

'Battle of the forms'—first shot, framework agreements and jurisdiction clauses - TRW v Panasonic [2021] EWCA Civ 1558

Chirag Karia QC

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While the 'last shot' usually wins the contractual 'battle of the forms' to determine which party's standard terms govern the contract concluded, in **TRW v Panasonic**, the Court of Appeal held that, exceptionally, the seller's 'first shot' had won the battle by creating an overarching 'master' agreement governing all subsequent purchases by the buyer. The court also rejected (obiter) the buyer's argument that that overarching agreement was unsupported by consideration, drawing an analogy with public procurement and framework agreements, which have been held to be binding and never challenged for lack of consideration. Written by Chirag Karia QC, barrister at Quadrant Chambers.

TRW Ltd v Panasonic Industry Europe GmbH and another [2021] EWCA Civ 1558

What are the practical implications of this case?

This decision demonstrates that the party firing the 'last' shot, ie the last party to send its standard terms to its counterparty before performance—will not always win the battle to determine which party's standard terms govern. Instead, by carefully drafting its standard terms to prevent any other terms from applying, and crucially, securing the agreement of its counterparty to those terms at the outset, the party firing the 'first' shot can prevail. This case further demonstrates the prejudice that the party losing the 'battle of the forms' can suffer: in this case, the buyer was deprived of the application of English law and jurisdiction and was forced to litigate in Germany under German law instead. Conversely, the seller enjoyed the substantial advantage of requiring all claims to be brought in its home jurisdiction (Hamburg) under its home law (German law).

Further, this decision makes it clear that an agreement at the outset that one party's standard terms will govern all future transactions between the parties is supported by good consideration, even without any purchases or other transactions being concluded between the parties.

What was the background?

The dispute arose from the sale of resistors by the German seller (Panasonic Industry Europe GmbH) to the English buyer (TRW Ltd); and the immediate question before the court was whether the seller's standard terms, which required all disputes to be brought before the Hamburg courts, governed the sale contracts so as to deprive the English courts of jurisdiction. Although that involved analysis of the law relating to Article 25 of Regulation (EU) No 1215/2012, the Brussels Recast, ultimately, the question boiled down to which party's standard terms had been incorporated into the individual sale contracts.

In 2011, the buyer had signed the seller's 'customer file' which stated, 'legally binding signature of the Customer' below the buyer's signature and that the buyer had 'received and acknowledged' the seller's standard terms, which terms were printed on the reverse of the document. The buyer's orders placed in 2015 and 2016 provided that the transistors were to be delivered 'in accordance with' the buyer's standard terms, which the orders said the seller was aware of and was deemed to have accepted. The buyer commenced proceedings before the English High Court, as provided for in the jurisdiction clause in its standard terms, for damages for alleged defects in the resistors supplied. The seller applied to set aside service of proceedings and a declaration that the English courts lacked jurisdiction on the basis that the Hamburg jurisdiction clause in its standard terms applied.

What did the court decide?

The Court of Appeal affirmed the decision of Mr Justice Kerr below setting aside service of process and declaring that the English court lacked jurisdiction, reasoning as follows.

The Court of Appeal first held that, since the judge's decision on jurisdiction involved an evaluative exercise on all the evidence, it should not interfere unless convinced that the judge had erred in law or come to a conclusion 'outside the bounds within which reasonable disagreement is possible', citing **Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV** [2019] EWCA Civ 10 at paras [95] and [123].

The court then held that, though in a traditional battle of the forms dispute, the conventional analysis is that the terms and conditions of the party who fired the last shot (often, the sender of the last document in time) will usually prevail, the judge had been correct to hold that, in the present case, it was the seller's first shot which prevailed. In doing so, the court:

- » rejected the buyer's argument that the signed 'customer file' amounted to a mere acknowledgment by it that it had received the seller's standard terms but had no contractual effect, as 'wholly unrealistic' and failing to give meaning and legal effect to the words 'legally binding signature' immediately below the buyer's signature
- » agreed with the judge that the arrangement created by the signed 'customer file' was analogous to the calling off of goods in a public procurement framework agreement and framework, 'master' or umbrella contracts more generally
- » ruled (obiter) that there was clear consideration for the buyer's agreement that, if it purchased any goods from the sellers, the seller's standard terms would govern
- » pointed out that the seller's standard terms had been deliberately and carefully drafted to protect it against the last shot doctrine, and that the buyer no longer disputed that, as a matter of drafting, the seller's standard terms protected it from all subsequent 'shots'
- » concluded that:

'this is therefore one of those "battle of the forms" cases where careful drafting has protected Panasonic [the seller] against the "last shot" doctrine'

Case details

Court: Court of Appeal, Civil Division

Judges: Lord Justice Peter Jackson, Lord Justice Coulson and Lord Justice Birss

Judgment: 28 October 2021

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Chirag Karia QC is a leading commercial silk with a broad commercial, international arbitration, energy, shipping and international trade practice. He appears regularly in the Commercial Court, the Court of Appeal and international arbitrations. He is listed as a 'Leading Silk' for Shipping and Commodities disputes by Chambers UK, Chambers Global, The Legal 500 UK, The Legal 500 Asia Pacific and Who's Who Legal and for Commercial disputes by Legal 500 EMEA.

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chirag.karia@quadrantchambers.com