

## “Entire Agreement Clause and Implied Terms”

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### INTRODUCTION

An Entire Agreement Clause is a provision in contracts, most notably commercial contracts, which is relied on by parties to exclude their liabilities arising from any statements and representations made before and during the negotiations of the contract, except as expressly mentioned in the agreement. The primary function it performs is that it brings in something called as "Parol Evidence Rule" which is enshrined in Section 92 of the Indian Evidence Act. What Parol Evidence Rule does is that when an agreement is reduced into a document, any other extrinsic oral evidence is not considered when interpreting the agreement. However, according to Proviso 5 of Section 92 of the Indian Evidence Act, implied terms such as any usage or custom not expressly mentioned in the agreement are admissible. They can be used to interpret the agreement. Thus from this perspective, implied terms are significant.

J. Lightman brilliantly describes how the entire agreement clause functions in *Inntrepreneur Pub Co. v. East Crown Ltd.* - “The objective of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some remark or statement (often forgotten or tough to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document.”<sup>1</sup> It is essential to establish here that the position of Indian courts concerning the entire agreement clause is the same as the English courts explicitly laid down by the Delhi High Court in *Thyssen Krupp Materials AG v. The Steel Authority of India*.<sup>2</sup> The judges also admitted that this area of law is not developed much in Indian jurisdiction and therefore rely on English courts, same as this research paper.

However, there has been some ambiguity as to when are the implied terms considered by the courts because in some instances they are admissible, but in some, they are not. This paper delves into this ambiguity and tries to create some coherent rationale behind the various decisions on entire agreement clauses and implied terms. The main question this paper tries to answer is when do courts include and exclude implied terms under the ambit of Entire Agreement Clauses. Moreover, to go a level deeper, how do the two types of implied terms—*intrinsic* and *extrinsic* implied terms fit in the ambit of Entire agreement clauses.

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<sup>1</sup> [2000] 2 Lloyds Rep 611.

<sup>2</sup> 2017 SCC OnLine Del 7997.

**POSITION OF IMPLIED TERMS IN ENTIRE AGREEMENT CLAUSES-**

Beginning with the more widely applied instances of exclusion of implied terms from the ambit of Entire Agreement clause and Parol Evidence Rule, *Hipwell v Szurek*<sup>3</sup> is the perfect example. The exact words used in the entire agreement clauses of the cases in this research paper are essential because courts while interpreting these clauses, pay attention to every word and each word can make the court to interpret the clause in some other manner. To be brief about the facts, this is a commercial contract for a lease. The tenant had to shut down her business due to the problems caused by questionable electrical wiring. The tenant sued the landlord for the recovery of the loss she incurred. Because of the absence of any express term in the agreement with regards to the duty of the landlord to maintain and repair the electrical installations, the tenant argued that there was an implied term for the same. The landlord depended on the entire agreement clause for his defence, claiming that no terms can be implied.

The entire agreement clause in this contract was- *“A clause (the ‘Entire Agreement clause’) stating that the Lease ‘constitutes the entire agreement and understanding of the parties relating to the transaction contemplated by the grant of this Lease and supersedes any previous agreement between the parties relating to the transaction’”*<sup>4</sup>

In this case, the court applied the principle of business efficacy. It found that there was a gap in the contract about electric wiring, and according to the intended objectives of the parties, it filled the gap with an implied term. Accordingly, the court implied a term in the agreement on behalf of the landlord. And thus it was established that if there are any gaps in the agreement, implied terms are admissible even though an entire agreement clause is present in the agreement.

This issue was looked into even more closely and went even further in *ExxonMobil Sales and Supply Corporation v Texaco Limited*<sup>5</sup>. In this case, the defendant was arguing for the inclusion of implied terms in the ambit of the entire agreement clause and the plaintiff that implied terms should apply because entire agreement clause does not affect entire agreement, as previously established. The plaintiff argued, based on another case called *Deepak v ICI*<sup>6</sup> which established that an entire agreement clause needs to explicitly exclude implied terms to escape liabilities from them and wished to apply the same in its case because the respondent had not explicitly excluded implied terms. The court though disagreed. The entire agreement clause in this contract was something like-

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<sup>3</sup> [2018] EWCA Civ 674.

<sup>4</sup> Ibid.

<sup>5</sup> [2003] EWHC 1964 (Comm).

<sup>6</sup> [1991] 1 Lloyds Rep 387.

*"This instrument contains the entire agreement of the parties concerning the subject matter hereof and there is no other promise, representation, warranty, usage or course of dealing affecting it."*<sup>7</sup>

The court decided that this clause did exclude implied terms even though it is not expressly mentioned in the entire agreement clause because "usage or course of dealing" are two ways by which terms are generally implied<sup>8</sup> and because these were explicitly included in the entire agreement clause, the court decided not to imply terms into the contract.

So we see that terms are implied and also sometimes not implied wholly based on how the courts interpret the entire agreement clause. Hence, while forming a contract, the construction of the entire agreement clause should be done cautiously and vigilantly. However, unfortunately, this clause has become a boilerplate clause and has been standardized due to which lawsuits regarding it keep coming up.

