**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **IAP WORLDWIDE SERVICES, INC. and AIG EGYPT INSURANCE CO. S.A.E.** | : | **CIVIL ACTION** |
| **v.** | : | **No. 04-4218** |
| **UTi UNITED STATES, INC. and UTi EGYPT, LTD.** | : | |

**MEMORANDUM AND ORDER**

**Savage, J.** **February 8, 2006**

In this diversity action alleging breach of contract, breach of bailment, negligence and conversion, plaintiffs IAP Worldwide Services, Inc. ("IAP") and AIG Egypt Insurance Company S.A.E. ("AIG Egypt") contend that the defendants UTi United States, Inc. ("UTi United States") and UTi Egypt, Ltd. ("UTi Egypt") are liable for direct and consequential damages arising from the loss of twelve XQ2000 Power Modules ("the modules"), which were to be delivered to the United States Army Corp of Engineers in Iraq. Each of the defendants has moved for summary judgment. UTi United States seeks summary judgment on the claims for breach of contract, negligence and breach of bailment, but not the claim for conversion.[1] UTi Egypt seeks summary judgment on the one claim in which it is named, the negligence claim, based upon contractual limitation of liability.[2] AIG Egypt has moved to dismiss the counterclaims for contribution and indemnity brought by UTi United States.

[1] *Mem. of Law in Supp. of Def. UTi, United States, Inc.'s Mot. for Summ. J.* at n 3.

[2] *Mem. of Law in Supp. of Def. Uti, Egypt Ltd.'s Mot. for Summ. J.* at 2.

After considering the motions and reviewing the record, we conclude that there are factual disputes regarding the scope and the terms of the contract, the relationship of the defendants, and the circumstances surrounding AIG Egypt's payment to IAP that must be resolved, and credibility determinations with respect to what terms are negotiable that must be made. These decisions are for the fact finder - the jury. Therefore, we shall deny UTi United States' and UTi Egypt's motions for summary judgment.

AIG Egypt's motion to dismiss the counterclaim has been granted in part and denied in part. Now, we shall state our reasons for doing so.

**Factual Background**

Plaintiff IAP, a Delaware Corporation, provides procurement services to the United States military.[3] Plaintiff AIG Egypt is an insurance company existing under the laws of Egypt and a member of the American International Group, Inc., providing insurance to individuals and businesses.[4] Defendant UTi United States, a New York corporation, provides worldwide supply chain management services. It is primarily a freight forwarder and a customs broker.[5] As a customs broker, it prepares the necessary documents, including export declarations and related documents, with respect to the movement of goods across countries as required for each specific shipment.[6] Defendant UTi Egypt, Ltd., an Egyptian entity, is an arranging type freight forwarder. It performs various transportation

[3] *Am. Compl*. ¶ 3.

[4] *Am. Compl*. ¶ 4.

[5] *Wells' Aff.* ¶ 4.

[6] *Id.*

logistics services but does not itself act as a carrier.[7] The term freight forwarder is equivalent to the term logistics provider.[8]

Prior to this transaction, IAP and UTi United States had engaged in twenty-nine transactions.[9] All of the other transactions involved exports from the United States.[10] However, this was the first time IAP had hired UTi United States to transport freight by ship and truck from Egypt into Iraq.[11] Thus, IAP had never before hired UTi to arrange a shipment originating outside the United States.

This shipment consisted of twelve modules, and was to have taken place in the summer of 2004. The modules were to be shipped from Alexandria, Egypt to a port in Jordan, then by truck to Baghdad and Tikrit, Iraq.[12] On August 7, 2004, UTi advised IAP that it had lost the twelve modules and was unable to confirm their whereabouts.[13]

On August 27, 2003, approximately one year prior to the disappearance of the modules, IAP had executed a document entitled a Customs Power of Attorney / Designation as Export Forwarding Agent and Acknowledgment of Terms and Conditions

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[7] *Morsy Aff.* ¶ 6. The term "arranging type freight forwarder" is not specifically defined in the Affidavit.

[8] *Morsy Dep.* 38:24 - 39:4.

[9] *Wells Aff.* ¶ 12.

[10] *Raymond Dep*. 130:10-18.

[11] *Am. Compl.* ¶ 11; *Kirby Aff*. ¶ 10.

[12] *Am. Compl*. ¶ 7-9, 11.

[13] *Am. Compl*. ¶ 18.

("the POA").[14] The POA was sent to IAP by Katie Baran of UTi United States.[15] Along with the POA, Baran sent IAP the Terms and Conditions of Service ("the T&C") and a credit application.[16] It is both required and standard in the customs broker industry to obtain a POA executed by the customer. [17]

UTi United States' POA uses the standard Terms and Conditions of Service promulgated by the National Customs Brokers & Forwarders Associations of America, Inc.[18] The T&C states in pertinent part:

> These terms and conditions of service constitute a legally binding contract between the "Company" and the "Customer". In the event the Company renders services and issues a document containing Terms and Conditions governing such services, the Terms and Conditions set forth in such other document(s) shall govern those services.
>
> 1. Definitions.
>
> (a) "Company" shall mean UTi United States, as well as its subsidiaries, related companies, agents and/or representatives;
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> . . .
>
> (e) "Third parties" shall include, but not be limited to, "carriers, truckmen, cartmen, lightermen, forwarders, UTi's customs brokers, agents, warehousemen and others to which the goods are entrusted for transportation carriage, handling and/or delivery and/or storage or otherwise."

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[14] *Wells Aff*. ¶ 10 - 11; *Kirby Dep*. at 52.

