

BATTLE OF THE FORMS

Whose Terms and Conditions Apply?

The 'battle of the forms' is a phrase used to describe a situation where opposing parties to a transaction each provide their terms and conditions to the other party in an effort to have their terms and conditions apply to the transaction. When this situation arises it may be difficult to ascertain whose terms and conditions apply.

Why is confusion over which terms and conditions apply an issue?

It is valuable to know which terms and conditions apply for several reasons, including:

- It can be costly to resolve a dispute over which terms and conditions apply; and
- Knowing which terms and conditions apply can assist you to efficiently resolve issues that arise under the transaction, such as delayed delivery. This may avoid disputes with the other party and maintain business relationships.

It is also likely that your terms and conditions contain terms that protect your business, such as limitation of liability provisions. These protections may not be available to you under the other party's terms and conditions. This can make succeeding in the 'battle of the forms' desirable.

How can confusion over which terms and conditions apply arise?

It is likely that your business will engage in a series of communications in relation to a business transaction with another party, during which each party may provide the other party with different terms and conditions.

For example, a supplier sends a quote for goods to a purchaser attaching the supplier's terms and conditions, the purchaser sends a purchase order to the supplier which attaches the purchaser's terms and conditions, following which the supplier supplies the goods to the purchaser. Such scenarios may lead to confusion over which terms and conditions apply to the transaction.

How is it determined which terms and conditions apply?

A central contractual principle to determining which terms and conditions apply is the principle of 'offer' and 'acceptance'.

Under this principle a contract is formed when party A makes an offer which is accepted by party B without party B changing party A's offer.

In a simple scenario, such as the scenario set out above, the person who is the last to provide their terms and conditions is likely to have their terms and conditions apply, for example:

- The supplier makes an 'offer' to the purchaser by sending the quote to supply goods together with the supplier's terms and conditions.
- The purchaser sends a purchase order to the supplier together with the purchaser's terms and conditions, this is not acceptance of the supplier's terms and conditions but a 'counter-offer.'
- The supplier receives the purchase order and the purchaser's terms and conditions and proceeds to supply the goods to the purchaser. It is likely that the supplier by its conduct of proceeding to supply the goods after receipt of the purchaser's terms and conditions will be considered to have 'accepted' the purchaser's counter-offer, meaning the purchaser's terms and conditions are likely to apply.

However, the scenario provided above is a simple scenario and the conduct of the parties may complicate the question of whose terms and conditions apply. In determining which terms and conditions apply the court will consider the party's conduct in forming the contract. As a result, it is important to be clear about your intentions regarding the terms and conditions.

What practical steps can be taken?

The following practical steps may assist you to avoid confusion over which terms and conditions apply to a transaction and may also assist your terms and conditions succeed in the 'battle of the forms':

- Clearly write that your terms and conditions apply to the business transaction and attach a copy of the terms and conditions, for example if you are a supplier providing a quote expressly refer to the terms and conditions and attach the terms and conditions to the communication.
- Refer to the terms and conditions in all documents comprising the contract, including for example a credit application, a quote and invoices.
- If you wish to make a counter-offer (to have your terms and conditions apply), clearly write that you do not accept the terms and conditions, that your terms and conditions apply and attach your terms and conditions to the communication.
- Do not engage in any conduct regarding performance of the contract if the parties are still resolving which terms and conditions apply to a transaction or are otherwise negotiating the particulars of the terms and conditions for a transaction.
- Be consistent in how you approach business transactions generally and within a specific



business relationship. For example, provide your terms and conditions to all new clients and provide your terms and conditions with each quote (whether or not the client is new or existing).

If you and the other party cannot agree on which terms and conditions will apply, consider reviewing the terms and conditions of the other party. Although they are likely to be in favour of the other party, the terms may still be reasonable and you may be able to negotiate the particulars of any unreasonable or risky terms.

Further consideration

The value in having the terms and conditions of your business apply to a transaction is dependent on the extent to which the terms and conditions favour your business, whether the terms and conditions adequately address matters relating to the supply of goods or services, and whether the terms and conditions contravene the unfair contract terms regime set out in the Australian Consumer Law (if applicable).

Takeaways

- Be clear in your communications regarding your terms and conditions applying to the transaction and whether you accept or reject the other party's terms and conditions.
- Be consistent in your approach to new and existing clients in providing your terms and conditions.
- Do not commence performing the contract, for example deliver goods, until it is clear which terms and conditions apply.
- Review your terms and conditions to consider if they protect your business and address matters relevant to the supply of goods or services.

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