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Analysis

Contract Formation and the 'Battle of the Forms': High Court Shoots Down 'Last Shot' Doctrine

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Biography

Claire Acklam is a Senior Associate in Walker Morris' (https://www.walkermorris.co.uk) Litigation & Dispute Resolution Team. Claire has experience of resolving disputes through litigation and alternative dispute resolution, including negotiation, mediation and expert determination.

Claire deals with a wide variety of disputes and pre-dispute advisory work, including contractual claims of all values and complexity, professional negligence, shareholder disputes and breach of restrictive covenants. She has been involved in cases with complex technical and legal issues, including in the manufacturing, house building and care home sectors where she has acted for a number of large national and international businesses. Claire also has experience of managing large portfolios of claims which whilst relatively small in value are of importance to the client business.

Keywords TRW v Panasonic, Commercial, Contract negotiation, Contract dispute resolution, Contract drafting, Contract formation, Agreement, Oral contract, Battle of the forms
Paper type Research, Opinion

Abstract

A recent High Court case challenges received wisdom regarding which terms prevail where parties negotiate and contract on standard terms and conditions. TRW v Panasonic[1] confirms that the well-known 'last shot' doctrine can be displaced by contractual wording. In this article, the author explains and offers practical advice for anyone involved in commercial contract negotiation or contract-related dispute resolution.

Introduction – contract formation and the 'battle of the forms': what are the issues?

Many commercial contracts – in particular contracts relating to specialist transactions, complex commercial relationships and/or high value deals – are negotiated and drafted meticulously. Agreement as to terms is often hard fought over many months, and specialist transactional lawyers frequently debate detailed wording through many iterations of the draft contract as it circulates between parties.


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It is important to note, however, that many other contractual arrangements – for example the numerous arrangements covering the supply of goods, materials, labour, services, and so on, that make up the everyday running of the majority of businesses – are often dealt with informally and/or orally. Such arrangements often arise as a result of long-standing relationships and repeat business; and many are dealt with via e-mail and/or conducted via standard terms which may be noted on, say, the reverse of invoices or other payment or process documents or communications.

A lack of understanding about the formation of contracts, including the 'battle of the forms' can have devastating consequences. For example, a party may have invested significant time and money in connection with a project or deal on the understanding that its opposite number was contractually bound (perhaps even on terms that have governed contractual arrangements between the parties in the past) only to find that, in fact, no binding obligations are actually in effect and that its opposite number can walk away scot-free, leaving the project to collapse, at any time.

Similarly, a party may be operating under the assumption that key terms (say, as to price, delivery, limitation of liability or termination options) apply as per its own standard terms, only to find that their conduct, or something they said to their opposite number several weeks ago, or the fact that their counterparty's standard terms actually prevail, has committed them contractually to what is now an unfavourable deal.


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Regardless of the means by which a contract comes into being, once it has been formed its terms are legally binding on the parties. It is therefore vital that the parties understand exactly the terms that are incorporated into their informal/oral contracts; and whose terms prevail when contracts arise following an exchange of 'standard' documents.

Formation of contracts: back to basics

A contract is formed when all of the following key elements are present: offer; acceptance; consideration (that is, money or money's worth); certainty of terms; and intention to create legal relations[2].

Contracts can be made orally (face-to-face or via some communication medium such as the telephone); via an exchange of e-mails or other correspondence; or they can even arise by virtue of the parties' conduct. Crucially therefore (with some limited exceptions) contracts can be formed without any written documentation or other formality whatsoever. In the same way that a contract can be formed without any formality, so too can it be varied without any formality.

Battle of the forms

Where contracts come into existence by virtue of the exchange of correspondence, invoices or other documents incorporating a business' standard terms and conditions, the governing terms of that contract will generally be determined by the doctrine known as 'the battle of the forms'. This is where parties make and accept contractual offers and counter-offers each using their own standard terms in the hope that they will prevail to govern the contract. In the majority of circumstances, whether a party's terms will apply depends on the 'last shot' principle – for instance, whether their terms were the last to pass before the contract was concluded.

