

# ARTICLE OF THE MONTH

## The Power of Arbitration Clauses and 'Terms of Service'

By: Steven Saal, Partner

Eastern District of Pennsylvania reaffirms the ability of large transportation companies, and specifically common carriers, to establish procedures that could preclude costly in-court litigation.

“How can we reduce our litigation costs and close claims earlier?”

This is a common and entirely justifiable inquiry we receive from clients on a regular basis. It is terrific to settle a claim for well under its potential value due to victories within the litigation itself, but this often comes after months and years and tens of thousands of dollars at the least. Clients understandably want to further reduce costs – after all, while spending \$75,000 to settle a case for \$100,000, if you could have resolved it for \$125,000 before litigation. Early resolution is the financially savvy strategy and a better result. The question is how?

Arbitrations are generally far more cost-effective than in-court litigation. Pre-empting a case entirely with Terms of Service Agreements to preclude claims is even better. These clauses need to be crafted shrewdly and logically – none of our clients want the public relations kerfuffle that arose when Disney sought to use the arbitration clause in its streaming service to prelude a wrongful-death litigation. But in a world where brokered services, whether it be for freight and shipping or commercial transportation, are more ubiquitous than ever, these clauses can help insulate our clients from claims and litigations that are unrelated to our clients' actual conduct.

This issue was considered last month by the Eastern District of Pennsylvania in a decision that considered whether such agreements in a contract could be enforced after the specific performance that was the subject of the contract was already concluded – the Court decided that the answer was “yes.” In *Rideway Express, Inc. v. Hawkeye Transp. Servs., Inc.*, 2025 U.S. Dist. LEXIS 199918 (E.D. Pa. Oct. 9, 2025), the Court addressed a dispute that arose following the conclusion of a Broker-Carrier Agreement (“Agreement”) between Rideway and Hawkeye (“HTS”). HTS had enlisted Rideway to broker the shipment and, after the shipment was completed, accused Rideway – erroneously, according to Rideway – of double-brokering the trip and publicly posting the same on two platforms used by logistics companies. Rideway provided documentation that the accusation was unfounded and demanded that HTS take down the comment. Rideway ultimately filed suit and the operative amended Complaint maintained the tort defamation and disparagement claims as well as false advertising under the Langham Act. HTS moved to dismiss, asserting the Court lacked jurisdiction pursuant to the arbitration provision of the Agreement.

HTS contended that, even though the alleged ‘defamatory’ conduct occurred after conclusion of the Agreement, the claims were still subject to the arbitration since the claims derive from conduct under the Agreement. HTS further argued that the action violated the venue provision of the Agreement and that Rideway failed to state a cause of action. Rideway contended that, since they withdrew the breach of contract, the remaining claims were not subject to the specific terms of the Agreement. The Court ultimately agreed with HTS. The Court focused specifically on the underlying “valid agreement” to arbitrate. *Id.* at \*20. There was nothing in the record that would serve to invalidate the agreement and the Court relied on clear precedent that, with regard to “arbitration provision[s] cover[ing] ‘a dispute arising out of this Agreement’ . . . [o]ur courts consider such language expansive and inclusive of a broad range of disputes – even those that arise from the agreement’s ‘demise.’” *Id.* at \*21 (internal citations omitted). The Court repeated the Third Circuit’s clear directive that “allegedly defamatory statements made after the termination of an agreement fall under the arbitration provision contained within that agreement.” *Id.* at \*22. The holding here reaffirmed the strength of these arbitration provisions.

Though Rideway Express focused on a full contractual agreement, the New York State Court of Appeals for example has already confirmed the effect of these clauses in 'click through' Terms of Service Agreements that people are presented with every day. Last year, in *Wu v. Uber Tech., Inc.*, 2024 Ny Slip Op 05869 (2024), New York's highest court affirmed lower court rulings validating the 'clickwrap process' Uber used to create a valid arbitration agreement.

This strategy requires diligence. These agreements must meet standards relative to required review, acknowledgment of the terms, sending out full copies of the terms to the agreeing party, etc. A quick hit, you clicked it, and agreed that the apparatus will invite more judicial scrutiny. But a comprehensive "clickwrap" mechanism utilized by Uber and discussed in the Wu case can serve as a model for strategies that can insulate large transportation and logistics companies from an onslaught of litigation costs. If these tools are skillfully-utilized, it could be a strategy to save exponentially on future litigation and claim costs.