

## LAW MATTERS

WHEN TERMS  
AND CONDITIONS  
DON'T APPLY

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MOST businesses have a standard set of terms and conditions ("Ts & Cs") which regulate the supply of goods and services to customers. Often a supplier provides a customer with a quote incorporating its Ts & Cs. This constitutes an offer to the customer. By accepting the quote the customer accepts the supplier's terms. If that happens, then an agreement will have been reached.

But what if the customer's acceptance is made subject to a different set of Ts & Cs and the supplier performs? Which terms apply?

**DOCTRINE OF QUASI MUTUAL ASSENT**

The supplier may be bound to the customer's Ts & Cs in terms of the doctrine of quasi mutual assent. This doctrine allows a party to a contract to contend that the performance by the other party reasonably entitled it to assume that the other party has read and accepted its Ts & Cs.

In order for the customer to rely on the doctrine it must prove the following:

- ◆ the supplier presented its Ts & Cs in such a manner as to draw them to the attention of a reasonable person;
- ◆ the customer responded with its Ts & Cs in a similar manner; and
- ◆ the supplier's conduct after receiving the customer's Ts & Cs gave the customer reasonable belief that the supplier was contracting on those conditions.

If the customer proves this, the purchase order will be regarded as a "counter offer" and the performance by the supplier will be regarded as acceptance of the customer's terms.

If there are other facts which show that the supplier's terms were in fact agreed to, then the customer will not be able to rely on the doctrine. For example, if the supplier invoices the customer at the rates specified in the supplier's Ts & Cs and the customer pays the invoice, the customer cannot thereafter challenge the price or the other Ts & Cs. The conduct of the parties in this instance is inconsistent with the customer's Ts & Cs.

**HANDWRITTEN CHANGES**

A customer may sign and return a supplier's set of terms and conditions to the supplier with handwritten changes. If the supplier does not accept the changes by countersigning them, is there a binding contract between the parties? This usually depends on what has been changed.

If a handwritten change is a material alteration to the contractual terms, then there was no meeting of the minds and therefore no agreement.

Terms relating to products, price, delivery and payment are all material terms. If the supplier performs the customer may use this as a basis to refuse payment.

Suppliers should train their sales staff to ensure that when they negotiate a contract with a customer they make the supplier's Ts & Cs applicable apply and that any changes to the supplier's terms and conditions are agreed to before the supplier performs.

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