[15] *Baran Aff*. ¶ 8-10; *Baran Dep*. at 82:12-13.

[16] *Baran Dep*. at 83:16-24, 85:12-15.

[17] *Wells Aff.* ¶ 4, *Baran Dep*. at 8:8-15.

[18] *Wells Aff.* ¶ 6.

. . .

4. No liability for the Selection or Services of Third Parties and/or Routes.

> Unless services are performed by persons or firms engaged pursuant to express written instructions from the Customer, Company shall use reasonable care in its selection of third parties, or in selecting the means, route and procedure to be followed in the handling transportation, clearance and delivery of the shipment; advice by the Company that a particular person or firm has been selected to render services with respect to the goods shall not be construed to mean that the Company warrants or represents that such person or firm will render such services nor does company assume responsibility or liability for any action(s) and/or inaction(s) of such third parties and /or its agents, and shall not be liable for any delay or loss of any kind, which occurs while a shipment is in the custody or control of a third party or the agent of a third party; all claims in connection with the Act of a third party shall be brought solely against such party and/or its agents; in connection with any such claim, the Company shall reasonably cooperate with the Customer, which shall be liable for any charges or costs incurred by the Company.

. . .

7. Declaring Higher Value to Third Parties. Third parties to whom goods are entrusted may limit liability for loss or damage; the Company will request excess valuation coverage only upon specific written instructions from the customer, which must agree to pay any charges therefore; in the absence of written instructions or the refusal of the third party to agree to a higher declared value, at Company's discretion, the goods may be tendered to the third party, subject to the terms of the third party's limitations of liability and/or terms and conditions of service.

8. Insurance: Unless requested to do so in writing and confirmed to Customer in writing, Company is under no obligation to procure insurance on Customer's behalf; in all cases, Customer shall pay all premiums and costs in connection with procuring requested insurance.

9. Disclaimers; Limitation of Liability

(a) Except as specifically set forth herein, Company makes no express or implied warranties in connection with its services;

(b) Subject to (c) below, Customer agrees that in connection with any and all services performed by the Company, the Company shall only be liable for its negligent acts, which are the direct and proximate cause of any injury to Customer, including loss or damage to Customer's goods, and the Company shall in no event be liable for the acts of third parties;

(c) In connection with all services performed by the Company, Customer may obtain additional liability coverage, up to the actual or declared value of the shipment or transaction, by requesting such coverage and agreeing to make payment therefore, which request must be confirmed in writing by the Company prior to rendering services for the covered transaction(s).

(d) In the absence of additional coverage under (b) above, the Company's liability shall be limited to the following:

(I) where the claim arises from activities other than those relating to customs brokerage, $50.00 per shipment or transaction(s).

(ii) where the claim arises from activities relating to "Customs business," $50.00 per entry or the amount of brokerage fees paid to the Company for the entry, whichever is less;

(e) In no event shall Company be liable or responsible for consequential, indirect, incidental, statutory or punitive damages even if it has been put on notice of the possibility of such damages.

. . .

21. Governing Law; Consent to Jurisdiction and Venue. These terms and conditions of service and the relationship of the parties shall be construed according to the laws of the State of New York without giving consideration to principles of conflict of law. Customer and

> Company (a) irrevocably consent to the jurisdiction of the United States District Court and State courts of New York. . . .[19]

The T&C was signed and acknowledged on IAP's behalf by its then president Reg Pellam.[20]

The POA was also signed by Pellam and was certified by IAP's chief executive officer Doyle McBride.[21] The POA provides in part:

> [IAP] hereby constitutes and appoints UTi United States, Inc., its officers, employees, and/or specifically authorized agents, to act for or on its behalf as a true and lawful agent and attorney of the grantor for and in the name, place and stead of said grantor, from this date, in the United States (the territory) either in writing, electronically, or by other authorized means.
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> . . .
>
> Grantor acknowledges receipt of UTi United States Terms and Conditions of Service governing all transactions between the Parties.[22]

The POA is used by customs brokers in the United States in order for them to act as an attorney in fact in the conduct of customs business in the United States.[23] The modules that are the subject of this lawsuit never touched United States territory.[24] The shipment originated in Alexandria, Egypt and reached the dockside in Jordan before it was lost.

According to Billy Wells, the UTi United States branch manager in Charleston and Savannah, IAP never requested an increase in the limitation of liability or additional liability

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[19] *Wells Aff.* Ex. B

[20] *Wells Aff*. Ex. A

[21] *Wells Aff*. Ex. B

[22] *Id*.

[23] *Raymond Dep.* at 130:7-18.

[24] *Id*. at l30:2-23.

coverage for the transport of the modules to Iraq.[25] Directly contradicting Wells is Ken Kirby, IAP's vice-president of procurement, who avers he requested from David Pixley, UTi United States' authorized agent, a quote for the transportation of the modules "on a turnkey basis."[26] Kirby believed that Pixley was the authorized agent of all UTi entities, including UTi Egypt because Pixley told him he "worked for Uti", a logistics company who (sic) had worldwide capabilities and because Pixley made no distinction between any individual or specific UTi companies."[27] In fact, the UTi subsidiaries have appointed each other as general agent in each UTi subsidiary's respective territory under the Networks Agreement, the glue that holds the international operation together. *Union-Transport Networks Inc. Airfreight & Oceanfreight Agreement* ¶¶ 2.1, 2.2

The term "turnkey" is central to the dispute in this case, each side ascribing to the term a different meaning having different consequences. Pixley testified at his deposition that "turnkey was Kirby's term, which he took to mean "we (UTi) will make all the arrangements."[28] He later testified, when asked to state his understanding of what "turnkey" meant, "I don't know what you mean by 'turnkey.'"[29] Nonetheless, in giving his price quote to Kirby, Pixley wrote:

> Here is the quote for each module from Alexandria to Tikrit/Balad (they appear close enough to [be] common rated). Quote is turnkey, including escort. From Mantrac in Alexandria to final destination(s).

