

Battle of the forms

Effective incorporation of standard terms and conditions into contracts of sale and purchase

What is a 'battle of the forms'?

A battle of the forms arises when two businesses are negotiating the terms of a contract and each party wants to contract on the basis of its own terms. The paradigm battle of the forms occurs when A offers to buy goods from B on its (A's) standard terms and B purports to accept the offer on the basis of its own standard terms. In this situation, the battle is often won by the party who fired the "last shot", that is, the last party to put forward terms and conditions that were not explicitly rejected by the recipient.

How to effectively incorporate terms

There are a number of drafting and procedural methods that your business, can employ to try and ensure that its standard terms and conditions have been incorporated into the contract or should prevail over another party's standard terms and conditions. Although none of them are guaranteed to be successful, they should at least strengthen your business's position:

In **all circumstances** you should:

- include or refer to your standard terms in as many pre-contractual documents (e.g. email correspondence) as possible to maximise your chances of incorporating your terms; and
- as a contract can be formed orally, you should ensure that any discussions with the other party (over the telephone or face to face) are expressed to be on the basis of your standard terms or are stated to be "subject to contract" (that is, will not be binding until a written contract is entered into).

When **supplying** goods:

- when your acting as a supplier you should set out or make an express reference to your standard terms and conditions:
 - in brochures, catalogues or other publications that you produce;
 - on quotations or delivery notes;
 - on the acknowledgement or confirmation of purchase order forms; and
 - on invoices (printing your standard terms and conditions on the back of an invoice will usually not incorporate the terms in the contract);
- require customers to submit a written purchase order, which you can then accept by issuing an acknowledgement stating a contract has come into existence on your standard terms and conditions. If the customer does nothing more and accepts delivery of the goods, your terms will usually be held to prevail; and
- consider preparing a standard order form for use by customers that sets out your standard terms and conditions or states that any order is an offer on your standard terms (in the latter case, you must also send your standard terms to the customer).

When **purchasing** goods:

When you are acting as a customer you should:

- supply a copy of your standard terms and conditions and make specific reference to those terms when submitting purchase order forms; and

Head Office
Heathervale House
2-4 Vale Avenue
Tunbridge Wells
Kent TN1 1DJ
T 01892 510000
F 01892 540170

Thames Gateway
Corinthian House
Galleon Boulevard
Crossways Business Park
Dartford
Kent DA2 6QE
T 01322 623700
F 01322 623701

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- supply a copy of your standard terms and conditions and state that your terms will apply on any written acceptance of quotations.

Guidance for your staff

All sales or purchasing staff should be made fully aware of the importance of putting forward your business's standard terms and conditions and the need to adhere to your sales or purchasing procedures at all times.

You should ensure that staff do not act upon a customer's purchase order without first sending the customer an acknowledgement of the customer's order stating that the order is accepted on your standard terms.

Staff should also be given guidance on the completion of any standard sales or purchasing document that has blank spaces which need to be filled in when an order is placed. Any blanks completed in a way inconsistent with the standard terms have the effect of adding provisions which override the standard terms.

Lastly, when introducing new standard terms and conditions, a copy should be sent to every customer, or every supplier, stating that the new terms and conditions will apply in the future. This is also an ideal opportunity to enclose a slip for return by which the customer or supplier acknowledges receipt of the new terms. Such a confirmatory slip will not always be returned but, when it is, it can be invaluable evidence of acceptance of the new terms.

This information sheet just provides an overview of the law in this area. If you would like any further information in relation to this information sheet please contact Faye Cook Solicitor in the Corporate & Commercial team at Thomson Snell & Passmore, on 01322 422549 or email at:

faye.cook@ts-p.co.uk