UNIVERSITETET I OSLO

English Law of Contract: Terms of contract

Emily M. Weitzenböck

March 2012

Norwegian Research Center for Computers & Law

Basic types of terms

UNIVERSITETET I OSLO

- **Terms** of contract set out duties of each party under that agreement. The terms will be of two kinds:
  1) **Express terms**: these are laid down by the parties themselves;
  2) **Implied terms**: these are read into the contract by the court on the basis of the nature of the agreement and the parties' apparent intentions, or on the basis of law on certain types of contract.
- Generally, the terms of a contract may be either:
  - Wholly oral
  - Wholly written
  - Partly oral and partly written.
- Terms are to be distinguished from statements made prior to the contract being made. Two main types of statement:
  - A representation about a state of affairs, or
  - A promise that something will or will not occur in the future.
- Either type of statement can become a term of the contract, whether or not they are oral or written, or partly oral and partly written.

UNIVERSITETET I OSLO

Express Terms (1)

- **Oral statements**
  - Key issue is whether oral statement made during negotiations prior to conclusion of contract becomes a term of the contract or remains mere representation/promise. This is a question of fact. Courts look at wide range of factors:
    - **Importance of statement**
      - If statement is so important that a party would not otherwise have entered into the contract, the statement is likely to be viewed as a term, see e.g. ***Bannerman v. White*** (1861).
    - **Timing of statement**
      - Generally, the more time between statement and conclusion of contract, the less likely is statement to be held a term of contract. See e.g. ***Routledge v. McKay*** (1954). Timing factor is point of departure only. If statement is otherwise strong and important then this may override significant delay between when it was made and when contract made. See e.g., ***Schawel v. Reade*** (1913).

Express Terms (2)

- **Oral statements (cont.)**
  - **Strength of statement**
    - The more emphatic the statement is, the more likely it is to be viewed as a term. See ***Schawel v. Reade*** above. Cf. ***Ecay v. Godfrey*** (1947).
  - **Special knowledge and skill of parties**
    - If statement made by party with special knowledge and expertise on matter, courts more likely to deem statement a term than if statement made by someone without such expertise. See e.g. ***Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.*** (1965). Cf. ***Oscar Chess v. Williams*** (1957).
      - Cf notion of "collateral warranty" – see Poole, pp. 208-209.

Express Terms (3)

- **Oral statements (cont.)**
  - **Written contract**
    - If contract is put down in writing, any statement appearing in that written agreement will usually be regarded as a term, and any prior oral statement that is not repeated in the written agreement will usually be regarded as a representation, due to the assumption that if a statement is left out of a written agreement, the parties did not view the statement as important. See e.g. ***Routledge v. McKay*** (above); ***Duffy & Ors v. Newcastle United Football Co. Ltd.*** (2000).
    - **Signature** will usually make it difficult for the signatory to successfully argue that the written terms of the agreement do not represent what they have agreed: see e.g ***L'Estrange v. Graucob Ltd.*** (1934).

UNIVERSITETET I OSLO

Express Terms (4)

- **Oral contracts: Incorporation of written terms**
  - Q.: When may written text be regarded as forming part of terms of an otherwise oral contract?
  - Incorporation must occur *before* contract is concluded. See e.g. ***Chapleton v. Barry Urban District Council*** (1940).
  - Incorporation can take place on basis of signature, reasonable notice, consistent course of dealing, and/or shared understanding of parties.
  - Generally speaking, it is harder to show incorporation the more onerous or unusual is the written clause. See e.g. ***Thornton v. Shoe Lane Parking Ltd.*** (1971).
  - In assessing the extent to which clause is onerous or unusual, one focuses on "meaning and effect of the clause in question", not the kind or type of clause: ***Ocean Chemical Transport Inc. v. Exnor Craggs Ltd.*** (2000).
  - See further Poole, pp. 219-221.

Express Terms (5)

- **Interpretation of express terms**
  - When construing meaning of contractual terms, courts attempt to ascertain the intention of parties on an objective basis. In ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society*** (1998), Lord Hoffmann stated that courts must look for "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."
  - Ongoing debate about the extent to which background knowledge (often termed "factual matrix") is to be taken into account. Traditionally, courts have been reluctant to taken account of background material.