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[25] *Wells Aff.* ¶ 16. He also averred that IAP never objected to the inclusion of the Terms and Conditions in any of the parties' twenty-nine prior transactions. *Id*. ¶ 17.

[26] *Kirby Aff*. ¶ 6.

[27] *Id*. ¶ 8.

[28] *Pixley Dep.* at 198:13-14.

[29] *Id*. at 236:22-24.

> UTi Egypt has already been in contact with Mantrac and have commodity specs in hand.[30]

Pixley admitted that he never asked Kirby what he meant when he used the term "turnkey" in asking for the quote.[31] He testified further:

> Q. As a turnkey transportation contractor, is it your view that UTi was to take care of all the details?
> A. It is my view that I didn't view us as whatever a turnkey transportation contractor is. We are an international freight forwarder.
>
> Q. So you quote a contract turnkey, but you undertook a different kind of service; is that what you're saying?
> A. I quoted a price for a movement, a shipment, with all-in service using my customer's terminology for that.
> Turnkey is not a word that's used in our industry regularly so –
>
> Q. It's a term that you used to quote the price, though, isn't it?
> A. It was a term I used to respond to my customer the way he worded it to me.
>
> Q. You didn't respond to say, There is no such thing as turnkey, Mr. Kirby, I can't quote it that way?
> A. I did not split hairs with him. I just interpreted his meaning through our conversations to mean, You'll handle all of the arrangements, et cetera.
>
> Q. Is it your view that UTi was to take care of all of the details – . . . – in connection with this move?
> A. No. My view is that UTi's responsibility was to arrange for the transportation of these goods.[32]

Kirby testified that he used the term "turnkey" with freight forwarders generally to mean the forwarder had "complete responsibility, one hundred percent possession, basically doing everything from A to Z; you're the expert." He added, "we're hiring you for

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[30] *Pixley Dep*. Ex. 12. Mantrac is the Caterpillar franchise in Egypt. *Kirby Dep.* at 24:20.

[31] *Pixley Dep.* at 238:22-24.

[32] *Pixley Dep*. at 258:12 - 259:19.

a service. And you'll find that actually our rates were not cheap and not skimpy, so we, yeah, we demand a lot but we also pay a lot."[33] He believed that all of his prior UTi arrangements were turnkey transactions.[34]

When asked if he had asked UTi to specifically find insurance to cover the shipment of the modules, Kirby stated

> Well, if I can make a comment on this, the point is we had contracted turn key. Part of that turn key was to provide insurance or whatever is necessary to get the product from point A to point B. [Katie Baran] had done that. She clearly demonstrated to me that she had done that.[35]

He also testified,

> Q. Okay, did IAP request insurance?
> A. Turn key; turn key is full responsibility; no different than what we had previously done in the previous transactions.
>
> Q. But that would – would that include insurance?
> A. That would include everything, full responsibility.
>
> Q. When you say turn key, does that always include insurance?
> A. Turn key is turn key. I'm not the expert. I was hiring the expert. UTi is – came in and sold themselves as a worldwide support agency. I hired an expert.
>
> Q. Well, if you – but you understand – do you understand what I mean by asking for insurance? I understand you testified about what your understanding is to turn key, but I'm asking you specifically –
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> . . .
>
> Q. But that's not a negotiated item?
> A. If it's a dollar and you're moving a dollar, I would expect you – common sense would dictate that you would insure for whatever

[33] *Kirby Dep.* at 36:25 - 37:5.

[34] *Id*. at 49:20.

[35] *Id*. at 61:8-18.

> you're moving if I was the carrier. I'm not the carrier. I'm not the person that's picking up my product and moving it from A to Z.[36]

UTi United States utilized the services of its related entity, UTi Egypt, to ship the modules.[37]

UTi Egypt uses the standard terms and conditions of service promulgated by the Egyptian International Freight Forwarding Association ("the Egyptian Conditions").[38] The Egyptian Conditions also contain a limitation of liability clause, which provides:

> (A) in respect of all claims . . . whichever is the least of
> (I) the value of, or SDR 666,67 per package or unit or
> (ii) 2 (two) special drawing rights (SDRs) per gross kilogram of the goods lost, damaged, misdirected, misbelieved or in respect of which claim arises.[39]

Paragraph 12 of the Egyptian Conditions provides that no insurance will be obtained for the shipment except upon express instructions given in writing.[40] UTi Egypt is party to a Networks Agreement with the parent UTi entity.[41] This agreement also contains a liability limitation:

> In the event of any loss or damage to goods exceeding in actual value $500 (lawful money of the United States) per package or, in case of goods not shipped packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per customary freight unit as the case may be, and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, unless that nature of the goods and a higher

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[36] *Id*. at 74:3 -75:4 (attorney objections deleted).

[37] *Morsy Aff*. ¶ 11.

[38] *Id*. ¶ 7.

[39] *Id*. ¶ 9.

[40] *Id*. ¶ 10.

[41] *Plaintiffs' Exhibit* 9.

> value shall be declared by the shipper in writing before shipment and inserted in the bill of lading.[42]

**Summary Judgment Standard**

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). In examining the motions, we must view the facts in the light most favorable to the nonmovants and draw all reasonable inferences in their favor. *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159-60 (3d Cir. 2003).

