Implied terms in English and Romanian law

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Abstract

This study analyses the matter of implied terms from the point of view of both English and Romanian law. First, the introductory section provides a brief overview of implied terms, by defining this class of contractual clauses and by providing their general features. Second, the English law position is analysed, where it is generally recognised that a term may be implied in one of three manners, which are described in turn. An emphasis is made on the Privy Council's decision in Attorney General of Belize v Belize Telecom Ltd and its impact. Third, the Romanian law position is described, the starting point of the discussion being represented by the provisions of Article 1272 of the 2009 Civil Code. Fourth, the study ends by mentioning some points of comparison between the two legal systems in what concerns the approach towards implied terms.

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JEL Classification: K12, K22

1. Introduction

The purpose of this study is to analyse the matter of implied contractual terms, by providing an overview of the legal positions under both English and Romanian law. As a starting point, it would be useful to define implied terms and to mention their general characteristics. It is considered that implied terms are those contractual clauses which may be read into the parties' agreement, even though they are not expressly contained in the text of the contract. Therefore, upon executing a contract, the parties may be subject to certain obligations which stem not from the written (formal) intention of the parties, but from a different formal source, namely the law.[2]

One must not understand from the previous statement that a term may be implied into a contract *only* if there is a *specific legal provision* in this sense. On the contrary, in both common law and civil law jurisdictions, a term may also be implied in various other manners, including by way of custom, usage or by taking into account wider considerations such as business efficacy or equity. In all these

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[2] Hugh Beale (ed), *Chitty on Contracts*, vol 1 (2nd supp, 31st edn, Sweet & Maxwell 2014) para 13-001. This is also true in civil law jurisdictions: Gérard Lyon-Caen, 'L'obligation implicite' (2000) 44 Archives de philosophie du droit 109.

situations (which will be described in more detail in the following sections), the parties are bound not only by their, but also by the terms implied by the court into the contract.

2. The English law position

The English law position is that a term may be implied in a contract in one of three manners. *First*, by way of custom, usage or previous course of dealing between the parties. *Second*, a term may be implied by statute or statutory instrument. *Third*, a term may be implied at common law, either as a term 'implied in fact' or as a term 'implied in law'.

2.1 Terms implied by way of custom, usage or course of dealing

It has been established that an implication may be made that the parties are held by customary terms which are specific to a particular trade or place.[3] For a usage to become binding, it must be notorious, certain and reasonable, and not contrary to law.[4] Moreover, the parties may only be held by something more than a mere 'trade practice'.[5] Usages which comply with these conditions are usually incorporated into the contract because the parties are deemed to be aware of particular customs or usages which are standard in a particular trade.

Nevertheless, actual knowledge of a specific usage is not a prerequisite for construing an implied term. In *Sutton v Tatham*,[6] a principal instructed a stock exchange broker to sell a higher number of shares than intended, by mistake. The broker had to account for the difference after he fulfilled the transaction and was entitled to recover damages from the principal. Littledale J held that '[a] person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed'.[7] Therefore, the ignorance of a party which enters into a contract which may be also governed by certain usages (in the case described, by stock exchange rules) is irrelevant.

In conclusion, the rationale behind the implication of terms by way of usage or custom is that the court is only clarifying that the parties should expect to be bound by these implied terms once they enter into a specific class of agreements. On the same note, the House of Lords held in *Liverpool City Council v Irwin*[8] that 'the courts are sometimes willing to add terms to [a contract], as implied terms: this is very common in mercantile contracts where there is an

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3 Hugh Beale (ed), *Chitty on Contracts*, vol 1 (2nd supp, 31st edn, Sweet & Maxwell 2014) para 13-019.
4 *Yates v Pym* (1816) 6 Taunt 446, 128 ER 1107.
5 *Cunliffe-Owen v Teather and Greenwood* [1967] 1 WLR 1421.
6 (1839) 10 Ad & El 27, 113 ER 11.
7 *Ibid* 12.
8 [1977] AC 239.

established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain'.[9]

With respect to the implication of terms by way of previous course of dealing between the parties, the test to be applied is somewhat unpredictable. The ground rule is that a party invoking such an implied term must demonstrate (1) that there was regular trading between the parties and (2) that such trading was consistent. In what concerns regularity, it has been considered that this requirement was not met if the parties only contracted on three or four occasions over the course of five years.[10] Conversely, consistent trading refers to the conclusion of agreements using the same terms and the same procedure. For example, in *McCutcheon v David MacBrayne Ltd*,[11] the House of Lords refused to imply a term into a subsequent oral contract concluded between the parties, since all previous agreements were concluded in writing.

