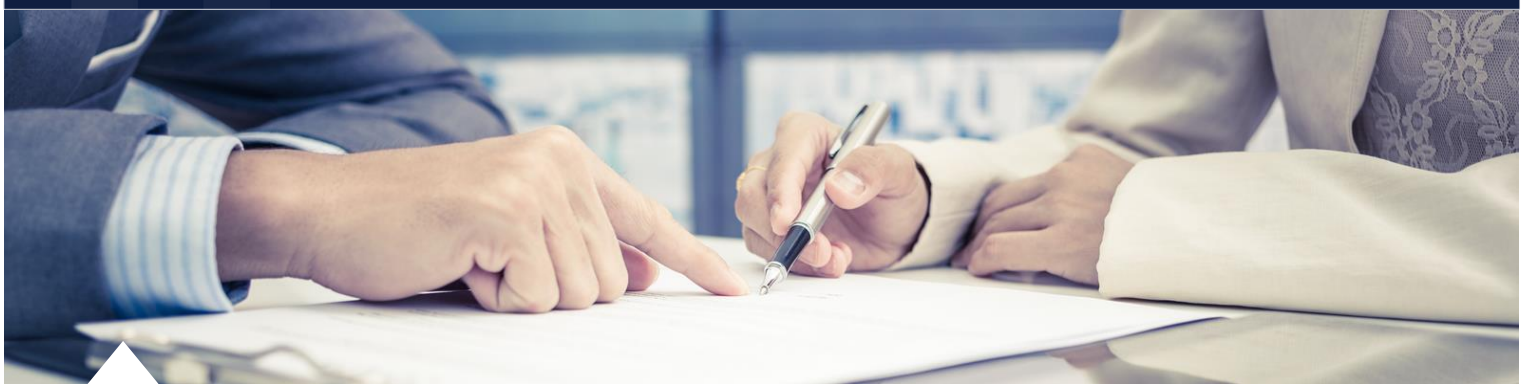

Pass the Parcel – Battle of the Standard-Form Contract

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February 2018

In an ideal world, all contracts take the form of a single document signed by all parties concerned with little fuss. If a dispute ever arises, the parties could simply revert back to that initial document and figure out what they actually agreed upon.

Unfortunately – but necessarily – contract law is a lot messier than that. Agreements change over time, and parties end up operating on 'unspoken' terms because abiding by the precise words of that initial agreement may not be practical anymore. This isn't unusual. No one expects you should type up a new contract every time there is even the slightest change in the relationship. At the same time, you need to understand what you have actually legally agreed to, and whether the contract you think you have in place still actually has any force at all. All of a sudden, that first agreement you thought you had may not be worth the paper it's printed on. It's an issue almost as old as contract law itself.

We have a client who was presented with this problem very recently. This client is a wholesaler, and issues its customers with Terms and Conditions when they begin a relationship with a customer. Some customers sign these T&Cs and there is never a problem. But every customer is different. Some don't sign; some raise issues with the T&Cs; others sneak in their own terms through other documents such as purchase orders. It is not in our client's interest to pester every single customer – both parties just want to get business done. However, our client was rightfully concerned about what contracts they are actually entering with each customer. The result is a 'Battle of the Forms', whereby each party keeps sending their perceived 'contract' to the other in the faint hope that their terms will somehow prevail. This is a surefire way to get into a 'he said/she said' shouting match when a dispute arises over a term that your customer says it never agreed to.

BUSINESS AS USUAL?

In our client's scenario where a buyer introduces their own terms on later documents, it is easy to think that because the client has not actually put its signature to the buyer's terms they could not apply. Don't be so sure.

Your prior conduct with a party can actually modify the original contract because it indicates what you have actually 'agreed' to. For example, if you keep receiving purchase orders with conflicting terms attached to them, you may have unwittingly agreed to those terms by continuing to do business with that customer. That might seem harsh, but think of the contract you enter into when you buy a train or plane ticket – you haven't signed anything, instead it's your conduct that really creates the contract.

In those circumstances, 'notice' of the terms is crucial. If you have completed a sale and invoice your customer, and the customer sends you a conflicting or ambiguous set of terms in response, you wouldn't have had sufficient notice of the terms because the sale was already completed. However, if you received a purchase order with these conflicting terms before you made the sale and

didn't raise them with the customer – say, for example, an exclusion clause included in the terms – there is a good chance you have actually accepted it. By making the sale, or indeed by continuing the relationship and making further sales with the customer, you may have implicitly agreed to the customer's terms.

THINGS TO KEEP IN MIND

To avoid a situation where your contract is starting to resemble a game of pass the parcel, you should try to do the following:

- Include everything you think entirely necessary in an initial agreement and make sure the other party signs it. Include a provision that states that this agreement constitutes the entirety of your arrangement.

- If you can see that the other party has 'snuck' a conflicting set of terms into your arrangement through later documents and its operation would prejudice you, make sure you put that concern to them in writing. You need to indicate your intention not to be bound by it. Your subjective intention isn't going to help much – so what you 'thought' at the time isn't as important as what you actually communicate.

- If, for commercial reasons, you don't think it is worth raising the issue with your customer, try and at least make sure that your terms 'come last'. The law will often favour the party that most recently presented its terms to the other. If all else fails, it is good to try and protect yourself by showing that you had the final say!

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