

Contracts

Contents

| | |
|--|----|
| Incorporation of terms..... | 2 |
| Interpretation..... | 4 |
| Implication..... | 8 |
| Termination..... | 14 |
| Mistake | 28 |
| Duress, undue influence, and unconscionable dealing..... | 35 |
| Illegality..... | 48 |

Incorporation of terms

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| Incorporation of terms | |
| <p>Overview</p> <ul style="list-style-type: none"> • for wholly oral contracts: court will determine terms of contract in light of all the evidence. • for contract at least partly in writing: <ul style="list-style-type: none"> - written terms are incorporated: by signature or by notice. - oral terms are incorporated: if they are sufficiently promissory in nature and survive the parol evidence rule. | |
| A. Incorporation by signature | |
| the general rule | where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document (<i>Toll</i>). |
| exception 1 | <p>when there is vitiating element (e.g. misrepresentation; mistake; duress; non est factum) or equitable or statutory relief.</p> <p>(a) misrepresentation</p> <p>i. express misrepresentation: ‘any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough.’ (<i>Curtis</i>)</p> <p>ii. misrepresentation by silence: There may be cases where the circumstances in which a document is presented for signature, or the presence in it of unusual terms, could involve a misrepresentation (<i>Obiter in Toll</i>). Given the Court’s strong affirmation of the signature rule, these circumstances should be limited to extraordinary cases.</p> |
| exception 2 | <p>if the document could not reasonably be considered a contractual document.</p> <p>Accordingly, a person will not be bound by signing a document that reasonably appears merely to be a timesheet, or a receipt or voucher (<i>Obiter in Curtis</i>).</p> |
| B. Incorporation by notice | |
| the general rule | <p>whether terms displayed or delivered terms are incorporated into the contract will depend on:</p> <p>whether the party to be bound have actual knowledge of the terms or have been given reasonable notice of the terms (knowledge or notice); and</p> <p>whether those steps were made before the contract was formed (timing).</p> |
| knowledge or notice | <p>knowledge</p> <p>if a party knows that the relevant document contains contractual terms, they will be bound by those terms regardless of whether they have read them (<i>PCL</i>).</p> |
| | <p>reasonable notice of contractual terms</p> <p>if a delivered or displayed document is one that a reasonable person would expect to contain contractual terms, the mere presentation of the document would be sufficient notice (<i>PCL</i>).</p> |
| | <p>reasonable notice of non-contractual terms</p> <p>if delivered or displayed terms are not contained in a document that is a well-understood contractual document, the party seeking to incorporate the terms must take reasonable steps to bring those terms to the notice of the party (<i>PCL</i>).</p> |

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| | <p>what amounts to reasonable notice depends on the circumstances of the case (including nature of the transaction, the character of the parties) and the nature of the term (the more usual the term is, more needs to be done in giving proper notice of those terms) (<i>Oceanic Sun Line; Shoe Lane Parking</i>).</p> <p>reference to terms contained in another document or a company office</p> <ul style="list-style-type: none"> are the terms readily available? if no, this approach has not been sufficient as reasonable notice (<i>Shoe Lane Parking; Oceanic Sun Line</i>) if readily available, are the terms not unusual or unexpected? if yes, terms available in other documents or the company office might be incorporated by reference (<i>PCL</i>). if the terms are unusual or unexpected, the mere availability of those terms at company offices does not amount to sufficient notice (<i>Baltic Shipping</i>). |
| timing | Only terms available to the party to be bound before the contract is made can be incorporated (<i>Oceanic Sun Line</i>). |
| C. Incorporation of statements made during negotiations | |
| does parol evidence rule exclude prior oral statement? | <p>The parol evidence rule only applies to exclude extrinsic evidence where a contract is wholly in writing.</p> <p>the correct rule is that the existence of writing which appears to represent a written contract between the parties is no more than an evidentiary foundation for a conclusion that their agreement is wholly in writing. (<i>Heath per McHugh</i>)</p> |
| non-application 1 of the parol evidence rule – contracts that are partly written partly oral | |
| a. was the oral statement sufficiently promissory? | If an intelligent bystander would reasonably infer that a [promise] was intended, that will suffice. ... Much depends on the precise words' (<i>Oscar Chess per Denning; also Heath</i>). Also consider and the expertise of the parties and the importance of the statement (<i>PCL</i>). |
| b. assuming an oral promissory statement is made, is it consistent with the written contract? | a prior oral statement cannot contradict the written terms in order to be incorporated as part of the contract. 'If there was an earlier, oral, consensus, it was discharged and the parties' agreement recorded in the writing they executed.' (<i>Equuscorp</i>) exceptions to the requirement of consistency: rectification; non est factum; mistake or misrepresentation (<i>Equuscorp</i>). |
| non-application 2 of the parol evidence rule – collateral contracts | |
| a. was the oral statement sufficiently promissory? | 'promissory and not merely representational', the test is an objective one that considers what a reasonable person would have understood them to have intended (<i>JJ Savage; Oscar Chess; Crown Melbourne</i>) |
| b. is it consistent with the written contract? | a collateral contract, which may be either antecedent or contemporaneous, being supplementary only to the main contract, cannot impinge on it, or alter its provisions or rights created by it. (<i>Hoyt's per Issacs</i>) |
| c. intended to induce entry into the contract? | <i>JJ Savage</i> |
| non-application 3 of the parol evidence rule – estoppel | |
| <ul style="list-style-type: none"> Estoppel may be an effective argument to support an oral promise because it is not restricted by the | |