However, there are some instances where the courts have implied a contractual term by way of previous dealing between the parties. In *Re Duncan & Co*,[12] it was held that an agreement to pay interest may be implied if interest was frequently charged and paid with no objection in the context of previous agreements between the parties.

It is important to mention that a court may imply a term (either by way of usage/custom or by way of previous dealing) only if there is no express agreement to the contrary. Furthermore, the incorporation must be consistent with the tenor of the contract as a whole.[13]

2.2 Terms implied by statute

The English law approach is that terms may also be implied by statute. It is considered that terms which were previously implied by the courts were later codified into statutes,[14] giving rise to this new manner of implying terms. In this sense, the Sale of Goods Act 1979 will imply certain terms in the parties' agreement, if the contract is silent on the matter. For example, according to Section 8, where no price for the goods is agreed, 'the buyer must pay a reasonable price'. Furthermore, pursuant to Section 29, where no place for delivery is agreed, it takes place at the seller's place of business. Sections 17 and 18 provide that where no mention is made of when title in the goods passes to the buyer, it is deemed to pass when the goods become ascertained and the parties intend it to pass. Section 13 of the Supply of Goods and Services Act 1982 provides that the services contracted will be carried out with reasonable care and skill. The exclusion of terms implied

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9 *ibid* 253.
10 *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71 (CA).
11 [1964] 1 WLR 125.
12 [1905] 1 Ch 307.
13 *London Export Corp v Jubilee Coffee Roasting Co* [1958] 1 WLR 661; Richard Austen-Baker, *Implied Terms in English Contract Law* (Edward Elgar 2011) 91.
14 *ibid* 100.

by statute may be subject to the provisions of the Unfair Contract Terms Act 1977, as suggested by section 16 of the 1982 Act.

Since these terms apply to the contract by default (in the absence of the parties' express intention), it may debatable whether they may be qualified as true implied terms (which would require some effort of interpretation from the court). In Romanian law, pursuant to Article 1272, paragraph 2 of the 2009 Civil Code, 'usual clauses are implied in a contract, even though they are not expressly stipulated'. It is considered that these terms may not be qualified as true implied terms, as will be described in Section 4.

2.3 Terms implied at common law

A term may be implied at common law[15] either as a 'term implied in fact' or as a 'term implied in law'. This dichotomy was recognised in *Scally v Southern Health and Services Board*.[16] The House of Lords distinguished between terms implied in order to give business efficacy to a particular transaction (terms implied in fact) and terms implied in all contracts of a certain type, on wider policy considerations (terms implied in law). However, in the common law world it is considered that there is a significant overlap between the two categories. The New Zealand Court of Appeal held that implied terms are 'categories or shades in a continuous spectrum' and that 'it may be doubted whether tabulated legalism will ever produce an exhaustive or rigidly discrete classification'.[17]

Still, it may be useful to distinguish between these two categories in their analysis, even though the differences between the two must not be overemphasised. It may be argued that terms implied in law may have originally been terms implied in fact (implied in a specific agreement, after taking into account the particularities of the transaction) before being implied in all contracts of a certain nature.[18]

As mentioned before, *terms implied in fact* reflect the parties' intention at the moment of drafting a particular agreement. The test for implying such a term is considered to be an objective one and the House of Lords in *Liverpool City Council v Irwin*[19] refused to allow the implication of a term simply because it would have been 'reasonable' for the parties to include it in their agreement.

Traditionally, the courts have employed either the business efficacy test or the 'officious bystander' test in relation to terms implied in fact. The principle of business efficacy was laid down in *The Moorcock*,[20] where Bowen LJ held that 'in business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all

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15 In this context, *common law* is used to describe law which stems from the body of judicial decisions.

16 [1992] 1 AC 294 (HL) 306-307.

17 *Vickery v Waitaki International Ltd* [1992] 2 NZLR 58 (CA) 64.

