

Discrepancies and Divergences of Express & Implied Terms

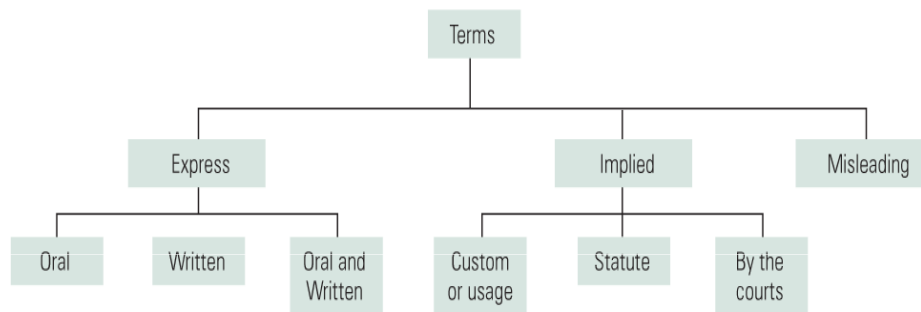
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Express & Implied Terms: What are They?

In forming a contract, especially in construction contract, not all obligations are expressed since both parties do not take the time and effort to express all of the obligations of both parties. This might raise contractual disputes, mostly involving the scope of each party. Therefore, if both parties do not make an enough consideration in constructing the contract, they may end up in court and long time disputes. Basically, there are 3 (three) types of term in a contract; express terms, implied terms and misleading terms. In this paper, I will focus on the first two types and how to manage any discrepancy or divergence occurs in construction contract.



The express terms can be divided into 3 main categories:

1. Conditions

Conditions are major terms of a contract where the breach of it may lead to the termination of contract by the innocent party. In other words, condition is a fundamental obligation of the contract.

2. Warranties

Warranties are minor terms of a contract where the breach of it does not lead to the termination of contract, but the innocent party is entitled to claim damages. In other words, warranty is a subsidiary obligation which is not so vital.

3. Innominate Terms

Innominate terms are not classified as either conditions or warranties. They can be major or minor terms. In deciding if the innocent party can terminate the contract, the consequences of the breach will need to be considered.

All terms which are stated in contract documents are considered as express terms. For example in PWD, Clause 8a; it is expressed that the Contract Documents are to be taken as mutually explanatory of one another. Furthermore, it is expressed that the Contractor must provide everything necessary for the proper execution of the works whether or not that work is particularly shown or described in the Contract Documents, so long as is reasonably inferred therefrom.

In practice, parties do not express all obligations to be performed under a contract as this would be impracticable. Therefore, in addition to expressly agreed terms, we may find implied terms in a contract. The main principle of this implied term is that it may not contradict an express term, but where the express term is flexible, it may be widened or narrowed by an implied term if necessary. So there is 2 functions of implied terms; first is to give implied rights, duties and obligations of both parties; and second is to give additional explanations of express terms of the contract.

There are 3 ways in which terms can be implied into a contract:

1. By Custom or Usage (also known as common practiced terms)

Refers to commonly used terms in certain type of trading or local contract.

2. By Statute

Refers to terms which implied into all contracts which may relevant to statutes, such as Sale of Goods Act.

3. By Court or Judicial Decisions

Terms implied by court revert to give business efficacy irrespective of the intentions of the parties or the fact of a particular case.

In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1978) 52 AJLR 20*, Lord Simon of Glaisdale had set up some circumstances where the court may imply the missing terms:

1. If it is reasonable and equitable

2. If it is necessary to give business efficacy to the contract

3. If it is obvious

4. If it is capable of clear expression

5. If it is not inconsistent with the express terms of the contract or its general tenor

However, there are some circumstances when terms cannot be implied into a contract:

1. Where one party may have agreed to certain terms, but the other party would not have

2. In rigorous contracts with detailed written terms where any omission would be deemed to be deliberate

Here are some typical implied terms in construction contracts; obey all laws, complete work in a good quality, conform to industry standards, complete work in a reasonable time, pay a reasonable price, freedom from minor defects, expected appearance and finish, fitness for all the purposes, durability, safety, etc. Next question is what should we do if there is a discrepancy in or divergence between terms in contract documents?

Discrepancy & Divergence

Both discrepancy and divergence are almost the same in meaning, except in the application of them. As far as I know, discrepancy usually used to define any difference in a document, while divergence is used to define any difference between documents. In construction projects, if it is not handled with good care, the appearance of any discrepancy or divergence may result in project delay, compromise on project quality and increase in project cost. Therefore, preventing and eliminating this discrepancy and divergence can enable projects to be completed successfully.