The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact. FED. R. CIV. P. 56(c). Once the movant has done so, the opposing parties cannot rest on the pleadings. To defeat summary judgment, they must come forward with probative evidence establishing the prima facie elements of their claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The nonmovants must show more than the "mere existence of a scintilla of evidence" for elements on which they bear the burden of production. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). An inference based upon speculation or conjecture does not create a material fact. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

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[42] *Id.* ¶ 7.

## UTi United States' Motion[43]

UTi United States does not dispute whether IAP specified a turnkey term as part of the Iraq contract. Rather, it contends that, regardless of whether that term was part of the contract, the limitations of liability set forth in the T&C remains enforceable.[44] It argues that it is undisputed that IAP was aware of the T&C and its applicability to all transactions. Thus, it concludes, the clause in the T&C limiting its liability to $50.00 applies to this dispute.

Construing the record in favor of the non-moving party, we find that IAP's submissions create a jury question on the issue of whether the parties' course of dealing over the year between when the T&C was signed and when the modules were shipped, as well as the negotiations between Kirby and Pixley, altered the application of the terms of the T&C to this transaction. Accordingly, a jury must determine whether the limitation of liability applies.

The choice of law provision of the T&C provides that, notwithstanding principles of conflict of laws, New York law governs the terms and conditions of service and the relationship of the parties. However, as this is a maritime contract and the dispute is not inherently local, federal law controls the contract interpretation. *Norfolk S. R. Co. v. Kirby*, 543 U.S. 14, 22-23 (2004) (authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts).

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[43] UTi Egypt, in addition to making its own arguments, adopts the arguments asserted by UTi United States. Thus, our discussion applies to both motions.

[44] *Mem. of Law in Supp. of Def. UTi, United States' Mot. for Summ. J.* at 3.

Under federal common law, general rules of contract interpretation govern maritime contracts. *See, e.g., Am. Tel. & Tel. Co. v. M/V Cape Fear*, 967 F.2d 864, 873 (3d Cir. Cir. 1992). These general rules are "the core principles of the common law of contract that are in force in most states." *United States v. Nat'l Steel Corp.*, 75 F.3d 1146, 1150 (7th Cir. 1996). Pursuant to these general principles, "if the parties' intent can be cleanly extracted from the clear and unambiguous words that the parties have used, it is equally conventional wisdom that they are held to those words contained in the contract." *Compass Tech., Inc. v. Tseng Labs., Inc*., 71 F.3d 1125, 1131 (3d Cir. 1995). If the terms of the agreement are clear and unambiguous, they must be enforced as written. *Id*.

If the language of a contract is ambiguous, that is, susceptible to more than one reasonable interpretation, the court may look to extrinsic evidence of the parties' intent such as their course of conduct throughout the life of the contract. *Williams v. Metzler*, 132 F.3d 937, 947 (3d Cir. 1997); *Hoyt v. Andreucci*, 433 F.3d 320, 331 (2d Cir. 2006) (construing New York law). A "course of dealing" is commonly defined as "a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." RESTATEMENT (SECOND) OF CONTRACTS § 223(1) (1979). "Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement." RESTATEMENT (SECOND) OF CONTRACTS § 223(2) (1979). Evidence of a prior course of dealing can thus establish a party's awareness of and consent to intended contractual terms. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 103 n.40 (3d Cir. 1991); *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG*,

121 F.3d 24, 31 (2d Cir. 1997) (citing RESTATEMENT (SECOND) OF CONTRACTS § 223) (1979)).

Ordinarily, a course of dealing analysis focuses on the actions of the parties with respect to a specific issue that the parties may have encountered before, such that a factfinder could reasonably infer that the parties have incorporated such a term in their agreement. *Step-Saver*, 939 F.2d at 103. But, the prior course of dealing doctrine extends "beyond prior dealings involving actual disputes to include evidence that a party has ratified terms by failing to object. Specifically, terms repeated in a number of written confirmations may, over time, become part of later contracts." *See Quick v. NLRB*, 245 F.3d 231, 247-48 (3d Cir. 2001); *see also Pervel Indus., Inc. v. T M Wallcovering, Inc.*, 871 F.2d 7, 8 (2d Cir. 1989) ("Where, as here, a manufacturer has a well established custom of sending purchase order confirmations containing an arbitration clause, a buyer who has made numerous purchases over a period of time, receiving in each instance a standard confirmation form which it either signed and returned or retained without objection, is bound by the arbitration provision."). In such cases, "the common knowledge and understanding of the parties . . . may be inferred from . . . tacit acceptance of a clause repeatedly sent to the offeree in an order confirmation document." *New Moon Shipping Co.*, 121 F.3d at 31.

A course of dealing, rather than modifying an agreement, may become part of an agreement at its inception by "explicit provisions of the agreement or by tacit recognition." U.C.C. § 1-201(b)(3) Official Comment 3.[45] It reveals the "bargain of the parties in fact," informing the nature and the extent of the parties' obligation to each other. *See*

[45] The U.C.C. is often used as a source for the federal common law. *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 94 n.6 (D.C. Cir. 2001).

*Kunststoffwerk Alfred Huber v. R.J. Dick, Inc.*, 621 F.2d 560, 564 (3d Cir. 1980) (stating that course of dealing may establish a limitation of damages term as part of the bargain of the parties in fact).