18 Gerard McMeel, *The Construction of Contracts* (2nd edn, OUP 2011) para 10.06.

19 [1977] AC 239 (HL).

20 (1889) 14 PD 64.

events by both parties who are business men'.[21] Also, quite frequently, the 'officious bystander' test is used, which refers to a term 'so obvious that it goes without saying'.[22] A term is implied in this manner if it is so obvious that, if an officious bystander (an objective third party) "were to suggest some express provision for it in their agreement, [the parties] would testily suppress him with a common 'Oh, of course!' ".[23]

The recent Privy Council[24] decision in *Attorney General of Belize v Belize Telecom Ltd*[25] brings about a change of perspective. The case concerned the interpretation of the articles of association of a company formed to privatise the state-owned telecommunications services in Belize. The Privy Council found that the articles of association impliedly provided that certain directors of the company had to vacate their positions if the special shareholder (who nominated them) lost his special class of shares. Lord Hoffman held (referring to terms implied in fact)[26] that the business efficacy and the officious bystander tests should not be applied independently, as if they had a life of their own. Instead, he established a general test of reasonableness, whereby: 'in every case in which it was said that some provision ought to be implied into an instrument, the question for the court was whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean'.[27]

In the same judgment, it was affirmed that criteria previously established by the courts (for example, business efficacy) are only means to the same end, which is to find out what the contract actually means. Therefore, it has been noted that the general test of reasonableness proposed by Lord Hoffman may still be assisted by employing previous principles as guidelines for the court in arriving at a conclusion.[28]

Even though the Privy Council's decision is not binding on English courts,[29] Lord Hoffman's statement was endorsed at an appellate level in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc*.[30] Nonetheless, in this latter case, Lord Clarke re-emphasised that it must be necessary (and not only reasonable) to imply the proposed term: 'the test is one of necessity'.[31] It may be considered that this approach in *Mediterranean Salvage* is consistent with the principle that courts should refrain from rewriting the parties'

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21 ibid 68.
22 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA) 227.
23 ibid.
24 To be more precise, reference is made to the Judicial Committee of the Privy Council of the United Kingdom, which acts as court of last resort for several Commonwealth states (for example, Belize).
25 [2009] UKPC 10, [2009] 1 WLR 1988.
26 Ewan McKendrick, *Contract Law* (9th edn, Palgrave Macmillan 2011) 173.
27 *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.
28 Hugh Beale (ed), *Chitty on Contracts*, vol 1 (2nd supp, 31st edn, Sweet & Maxwell 2014) para 13-005.
29 *Absalom v Talbot* [1944] AC 204 (HL) 227.
30 [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep 639.
31 ibid 646.

agreement pursuant to their own principles of reasonableness. Therefore, the test of necessity comes in support of the parties' contractual freedom, by only allowing the courts to intervene (by way of implying terms) in some specific instances.[32] This view that courts may put the parties' freedom to contract in danger has been somewhat criticised, because the ultimate goal of interpretation of the contract (which may consist of reading into the agreement an implied term) is precisely to give effect to the parties' intent.[33] The Court of Appeal has recently attempted to clarify the relation between reasonableness and necessity. In *Marks And Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Anor*,[34] Arden LJ commented that the fact that a contract could work without implying a particular term does not prove that that term is unnecessary: 'A term may be implied if it is necessary to achieve the parties' objective in entering into an agreement'.[35]

In contrast with terms implied in fact, *terms implied in law* appear in all contracts of a certain nature, based on wider considerations,[36] which reflect a general relationship between the parties (as opposed to particular circumstances of an agreement, which may lead to an implication of a term in fact, as described above). In *Crossley v Faithful & Gould Holdings Ltd*,[37] Dyson LJ stated that courts faced with the issue of terms implied in law should 'recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations'.[38] Terms may be implied in law even though there is no specific legal provision (as in the case of terms implied by statute).

For example, the obligation of seaworthiness is a term implied in law,[39] since English courts have constantly recognised that in all contracts of carriage by sea, there is an implied term (absent any contrary provision) that the shipowner is to provide a seaworthy ship.[40] It may be submitted that policy considerations, such as safety of the crew and cargo involved in a marine adventure, impose on the carrier the duty to provide an appropriate ship for the intended voyage.

