

A Comparative Analysis of US and English Contract Law *Interpretation and Implied Terms*

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ABSTRACT

Contractual disputes frequently arise out of disagreements between commercial parties around ambiguous or incomplete contractual terms. Negotiating parties will seek to incorporate the terms of their commercial arrangement within a written contractual instrument that is comprehensive and unambiguous. Often, however, contracts are:

- 1) agreed under commercial pressure;
- 2) made between parties of unequal bargaining power; or
- 3) between parties dealing on cross-border transactions using differing terminology and drafting techniques.

International in-house counsel are consequently required to deal with a variety of contracts with different governing laws and a colourful mix of terminology and drafting. The circumstances around a transaction may change and the written terms of a commercial contract are reviewed to address and hopefully resolve a particular issue. The same question then arises time and time again: how should we interpret this clause?

The purpose of this article is to explore how the Courts approach the issue of contract interpretation and the enforcement of implied or ambiguous terms. Questions of interpretation may arise because the contract is not clearly drafted but also because the English language is complex and the meaning of a clause can vary greatly depending on its context and the parties differing understanding of the intent behind a clause. Furthermore, contracts can rarely deal with every eventuality and circumstance so the Courts may be asked to fill a gap by implying or even adding a term into a contract. The extent to which the Courts step in to potentially interfere with the parties' negotiated contract or "bargain", is considered throughout this article.

To provide some greater insight into the English Courts' approach to contract interpretation, US law is also considered by way of an interesting comparison. English law is the governing law of choice for many international cross-border contracts and many international companies have manufacturing, trading or operational hubs in the US and the UK. British-American relations of course remain strong ensuring trade and investment between the US and UK, giving rise to a variety of cross-border contractual arrangements governed by either English or US law.

INTRODUCTION

To fully understand the law around contractual interpretation and implied terms, it is necessary to begin with a brief explanation of the jurisprudential foundations of contract law. These foundations are relevant because they have played a key part in shaping the Courts' approach to contractual interpretation and the policy considerations of the legislature in enacting law that implies terms into a contract in both US and English law.

Freedom of contract is the principle that autonomous parties have the ability to freely negotiate and agree upon a contractual instrument without restriction or intervention from the government or legislation. Atiyah, in his book, *The Rise and Fall of the Freedom of Contract*¹, examines the evolution of the freedom of contract principle. He argues that after 1800 the very concept of contract in English law and theory changed its character, and all contracts came to be seen as consensual; perceived as depending on an agreement, or an exchange of promises. The law treated the contract as an instrument of market planning based on the economic model of the free market transaction.

Atiyah then suggests that the position evolved such that even where parties enter into a transaction as a result of some voluntary conduct, the resulting rights and duties of the parties are, in large part, a product of the law, and not of the parties' real agreement. He recognises that this does not necessarily hold true of a carefully negotiated commercial document, every clause of which is hammered out between the parties and their legal advisers, but, Atiyah argues, even contracts of this character do not successfully foresee every contingency or avoid every ambiguity; any resultant dispute must be solved by an active judicial decision, not by the purely passive interpretive process which formalism takes to be the judicial role.

In American contract jurisprudence, Charles Fried in *Contract as Promise*² studies the philosophical foundations of contract law and strongly proposes a moral basis for the central concept of contract as a promise. Fried acknowledges that where things go wrong - mistaken assumptions, unexpected developments, breaches and failures of one or both parties - the promissory principle either does not apply at all or must compete with rival moral principles. He argues, though, the challenge is to show that the promissory principle can hold its own in these circumstances.

In a commercial context one can see how the judiciary must proactively interpret a contract to resolve a dispute or to avoid a situation that clearly was not contemplated by the parties. However, it would arguably be dangerous to ignore the fundamental notions of freedom of contract or contract as promise which lie at the heart of the US and English free market economies.

