‘Battle of the forms’ and jurisdiction clauses (TRW v Panasonic)

This analysis was first published on Lexis®PSL on 19 January 2021 and can be found here (subscription required).

Commercial analysis: In the contractual ‘battle of the forms’ to determine which party’s standard terms govern the contract concluded, the ‘last shot’ usually wins. But, in TRW v Panasonic, Mr Justice Kerr exceptionally held that the ‘first shot’ had won. He did so because the buyer in that case had, at the outset, agreed to the seller’s standard terms which precluded any contrary terms proposed by the buyer from applying even if the seller ‘had effected delivery or rendered services without reservation’ against a purchase order incorporating such terms, unless the seller had agreed to such terms in writing. This is an important decision because it demonstrates that parties firing the ‘last shot’, and those advising them, cannot safely assume that their ‘shot’ will always win; and that there are ways for the party firing the ‘first shot’ to ensure that its terms prevail instead. Written by Chirag Karia QC, barrister at Quadrant Chambers.

TRW Ltd v Panasonic Industry Europe GmbH and another company [2021] EWHC 19 (TCC)

What are the practical implications of this case?

This is an important decision for parties doing business on standard terms and those advising them, because it demonstrates that it is possible for a party to appropriately word its standard terms so as to win the ‘battle of the forms,’ and thereby avoid the risk of finding themselves bound by their counterparty’s standard terms instead. This case provides an example of how the counterparty’s rival terms can substantially prejudice the party: 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. On the other hand, the seller, by ensuring that its standard terms were appropriately worded and the buyer’s agreement to those terms was obtained at the outset, was able to require all claims to be brought in its home jurisdiction (Hamburg) under its home law (German law).

This case also vividly highlights the danger for a party (usually the purchaser or recipient of services) that assumes that its ‘shot’ will always win because it is the last one. All the contract terms passing between the parties must be considered, and a prior agreement to certain terms, even if it did not lead to any supply of goods or services, could ensure that subsequently exchanged standard terms fail to have the intended effect.

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 which out of the two jurisdiction clauses in those parties’ rival standard terms (in favour of the German and English courts, respectively) prevailed. Although that involved analysis of the law relating to Article 25 of Regulation (EU) 1215/2012, Brussels I (recast), ultimately, the question boiled down to which party’s standard terms had been incorporated into the individual sale contracts.

While the individual sale contracts in dispute had been concluded in 2015 and 2016, in 2011 the buyer had signed the seller’s ‘customer file’ which stated that the buyer had ‘received and acknowledged’ the seller’s standard terms. The seller’s standard terms provided for German law to govern and the jurisdiction of the German courts in Hamburg; and the buyer’s standard terms provided for English law to govern and the jurisdiction of the English courts. The buyer commenced

proceedings before the English High Court claiming damages for the supply of defective resistors. The seller applied to set aside service of proceedings and a declaration that the English court had no jurisdiction on the basis that the German jurisdiction clause in its standard terms applied.

What did the court decide?

The court allowed the seller's application, setting aside service and declaring that the Hamburg court had exclusive jurisdiction over the dispute. The court first rejected the buyer's argument that the 'customer file' it had signed did not incorporate the seller's standard terms, pointing out that the buyer's signature would have been pointless if that had been the case.

The court then addressed the crucial 'battle of the forms' dispute, holding that the provision in the seller's standard terms prohibiting contrary terms (unless confirmed by the seller in writing) was effective to protect the seller 'against falling victim to what in English law is called the last shot doctrine'. The court explained that the situation was akin to that under a public procurement framework agreement: although the signing of the 'customer file', with the seller's standard terms attached, did not itself create any obligation on the parties to buy or sell any products, those standard terms were binding on any future trades that might or might not occur between the parties.

The court explained that, once the buyer had agreed to the seller's standard terms in 2011, its only remedy, if it did not want to be bound by the seller's standard terms, was to either not buy from the seller at all or to persuade the seller to agree in writing to renounce its standard terms. However, the buyer had done neither. The court concluded that, although it is unusual, 'the last shot doctrine was displaced on the facts here. The [buyer's] last shot missed the target'.

The court therefore set aside service and declared that the Hamburg court had exclusive jurisdiction over the dispute.

Case details:

- Court: Technology and Construction Court (Queen's Bench Division), Business and Property Courts of England and Wales, High Court of Justice
- Judge: Kerr J
- Date of judgment: 8 January 2021

Chirag Karia QC is a barrister at Quadrant Chambers. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.