[CONTRACTS]

On one condition

On whose terms a contract is made depends largely on who has the last word in the preceding negotiations. **Alan Ma** looks at what happens when this becomes an area of dispute

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If A makes an offer on its (A's) conditions and B accepts that offer on its (B's) conditions, based on the principle of offer and counter-offer there is a contract on B's conditions. Who fires the last shot wins the battle.

An unsettled area is whether the traditional analysis of offer and acceptance should be displaced when the parties have had previous dealings. Cases that fall in this grey area reach the courts from time to time and the latest example is Tekdata v Amphenol.

Rolls-Royce bought engine control systems from Goodrich, which itself bought cable assembly items from Tekdata. To manufacture these items, Tekdata (the buyer) bought connectors from Amphenol (the seller). The firms had done business together for 20 years, and for most of that time the supply of connectors had been controlled by Goodrich, which required Tekdata to purchase the connectors from Amphenol to Goodrich's specification and at a price determined by Goodrich. Amphenol had also had a long-term contract with Goodrich, which stipulated the seller would supply connectors to the buyer for the price set by Goodrich.

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However, a dispute arose when Tekdata sent purchase orders to Amphenol according to the buyer's own conditions. Amphenol acknowledged the purchase orders by sending a message stating the seller's own conditions applied.

The last shot principle would result in a contract on Amphenol's terms. However, the judge held Tekdata's terms applied as he found that was the parties' intention. He took into account the long-term relationship and the parties' respective contracts with Goodrich.

However, the Court of Appeal overturned the judge's decision. It was held the last shot principle had to be adopted unless the parties' documents and conduct showed their common intention was the motive for some other terms to prevail. The appeal judges considered the factual circumstances were not strong enough to displace the result, which a traditional offer and acceptance analysis would dictate. Accordingly, the terms on the seller's acknowledgment were the terms on which the parties contracted.

There are no set rules for such a "battle of the forms". Each case must be considered on its material facts for objective assessment of the parties' intentions. Here are some tips on winning the battle.

- Maintain an up-to-date set of standard terms and conditions.
- Ensure that the standard form contains a clause making it clear that your terms prevail over any terms of the other party.
- Ensure your set of standard terms and conditions are included in all pre-contractual documents, such as invitations to tender, quotations, acknowledgement forms, delivery notes and correspondence.
- Implement a policy of only contracting based on your own set of conditions.
- Confirm any oral agreement in writing, making it clear that the contract is entered into on your own terms, which override those of the other parties.
- Fire back the "last shot" by ensuring your document is the last document to pass between the parties immediately prior to the contract being concluded.