CONTRACT FORMATION

The starting point in any analysis of a commercial dispute is usually to consider whether a contract exists between two parties and what the terms of that contract are. When dealing with non-lawyers, a common mistake is to wrongly assume that no contract exists just because a fully documented, executed and completed written agreement has not been concluded. However, there may well be a legally binding contract where there are sufficiently certain terms and the fundamental elements of a contract exist: offer, acceptance (which may be by conduct), consideration and an intention to create legal relations. These fundamental elements of a contract are required by both English and US contract law. The purpose of this article is to focus on contract interpretation and implied terms so the Court's approach to contract formation will not be examined, although it is likely that consideration of the contract's formation will be a necessary preliminary step in dealing with a contractual dispute.

¹ P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1985

² C. Fried, *Contract as Promise, A Theory of Contractual Obligation*, Harvard University Press, 1981

CONTRACT INTERPRETATION

English law

The leading authority on the principles that the English Courts will adopt in interpreting a contract is *Investors Compensation Scheme v West Bromwich Building Society*³. Lord Hoffman set out five principles which have been referred to in a number of cases subsequently. The key question to establish the meaning of the language in question was succinctly summarised in *Chartbrook Ltd v Persimmon Homes Ltd*⁴:

“It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.”

The analysis is objective; it is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language⁵. Of course, the parties' intentions may well align with the objective meaning derived from the language and surrounding circumstances, but this is not the purpose of the analysis. It is also key that the analysis is to be what a reasonable person would have understood the contract to mean at the time the contract was made, post contract conduct is largely seen as irrelevant (save for in circumstances of estoppel by convention, as referred to below).

The House emphasised in *Chartbrook* that it does not easily accept that people have made linguistic mistakes, particularly in formal documents. The parties in this case disagreed with the interpretation of a clause relating to how much Persimmon would pay as a balancing payment for each residential unit developed on Chartbrook's land. The clause in question on Chartbrook's interpretation would have resulted in a calculation of payment to Chartbrook of £4,484,862 but Persimmon said, on a proper construction of the clause, the amount due to Chartbrook was £897,051, significantly less. The differences in interpretation would therefore have a major commercial impact.

Lord Hoffman considered that Chartbrook was the type of case where something had gone wrong with the language and therefore there was “*no limit to the amount of red ink or verbal rearrangement or correction which the court is allowed*”, arguably a liberal statement as to the powers of the Court to amend a binding commercial agreement. Chartbrook's interpretation of the clause in question, in Lord Hoffman's view, in accordance with ordinary rules of syntax, made no commercial sense. Persimmon's interpretation did make sense, and this is the interpretation Lord Hoffman chose.

The Court felt obliged to consider the question of pre-contract negotiations as it was argued that the general rule that evidence of pre-contract negotiations is inadmissible may prevent the Court from putting itself in the position of the parties and ascertaining their true intent. After a consideration of a number of arguments, Lord Hoffman concluded that admissibility of this evidence would create uncertainty and would not be pragmatic. This seems correct as a term may have been agreed during negotiations in exchange for some concession made elsewhere in the transaction; it would not be the Court's role to unpick the deal.

In *Rainy Sky SA v Kookmin*⁶ the Supreme Court considered the role to be played of “commercial common sense” in the interpretation of contracts. Lord Clarke summarised the approach to conflicting interpretations:

³ [1998] 1 WLR 896

⁴ [2009] UKHL 38; [2009] 1 AC 101

⁵ *Sirius International Insurance Company (Publ) – v – FAI General Insurance Limited and others* [2004] UKHL 54, at paragraph 18.

⁶ [2009] EWHC 2624 (Comm)

“[W]here a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense.”

The case turned on the interpretation of a performance bond and the triggering event for payment under the bond. Pursuant to a number of shipbuilding contracts pre-delivery instalments were made to the shipbuilder prior to delivery of the ship. The shipbuilder’s performance bond entitled the buyer to repayment of the pre-delivery instalments in the event of termination. The case turned on a clause which stated, *“In consideration of your agreement to make pre-delivery instalments under the Contract ... we hereby undertake to pay to you ... all such sums due to you under the Contract ...”* The bank argued that the term “such sums” referred to in this clause related only to pre-delivery instalments recoverable under the previous clause, which did not include insolvency. The Court held that the buyer’s construction was to be preferred because it was consistent with the commercial purpose of the bonds in a way in which the bank’s construction was not. There was no commercial reason why the buyer could not call on the bond in circumstances of insolvency.