Where an agreement is silent on a particular term, a course of dealing may fill the void. This is made clear by the fact that a course of dealing may supplement or qualify the terms of the parties' agreement as well as provide interpretive guidance on terms explicit in that agreement. *James v. Zurich-Am. Ins. Co. of Ill.*, 203 F.3d 250, 255-56 (3d Cir. 2000) (citing *Capitol Bus Co. v. Blue Bird Coach Lines, Inc.*, 478 F.2d 556, 559-60 (3d Cir. 1973)).[46]

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[46] New York common law is essentially the same. A contract is interpreted to effectuate the parties' reasonable expectations. *See Omni Berkshire Corp. v. Wells Fargo Bank, N.A.,* 307 F. Supp 2d 534, 539-40 (S.D.N.Y. 2004) (*citing Sunrise Mall Assocs. v. Import Alley of Sunrise Mall, Inc*., 621 N.Y.S.2d 662, 663 (N.Y. App. Div. 1995)); *see also VTech Holdings Ltd. v. Lucent Techs., Inc*., 172 F. Supp 2d 435, 441 (S.D.N.Y. 2001) ("the essence of contract interpretation . . . is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract") (internal quotations and citation omitted). To give effect to the parties' reasonable expectations, the court must determine their purpose and intent in entering the contract. *Sunrise Mall*, 621 N.Y.S.2d at 663; *Space Imaging Eur., Ltd. v. Space Imaging L.P.*, 38 F. Supp 2d 326, 334 (S.D.N.Y. 1999). The first step in this analysis is an examination of the language of the contract. *See Md. Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617, 624 (2d Cir. 1993); and *U.S. v. Am. Soc'y of Composers, Authors and Publishers*, 309 F. Supp 2d 566, 571 (S.D.N.Y. 2004).

"Where the contract is unambiguous on its face, it should be construed as a matter of law and summary judgment is appropriate." *Niagara Frontier Transit Metro Sys., Inc. v. County of Erie*, 623 N.Y.S.2d 33 (N.Y. App. Div. 1995); *see also Rothenberg v. Lincoln Farm Camp, Inc*., 755 F.2d 1017, 1019 (2d Cir. 1985). By contrast, where the contract's language is ambiguous, its interpretation is a question of fact normally reserved for a jury. *See State of New York v. Home Indem. Co.*, 66 N.Y.2d 669 (N.Y. 1985). Contract language is unambiguous if it has "a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion." *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989) (*quoting Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280 (N.Y. 1978)). Alternatively, contractual language is ambiguous if it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp*., 818 F.2d 260, 263 (2d Cir. 1987). The question of whether a writing is ambiguous is itself a question of law. *Pellot v. Pellot*, 759 N.Y.S.2d 494, 497 (N.Y. App. Div. 2003).

Whether the POA and T&C apply to the shipment of the modules depends, in the first instance, upon the interpretation of the "territory" clause in the POA and whether that limitation applies solely to the customs brokerage services or to all services UTi was to provide to IAP. As quoted above, the POA appointed UTi United States the attorney in fact to act for IAP "in the United States (the territory)." The same document also provides that IAP "acknowledges receipt of UTi United States Terms and Conditions of Service governing all transactions between the Parties." UTi argues that the document served three distinct purposes: to designate UTi United States the attorney in fact while in the territory, to appoint it the forwarding agent to complete export documents, and to make the T&C applicable to *all* transactions between the parties, irrespective of where the transaction took place.[47] Despite the clear language that the territory clause specifically applies within the United States, UTi asserts that the T&C acknowledgment applies worldwide. We agree with IAP that, given the specific territorial limitation contained in the POA, it is ambiguous whether the parties intended the T&C to apply extra-territorially.

There is certainly a reasonable basis for a difference of opinion on the extra-territorial scope of the T&C. Nothing in the POA specifies that the T&C acknowledgment applies beyond the United States. While UTi argues that, as a logistics provider, it is often called upon to serve multiple functions and will need documents that will apply in some contexts but not others, the writing itself implies no difference in the territorial scope of those various functions. Just as UTi's power of attorney function is limited to the United States, so is its appointment as forwarding agent:

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[47] *Mem. of Law in Supp. of Def. UTi, United States' Mot. for Summ. J.* at 12.

> Appointment as Forwarding Agent: Grantor authorizes the above Grantee to act *within the territory* as lawful agent to sign and endorse export documents . . . as may be required under law and regulation *in the territory*.[48]

Rather than reading the acknowledgment clause as extending the reach of the T&C beyond the United States, it is just as reasonable to interpret the entire agreement as evincing the true intent of the parties to make the T&C applicable only to "all" transactions between the parties "in the territory," since both the attorney in fact and forwarding agent duties are so limited.

The parties' course of conduct creates a jury question regarding whether the parties intended that the T&C was limited to the territory. The course of conduct raises an inference that the POA was intended to apply only to the services UTi rendered for IAP in the United States because all of the parties' prior transactions involved exports from the United States.[49] The transaction that resulted in the loss of the modules was the first time IAP hired UTi to provide logistics that were entirely extra-territorial. To accomplish this, Kirby asked for a "turnkey quote," which if the jury finds credible, was intended by Kirby to give UTi complete responsibility to ensure the modules were safely delivered. Combined with Pixley's testimony that he used the term in his quote without understanding what Kirby meant by the term, a jury could conclude that Pixley bound the company to a level of liability beyond the limitations contained in the T&C.

UTi United States also argues that it is entitled to judgment as a matter of law on the claims brought by AIG Egypt. The amended complaint alleges that UTi had contracted

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[48] *Wells Aff.* Ex. B (emphasis added).

