

The use of general terms and conditions

In a business context, it is common that both contracting parties have general terms and conditions and would like their own general terms and conditions to apply to the agreement to be concluded between them. This is hardly surprising, since a company's own general terms and conditions often contain favourable provisions for their own organization. The situation in which parties refer to different sets of general terms and conditions is also known as the 'battle of forms'.

The battle of forms, who wins?

In the case that both parties declare that their own general terms and conditions apply to the same agreement, the first reference to the general terms and conditions—the so-called first shot rule— applies, unless the second reference expressly rejects the applicability of the general terms and conditions mentioned in the first reference. In other words, the battle of forms is won by the party that first refers to their general terms and conditions, unless the other party, in their response, explicitly rejects their applicability.

An explicit rejection of the first reference is therefore one way to escape the first shot rule. However, what is considered to be an explicit rejection differs from case to case. Simply declaring one's own general terms and conditions applicable is, in any case, not considered to be an explicit rejection. A standard statement in the company's own general terms and conditions or a pre-printed phrase on letterhead rejecting the general terms and conditions of the first referrer is often not a sufficient rejection either. **This means that the second referrer will then also have to indicate in writing that the general terms and conditions of the other party/first referrer are not agreed to and that only their own general terms and conditions apply to the agreement.**

If the first referrer then does not wish to agree to the applicability of the second referrer's general terms and conditions, the first referrer will in turn have to reject the applicability of these general terms and conditions. If the first referrer does not challenge the second reference, the second referrer will be the winner of the battle.

Battle of forms: draw

Sometimes, the general terms and conditions of contracting parties are diametrically opposed. In that case, it could be agreed not to have any general terms and conditions apply to the agreement, or the parties could examine together whether either set of terms and conditions could still apply, provided exceptions may be formulated. In turn, these exceptions will be included in the contract to be entered into.

What does this mean for the University of Groningen (UG)?

For the UG, this means that it is important that we, as the first party, or first referrer, immediately declare in, for example, the offer phase that the UG's general research terms and conditions are applicable. If the other party then explicitly rejects our general research terms and conditions, the UG must subsequently indicate in writing, e.g. by email, that it does not wish to agree to the general terms and conditions of the other party or second referrer.

When this situation arises, it is advisable to contact the ABJZ department so that negotiations can potentially take place about both sets of general terms and conditions and the exceptions that may be made to them.