### **INTRINSIC AND EXTRINSIC IMPLIED TERMS**

One reason which can be attributed to this discrepancy in courts' decisions for implied terms can be because implied terms can be divided into two- intrinsic implied terms and extrinsic implied terms. Intrinsic implied terms are the terms which are the parts of the contract itself. *Hipwell v. Szurek*, the case which was discussed earlier had an intrinsic implied term and maybe hence why the court decided to enforce the implied term, even though there was an entire agreement clause present in the contract. The courts even enforce the intrinsic implied terms which are explicitly included within the ambit of an entire agreement clause. This is the premise for "*Axa Sun Life Services PLC v Campbell Martin Ltd.*"<sup>9</sup> In this case, petitioners endure some loss which it tries to recover due to termination of an agreement between petitioners and the respondents. The respondents claim that they were induced into an agreement by the representations and warranties made by the petitioners before agreeing for a contract. In their defence, the petitioners relied on the entire agreement clause in their contract, which would relieve them of any representations made pre-contract. The entire agreement clause in their contract was-

*"This Agreement and the Schedules and documents referred to herein constitute the entire agreement and understanding between you and us about the subject matter thereof. Without prejudice to any variation as provided earlier in this contract, this agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this agreement but this will not affect any obligations in any such prior agreement which are expressed to continue after termination"*<sup>10</sup>

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<sup>7</sup> *ExxonMobil* (n 4).

<sup>8</sup> Chitty on Contracts (30<sup>th</sup> Ed.), Ch.13-018.

<sup>9</sup> [2011] EWCA Civ 133.

<sup>10</sup> *Ibid.*

In this clause, even though it explicitly mentions and includes implications of this contract itself in the ambit of the entire agreement clause, the court still applied the implied term.<sup>11</sup> This judgement creates more confusion in this field. Sometimes implied terms are excluded, sometimes included under the ambit of entire agreement clause. The position of extrinsic implied terms does not help this predicament either.

Extrinsic implied terms are the terms which are implied following specific usages or custom persisting in a particular field of business. They are extrinsic because they do not arise out of the main contract itself. In the previous case of *Axa Sun Life PLC v. Campbell Martin Ltd.*, Stanley Burnton LJ makes a passing remark about extrinsic implied terms and says that these terms would not be applied if it is explicitly mentioned in the entire agreement clause. Moreover, the *ExxonMobil* case discussed earlier, was also dealing with an extrinsic implied term and hence why the courts decided to exclude the implied terms from the ambit of the entire agreement clause. The vital thing to keep in mind with respect to extrinsic implied terms is that not all of these terms are considered. These are per Section 92 of the Indian Evidence Act, 1872 and its provisos. For instance, proviso (5) lays down the exception to the Parole Evidence Rule if usage or customs are the extrinsic terms being implied in a particular case.

The reason for this differentiation between extrinsic and intrinsic implied terms could be that every implied term of intrinsic nature is particular to that contract only. It is something which both the parties have bargained and have reached an agreement for. It is free from any generalities. However, on the other hand, extrinsic implied terms are very general, not specific to any contract. It is the general norms and customs which have been applied from ages and therefore are still applied and hence do not need to be strongly impossible if the parties do not mention them in the agreement.

## **CONCLUSION**

Entire agreement clauses exclude representations and statements made amongst the parties during or before the negotiation for a contract by acknowledging that the agreement entered into by the parties is the final and the only one. This is important as it ties in the Parol Evidence Rule given in Section 92 of the Indian Evidence Act, 1872. However, there are certain exceptions provided in the provisos of the said act which allow implied terms to be admissible in a court even in the presence of an entire agreement clause. The main question researched in this paper was to understand when the courts include and exclude implied terms from the ambit of an entire agreement clause. The answer to this question flows into the next question asked to research on in this paper. How do extrinsic and intrinsic implied terms fit in the ambit of entire agreement clauses.

Looking at all the cases discussed and analyzed in this research paper, it can be said that the courts excluded some implied terms from the ambit of the entire agreement clause because of the precise wordings involved in the construction of these clauses. Hence why there is a need

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<sup>11</sup> Ibid. [42]

to carefully form these clauses and not consider them as boilerplate clauses to avoid any future litigation.

An underlying reason for courts to dismiss specific implied terms is because of their intrinsic or extrinsic nature. If they are intrinsic, they are imposed on the agreement and excluded from the power of the entire agreement clause, as shown in Axa Sun Life Services case. If they are extrinsic, they would have to satisfy the provisos in Section 92 of the Indian Evidence Act to be excluded from the ambit of entire agreement clauses like usages and customs are in ExxonMobil case. Reason for this is that intrinsic terms are precise and are bargained by the parties while extrinsic terms are generally applied.

On a final note, the researcher would like to put more emphasis on again considering caution while constructing an entire agreement clause because it has rapidly been standardized, which would increase the chances of future litigation.