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32 Brandon Kain, 'The Implication of Contractual Terms in the New Millenium' (2011) 51 Canadian Business Law Journal 170, 177-178. The author considers that 'the appropriate standard of necessity is one of business efficacy'.

33 Sebastién Grammond, 'Implied Obligations from a Comparative Perspective' (2011-2012) 52 Canadian Business Law Journal 113, 121.

34 [2014] EWCA Civ 603.

35 ibid [28].

36 *Scally v Southern Health and Services Board* [1992] 1 AC 294 (HL) 307.

37 [2004] EWCA Civ 293, [2004] ICR 1615.

38 ibid 1626.

39 Gerard McMeel, *The Construction of Contracts* (2nd ed, OUP 2011) para 10.31.

40 *Steel v State Line Steamship Co* (1877) 3 App Cas 72 (HL) 86.

3. The Romanian law position

Traditionally, implied obligations have not been the subject of much debate in the Romanian legal landscape. More recently, some legal scholars have argued that Romanian law has somewhat implemented the idea of implied obligations in contract law, following the model of French and Canadian law.[41] Similarly to the common law approach, implied obligations in the civil law systems also give expression to the parties' presumed intention, which was not laid down in the text of their agreement.

The starting point for this analysis is represented by the provisions of Article 1272, paragraph 1 of the 2009 Romanian Civil Code, pursuant to which 'a valid contract binds the parties not only to what it expressly stipulates, but also to all the consequences which the parties' established practices, usage, law or equity which flow from the contract, according to its nature'. This provision (which is similar to Article 1135 of the French Civil Code) leads to the idea that a court may, after analysing a contract, come to the conclusion that the parties have agreed to something more than the contract 'expressly stipulates'. Therefore, it is submitted that Article 1272 of the Civil Code is the gateway towards implying terms in a contract under Romanian law. It seems that there are four sources for implied terms in Romanian law: the parties' established practices (their previous course of dealing), usage, law and equity.

Previous course of dealing between the parties may impact their future contractual arrangements and the 2009 Civil Code recognises the importance of established practices in several areas of law. For example, the silence of one party when receiving an offer may be treated as an acceptance if there was an established practice between the parties (Article 1196, paragraph 2 of the Civil Code). Also, in the context of contracts of carriage, the place of delivery of the goods is the domicile of the recipient, if there is no previously established practice between the parties (Article 1976, paragraph 2 of the Civil Code).

The role of usage has become more relevant in the context of the 2009 Civil Code. In accordance with the hierarchy of sources of civil law presented in Article 1 of the 2009 Civil Code, usages play a major role, being placed in the second tier, after legal provisions. It is interesting to mention that the Romanian law position seems to be that actual knowledge of an usage is not required in order for an usage to apply.[42] Therefore, it has been noted that professionals involved in a certain trade or operating on a certain market are deemed to have knowledge of the usages affecting a transaction. However, the presumption that the usage is known does not operate against a private party (a nonprofessional) who is not specialised

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[41] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Curs de drept civil: obligațiile* (*Civil law: the law of obligations*) (Universul Juridic 2015) 108.

[42] Ionuț-Florin Popa, 'Ierarhia surselor dreptului în noul Cod civil - rolul uzanțelor' ('The hierarchy of sources of law in the new civil Code - the role of usages') (2013) 3 Revista Română de Drept Privat.

in dealing on that particular market.[43] The positions in both English and Romanian law are quite similar in this regard.

In what concerns the law as a source of implied obligations pursuant to Article 1272 of the 2009 Civil Code, there is a close similarity to English law terms implied by statute. For example, pursuant to Article 627, paragraph 4 of the 2009 Civil Code, 'the stipulation of inalienability is implied in agreements which give rise to an obligation to transfer property in the future to a determined or determinable person'.

Furthermore, with respect to equity, this provision has traditionally allowed judges in civil law jurisdictions (especially in the French legal system) to imply certain obligations in a contract which had their origins in a general requirement of good faith, which is considered an essential component of the law of obligations in the civilian tradition.[44] Article 1170 of the 2009 Romanian Civil Code provides that 'the parties must act in good faith when drafting and concluding the contract, but also throughout its performance. They cannot remove or limit this obligation'.