In *Arnold v Britton*⁷ the Supreme Court adopted a more cautious approach to the application of “commercial common sense”, or, what some commentators have referred to as the liberal approach to contract interpretation:

“[C]ommercial common sense and surrounding circumstances should not be invoked to under value the importance of the language of the provision which is to be construed ... while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight.”

In *Arnold v Britton* the interpretation argued for involved adding in the words “up to” in the relevant clause so that the sum specified a maximum and not a definition of the amount which had to be paid. This was arguably a very radical change to the wording and too much of a diversion to be a possible and credible interpretation.

This caution was followed in *Wood v Capita Insurance Services Ltd*⁸. The Court of Appeal held that an indemnity given by the sellers in a share purchase agreement did not cover the buyer’s warranty claim. The Court considered the construction of a lengthy clause which the buyer argued entitled it to recover an amount in respect of mis-selling of insurance claims by the seller.

The judge commented that the SPA was a substantial, professionally drafted document, drawn up by Addleshaw Goddard. Capita, the buyer, sought to argue that on its interpretation Capita would be entitled to recover what it had paid as compensation for the mis-selling of insurance because it was not necessary to register a complaint with the FSA, the Ombudsman or any other Authority. Mr Wood, the seller, argued that on his interpretation, Capita would not be entitled to recover from him if there had been no claim made against the company, nor any complaint registered with the FSA, the Ombudsman or any other Authority.

The Court held that the lengthy indemnity should not be read as though it were divided in parts and preferred Mr Wood’s interpretation. The Court looked at the agreement as a whole and referred to Capita’s benefit of warranties elsewhere in the agreement where

⁷ [2015] UKSC 36

⁸ [2015] EWCA Civ 839

any mis-selling would likely to have breached those warranties, in addition to the clause being relied upon. During the course of the judgment the judge said that, in discussing *Arnold v Britton* and *Rainy Sky*:

“Care must ... be taken in using “business common sense” as a determinant of construction. What is business common sense may depend on the standpoint from which you ask the question. Further the Court will not be aware of the negotiations between the parties. What may appear, at least from one side’s point of view, as lacking in business common sense, may be the product of a compromise which was the only means of reaching the agreement.”

Lord Clark LJ noted that there is a balance to be struck between the indications given by the language and the implications of rival constructions. And this seems like an accurate summary of the Court’s correct approach:

“The clearer the language, the less appropriate it may be to construe or confine it so as to avoid a result which would be characterized as unbusinesslike. The more unbusinesslike or unreasonable the result of any given interpretation the more the court may favour a possible interpretation which does not produce such a result and the clearer the words must be to lead to that result.”

The lesson is clear. Rival constructions can be avoided by careful drafting: breaking long clauses down, accurately defining terms and considering the contract and interplay between the clauses as a whole. The Courts may well look at the commercial implications of a clause but from the cases examined above it seems the Courts will be mindful that parties do sometimes make decisions which could later be characterised as a “bad bargain”, which cannot later be unpicked.

It should be noted that English law makes a distinction between interpretation and rectification, which are different exercises undertaken by the Courts, depending on what is pleaded. The range of evidence that a Court can take into account in interpreting a contract is narrower than in a rectification (evidence of pre-contractual negotiations are admissible in rectification claims). There has been some blurring of the lines between the two exercises, which is why arguments of interpretation and contract rectification will often both be pleaded by a party for the Courts to resolve.

Estoppel by convention may also be pleaded where the parties have been conducting themselves contrary to the terms of the agreement for some period of time and it would be unjust or unconscionable to go back on the established convention. A useful case illustrating estoppel by convention is *Mears Ltd v Shoreline Housing Partnership Ltd*⁹. In this case an employer considered that it had been overpaying a contractor and sought to rely on the contractual payment mechanism. The contractor argued the employer was not permitted to do this. It was held that there was an estoppel by convention and the employer was not entitled to recover the sums alleged. The various elements of estoppel by convention were discussed, including that a key element is unconscionability or unjustness on the part of the person said to be estopped.

