

Read Those Terms and Conditions.....“Battle of the Forms”

- by Nicholas D. Krawec, Esq.

How often have you and your customer exchanged documents, i.e., their purchase order, your acknowledgement or invoice, and each document contains the parties' respective “boilerplate” terms and conditions? Hopefully you're familiar with your terms and conditions. But, are you so thrilled with landing the sales contract, that you don't take the time to read your customer's terms and conditions? After all, how bad can they be, right? In a case in which the Bernstein Law Firm succeeded in having its client avoid an unfavorable and expensive term in a debtor's purchase order, the Pennsylvania Superior Court joined the majority of jurisdictions in the U.S., in adopting the “knockout rule” in battle-of-the-forms cases under Article 2-207 of the Uniform Commercial Code.

In the case of Flender Corporation v. Tippins International, Inc., 830 A.2d 1279 (Pa. Super., 2003), the Pennsylvania Superior Court, accepted Bernstein Law Firm's argument, and drew a distinction, between how to treat **different** terms between a seller's and buyer's contract forms, and how to treat **additional** terms in one party's contract forms. Tippins, a Pittsburgh company, was engaged in the construction of a steel mill in the Czech Republic, and sought to purchase from Flender, a company located in Elgin, IL, gear drive assemblies to be installed in the steel mill. Tippins issued a purchase order to Flender, which specified the terms and conditions of sale. Among the terms in Tippins' purchase order, was that “Tippins purchase order is expressly limited to acceptance of ‘Standard General Conditions Nova Hut Purchase Order’ and special conditions of purchase, which take precedence over any terms and conditions written on the back of the purchase order,” and which included a forum selection provision which included the requirement that any claims or disputes arising out of the contract must be submitted to *arbitration before the International Chamber of Commerce in Vienna, Austria, and that Austrian law would apply!* Flender did not sign or return the acknowledgement form, but rather issued an acknowledgement of Tippins' purchase order. The acknowledgement document's terms and conditions provided that they “are the sole terms and conditions on which the order of the buyer will be accepted.” Flender's terms further provided that its acceptance of Tippins' order would not constitute an acceptance of printed provisions on Tippins' order form which were inconsistent with or additional to the terms and conditions on Flender's invoices unless Flender specifically accepted the buyer's terms in writing. Flender's terms also included a forum selection clause which provided that exclusive jurisdiction and venue for resolution of any disputes arising out of the contract would be vested in the Federal and/or state courts located in Chicago, IL. Flender thereafter manufactured and shipped the finished drive assemblies, and included with the shipment of the drive assemblies,

were Flender's invoices which had the same "Conditions of Sale and Delivery" on the reverse side that appeared on Flender's acknowledgement of Tippins' purchase order.

Flender retained Bernstein Law Firm, P.C., to proceed with a collection action against Tippins when Tippins failed to pay for the gear drives. Suit was filed by Flender against Tippins in state court, located in Pittsburgh, Pennsylvania, where Tippins headquarters is located. Tippins filed a Motion to Dismiss on the basis of the alternative dispute resolution clause in Tippins' purchase order. The trial court overruled Tippins' objections, on the basis that the arbitration clause on which Tippins relied was "knocked out" because it was materially different from the dispute resolution clause in Flender's acknowledgement and invoices. Tippins appealed the decision, and the issue before the Superior Court was whether the trial court erred in ruling that neither Flender's nor Tippins' forum selection provision became a part of their contract, thus finding that the appropriate forum for Flender to bring its action against Tippins was in Pennsylvania, where Tippins is located.

The Superior Court noted that neither it nor the Pennsylvania Supreme Court had previously determined when a written contract may be formed based on different terms in competing writings, nor had Pennsylvania's appellate courts considered whether the "knock out rule" applied by the trial court, is properly applied to cancel conflicting terms in the parties' competing writings thus creating a contract out of the terms on which the parties actually agree. Bernstein Law Firm convinced the Pennsylvania Superior Court to affirm the trial court and adopt the "knock out rule" on the issue of *different* terms between the buyer's and the seller's competing forms. Thus, the forum selection clauses of *both* contracts were "knocked out," and neither one governed the transaction. The contract consisted of the terms on which the writings of the parties did agree (such as the items, the quantities, the prices) and the provisions of the Uniform Commercial Code. This kept the case in the U.S., at much less expense and inconvenience to the creditor/seller, and out of the International Chamber of Commerce arbitration process in Austria.

How does this decision affect you in dealing with Pennsylvania debtors, or entering into contracts where Pennsylvania law applies? Clearly, including language that expressly conditions your acceptance or contract performance on the other party's assent to your terms, while necessary, may not be enough. It is important to ensure you closely review the "boiler plate" terms and conditions of the other contracting party's forms, even if your forms have the "expressly conditioned" language in them. This landmark decision has adopted the "knock-out rule" as the law of Pennsylvania in battle of the forms situations, and was a successful result for Bernstein Law Firm's client, as it kept the litigation in the U.S., avoided an unfamiliar and expensive foreign litigation process for the creditor and expedited recovery of the debt for the creditor/seller.

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