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THE BASICS: WHOSE TERMS APPLY TO A CONTRACT?

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In our recent article, we looked at the necessary ingredients for a contract. When you've established that you have got a contract, how do you know whose terms apply?

- Whose terms and conditions apply? Who wins the battle of the forms?
- Is there any way to get around the battle of the forms?
- What if I print terms and conditions on my invoices? Will they be incorporated into the contract?
- What happens if I start performing the contract while we are still negotiating detailed terms?
- Does the battle of the forms always decide whose standard terms apply?
- What terms could be implied by legislation?
- What are unfair terms?

It's a common scenario - one party makes an offer subject to its standard terms; the other party purports to accept the offer, but on its own standard terms. The parties may have reached an agreement on the key subject matter (e.g. what they are buying and selling and at what price) but as for the finer details (e.g. as to delivery or time for payment) they each believe their own standard terms apply.

This scenario is often referred to as "the battle of the forms", referring to the various documents exchanged between the parties on which their respective terms may be printed - for example offer letters, purchase orders, order acknowledgements, delivery notes or invoices.

Whose terms and conditions apply? Who wins

the battle of the forms?

Generally, the party whose terms were last circulated before the substance of the contract is performed. So, imagine a situation where a seller makes an offer to sell goods on its terms. The buyer accepts, but on their own terms. The seller then delivers the goods. In that scenario, it will be the buyer's terms which apply to the sale, as those were the last terms circulated before delivery. In legal terms, the buyer hasn't accepted the seller's offer here at all - instead it has made a counteroffer which the seller has accepted by performing the contract.

Is there any way to get around the battle of the forms?

One approach which is sometimes taken in an effort to resolve the battle of the forms is a prevalence clause. For example, the seller's terms may state that they will prevail over any terms which the buyer attempts to introduce. The problem with this approach is that the prevalence clause itself is part of the seller's terms. If the buyer makes a counteroffer as described above, based on its own terms, and the seller then performs the contract, the seller's terms were never incorporated into the contract, and so the prevalence clause within them has no effect - the contract will still be on the buyer's terms. So if you want your terms to apply, you need to ensure you fire the last shot in the battle of the forms.

What if I print terms and conditions on my invoices? Will they be incorporated into the contract?

Nice try, but unlikely. Although parties have taken to including their terms on all manner of standard documents in a bid to win the battle of the forms, terms and conditions printed on invoices are unlikely to form part of the contract. That is because even if payment is outstanding such that the contract has not yet been fully performed, the performance characteristic of the contract (e.g. delivery of goods or provision of services) will typically have taken place before the date of the invoice. The key is to ensure that your terms are incorporated into the contract before that 'characteristic performance' takes place.

What happens if I start performing the contract

while we are still negotiating detailed terms?

Although this may sometimes be necessary, it is generally best avoided. There is a risk either that there is no contract at all at this stage, or that the parties are in fact contracting on a basis different from that which is eventually set out in a signed contract. Either way, this can lead to uncertainty as to the parties' rights and obligations.

Does the battle of the forms always decide whose standard terms apply?

Not necessarily. In some cases, the courts have found that even where parties have exchanged standard terms in a battle of the forms, in fact the course of negotiations show that neither party accepted the other's standard terms, and so the parties' relationship was governed instead by terms implied by legislation.

What terms could be implied by legislation?

Various pieces of legislation set out terms that will be implied into contracts. In some cases parties can opt out of these implied terms; others are mandatory protections which the parties cannot contract out of. Examples include minimum standards that goods and services must conform to, and restrictions on terms which may be unfair.

What are unfair terms?

Unfair terms include:

- any clause which excludes liability for death or injury due to negligence;
- a term which purports to exclude the protections referred to above as to quality of goods; and
- a term in standard written terms of business which excludes liability, unless it is reasonable.

For an example see Unfair Contract Terms - when does one party deal on the other's written standard terms of business?

Summary

Remember to consider these points during contract negotiations and performance to ensure that you know whose terms you are contracting on, and to avoid any uncertainty which could later lead to costly disputes.

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