US law

In the US, the law can vary from State to State. Some States in the US have adopted a similar approach to the English courts in how they approach the issue of contract interpretation. In *Landmark Ventures, Inc. v. Wave Sys. Corp.*¹⁰ the New York Court considered that it must avoid interpreting a contract in a manner that would be “*absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties.*”

⁹ [2015] EWHC 1396 (TCC)

¹⁰ No. 11 Civ. 8440, 2012 WL 3822624

The Court went further in *Newmount Mines Ltd. v Hanover Ins.Co.*¹¹ in stating that contracts should be examined “*in light of the business purposes sought to be achieved by the parties.*”

In *West Willow-Bay Court, LLC and Robino-Bay Court Plaza, LLC*.¹² the judge in the Delaware Court of Chancery quoted *Abry P’ners V, L.P. v F& W Acquisition LLC*¹³ as putting some limits on the extent to which the Courts can deviate from the plain construction of a contract, even if there are compelling commercial reasons to interpret it in a particular way:

“There is ... a strong American tradition of freedom of contract, and that tradition is especially strong in our State, which prides itself on having commercial laws that are efficient.”

The Court went on to say that, “*Freedom of contract enables parties to enter into all sorts of agreements, advantageous and disadvantageous. Where, as here, the parties have voluntarily ordered their relationship through a binding contract, Delaware law is strongly inclined to respect their agreement ...*”

Therefore, the Court held that it would not read a reasonableness or “best efforts” requirement into a contract entered into by two sophisticated parties. A party is not discharged from the binding language of a contract simply because its obligation under that language turns out to be difficult or burdensome.

In another interesting Delaware case the court set out the “Forthright Negotiator Principle” when a contract is ambiguous.¹⁴ Under this principle, a reasonable interpretation of contract language of one of the parties will be binding upon the other party to the contract if one of the parties knew or should have known of the other party’s understanding, and the party aware of the other’s reasonable interpretation did not object to it when the contract was signed. This is analogous to the equitable remedy in English law of estoppel by convention.

In the United States, the Unified Commercial Code (UCC) was introduced to cover a wide variety of commercial issues, including the sale of goods. The UCC is a “model” and is only law when a state legislature adopts it as law; it can therefore vary from state to state. The UCC has been enacted by all 50 states¹⁵. Whilst companies can contract out of the UCC in commercial transactions, it is a useful benchmark to examine how the US approaches the issue of interpretation.

Under the UCC, course of performance, course of dealing and usage of trade may give a particular meaning to specific terms of the agreement. The Courts need not find any ambiguity for commercial practices to be used to interpret the contract. The Code assumes that the parties contracted with a commercial context in mind, so it arguably makes sense to interpret the words they use in light of that context.

It should be noted that the parole evidence rule is common to US and English law whereby extrinsic evidence cannot generally be introduced to add to, vary or contradict a written contract. There are exceptions to this rule but it is common to both English and American legal systems.

¹¹ 784 F2d 127, 135

¹² C.A. No. 2742-VCN 2007

¹³ Del. Ch. 2006, 891 A.2d 1032, 1059-60

¹⁴ *United Rentals Inc v RAM Holdings Inc. C.A. No. 3360-CC (December 12 and 21, 2007)*

¹⁵ The State of Louisiana has enacted all of the UCC other than Article 2; Louisiana continues to rely on its own civil law to govern the sale of goods.

The parole evidence rule is founded on the principle that parties intend to make the written contract an expression of their final agreement that supersedes all prior understandings, and that final written understanding must be honoured by the interpreter. The second justification of this rule regards the quality of evidence: a final written contract carefully drafted to reflect the parties' intention deserves a better and preferred rank as proof than any other prior or contemporary agreement between the parties.

