight forwarder can rely upon these standard terms and conditions as a defence in disputes depends upon:

- whether they have been incorporated into the contract in question; and
- whether they have been sufficiently drafted.

There has been much commentary on the decision in *Technology Swiss Pty Ltd v Famous Pacific Shipping (Vic) Pty Ltd* [2019] VCC 1542 in respect of its conclusion that even if standard terms and conditions have not been provided to a customer they can be incorporated into a contractual relationship with a customer if there is an email footer on the freight forwarder’s emails stating:

- all of the freight forwarder’s business is transacted subject to standard terms and conditions which are available on request; and

- in certain circumstances the terms exclude the freight forwarder’s liability and include indemnities for its benefit.

Contrary to some recent articles written about this case, there is no new law in the decision and it merely follows the established principles of Australian law regarding the incorporation of standard terms and conditions and the subsequent interpretation of those terms.

Although some commentaries have suggested that email footers can be used to incorporate standard terms and conditions into contracts, the effect of the decision cannot be put so highly.

It is misleading to suggest that email footers can incorporate a freight forwarder’s standard terms and conditions. This is because the *Technology Swiss* decision from a lower court (the County Court) which still follows the leading Australian Court of Appeal and High Court decisions on this issue. These decisions state that for a party to show that its standard terms are incorporated into a contract, it must show that it did all that was reasonable in the circumstances of the case to bring the terms to the attention of the other party. This is a question of fact in the circumstances of the case having regard to all of the circumstances of the parties.

Generally, following authority from the New South Wales Court of Appeal, a reference to terms and conditions being available on request in an email footer (as was the case in the *Technology Swiss* decision) is not sufficient to incorporate a party’s standard terms and conditions. This is because it leaves one party who is burdened by the terms the task of finding out what those conditions are and what they state.

However, in the decision in *Technology Swiss*, the email footer was, having regard to all the circumstances of the parties, able to incorporate the standard terms and conditions of Famous Pacific Shipping. This was due to the following:

- Famous Pacific Shipping had sent an email to *Technology Swiss* providing a quotation for its services which stated that the quotation included “FPS Standard terms and conditions”. This quotation was accepted by an email from *Technology Swiss* to Famous Pacific Shipping. That acceptance, despite a copy of the terms and conditions not being provided, was alone sufficient to incorporate Famous Pacific’s standard terms pursuant to authority in the Victoria Court of Appeal. In other words, the issue of the impact of the footer was not decided by the Court because the terms had already been incorporated into the contract by email correspondence; and

- The footer in the email, in addition to stating the terms and conditions were available on request, also stated that in certain circumstances the terms “exclude the Company’s liability and include indemnities which benefit the Company”. This statement clearly put the freight forwarder’s customer on notice that terms changed the common law rights of the parties.

Although the terms of the freight forwarder were incorporated into the contract for freight forwarding in question, the freight forwarder was found not to be able to rely upon the limitation clause in those terms. This was due to the manner in which the clause was drafted which meant that where there was a commercial invoice for the damaged goods in question, the basis of liability for the claim was not



a limitation amount but the commercial invoice value of the damaged goods.

Importantly, the decision in *Technology Swiss* should not be considered authority for the position that email footers can be used to incorporate a freight forwarder's standard terms and conditions. Rather it is a timely reminder that a freight forwarder must do all that was reasonable in the circumstances of the case to bring the terms to the attention of the other party. Email footers cannot be the principle means by which terms are to be incorporated into a contract. Freight forwarders should still incorporate their terms by doing the following:

- providing a copy of their standard terms and conditions to its customer, and obtaining a signed acceptance from its customers (through a credit application or other document such as a signed quotation) which states the customer has read the terms and understands that they apply to all services performed by the freight forwarder; or

“ *It is misleading to suggest that email footers can incorporate a freight forwarders standard terms and conditions* ”

- where there is no signed acceptance of terms, have email correspondence with the client regarding a contract which states that the contract is subject to the freight forwarders standard terms and conditions which apply to all services, and have a response from the customer to that email which accepts that position.

Email footers at best can only assist in “bullet proofing” the incorporation of standard terms and conditions. If they are used they should:

- state the freight forwarder's standard terms and conditions apply to all services it provides;
- state the freight forwarder's standard terms and conditions in certain circumstances exclude or limit the freight forwarder's liability and include indemnities in its favour; and
- contain a hyperlink to the freight forwarder's terms and conditions on its website.

Although the terms of the freight forwarder in the *Technology Swiss* decision were found to be incorporated, they could not be relied upon to exclude liability because they had been poorly drafted. Accordingly, the decision is a reminder a freight forwarder must have terms and conditions that are appropriately drafted for their operations.



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