[49] *Raymond Dep.* at 130:10-18.

with AIG Egypt to insure the shipment of the modules for the benefit of IAP.[50] On August 16, 2004, AIG Egypt notified IAP that UTi was not providing sufficient information about the loss and that it was, therefore, reserving its right to deny coverage.[51] Nonetheless, in March 2005, AIG Egypt partially settled the claim for loss of the modules and was subrogated to the rights of IAP against UTi in accordance with the terms of the settlement.[52] AIG Egypt is a co-plaintiff on all of the counts contained in the amended complaint.

UTi United States asserts that AIG Egypt's agreement to pay IAP constituted a voluntary payment in exchange for a compromise of the claim, rather than a compulsory payment, and thus AIG Egypt is not entitled to subrogation.[53] According to AIG Egypt's assistant general manager, Mohamed Mahran, AIG Egypt initially questioned coverage because it received late notice of the claim and also because there was reason to believe that the loss was due to the truck driver stealing the modules, an act that would not have been a covered loss under the policy.[54] He testified that AIG Egypt paid the claim on advice of counsel, even though there were serious issues regarding policy coverage.[55]

UTi argues, citing *Kemper Nat'l P&C Cos. v. Smith*, 615 A.2d 372 (Pa. Super. Ct. 1992), that where the payment made by the insurer on behalf of its insured to the third

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[50] *Am. Compl.* ¶ 23.

[51] *Id.*

[52] *Id.* ¶ 31.

[53] *Mem. of Law in Supp. of Def. UTi United States' Mot. for Summ. J.* at 24.

[54] *Mahran Dep.* at 82:8 - 83:2; 90:24 - 92:6.

[55] *Id*. at 92:15 - 93:16.

party victim is "voluntary," it has no right of subrogation against an alleged independent tortfeasor. *See also Travelers Ins. Co. v. Nory Const. Co., Inc*., 708 N.Y.S.2d 252, 256 (2000) (qualification regarding the right of equitable subrogation is that payment by the insurer must have been made under compulsion or for the protection of its own interests, and in discharge of an existing liability; conversely, subrogation is denied where payments are voluntarily made). The fact that AIG Egypt paid the claim after first reserving its rights does not transform the settlement into a voluntary payment as a matter of law. Unlike the third party claim paid in *Kemper*,[56] AIG Egypt's payment here was to its own insured, to whom it owed an affirmative duty of good faith. "The liability of an insurer need not be ironclad in order for it to settle a claim without a subsequent finding that the payment to the insured was voluntary." *Weir v. Fed. Ins. Co.*, 811 F.2d 1387, 1394 (10th Cir. 1987) (citing *Agricultural Ins. Co. v. Smith*, 262 Cal. App. 2d 772, 778-79 (Cal. Dist. Ct. App. 1968)). A payment is not voluntary if it is made with a reasonable or good faith belief in an obligation or personal interest in making that payment. *Weir*, 811 F.2d at 1394 (citing 73 AM. JUR. 2D SUBROGATION § 25 (1974)). There is ample evidence in the record to support the proposition that AIG Egypt might have paid the claim in a good faith belief it was obligated to do so. Thus, the voluntariness of the payment is a factual issue that must be decided by the jury.[57]

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[56] In *Kemper*, the insured was involved in an automobile accident as a result of which his victim was receiving chiropractic treatment. *Kemper*, 615 A.2d at 373. While on a trip to Pennsylvania, the victim was treated by another chiropractor who allegedly caused the victim to suffer a stroke. *Id.* at 373-4. The insurer settled with the third party victim and sought indemnity against the Pennsylvania chiropractor. *Id.* The court held that the insurer did not state a claim for subrogation, but rather attempted to recover a form of contribution from a successive or independent tortfeasor. *Id*. at 376-7.

[57] Specifically, Mahran testified that the claim was paid on the advice of counsel. It is certainly reasonable to infer from this testimony that counsel advised that payment be made because the company had a good faith obligation to make the payment.

**UTi Egypt's Motion**

In its motion, UTi Egypt argues that its own liability limiting terms apply to the loss of the modules. It asserts that UTi United States understood and recognized that UTi Egypt operated pursuant to Egyptian Conditions, and agreed to be bound by them. Those terms, it contends, are enforceable against IAP by reason of the language in the T&C, part of the contract between IAP and UTi United States, making IAP subject to the terms of a third party's limitations of liability and/or terms and conditions of service.[58] IAP responds that, since UTi Egypt's arguments are based upon the application of the T&C, and application of the T&C is a disputed issue of fact, UTi Egypt's motion must also be denied.[59]

We do not agree with IAP. Application of the Egyptian Conditions is not dependent upon a finding that the T&C governs the dispute between UTi United States and IAP. Rather, the Egyptian Conditions apply in their own right.

"When an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed." *Norfolk Southern R. Co. v. Kirby*, 543 U.S. 14, 33 (2004) (citing *Great Northern R. Co. V. O'Connor*, 232 U.S. 508, 514 (1914). This is because the carrier "had the right to assume that the [intermediary] could agree upon the terms of the shipment; it could not be expected to know if the [intermediary] had any outstanding, conflicting obligation to another party. . . . The owner's remedy, if necessary, was against the

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[58] *Mem. of Law in Supp. of Def. UTi Egypt's Mot. for Summ. J.* at 6-7.

[59] *Pls.' Mem. in Opp'n to Mot. for Summ. J. of UTi Egyp*t at 6.

[intermediary]." *Norfolk S.*, 543 U.S. at 33 (quoting *Great N*, 232 U.S. at 514-15.) Thus, vis-a-vis the cargo owner, the Court held that a railroad could rely on the liability limitation in its own tariff agreement with the intermediary, without needing to rely upon the law of agency. *Norfolk S.*, 543 U.S. at 34.