American courts often adopt the "four corners" rule whereby the starting point is that all information related to the interpretation of the contract will be from within the document itself is used and not evidence from extrinsic sources. However, the American courts have found various exceptions where extrinsic evidence can be used to determine the intent of the parties, for example, where the provision is ambiguous¹⁶ where the parole evidence rule may not apply. As a result US Courts have adopted a more liberal approach than the English courts to the circumstances where the parole evidence rule will apply.

IMPLIED TERMS

English law

The Courts have tended to be reluctant to imply terms into a contract when no such term exists. The judgment of Lord Hoffman in *Attorney General of Belize v Belize Telecom Ltd*¹⁷ is treated by the Courts as a leading authority on the subject of implied terms. Generally, the Courts have affirmed that necessity remains the important factor in whether to imply a term into a contract.

In *Belize* Lord Hoffman cautioned against treating the two formulations that the implied term (1) must "go without saying" and (2) must be "necessary to give business efficacy to the contract" as different or additional tests, rather:

"There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

He continued to examine the authorities, including *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*¹⁸ in which Lord Simon of Glaisdale said that the following conditions must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it 'goes without saying'; (4) it must be capable of clear expression; and (5) it must not contradict any express term of the contract. Lord Hoffman thought it best not to consider these conditions as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means. It seems correct that no such "tests" can be formulated to imply a term into a contract as, whilst various principles and common approaches may be applied by the Courts, the meaning of each contract should be considered in detail on a case by case basis.

In *Rosserlane Consultants v Credit Suisse International*¹⁹ Mr Justice Smith examined the authorities relating to the implication of terms into a contract. This case concerned a dispute arising out of the sale of a 51% stake in a company. The claimants were the owners of a share in the company. The claimants and defendant had entered into a Participation Agreement which enabled the bank to force a sale of the company. The claimants' case was that there was an implied term that the bank owed them a duty "to

¹⁶ *Gordon v Vincent Youmans, Inc.* 358 F. 2d 261, 264 (2d Cir. 1965)

¹⁷ [2009] UKPC 10, [2009] 1 WLR 1988

¹⁸ [1977] 180 CLR

¹⁹ [2015] EWHC 384 (Ch)

take reasonable precautions and exercise reasonable care as to seek to obtain the best price reasonably obtainable, or alternatively a fair, true and proper market price upon such sale.” The defendant denied there was any such implied term.

There were a number of factors that lead the judge to conclude that the term, as argued, could not be implied into the contract. Firstly, this was a commercial contract between sophisticated investors and the bank. The terms, in the judge’s view, were harsh but, he said, the harshness or otherwise of the terms was not for argument in this case. Of importance was that the agreement said nothing about any duty to obtain the best reasonable price whether by the claimants or the bank when the sale process was being conducted. Both had an incentive to obtain as much money as possible under the terms of the agreement and therefore the Court concluded that the term could not be implied into the contract.

US law

The UCC incorporates commercial practices – course of performance, course of dealing, and usage of trade – into the parties’ agreement. The aim of the UCC is to “*reduce the gap between law and practice and ... insure that decisions are practical and responsive to the needs ... of the parties and the relevant business community.*”²⁰ .

The UCC has been argued to reflect a “legal realist” philosophy²¹. An important element of that philosophy is understanding the commercial context in developing legal rules. Fundamentally a pragmatist, Llewellyn, who was instrumental in the UCC’s drafting, thought that contract doctrine should respond to commercial reality and not, as the classical theorists imagined, the other way round. The UCC therefore seems to reflect a wider philosophy in US law than English law as to whether terms can be implied into a contract.

Course of performance, course of dealing and usage of trade may “*supplement or qualify the terms of the agreement*”²² under the UCC; Article 2 of provides that:

“Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement .”

However, course of performance, course of dealing and usage of trade may override default rules (or gap-fillers) specified in the UCC. For example, the UCC provides that “*unless otherwise agreed ... the place for delivery of goods is the seller’s place of business.*”²³ If a course of performance, course of dealing or usage of trade establishes a

²⁰ PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP

UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT 9 (1990).

