CONSTRUCTION : BULLETIN

7 Key Principles to Unlocking the Battle of the Forms

The 'battle of the forms' often arises in circumstances where parties enter into a contract and both seek to rely on their own standard terms and conditions. In those circumstances, whose terms will prevail?

This question arose in the recent case of *Transformers & Rectifiers Ltd* ("Transformers") *v Needs Ltd* ("Needs").

Background

From the mid-1990s to the present day, Transformers placed weekly orders with Needs for nitrile gaskets (a type of gasket resistant to many oils and acids).

The gaskets were ordered using purchase orders which had Transformers' standard terms printed on the reverse. However, there was nothing on the front of the purchase orders which made it obvious that there was any writing on the reverse.

Needs responded to each purchase order by issuing an order acknowledgement which stated: *"The quoted prices and deliveries are subject to our normal Terms and Conditions of Sale (copies available on request)."*

Whenever goods were delivered by Needs, they were accompanied by a delivery note. The delivery notes included a certificate of conformity which stated "*We hereby certify that the material detailed hereon has been inspected in accordance with the requirements of the conditions and requirements of the contract/purchase order, and unless stated otherwise conforms in all respects to the drawing(s)/specification(s) relevant thereto*."

Two contracts became the subject of the dispute, one entered into in March 2012 and the other in February 2013 (the "Contracts"). Transformers alleged that the gaskets supplied by Needs under the Contracts were not fit for purpose and were not in accordance with the Contracts. A dispute arose as to which party's standard terms applied to the Contracts.

Transformers argued that Needs was aware of Transformers' terms, and that by issuing its order acknowledgment, Needs had accepted Transformers' terms. However, no evidence was produced to show that Needs had ever seen Transformers' terms. Indeed, in many cases, Transformers placed orders by fax or e-mail and only transmitted the front page of the purchaser order. Only the hard copy purchase orders had any terms and conditions printed on the back.

Transformers also argued that the certificate of conformity on the delivery notes indicated that the purchase order was the governing document because it referred to the purchase order. In addition, the purchase orders stated that a certificate of conformity was required for all goods.

Needs argued that Transformers had taken insufficient steps to give reasonable notice of its standard terms, so they were not incorporated into the Contracts. By contrast, Needs argued that it had given sufficient notice of its terms in its order acknowledgement and that this was therefore a counter offer that was accepted by Transformers when it took delivery of the goods.

Hawkswell Kilvington

Solicitors to the Construction and Engineering Industries

Hawkswell Kilvington

17 Navigation Court
Calder Park
Wakefield
WF2 7BJ

90 Long Acre
Covent Garden
London
WC2E 9RZ

T: 0844 809 9566
E: enquiries@hklegal.co.uk
W: www.hklegal.co.uk

The Authorities

In his decision, the judge referred to a number of cases, all dealing with the battle of the forms, including:

Balmoral Group v Borealis – this case concerned nearly 400 purchases. Borealis made it clear that its prices were quoted *"…subject to normal terms and conditions of sale"* and these terms were put on the reverse of the invoices. Balmoral saw and initialled all of these invoices, knowing the terms were on the reverse but choosing never to study them.

Balmoral's purchase orders referred to Balmoral's terms but these were never otherwise referred to or provided to Borealis.

The judge in that case stated *"Whether or not one party's standard terms are incorporated depends on whether that which each party says and does is such as to lead a reasonable person in their position to believe that those terms were to govern their legal relations… The question is one of fact*". It was held that Borealis was reasonably entitled to assume that Balmoral accepted that its conditions applied.

Tekdata Interconnections Ltd v Amphenol Ltd – in this case the judge made a number of observations:

"*…there can be circumstances in which a traditional offer and acceptance analysis can be displaced by reference to the conduct of the parties over a long-term relationship*".

"*…it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms… But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, it seems to me that the corrects analysis is… the 'traditional offer and acceptance analysis'*".

The 7 Principles

After reviewing the relevant case law, the judge stated that in cases concerning a battle of the forms, the following principles apply:

1. "*Where A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, the correct analysis, assuming that each party's conditions have been reasonably drawn to the attention of the other, is that there is a contract on B's conditions.*"

2. "*Where there is reliance on a previous course of dealing it does not have to be extensive.*"

3. "*The course of dealing by the party contending that its terms and conditions are incorporated has to be consistent and unequivocal.*"

4. "*Where trade or industry standard terms exist for the type of transaction in question, it will usually be easier for a party contending for those conditions to persuade the court that they should be incorporated, provided that reasonable notice of the application of the terms has been given*."

5. "*A party's standard terms and conditions will not be incorporated unless that party has given the other party reasonable notice of those terms and conditions.*"

6. "*It is not always necessary for a party's terms and conditions to be included or referred to in the documents forming the contract; it may be sufficient if they are clearly contained in or referred to in invoices sent subsequently.*"

7. "*By contrast, an invoice following a concluded contract effected by a clear offer on standard terms which are accepted, even if only by delivery, will or may be too late.*"

The Judgment

The judge decided that Transformers' terms were not incorporated into the Contracts because Transformers had not made it clear that it wished to rely on them. Transformers had adopted inconsistent ordering practices, sometimes sending hard copy purchase orders with terms printed on the reverse and sometimes sending purchase orders electronically without any terms. The consequence of this failure to follow a consistent practice was that Needs was entitled to assume that Transformers did not intend to rely on its standard terms.

However, Needs' standard terms were not incorporated either because it had failed to draw those terms to Transformer's attention, whether by printing the terms on the reverse of its order acknowledgement or separately providing a copy of them to Transformers.

The judge concluded that neither party's standard terms were incorporated into the Contracts. The likely consequence of this will be that the Contracts are governed by implied terms such as the Sale of Goods Act 1979.

Analysis

This case emphasises the importance of following a consistent procedure when doing business.

It is essential to ensure that any document you send to the other party makes clear reference to the terms and conditions you seek to incorporate, especially if these are printed on the reverse of a document. It is not sufficient to refer vaguely to your own standard terms without taking steps to draw these terms to the attention of the other party.

In addition, if you are buying or selling using different methods (e.g. by post and by email), you must consider how each method affects the incorporation of your terms and conditions. For example, orders placed by email may need to include a separate attachment of your standard terms.

CONTACT DETAILS
Hawkswell Kilvington Limited

17 Navigation Court
Calder Park
Wakefield
WF2 7BJ

90 Long Acre
Covent Garden
London
WC2E 9RZ

T: 0844 809 9566
W: www.hklegal.co.uk
E: enquiries@hklegal.co.uk