BATTLE OF THE FORMS

SPRING 2011

PETER COLLINS

Imagine that you are a product supplier. You enter into discussions with a customer to provide your product. At some point in the process you issue a quotation (with your standard terms and conditions attached). The customer issues a purchase order to you (containing the customer's standard terms and conditions). The purchase order, which describes your goods, price, etc., also contains a tear-off acknowledgement form, which you sign and return. You supply the product. Something goes wrong, and the customer claims against you for damages. You point to your quotation and the limited warranty and liability limitation clauses in it. The customer then points to its purchase order, which has warranty and liability provisions much more onerous to you. Whose form governs?

Welcome to the "battle of forms": a phrase coined by Lord Denning of the English Court of Appeal in the 1979 case of *Butler Machine Tool Co Ltd. v. Ex-Cell-O Corporation (England) Ltd.*. In that case, the machine tool supplier issued a quotation with a price escalation clause (to reflect price increases between order and delivery). The customer issued a purchase order for the goods described in the quotation, for the (base) price in the quotation, but without any price adjustment clause. The purchase order contained an acknowledgement form, which the supplier signed and returned. When the supplier charged the customer an escalated price, the customer refused to pay, and the dispute ended up in court. Lord Denning held that the Court will consider all of the relevant documents and the conduct of the parties to determine if, although there are differences, the parties have reached agreement on all material points. Lord Denning's analysis highlights the difficulties in resolving the battle of the forms, and the legal and commercial uncertainty that can result:

> "In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date. … The better way is to look at all the documents passing between the parties — and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points — even though there may be differences between the forms and conditions printed on the back of them…
>
> "It will be found that in most cases when there is a "battle of forms," there is a contract as soon as the last of the forms is sent and received without objection being taken to it. … The difficulty is to decide which form, or which part of which form, is a term or condition of the contract.
>
> "In some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them…
>
> "In some cases the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back: and the buyer orders the goods purporting to accept the offer — on an order form with his own different terms and conditions on the back — then if the difference is so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller.
>
> "There are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable — so that they are mutually contradictory — then the conflicting terms may have to be scrapped and replaced by a reasonable implication."

On the facts before him in the *Butler* case, Lord Denning concluded that the acknowledgment was the decisive document. It made it clear that the contract was on the customer's terms and

EDMONTON
2000, 10235 - 101 STREET
EDMONTON AB T5J 3G1
PH 780 423 3003
FX 780 428 9329

CALGARY
400, 604 - 1 STREET
CALGARY AB T2P 1M7
PH 403 260 8500
FX 403 264 7084

YELLOWKNIFE
201, 5120 - 49 STREET
YELLOWKNIFE NT X1A 1P8
PH 867 920 4542
FX 867 873 4790

WWW.FIELDLAW.COM

not on the supplier's terms - and the customer's terms did not include a price variation clause.

Lord Denning's analysis in the *Butler* case has been cited and relied upon many times by courts throughout the Commonwealth, including Canadian courts. Canadian courts have also considered factors such as conduct of the parties, their past practices, industry practices, the reasonableness of the terms, and the type and prominence of notice.

You do not want to get into a battle of the forms, because of the contractual and commercial uncertainty that results. Your challenge is to, first, avoid the battle and, second, recognize when you have entered battle. If you think you are entering, or are in, a battle of the forms, take steps to resolve the battle before either party starts contractual performance.

The parties can sometimes end the war through a custom agreement that clearly sets out the battle history and the governing terms and conditions. Or, you can prevent a war by having a negotiated "high level" agreement. In *Hershey Canada Inc. v. Solae, LLC* (Ontario Superior Court of Justice, 2007), for example, the Court ruled that an apparent battle of the forms between the shipping department of Solae and the purchasing department of Hershey was overruled by an agreement negotiated at the executive level of both companies. The Court quoted another Canadian case that states that "where senior management has negotiated an agreement on certain terms, it is unlikely that the parties intended to change the transaction by using standard terms and conditions expressed by the administrative staff involved in shipping and delivery…."

If you are doing business internationally, be aware that the 1980 *United Nations Convention on Contracts for the International Sale of Goods* has a different set of rules to resolve a battle of the forms. The *Convention* states, "a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance." Parties dealing internationally can opt out of the *Convention* - but that just puts you back into the battle.

If you are doing business in the United States, the *Uniform Commercial Code* (section 2-207) has yet another set of rules. If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract are (a) terms that appear in the records of both parties; (b) terms, whether in a record or not, to which both parties agree; and (c) terms supplied or incorporated under any provision of the *Uniform Commercial Code*. As with the *United Nations Convention*, it is possible to opt out of the *Uniform Commercial Code* - but, again, that just puts you back into the battle.

It is unfortunate that there is no simple, uniform solution to the battle of the forms. The best protection is to be alert to the issue, so that you can avoid the battle, or resolve the battle outside a courtroom! ▲

EDMONTON
2000, 10235 - 101 STREET
EDMONTON AB T5J 3G1
PH 780 423 3003
FX 780 428 9329

CALGARY
400, 604 - 1 STREET
CALGARY AB T2P 1M7
PH 403 260 8500
FX 403 264 7084

YELLOWKNIFE
201, 5120 - 49 STREET
YELLOWKNIFE NT X1A 1P8
PH 867 920 4542
FX 867 873 4790

WWW.FIELDLAW.COM