Battles of the forms: When bids and purchase orders collide

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A battle of the forms arises where two parties—often two companies—are negotiating the terms of a contract and each party wishes to contract on its own terms. For example, A offers to buy goods from B on A's terms (the purchase terms), and B claims to accept A's offer, but on B's terms (the sales terms).

At this point, there is no doubt that the parties have entered into a contract. But the question is, which terms actually apply?

Purchasing, procurement and sales teams are often confronted with this situation, and if not managed properly, it can create a major blind spot in terms of risk. Some jurisdictions address this issue by applying specific principles. For instance, they may enforce the "first shot rule" or the "last shot rule", whereby only the terms and conditions communicated first or last apply, while the others are eliminated. Other jurisdictions simply refer to contract law to settle such matters.

Battle of the forms in Quebec

Quebec courts simply refer to the general rules that apply to contract law, which are set out in the *Civil Code of Québec*[1] (hereinafter the "**CCQ**"). Regardless of the means of communication used, a contract comes into force where and when the offeror receives acceptance of the offer. According to articles 1388 and 1389 of the CCQ, an acceptance sent to the offeror will only be deemed valid if it includes all of the essential elements of the offer.

If not, the offer will be considered a counter-offer, which will be subject to the same terms and conditions, namely that the acceptance must include all of the essential elements.

And if that is not the case, the response to the counter-offer will be considered a counter-counter-offer under article 1393 of the CCQ. This ping-pong situation can continue until the acceptance sent to the offeror is deemed valid. If a disagreement relating to the contract is considered "non-essential," the courts defer to the parties' common intention at the time the contract was drafted.

Landmark decision: *STMicroelectronics Inc.* c. *Matrox Graphics*

To this day, the landmark decision in this regard remains the decision in *STMicroelectronics Inc.* c. *Matrox Graphics*.[2] In this particular case, there was a clause in the contract that required the buyer to acknowledge that the only courts with jurisdiction in the matter were the courts of the United States sitting in Dallas County, Texas:

19. GOVERNING LAWS: This contract will be governed by and construed in accordance with the laws of the State of Texas, and, in the case of an international sale of goods with respect to which the Convention on Contracts for the International Sale of Goods ("CISG") or any other law would otherwise apply, the Uniform Commercial Code as adopted in the State of Texas, and not CISG or any such other law, shall apply. Buyer agrees that it will submit to the personal jurisdiction of the competent courts of the State of Texas and of the United States sitting in Dallas County, Texas, in any controversy or claim arising out of the sale contract, and that service process mailed to it at the address appearing on the reverse side hereof by registered mail, return receipt requested, shall be effective service of process in any such court.

On one side, STMicroelectronics Inc. was of the opinion that the above clause applied and that only the courts of the State of Texas and of the United States sitting in Dallas County, Texas, had jurisdiction. On the other, Matrox Graphics Inc. argued that it never explicitly or implicitly accepted the terms and conditions of STMicroelectronics Inc.

At that point, the court examined the battle of the forms situation and had to determine whether the terms and conditions of STMicroelectronics Inc. or Matrox Graphics Inc. took precedence. The evidence shows that both parties' representatives sincerely believed that their respective terms and conditions prevailed.[3]

The court concluded that the parties' respective clauses complemented each other and could be read and applied together, as opposed to being mutually exclusive.[4] The mere exchange of terms and conditions through purchase orders during each transaction was binding on the parties, and their silence regarding such terms and conditions was not exculpatory.[5] Thus, the terms and conditions of both parties applied.[6] The remaining question was that of the scope of Clause 5 of Matrox's terms and conditions, which reads as follows:

Terms and Conditions: . . . 5) The Terms and Conditions will prevail notwithstanding any different or conflicting Terms and Conditions which may appear on any order acknowledgment submitted by the seller.

The Court of Appeal judges indicated that this clause was open to different interpretations.[7] The use of the word "prevail" in relation to conflicting clauses obviously required that there actually be a conflict between clauses. Matrox Graphics Inc. could not simply state that only its terms and conditions applied. In this case, the terms and conditions of Matrox Graphics Inc. did not include a clause regarding the courts' jurisdiction to hear a dispute. Thus, Clause 19 of STMicroelectronics Inc. applied.[8] The court ultimately ruled that although STMicroelectronics Inc.'s Clause 19 applied, the wording of the clause was not sufficiently binding to force Matrox Graphics Inc. to litigate in Texas.[9]

Consequences of battles of the forms

The following is a non-exhaustive list of the possible consequences of accepting the other party's terms and conditions:

A warranty that is longer (or shorter) than expected, or even no warranty at all.
Unfavourable payment terms and legal proceedings in a different country in the event of non-payment.

