

Do not be caught out by implied terms in a commercial contract

By Humphries Kirk

When entering any sort of contractual relationship, it is essential to understand that, as well as those express provisions agreed orally or set out in writing, you will also be bound by a series of terms which will be automatically implied.

Understanding how these terms work, and when it may be possible to exclude or vary them by agreement, is essential to ensure you know what you are signing up for. The rules that apply vary depending on the type of arrangement in question which is why it is important to take legal advice.

Implied terms in commercial contracts exist to ensure business efficacy and that obvious things that need to happen to make the contract work are automatically included.

The generally accepted test for determining whether a particular term should be implied is whether it is needed to produce the result the contract is designed to deliver or should so obviously have been included that someone looking at the contract would say 'oh, of course we need that.' .

There are a range of circumstances which may give rise to terms being implied.

Legislation

There are various rules and regulations which provide for the automatic imposition of certain terms into contractual dealings. Common examples include consumer protection laws which imply an obligation to supply goods and services of a satisfactory standard when dealing with members of the public, and late payment provisions which stipulate the deadline for settling business-to-business debts and which entitle a business to claim interest, costs and compensation where the deadline is missed.

Previous dealings

If you have a longstanding relationship with a business client, which has always been conducted on certain terms, then it may be reasonable for the client to expect those terms to be implied into future dealings.

Custom

If you operate in an industry or within a country or region where it is customary to include certain terms within contractual arrangements then it may be possible for those terms to be implied into your contracts even where they have not been expressly agreed. However, for terms to be implied on this basis they must be more than simple trade practice and they must also be reasonable and sufficiently well known.

Reflecting intentions

If it is clear what your intentions were when you entered a contract, but the agreement you have ended up with does not reflect this, it may be possible for any terms needed to give effect to your intentions to be implied.

Can implied terms be avoided?

Excluding implied terms in contracts with consumers can be difficult as they are generally viewed to be in a weak bargaining position. However, the same cannot be said of contracts with other businesses where implied terms can very often be excluded or varied with careful drafting.

By seeking advice from a commercial lawyer who is familiar with your type of business and the industry you operate in, steps can be taken to ensure that:

- all contracts are scrutinised before they are signed to ensure any applicable implied terms are identified and excluded or varied where appropriate;
- limitation of liability provisions are inserted to cap the amount of compensation you may have to pay where an implied term is breached and, where possible, to prevent any other penalties or sanctions being imposed; and
- existing contracts which have slipped through the net are re-examined for implied terms so that you know where you stand and can take steps to minimise any risk of non-compliance.

By Humphries Kirk 2018

Legal advice helpline for DBA members, provided by Humphries Kirk:

For help with this subject, or any other commercial advice, please contact Darrell Stuart Smith, a Partner in Humphries Kirk's commercial team at their Dorchester office on 01305 251007.