UNIVERSITETET I OSLO

Express Terms (6)

- **Parol evidence rule**
  - Where a contract is reduced to writing, neither party can submit evidence extrinsic to (falling outside) the contractual document alleging terms agreed upon but not contained in the document. E.g. of rule in practice: ***Henderson v. Arthur*** (1907).
  - **Many exceptions to rule, e.g.:**
    - **Intention that agreement be only partially written:** If written document was not intended to set out all of the terms agreed between the parties, extrinsic evidence of other terms is admissible. There is tendency nowadays for courts to infer, if possible, such an intention.
    - **Rectification:** If the document is intended to record previous oral agreement but does not do so accurately, evidence of oral agreement is admissible.

UNIVERSITETET I OSLO

Express Terms (7)

- **Parol evidence rule (cont.)**
  - **Exceptions (cont.):**
    - » **Proof of custom or trade usage:** Evidence may be admitted to prove a custom or trade usage that would cast light on how a term in the contract should be construed. See e.g. ***Smith v. Wilson*** (1832) .
    - » **Clarify ambiguity:** Extrinsic evidence admissible to clarify ambiguity in express terms.
    - » **Show capacity of parties:** Extrinsic evidence admissible to show in what capacity the parties were acting when they entered agreement (e.g. as principal or agent).
    - » **Show how contract operates:** Parol evidence admissible to show under what circumstance(s) the written contract was intended to commence or cease. See e.g. ***Pym v. Campbell*** (1856).
    - » **Support or rebut implied terms:** Parol evidence admissible to support or rebut any terms implied by law.

Express Terms (8)

- **Collateral contracts**
  - An oral statement can be deemed binding even when it is not a term of a written contract, if it gives rise to a collateral contract. If one party says that he will sign the written agreement if he is assured that it is to be construed in a certain way, two contracts may arise: the written agreement and a collateral contract based on the oral statement. Classic exposition is the judgment of Lord Moulton in ***Heilbut Symons & Co. v. Buckleton*** [1913] AC 30 at 47.
  - Good example of device in operation: ***City and Westminister Properties Ltd. v. Mudd*** (1959).
  - Device of collateral contracts is a way of avoiding parol evidence rule. But device requires provision of consideration, which will usually be entry into main contract. Remember rule on past consideration!

Express Terms (9)

- **Entire agreement clauses**
  - These clauses state that the written contract contains the entire agreement. They are aimed at preventing one party subsequently claiming that an earlier statement is also part of the written agreement. These will be upheld by the courts but do not exclude liability for misrepresentation (dealt with in later lecture).
- **Significance of wording**
  - Where possible, words are to be given their natural and ordinary meaning. This may be departed from where this would lead to absurdity or inconsistency with the rest of contract. See e.g. ***Sinochem International Oil (London) Co. Ltd. v. Mobil Sales and Supply*** (2000) *per* Court of Appeal.

Implied Terms (1)

UNIVERSITETET I OSLO

- **Four categories of implied terms:**
  1. Implied by fact
  2. Implied by law
  3. Implied by custom
  4. Implied by trade usage

1. Terms implied by fact:

- These are terms that courts assume both parties would have intended to include in the contract had they thought about the issue. They are implied on a "one-off" basis.
- Two overlapping tests have been trad. used to ascertain parties' intention:
  - Officious bystander test: "if, while the parties were making the bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course!" (***Shirlaw v. Southern Foundries*** (1926) per MacKinnon LJ).
  - Business efficacy test: terms must be implied to make contract work. Leading case is ***The Moorcock*** (1889). Later case law (see e.g. ***Trollope and Colls Ltd. V. North West Regional Hospital Board*** (1973) makes clear that term only implied if contract cannot work without it; not sufficient that term makes contract fairer or more sensible.

UNIVERSITETET I OSLO

Implied Terms (2)

1. **Terms implied by fact** (cont.):
   - Both tests are subjective in the sense that they ask what parties in the case at hand would have agreed, not what a reasonable person in their position would have agreed. So the term cannot be implied if one of the parties was unaware of the subject matter of the term or facts on which it is based. See e.g. ***Spring v. National Amalgamated Stevedores and Dockers Society*** (1956).
   - Now, however, application of the two tests has been supplanted by an objective "construction" approach stipulated by Privy Council in ***Attorney-General of Belize v. Belize Telecom Ltd.*** (2009). This approach involves arriving at a proper construction or interpretation of the contract:
     - "[I]n every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean" (*per* Lord Hoffmann at [21]).