Before we talk about the methods in solving discrepancy and divergence, it is important to know the potential causes of discrepancies and divergences in the project life cycle. Generally we can divide the causes into 2 phases; design phase and construction phase. Below are some causes of discrepancies and divergences in projects:

A. Design Phase

1. Involvement of contractor in the design conceptual and development phases

2. Lack of data

3. Delay in preparing construction documents

4. Lack of human resources in design division

5. Time limitation in the design phase

B. Construction Phase

1. Lack of designer's knowledge of available materials and equipment
2. Incomplete plans and specifications
3. Insufficient working drawing details
4. Communication problems between contractor, employer and designer
5. Lack of mutual respect between contractor, employer and designer
6. Ambiguous design details
7. Lack of specialists in complicated designs and technologies
8. Material changes during the construction phase
9. Shortage of construction resources
10. Design errors
11. Lack of coordination between parties
12. Design complexity
13. Buildability
14. Fast track construction
15. Weather conditions
16. Variation orders
17. Involvement of designer/contractor as consultant

And next issue is how to solve this discrepancy and divergence in a contract dispute?

Solving Discrepancies & Divergences of Express & Implied Terms

What we need to hold is the main purpose of a project execution, which is to complete the work according to the said quality and during a reasonable time within a reasonable price. Contract is formed in order to guide the work execution and eventually to define rights, duties and obligations of both parties. If there is a discrepancy or divergence during the project duration, the main way to solve this is through negotiating. Since it is important to solve any discrepancy in and divergence between terms in contract documents as soon as possible, we need certain methods in negotiating. What are they?

A. Solving Discrepancy & Divergence of Express Terms

If there is a discrepancy or divergence of express terms in contract documents, there are 2 ways in solving this; the rule of interpretation and by way of reference.

1. The Rule of Interpretation

a) Literal Rule

Words that are reasonably capable of only one meaning must be given that meaning whatever the result.

b) Golden Rule

Ordinary words must be given their ordinary meanings and technical words their technical meanings, unless absurdity would result.

c) Mischief Rule

When an Act aims at curing a defect in the law any ambiguity is to be resolved in such a way as to favour that aim.

d) Purposive Rule

Purposive approach which seeks to give effect to the true purpose of legislation.

e) *Contra Proferentem* Rule

The doubt or ambiguity should be resolved against the party who drafted it or who uses it as a basis for a claim against another.

f) *Ejusdem Generis* Rule

"Of the same kind"; when a list of specific items belonging to the same class is followed by general words, the general words are to be treated as confined to other items of the same class.

g) Expressio Unius Est Exclusio Alterius Rule

“The inclusion of the one is the exclusion of the other”; when a list of specific items is not followed by general words it is to be taken as exhaustive. For example, “weekends and public holidays” excludes ordinary weekdays.

h) In Pari Materia Rule

“On the like matter”; when a prior Act is found to be “on the like matter” it can be used as an aid in construing the statute in question.

i) Noscitur a sociis Rule

“Known by its associates”; when a word or phrase is of uncertain meaning, it should be construed in the light of surrounding words.

2. Reference Method

Whether there are other terms incorporated in other sub-documents.

B. Solving Discrepancy & Divergence of Implied Terms

There are 2 ways in solving discrepancies and divergences of implied terms; first where the parties have reached agreement but did not consider reducing to writing certain terms which they have already contemplated, and second, where it is necessary to give business efficacy. For the last, the court will imply the terms to make the contract meet the business efficacy, which means when a case arises with absence of express terms, the court will consider the business efficacy point of view to imply the terms and give judgment according to it. Business efficacy looks on how efficient the business before and after the implication.

In standard form of contract, there are 3 (three) ways which can be applied regarding to this matter:

1. Order of Priority

Looks on the contract documents hierarchy. Most standard forms of contract include a clause, which stipulates the order of priority of the various contract documents. In other words, the standard form expressly indicates which clause or document prevails should an ambiguity and/or discrepancy be found between provisions set out in different contract documents.

2. Co-ordination and Design Obligation

Most contracts will impose upon the contractor express duties as to the need for co-ordination drawings, shop drawings, compliance with statutory obligations, design development, choosing materials and workmanship.

3. The Architect/Superintending Officer's Instruction

Most standard forms of contract will usually give the Architect the power to issue an Architect's Instruction (AI) to resolve the ambiguity and/or discrepancy.

In PWD 203A, there is a specific clause deals with discrepancy or divergence which is clause 8(b). The main point of this clause is that if the Contractor discovers a discrepancy or divergence, he must give written notice to the Superintending Officer as soon as possible. It is essential for the Contractor to notify the Superintending Officer, otherwise he would lose his entitlement to an extension of time under clause 43(e) and his limited right to loss or expense or both under clause 5(d).

In PAM 2006, there is a similar clause which is clause 1.4 subtitle ‘Discrepancy or Divergence between Documents’. And in CIDB it is stated in clause 7.4 subtitle ‘Responsibility for Identifying the Discrepancy’.

Closing

Construing contractual documents to me is an art since it is involved many skills and takes many years of experience. If we cannot forming a contract in such a proper way, there might be many problems appear during and after the construction. There is a need to reduce the causes of discrepancies and divergences so that the project can be completed properly. The best way to deal with discrepancies and divergences is by having more frequent professional meetings during the various project phases so that it would help to reduce discrepancies and divergences by way of identifying, controlling and monitoring these matters.