IAP argues that the *Great Northern* rule should not apply. It asserts that, while UTi United States' standard contract allegedly advised IAP that "third parties" might have their own liability limitations, UTi Egypt is a not "third party" but rather an agent of UTi United States. As an agent, IAP argues, UTi Egypt is not subject to the disclaimers of third party liability in the T&C.[60] This argument seems insupportable. The *Norfolk Southern* Court determined that there was no need to look to the law of agency; it was appropriate to apply the *Great Northern* rule in the *absence* of traditional agency relationship, so that the agreement between the carrier and the intermediary bound the cargo owner. Whether UTi Egypt is deemed an agent or a third party is irrelevant. It is entitled to rely on its own limitations on liability vis-a-vis the cargo owner and IAP's remedy properly lies against UTi United States.

One argument, however, does give us reason to pause. IAP also argues that, as UTi Egypt failed to identify the Egyptian Conditions as part of the jurisdictional discovery, it should be precluded from reliance upon it.[61] The jurisdictional discovery asked UTi Egypt to identify all contracts and agreements "between UTi Egypt and any UTi Company, including but not limited to UTi, UTi US and UTi Worldwide. . . ," as well as all

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[60] *Pls.' Mem. in Opp'n to Mot. for Summ. J. of UTi Egypt* at 7.

[61] *Pls.' Mem. in Opp'n to Mot. for Summ. J. of UTi Egypt* at 10.

"arrangements between UTi Egypt and UTi United States or UTi Worldwide concerning the transportation of freight." As we read them, the Egyptian Conditions are not a contract per se, but rather the standard terms under which UTi Egypt operates. They may, however, constitute an "arrangement." Regardless, it was incumbent upon UTi Egypt to disclose the material at the center of its claimed defense.

We shall deny UTi Egypt's summary judgment motion. However, we shall revisit the issue after UTi Egypt has an opportunity to offer a credible explanation why the document had not been produced and IAP can show how it has been prejudiced by the late disclosure. We leave for another day the question whether *Norfolk Southern* would provide haven for UTi Egypt if it is determined that it is the alter ego of UTi US, thus rendering UTi Egypt and UTi US one and the same.

**AIG Egypt's Motion**

In its counterclaim, UTi United States seeks common law indemnity and contribution from AIG Egypt based on two theories. First, it asserts that AIG Egypt was in a position to negotiate the return of the modules (presumably from the thieves that stole them) for a fraction of the amount of IAP's claimed loss, but chose not to pay the ransom.[62] UTi United States alleges that this failure was the proximate cause of IAP's loss. In addition, it asserts – in direct contradiction of its earlier "voluntary payment" arguments – that AIG Egypt *improperly* asserted its policy defenses against its insured and that this wrongful

[62] *Countercl.* ¶ 15.

adjustment of the claim was also a proximate cause of IAP's loss.[63] In short, despite its third party status, it makes a bad faith insurance claim.

In its motion to dismiss the counterclaim, AIG Egypt argues that UTi United States has no right to indemnity because (1) it was not named as an additional insured on the IAP policy and (2) an insurer owes no duty of good faith dealing to third parties.[64] AIG Egypt argues there is no right to contribution because, under Pennsylvania law,[65] the right to contribution arises only among joint tortfeasors and there is no allegation in the Counterclaim that UTi United States was involved in the tortious actions that resulted in the theft of the modules.

In examining motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), we accept all of the well-pleaded allegations in the complaint as true. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 77 (3d Cir. 2003). Dismissal under 12(b)(6) can be granted only if the plaintiff cannot obtain relief under any set of facts. *Leamer v. Fauver*, 288 F.3d 532, 547 (3d Cir. 2002).

"Indemnity is a common law remedy which shifts the entire loss from one who has been compelled, by reason of some legal obligation, to pay a judgment occasioned by the initial negligence of another who should bear it." *Willet v. Pa. Med. Catastrophe Loss Fund*, 702 A.2d 850, 854 (Pa. 1997); *Builders Supply Co. v. McCabe*, 77 A.2d 368, 370 (Pa. 1951); *see* RESTATEMENT OF RESTITUTION § 76 (1962). "It is not a fault sharing

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[63] *Id.* ¶ 18-19.

[64] *Mem. of Law in Supp. of AIG Egypt's Rule 12(b)(6) Mot. to dismiss the Countercls. of UTi United States, Inc.* at 5.

[65] UTi United States does not dispute that Pennsylvania law applies to the Counterclaim. See *UTi United States' Memorandum of Law in Opposition to AIG EGYPT's Motion to Dismiss* at 4 (citing Pennsylvania law).

mechanism . . . it is a fault shifting mechanism [where a defendant] seeks to recover his loss from a defendant who was actually responsible for the accident which occasioned the loss." *Sirianni v. Nugent Bros., Inc.*, 506 A.2d 868, 871 (Pa. 1986)). The right of indemnity inures to the benefit of the entity who, while not at fault, is compelled to pay damages occasioned by the negligence of another. *Willet* at 623 (citing *Judge v. Allentown & Sacred Heart Hosp.Ctr.,* 496 A.2d 92, 94 (Pa. Commw. Ct. 1985).[66]

The allegations of the counterclaim state a cause of action for common law indemnity. Although the counterclaim arises in relation to an insurance policy, it does not seek contractual indemnity under the policy. Rather, the counterclaim is clearly one for common law indemnity based upon the alleged inequity of making UTi United States suffer any of the fault from the loss of the modules. Since it asserts, alternatively, that AIG Egypt's failure to pay the ransom or its wrongful adjustment of the claim were the proximate cause of IAP's loss, the indemnity counterclaim may go forward.