UNIVERSITETET I OSLO

Implied Terms (3)

2. Terms implied in law:

- These are terms which the law requires present in certain types of contracts (i.e. not just on "one-off" basis and sometimes irrespective of the wishes of the parties). E.g. tenancy agreements will include implied term that the landlord must take reasonable care to keep common parts of property in good repair (***Liverpool City Council v. Irwin*** (1977)); contracts of employment will include implied term that employer will give departing employee a job reference (***Spring v. Guardian Assurance plc*** (1994)) and implied term that employer and employee will not act in ways "likely to undermine the trust and confidence required if the employment relationship is to continue" (***Malik v. Bank of Credit and Commerce International SA*** (1997)). Cf. ***Crossley v. Faithful & Gould Holdings Ltd.*** (2000).
- Statutes will also imply terms: e.g. sale of goods to consumers will have implied term that goods are "of satisfactory quality" (see Sale of Goods Act 1979 s. 14(2) and Unfair Contract Terms Act 1977).

UNIVERSITETET I OSLO

Implied Terms (4)

3. Terms implied by custom

– Terms can be implied if there is evidence that under local custom they would usually be present. See e.g. ***Smith v. Wilson*** (above).

4. Terms implied by trade usage

– Terms routinely used in contracts within a particular trade or business may be implied into other such contracts. See e.g. ***British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.*** (1975).

UNIVERSITETET I OSLO

Relative significance of terms (1)

- Three types of contractual terms, each of which has normative importance relative to the others:
  1. Conditions
  2. Warranties
  3. Innominate terms
- **Conditions**
  - These are the most important terms of contract. Serious consequences if breeched. Innocent party can treat contract as repudiated (and thus is freed from rendering further performance of contract) and can sue for damages.
  - Description in contract of term as "condition" is not necessarily determinative of question whether term is condition. Courts tend to search for evidence that parties really intended term to be such. See e.g. ***Schuler AG v. Wickman Machine Tool Sales Ltd.*** (1974).

Relative significance of terms (2)

- **Conditions** (cont.)
  - Statute may determine that certain terms are to be treated as conditions. E.g. Sale of Goods Act 1979 provides that certain terms relating to title to goods and quality of goods are not just to be implied into consumer contracts but also to be conditions.
  - Case law also determines that certain terms – typically standard terms in commercial contracts – are to be treated as such. See, e.g. ***The Mihalis Angelos*** (1970) *per* Court of Appeal: "expected readiness" clauses in charterparties are usually to be regarded as conditions.
- **Warranties**
  - Of lesser importance than conditions, and can be breached without such serious consequences. Innocent party can sue for damages but is not able to terminate the contract.

Relative significance of terms (3)

- **Innominate terms**
  - Can be either conditions or warranties. Breach of them can be serious or trivial depending on particular fact situation. If effects serious, they are conditions and vice versa.
  - Notion of such terms first emerged in ***Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Ltd.*** (1962).
  - Introduction or recognition of this category of terms has given more flexibility to law, but also created more potential for uncertainty. Hence, courts have subsequently been inclined to hold that certain terms will usually be conditions to give commercial actors in a particular market certainty. Hence (as seen above) term in shipping contract stipulating that the ship will be ready within certain number of days will often be held as condition, breach of which enables discharge of contract even in cases when there is only slight delay with trivial or no harm. See ***The Mihalis Angelos*** case. See, too, follow-up cases such as ***Bunge Corp. V. Tradax Export SA*** (1981) and ***The Naxos*** (1990).

Relative significance of terms (4)

- **Innominate terms** (cont.)
  - However, ***Hong Kong Fir*** approach is far from dead. See e.g. ***Torvald Klaveness A/S v. Arni Maritime Corporation, The Gregos*** (1994). It may even apply in cases involving contracts for sale of goods. See e.g. ***Cehave v. Bremer (The Hansa Nord)*** (1975).
  - Poole argues that instead of operating with 3 classes of terms, one should just operate with 2 classes: conditions and non-conditions.