Therefore, the basic obligation of good faith is part of positive law. Since a party's conduct throughout the life of a contract needs to comply with this general requirement, a need to mention some specific examples of this conduct has arisen. Therefore, legal scholars (followed sometimes by the courts) have mentioned several implied obligations which originate in this requirement of contractual good faith. For example, the obligation of contractual cooperation demands the parties' collaboration in achieving the common objectives of their agreement (especially in relation to pre-contractual communications between the parties). Some authors consider that the parties are also bound by an obligation of contractual consistency, which requires for one party to act within the reasonable expectations of the other, once a certain conduct has been established.[45] Non-compliance with this obligation is described as *venire contra factum proprium* in civil law jurisdictions or as estoppel in the common law world. In Romanian law, a breach of this obligation may amount to an abuse of contractual rights, which usually gives a right to claim damages.[46]

The contract may give rise to additional implied terms, such as the obligation to provide certain information to the other party throughout the performance of the agreement. Finally, some contracts also contain safety obligations, which were originally implied terms (usually in contracts of carriage of passengers).[47] Nowadays, however, there are express statutory provisions in both

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43 ibid.

44 Yves Lequette, François Terré, Philippe Simler, *Droit civil. Les obligations* (*Civil law. The law of obligations*) (Dalloz 2013) 50.

45 Sébastien Pellé, *La notion d'interdépendance contractuelle* (Dalloz 2007) 242.

46 Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Curs de drept civil: obligațiile* (*Civil law: the law of obligations*) (Universul Juridic 2015) 111.

47 By the French Cour de Cassation in *Compagnie Générale Transatlantique à Zbidi Hamida Ben Mahmoud*, Cass. civ., 21 november 1911.

Romanian and French law which cover safety obligations and it is therefore no longer necessary to describe them as implied terms.

In what concerns the possible remedies in the event of breach of implied terms, the aggrieved party in a contract governed by Romanian law will usually be able to make recourse to the entire range of contractual remedies available pursuant to the Civil Code. There is no distinction in this regard between express and implied terms.

4. Some points of comparison between the English and the Romanian law positions

The previous analysis of the legal positions in English and Romanian law has demonstrated that there several areas where the two legal systems are similar. The question of implied terms, although approached from different theoretical perspectives, frequently leads to comparable results. This is especially true in relation to sources of implied terms, usage and previous course of dealing between the parties having a significant role under both systems.

Continuing with this comparative approach, it is relevant to mention that both English and Romanian law take similar views with respect to terms which are automatically implied by the law in certain classes of contracts. It has been noted that qualifying these terms as implied is somewhat artificial,[48] since a court will consider these terms as being part of the agreement not after interpreting the unexpressed will of the parties, but after making direct application of a legal rule (laid down in a statute or pronounced by a court, in what concerns English law). In Romanian law, as mentioned before, pursuant to Article 1272, paragraph 2 of the 2009 Civil Code, 'usual clauses are implied in a contract, even though they are not expressly stipulated'. This provision makes reference, for example, to the parties' obligations under a contract of sale, which are detailed by the Civil Code and which become applicable by default, unless there are specific terms in the agreement.[49]

It would be also relevant to mention that there is no general requirement of good faith in English law, as it is provided in the 2009 Romanian Civil Code. As stated by Bingham LK in *Interfoto Picture Library v Stiletto Visual Programmes*,[50] 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. [...] English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness'.[51] One of these piecemeal solutions in relation to implied terms is the

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[48] Hugh Beale (ed), *Chitty on Contracts*, vol 1 (2nd supp, 31st edn, Sweet & Maxwell 2014) para 13-003.

[49] Gérard Lyon-Caen, 'L'obligation implicite' (2000) 44 Archives de philosophie du droit 109.

[50] [1989] QB 433 (CA).

[51] ibid 439.

limitation on exclusion clauses, pursuant to the provisions of the Unfair Contract Terms Act 1977.

Another distinction between the two legal systems is represented by the interpretation techniques used by the courts. On the one hand, in English law, the court begins by analysing the express provisions of the contract in order to ascertain the intention of the parties, before possibly arriving at the solution that an implied term needs to be read into the agreement. On the other hand, the Romanian law approach has a different starting point. The court will first look at the provisions of the law, by interpreting an agreement in accordance with the applicable legal provisions. Nevertheless, both systems' approaches may reach the same outcome: the implication of a terms which was not expressly provided by the parties.

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