The practical application of the battle of the forms was brought into sharp focus by the recent case of TRW v Panasonic. Somewhat surprisingly, the High Court held that, in this case, the 'first shot' terms had won.

The first shot had been fired by the seller. It had commenced the to-ing and fro-ing of negotiations for a supply relationship that would involve multiple orders for a regular flow of products over time by asking the purchaser to sign its 'customer file' (for instance, an umbrella agreement intended to govern the relationship as a whole). When the purchaser subsequently bought a product, it believed it had done so on the basis of its own standard terms, as they had been the last to pass between the parties before that particular purchase was concluded.

However, the 'first shot' umbrella agreement had contained a term which stated that the purchaser was bound by the seller's standard terms and that no other terms would apply unless confirmed by the seller in writing. Subsequent exchanges of the parties' respective standard terms did not constitute the seller confirming in writing the application of any other terms, and so the seller's first shot prevailed.

The TRW case highlights that the battle of the forms is about more than just the last shot principle. Rather, the terms which govern a contractual relationship can depend on a number of concurrent and often competing factors, including whether


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the terms were properly drawn to the opponent's attention, whether the contract was stated to be subject to particular terms, whether the last shot principle has been displaced by any expressly stated and accepted earlier terms, and so on.

Practical advice

Commercial contracting parties should note the following practical advice:

- An awareness of the likely scenarios in which informal commercial discussions and/or e-mail correspondence may arise for a particular business will be key to getting the balance right between being able to quickly obtain sufficient comfort to enable parties to proceed with their plans, and becoming legally bound on appropriate terms.

- The lack of any specific requirement for formality and/or documentation means that contracts can be formed or varied orally and by conduct as well as in writing. It is therefore important that parties should not act in any way that is inconsistent with their contractual intentions in case a contract comes into effect prematurely, inadvertently or on unsuitable terms.

- Ideally, parties should communicate their intentions clearly when negotiating. If you do not intend to be bound until a formal document is signed or further terms are agreed, expressly and prominently label correspondence and draft agreements as "subject to contract". This includes email correspondence[3].


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- When it comes to dealing with suppliers – or any other counterparties which might seek to deal on standard terms – a full understanding of the application of the battle of the forms is essential. Any invoices or other process documents, including umbrella and service level agreements, can come into play in the battle of the forms. Their terms, and when they are 'fired', will be relevant.

- It may be worth a business reviewing its own standard terms and conditions in light of the TRW case in case there is the potential to ensure, via the drafting, that such terms will always prevail.

- It is essential that businesses educate their staff as to the risks of both inadvertent contract formation and of conducting business outside internal/ standard procedures and/or outside their remit or authority.

- For large organizations, it can be particularly important to ensure that different teams are aligned to the same position (so that, for example, operational teams behave consistently with procurement teams if a contract is not yet meant to be binding).

- In addition, before committing resources and expenditure to perform a particular transaction, businesses should be clear that any counterparties have actually committed to their side of the bargain, and that all parties understand the terms on which their contractual relationship is based.

In conclusion

The basic principles of contract formation are well known, but in the real world of business, especially when it comes to building contracts, things are very rarely that simple. It is important therefore, to always seek professional legal advice when dealing with commercial contract disputes, both from a pre-emptive risk-management perspective and when it comes to resolving issues after they have arisen.

Reference

1 TRW Ltd v Panasonic Industry Europe GmbH & Anor [2021] EWHC 19 (TCC)

2 In a commercial context there is a rebuttable presumption of an intention to create legal relations.

3 "Subject to contract" or equivalent language is a strong indicator that parties do not intend to be legally bound, but it is not conclusive. A court will look at all of the parties' words – and conduct – when deciding whether or not a contract has been formed in any particular case.