Unilateral changes to prices or requirements regarding products or services, or even potential penalties.
Unforeseen transportation costs and terms and conditions.
Restrictions on use or issues related to intellectual property.

Deal with this issue in practice

Here are a few tips to avoid confusion when applying the clauses of a given contract and prevent unintended interpretations of its terms and conditions:

Negotiation of a master contract: Where there is an ongoing contractual relationship, negotiating a master contract is recommended to reduce the risk of ambiguity in the interpretation of clauses.

Addition of a clause in the purchase order: A buyer may include its terms and conditions of purchase in the purchase order and specify that only its general conditions apply to the contract. Alternatively, it may exclude any different or additional terms and conditions appearing on the seller's documents. Although purchase orders are typically issued by the buyer, the seller may negotiate the addition of specific clauses to impose its terms and conditions of sale.

Issuance of a confirmation slip: A confirmation slip is often sent upon receipt of a purchase order. It allows one party (usually the seller) to confirm acceptance of the order, while setting out the terms and conditions under which this acceptance is given.

Just how effective this type of clause is really depends on how it is worded, so drafting it in clear terms that leave no room for interpretation is crucial.

Outside Quebec: several possible solutions

Any contract entered into outside Quebec may be subject to entirely different methods for resolving battles of the forms.

In practice, there appear to be three widely accepted principles to address this issue.

In Canada—with the exception of Quebec—the last shot rule is most commonly applied. According to this rule, the terms and conditions of whichever party is last to send or acknowledge the contract will apply. It is based on the general rules governing offers and acceptance. The landmark ruling in this regard was handed down by the Court of Appeal of England and Wales, which provided an essential clarification on this legal principle:[10]

In most cases, when there is a battle of the forms, there is a contract as soon as the last of the forms is sent and received without objection being taken to it . . . In some cases, the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them . . .

Another widely accepted principle is known as the knock-out rule. According to this rule, a contract is considered valid even where offer and acceptance do not perfectly match due to the differing general conditions. The terms governing the contract are those that are common in substance in the general conditions of both the seller and the buyer. The differing terms cancel each other out and are replaced by the default rules provided for by the applicable law. The knock-out rule applies in several countries, including the United States, France and Germany.[11] The big downside is that, when applied, it generally excludes the applicable law clause, which is commonly found in both sales and purchase terms and conditions and sets out choice of forum and choice of law clauses that typically differ.

The last of the three principles is called the first shot rule, whereby the terms and conditions contained in the first contractual offer prevail over subsequent ones.[12] Although this principle is not as popular or frequently applied as the others, it is used and codified in Article 6:225 of the *Civil*

Code of the Netherlands.[13]

Ultimately, it seems that each jurisdiction applies its own principle, with no particular one being regarded as superior to the others. Although Quebec does not apply any of the principles, it does seem to favour the last shot rule, which can lead to a ping-pong situation. In such cases, the challenge lies in determining which party sent the final version of the contract.

Written with the collaboration of

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1. Specifically, articles 1387 et seq. and 1425 et seq.
2. *STMicroelectronics Inc.* c. *Matrox Graphics Inc.*, 2007 QCCA 1784
3. *STMicroelectronics Inc.* c. *Matrox Graphics Inc.*, 2007 QCCS 31, para. 26.
4. *STMicroelectronics Inc.* c. *Matrox Graphics Inc.*, 2007 QCCA 1784, para. 62.
5. *Achilles (USA)* c. *Plastics Dura Plastics (1977) ltée/Ltd.*, 2006 QCCA 1523, para. 24.
6. *STMicroelectronics Inc.* c. *Matrox Graphics Inc.*, 2007 QCCA 1784, para. 40.
7. *STMicroelectronics Inc.* c. *Matrox Graphics Inc.*, 2007 QCCA 1784, para. 51.
8. *STMicroelectronics Inc.* c. *Matrox Graphics Inc.*, 2007 QCCA 1784, para. 62.
9. *STMicroelectronics Inc.* c. *Matrox Graphics Inc.*, 2007 QCCA 1784, para. 126.
10. *Butler Machine Tool Co Ltd.* v *Ex-Cell-O Corp (England) Ltd.* [1977] EWCA Civ 9 (25 April 1977), para. 62.
11. Giesela Rühl, “The battle of the forms : comparative and economic observations”, (2003) 24:1 University of Pennsylvania Journal of International Economic, pp. 198 and 199.
12. John Henry Davis, “Defense of the Battle of Forms: Curing the First Shot Flaw in Section 2-207 of the Uniform Commercial Code” (1973) 49:2 Notre Dame Law 384, p. 389.
13. *Burgerlijk Wetboek (Civil Code of the Netherlands*), Book 6, Article 6:225.