²¹ Dennis M. Patterson, Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code, 68 TEX. L. REV. 169, 171 (1989).

²² U.C.C. 1-303(d)

²³ Section 2-308

different place of delivery, these circumstances trump the UCC default rule. The UCC's provisions on implied warranties are examined further below.

Implied Term as to Good faith

US law and English law differ in their approaches to implying obligations of good faith into a contract. In summary, US law does have a general implied duty of good faith in the performance and enforcement of contracts, but English law does not have such a duty of good faith recognised (unless expressly stated).

The case of *Yam Seng Pte Ltd v International Trade Corporation Ltd*²⁴ is widely reported to indicate a sea change in the Court's approach and open the door to wider instances where a duty of good faith could be implied into a contract. In this case, Mr Justice Leggatt gave three reasons for the "traditional English hostility" towards a doctrine of good faith:

- (1) The preferred method of English law to proceed incrementally by fashioning particular solutions in response to particular problems rather than enforcing broad overarching principles;
- (2) English law is said to embody an ethos of individualism, whereby parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract;
- (3) Fear that recognising a general requirement of good faith in performance of contracts would create too much uncertainty.

Mr Justice Leggatt expressed the view that English law would appear to be "swimming against the tide", including noting that that a doctrine of good faith has been recognised in the United States:

- (1) the New York Court of Appeals said in 1918: "*Every contract implies good faith and fair dealing between the parties to it.*"²⁵
- (2) The UCC in section 1-203 provides that: "*every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.*"

In Mr Justice Leggatt's view, the basis of the duty of good faith is the presumed intention of the parties and meaning of their contract, its recognition is not an illegitimate restriction on the freedom of the parties to pursue their own interests. He considers that the essence of contracting is that the parties bind themselves in order to co-operate to their mutual benefit. He thought that the fear that recognising a duty of good faith would generate excessive uncertainty is unjustified; it is no more uncertain than the inherent process of contract interpretation.

The judge held it was clearly implied that ITC would not knowingly provide false information on which Yam Seng was likely to rely: "*Such conduct would plainly infringe the core expectation of honesty ..*". Secondly, it was held there was a duty not to undercut duty free prices. The judge considered that because the document in this case was "skeletal", it was easier to imply a term than in the case of a professionally drafted contract to suppose that part of the bargain had not been expressed. The judge seemed to look at what the parties would reasonably have understood and would have expected that their obligations would reflect this assumption without requiring the parties to spell it out.

Mr Justice Leggatt also sought to categorise "relational contracts", for example, joint venture agreements, franchise agreements and long term distributorship agreements

²⁴ [2013] ECWH 111 (QB)

²⁵ *Wigand v Bachmann – Bechtel Brewing Co.* 222 NY 272 at 277

which require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence. Expectations of loyalty may not be legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements.

The attractions in this approach are obvious, but the concern is that the duty of good faith may cut across express contractual rights or require a party to forego its commercial interests. In addition, the idea that parties are contracting for their "mutual benefit" might not be true; the commercial arrangement may be unbalanced where one party has taken a commercial risk for some other commercial benefit, perhaps not immediately apparent from the wording of the contract.

The Court adopted a more cautious approach in *TSG Building Services plc v South East Anglia Housing Ltd*²⁶. In this case a contract for building services contained an obligation to "work together and individually in the spirit of trust, fairness and mutual co-operation." However, there was no implied duty of good faith and, even if there were it could not circumscribe or restrict what the parties had expressly agreed, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed²⁷.