The contribution counterclaim is more problematic for UTi. In Pennsylvania, contribution based on joint and several liability is governed by statute and is available only among joint tortfeasors. 42 PA. CONS. STAT. ANN. § 8324; *Kemper*,615 A.2d at 380 (common law regarding contribution has been replaced by statutory authority which does not recognize a right of contribution among successive or independent tortfeasors). The term "joint tortfeasors" is defined as "two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered

[66] Modern theories of comparative negligence and contribution have not impaired or superseded the common law right to indemnity under Pennsylvania law. *Sirianni*, 506 A.2d at 870-71.

against all or some of them." 42 PA. CON. STAT. ANN. § 8322. In determining whether parties are joint tortfeasors, courts generally consider the following factors:

> the identity of a cause of action against each of two or more defendants; the existence of a common, or like duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiffs; identity of the facts as to time, place or result; whether the injury is direct and immediate, rather than consequential, responsibility of the defendants for the same *injuria* as distinguished from *damnum*.

*Harka v. Nabati*, 487 A.2d 432, 434 (Pa. Super. Ct. 1985) (citations omitted). *See also Lasprogata v. Qualls*, 397 A.2d 803, 806 n.4 (Pa. Super. Ct. 1979) (quoting Black's Law Dictionary, 4th ed., for the position that, "to be a joint tortfeasor, 'the parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury'"). Where the pleadings show separate torts, rather than a joint tort, the third-party contribution action must be dismissed. *Foulke v. Dugan*, 212 F.R.D. 265, 270 (E.D. Pa. 2002). "Whether liability for harm to a plaintiff is capable of apportionment is a question of law for the court, not a question of fact for the jury." *Voyles v. Corwin*, 441 A.2d 381, 383 (Pa. Super. Ct. 1982).

As a matter of law, AIG Egypt and UTi United States are not joint tortfeasors. There is no identity between IAP's breach of contract, breach of bailment and conversion claims and AIG Egypt's alleged negligence in failing to pay the ransom and properly adjust the loss. That UTi United States lost the modules while they were in its bailment is the alleged breach of duty and injury supporting IAP's claims. The duty and injury alleged in the counterclaim arise from the failure to mitigate a third party's exposure for the insured loss. The fact that the counterclaim alleges that AIG Egypt's negligence occurred after the modules were already lost defeats any argument of identity as to time, place or result.

Accordingly, while UTi United States can assert that the liability for the loss shifts entirely to AIG Egypt under the common law of indemnity, there can be no claim for statutory contribution to apportion the loss between them.

Notwithstanding the clear language in *Harka* that statutory contribution is only available among joint tortfeasors, UTi United States argues that Pennsylvania still permits "non-statutory" apportionment among independent tortfeasors. It asserts that the *Harka* Court recognized that, even where parties are not technically "joint" tortfeasors, the damages should be apportioned where two "active" tortfeasors cause harm to a plaintiff, and that harm is capable of apportionment. This argument is based on the *Harka* Court's citation with approval to *Embrey v. Borough of W. Mifflin*, 390 A.2d 765 (Pa. Super. Ct. 1978). The *Harka* Court stated:

> As we have held in *Embrey* . . . , to the extent that the acts of the original tortfeasor and those of the [independent tortfeasor] physician are capable of separation, the damages should be apportioned accordingly. This apportionment does not necessarily follow the statutory rules for contribution among tortfeasors applicable in situations where such tortfeasors are characterized as joint. Instead, where identifiable acts of negligence of the original wrongdoer and the negligent physician are separate from each other in nature and time, the damages are accordingly apportionable.

487 A.2d at 434-5. While *Harka* may have kept non-statutory contribution alive for independent tortfeasors, it clearly did not survive the decision in *Kemper*.

After recognizing that "several prior decisions of this court have permitted damages among successive or independent tortfeasors to be apportioned," and thoroughly reviewing the laws of other states, the *Kemper* Court made it clear that the statutory rule permits contribution only among joint tortfeasors. *Kemper*, 615 A.2d at 377. It held,

> the rights of contribution and apportionment of liability among multiple defendants is a matter which is governed *exclusively by statute* in Pennsylvania. While some states have attempted to ameliorate the precise problem at issue here by limiting a defendant's liability for those injuries caused solely by his or her own negligence or by permitting the apportionment of liability among all tortfeasors, even those who have not been made parties, Pennsylvania's statute does not so provide. Rather, Pennsylvania only authorizes contribution among joint tortfeasors.

*Id.* at 379-80. (emphasis added). Accordingly, we conclude that, as a matter of law, UTi United States cannot state a claim for contribution against AIG Egypt.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **IAP WORLDWIDE SERVICES, INC.;** | : | **CIVIL ACTION** |
| **AIG EGYPT INSURANCE CO. S.A.E.** | : | |
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| | : | |
| **v.** | : | **No. 04-4218** |
| | : | |
| | : | |
| **UTi UNITED STATES, INC.;** | : | |
| **UTi EGYPT, LTD.** | : | |

**ORDER**

**AND NOW**, this 8th day of February, 2006, upon consideration of UTi, United States, Inc. and UTi, Egypt, Ltd.'s Motions for Summary Judgment and/or Partial Summary Judgment (Document Nos. 90 and 91), and the plaintiffs' responses, it is **ORDERED** that motions are **DENIED**.

s/ Timothy J. Savage
TIMOTHY J. SAVAGE, J.