Last shot always wins' Not when it misses the target.

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The English High Court has recently revisited the long standing “battle of the forms” with a rare result as to which party’s “shot” successfully incorporated its standard terms into the contract.

In the judgment in *TRW Limited v Panasonic Industry Europe GmbH and another* [1], Mr. Justice Kerr held that Panasonic’s careful draftsmanship in the first shot secured applicability of its General Conditions to any future trade, unless it agreed otherwise in writing.

The defendant Panasonic companies (“Panasonic”) based in Germany, supplied among other things, electronic resistors for use in vehicle parts. The claimant buyers (“TRW”), were UK based and supplied parts to the automotive industry, which included the Panasonic made resistors.

TRW sued Panasonic claiming that the resistors were defective. In response, Panasonic applied to set aside service and for a declaration that the English court had no jurisdiction over the claim[2], because the parties agreed to German law and exclusive jurisdiction of the Hamburg court over any claim by TRW arising from supply of the resistors.

Whilst there was some analysis of the law relating to Article 25 of the Recast Brussels Regulation[3] (which is not considered in this article), deciding which of the two competing jurisdiction clauses applied, required a determination of which party’s standard terms were incorporated into the contract.

The background to the supply was as follows:

In 2011 TRW signed a “customer file” document which stated it had “*received and acknowledged the General Conditions*” of Panasonic. The General Conditions provided for German law and German court jurisdiction and stated that, “*conditions of the buyer diverging from our terms and conditions shall not be valid even if we effected delivery or rendered services without reservation*.”

TRW placed orders for the resistors in 2015 and 2016 by purchase orders which asked for the goods to be delivered in accordance with TRW’s conditions of purchase (“TRW Terms”) (which provided for English law and English jurisdiction) and that delivery of goods under the order(s) “*shall constitute your confirmation [that you] are aware and accept such terms, conditions and requirements*.” Panasonic was not asked to sign and return the purchase orders, nor otherwise to confirm in writing its agreement to TRW’s Terms. Panasonic did, however, act on those purchase orders and delivered the resistors to TRW.

TRW contended that the ordinary battle of the forms analysis applied: TRW fired the last shot by referring to its Terms in the two purchase orders. By delivering the goods, Panasonic agreed to incorporation of TRW’s Terms into the contract, to the exclusion of Panasonic’s General Conditions, which were expressly rejected by the wording of the two purchase orders and fell away.

Panasonic meanwhile argued that its General Conditions were incorporated expressly into a document signed on behalf of TRW setting terms that precluded TRW from relying on incorporation of subsequent terms by conduct, including by delivery of goods, unless expressly agreed in writing by Panasonic.

Kerr J concluded that Panasonic had the better of the arguments by a comfortable margin, declaring that the Hamburg court had exclusive jurisdiction over the claim, and service was set aside.

Kerr J arrived at this decision for several reasons: First, rejecting TRW's suggestion that its signing of a "customer file" simply acknowledged the existence of the General Conditions, Kerr J held that the signature clearly acknowledged their applicability to any subsequent contract. It placed the parties under an obligation, if they later chose to enter into supply contracts, to do so on Panasonic's General Conditions terms, unless Panasonic should agree otherwise in writing. Kerr J could see no reason why parties may not agree binding terms of future trades that may or may not occur, noting that it meant a buyer would gain access to the seller's goods and the likelihood of being able to buy them if it wished, and in return the buyer agreed to the seller's conditions.

Turning to the battle of the forms question, Kerr J found, although it was an unusual outcome, the last shot doctrine was displaced on the facts here. The wording used in Panasonic's General Conditions excluding any other terms not expressly agreed in writing, protected it against the last shot doctrine. Kerr J could see no reason why those words should not mean exactly what they say – their meaning was clear and in no way ambiguous. If TRW was unwilling to abide by Panasonic's General Conditions, its remedy was to either not buy from Panasonic at all or to persuade Panasonic to agree in writing to renounce its General Conditions. However, TRW did neither.

As recognised by the editors of Chitty, and referred to in the judgment, "*it is possible by careful draftsmanship to avoid losing the battle of forms…but not (if the other party is equally careful) to win it*."[4] Here though, the supplier's drafting ensured that its General Conditions set binding terms for future trading which could only be undone by written consent. The outcome is unusual but highlights that clever drafting early on in negotiations can upset the last shot rule, and is a reminder that all agreed party terms will be taken into account when determining what is the contract.

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[1] [2021] EWHC 19 (TCC)

[2] Alternatively, Panasonic applied for a stay of action to avoid the risk of irreconcilable judgments in respect of related proceedings in Michigan, USA. That alternative is not considered in this article.

[3] The recast Brussels I Regulation (Regulation (EU) No 1215/2021)

[4] (2-036)