WINNING THE BATTLE OF THE SMALL PRINT

'As so often happens in the commercial world, those dealing with the projects had little or no interest in what might justifiably be called the small print.'

The above quote from a judgment in a recent case highlights the importance of paying attention to the terms and conditions of a contract, more commonly referred to in business as the 'small print'.

But no matter how well these terms and conditions are drafted and understood, a common problem is competing terms and conditions between buyer and seller. This can sometimes lead to a dispute between the parties as to the applicable terms and conditions that have been incorporated into the contract where there is no signed contractual document. The so-called 'battle of the forms' or 'small print'.

In law, an agreement and a contract are different animals. A contract is formed when an offer by one party is accepted by the other party provided there is consideration (normally the price) and a mutual intention to create legal relations. It is important to identify the precise moment when a contract comes into existence, because the question of which party's terms and conditions apply to the contract can then be determined.

HOW TO WIN THE BATTLE OF THE SMALL PRINT?

A successful party needs to take sufficient steps to bring its terms and conditions to the attention of the other party. In reality, it is the last set of terms and conditions despatched before the contract comes into existence that wins and will be deemed to be incorporated into the contract.

Therefore, try and include your terms and conditions in as many pre-contractual documents as possible.

One strategy is to refrain from discussing the other party's terms and conditions as an issue before sending your own just before the contract comes into existence. In practice, this date will be before performing, delivering or receiving the respective goods or services.

A more direct strategy is to carefully read the other party's terms and conditions and discuss any particular clauses which are onerous or of concern. Even better, let your lawyer review them and advise! A side letter to lessen the impact of onerous terms and conditions or exclude them is an option and part of the commercial negotiations between the parties.

A Court should, in these circumstances, find it much easier to determine who has won the battle of the small print.

A FEW WORDS OF WARNING

- Check that your terms and conditions are kept up to date and regularly reviewed by a lawyer. Use clear and precise language.
- Read the other party's terms and conditions for onerous terms. Negotiate if possible but remember that it is the last set of terms and conditions sent and brought to the attention of the other party before the contract is formed that wins.
- Understand that an agreement is not always a contract and that specialist legal advice should be taken as to the distinction and whether the agreement is enforceable.
- If a contract is substantial it is sensible to have the contract prepared or checked by a lawyer to ensure that there is a single document with no uncertainty as to the relevant terms and conditions.
- If you do amend or update your terms and conditions, make sure you delete the old ones from the system and bring the new ones to the attention of your clients or customers at the first opportunity.
- Do not think that sending out the terms and conditions after the contract will wash. It will not!
- Finally, be on your guard about the phrase 'terms and conditions available on request'. Do request them as otherwise they risk being incorporated into the contract!

This article contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances.

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