IMPLIED WARRANTIES AND TERMS

Where a commercial contract does not expressly exclude the Sale of Goods Act 1979 ("the Act") or the UCC, English law and US law may imply warranties into the agreement. The below table serves as a useful comparison between the approaches to implied warranties in commercial arrangements in the US and England and to show the similarities between English and US law:

	SALE OF GOODS ACT 1979 ²⁸	UCC
Title	Implied term that seller has right to sell the goods (Section 12)	Implied term that seller owns the goods and has the right to sell them (Section 2-312(1))
Quality	Implied term that the goods supplied under the contract are of satisfactory quality (section 14(2))	Implied warranty of merchantability (Section 2-314(1))
Fitness for Purpose	Implied term that goods are fit for the purpose expressly or implicitly made known to the seller (section 14(3))	Implied warranty of fitness for a particular purpose, requiring the seller to know or have reason to know the purpose for which the buyer is purchasing the goods (UCC 2-315)

In addition to terms relating to the nature and quality of goods, if a sale of goods contract is silent on particular matters relating to the performance of the contract, and there is no evidence of the parties' express intentions the Act and UCC will imply certain terms to bridge the gap, for example under both Sale of Goods Act 1979 and UCC where no price is agreed, the buyer must pay a reasonable price for the goods.

²⁶ [2013] EWHC 115]

²⁷ In the recent case of *Mr H TV Ltd v ITV2 Ltd* [2015] EWHC 2840 the judge refused to imply a term of trust and confidence into a Production Agreement.

²⁸ Note that in relation to consumer rights, please refer to the Consumer Rights Act, which came into force on 1 October 2015

It is useful to bear in mind that US and English law have differing requirements in respect of disclaimers (US law) or warranty exclusions (English law). In US contracts under the UCC the disclaimer must be conspicuous (UCC Section 1-201(b)(10)) so generally clauses are either: capitalized; bold; italicized or in a different colour. Generally, in US law, governed contracts disclaimers will therefore be capitalised. There are no such conspicuous requirements in English law.

OTHER DIFFERENCES BETWEEN US AND ENGLISH LAW

A key difference between US and English law is that best or reasonable “endeavours” should generally be used in English law contracts while best or reasonable “efforts” is generally the preferred term of art in US Law documents. In order to avoid the uncertainties around contract interpretation, it is preferable to use terms of art which have been considered time and time again by the courts. Whilst it may seem overly “lawyerly” to business colleagues to use these terms in contract drafting, it will likely assist in creating some certainty around the meaning of a particular clause.

It should also be noted that US and English law deal differently with limitations of liability. When parties exclude “indirect and consequential losses” in the US, this exclusion prohibits the recovery of damages stemming from losses of profit and/or revenue that may be attributable to a breach of the contract because under the laws of most US states the term “indirect and consequential losses” include such losses. English law, however, often considers such losses to be direct i.e. not indirect losses, so they would not fall under the exclusion clause.

The case law will not be examined in detail in this article²⁹, but the differences should at least be noted in drafting contracts in transatlantic transactions such that care is taken in drafting limitation clauses in English law contracts to spell out the specific potential losses that the parties are seeking to exclude from recovery.

CONCLUSION

The above analysis of English and US law demonstrates that the Courts and legislature on both sides of the Atlantic *prima facie* respect, to a large extent, the autonomy of parties to enter into whatever commercial arrangement they choose.

In particular, where it is known that the contract has been drafted with the assistance of legal advisers, the Courts will seek to uphold the “four corners” of the written contractual instrument. Careful and clear drafting of contracts is paramount to avoid unwanted consequences and costly, time consuming disputes.

Where things do go wrong with the language of the contract both the English and US Courts have demonstrated that they will consider the commercial context and implications of differing interpretations; they will balance the need to respect the language of the contract and bargain of the parties, whilst at the same time avoiding commercially absurd results where a particular result was clearly not intended or expected by the parties.

In this way, certainty and the sanctity of the written terms of the contract should be upheld and, ultimately, the longstanding principle freedom of contract will be respected.

²⁹ See, for example, *McCain Foods (GB) Ltd v Eco-Tec (Europe) Ltd* [2011] EWHC 66 (TCC)

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Hesco Group is a world leader and innovator in the design and manufacture of rapidly deployable barrier systems and armor. Hesco are at the forefront of barrier technology, saving countless lives and millions of dollars worth of property and equipment in the military, security, flood and humanitarian markets.

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