THE DOLLAR VALUE OF WORDS

BY HFW IN ASSOCIATION WITH BARRISTERS FROM 7KBW

CONTENTS

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INTRODUCTION

This Dollar Value of Words Pack sets out an overview of the court's approach to contractual interpretation and an overview of how punctuation and the use of definitions can materially alter interpretation. Further, we discuss how terms could end up being implied into contracts and explore the future of contracts, and words specifically.

Businesses who frequently enter into commercial contracts should be alert to how the courts will interpret the words used in those contracts, to ensure the contract is interpreted as intended in the unfortunate event of a dispute.

Obtaining legal advice when entering into contracts is always advised, to ensure that the contract is drafted to avoid uncertainty, and to avoid leaving the interpretation up to the courts.

This Dollar Value of Words Pack should be construed in accordance with English law and is to be considered accurate as of July 2022.

We very much hope you find this Dollar Value of Words Pack useful. If you have any questions or comments, please do get in touch.

Yours sincerely

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01

THE COURT'S APPROACH TO CONTRACTUAL INTERPRETATION

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In theory, it has never been easier to state the English law rules of construction. Following a trilogy of Supreme Court cases (*Rainy Sky SA v Kookmin Bank*[1]; *Arnold v Britton*[2]; *Wood v Capita Insurance Services Ltd*[3]), users of English law contracts know with certainty that *"the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement"*[4]. And as put concisely by Lord Neuberger, *"the mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language"*[5]. The court must achieve this through consideration of the language used and the wider context (i.e., considerations of commercial sense). This is a *"unitary exercise"*, which *"involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated"*.

In practice, however, statements of high-level principle of this type are of limited use to those involved in drafting and advising on the meaning of complex commercial contracts. Commerce requires confidence about the effect of particular forms of word if used in a contract. Resort to the (alleged) natural meaning of the words used and commercial sense alone cannot supply the detail which is needed to support commercial certainty.

Debate: Literalism vs Contextualism

Looking back to 1996, Lord Hoffman famously stated that "*in some cases the notion of words having a natural meaning is not a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural.*"[6]

Reflecting on the above, Lord Sumption gave a polemical speech directed at Lord Hoffman in 2017, stating that he found "*the belittling of dictionaries and grammars as tools of interpretation to be rather extraordinary…If we abandon [dictionaries and grammars] as the basic tools of construction, we are no longer discovering how the parties understood each other. We are simply leaving judges to reconstruct an ideal contract which the parties might have been wiser to make, but never actually did*."[7]

Never one to be deterred, Lord Hoffman responded[8] stating that words are given meaning by custom and convention, i.e., by the rules of the game that the users of the language are playing. Commercial parties are playing a 'game' against each other and their words must be read in light of the rules of that game. To an extent these rules and conventions are recorded in dictionaries and grammars, but to another possibly wider extent they are not. While dictionaries will sometimes be of assistance, judges must also consider unwritten conventions and customs in the use of language by commercial parties. Lord Hoffman explained that he is not advocating abandoning dictionaries and grammars, but that judges must *"distinguish carefully between what appears to have been a mistake of language and a mistake about the world*." He observed that Lord Sumption believes that words used in speech can have an "autonomous meaning". But this is a fallacy: words have conventional meanings that you can only understand what they were used to mean if you know the context in which they were used.

English law provides certainty where possible through its case law, honed over centuries and shaped by external events and changes to commercial wordings. In reality, the first response of any English court to an issue of construction is to ask whether the clause (or a similar one) has been considered by the courts before in another case. English law rules of construction are to be found woven throughout our case law, not by turning up one case alone and not through statements of general principle alone.

[1] [2011] UKSC 50, [2011] 1 WLR 2900.
[2] [2015] UKSC 36, [2015] AC 1619.
[3] [2017] UKSC 24; [2017] AC 1173.
[4] *Wood v Capita* [12].
[5] *Arnold v Britton* at [19].
[6] *Charter Reinsurance v Fagan* [1996] 2 W.L.R. 726.
[7] Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017.
[8] 'Language and Lawyers' Law Quarterly Review October 2018.

Recent decisions of the Commercial Court in shipping and commodities cases show that this approach is alive and well, notwithstanding the Wood v Capita rules. For example, in the "***Eleni P***"[9] , Popplewell J resolved an off-hire issue by reference to the Court's long-established approach to off-hire clauses. He regarded this as a fulfilment of the guidance in Wood v Capita because it took into account the nature of the contract – i.e., that the contract was a charterparty, a type of contract in relation to which there are detailed and developed rules. Similarly, in The "***Maria***"[10] , Henshaw J had regard to "the paramount desirability of certainty" when construing a demurrage time-bar provision and applied the same approach as past cases.

These cases show that if there has been a prior case on point, that remains the point of first recourse for an English court construing a particular contract term. Users of English law contracts can continue to have confidence that a previously considered clause will mean the same thing this year as it meant the year before; and that two different judges would construe it in the same way.

This is well and good, but the scope for problems of inconsistency or debate about the hierarchy of clauses is acute in the context of contracts such as charterparties and contracts for the sale of commodities. Issues arise because these types of contracts are typically agreed in a compressed way, by brief recap, and incorporate standard wordings and additional clauses (i.e., boilerplate). Here, the courts wrestle with whether to adopt a "jigsaw puzzle" approach to construction[11] , whereby each clause must somehow be fitted in and made to make sense with other provisions; or whether to recognise that something really has gone wrong, and to give effect to what the parties must have intended in light of parts of their agreement which are clear[12] . Which approach is adopted depends on the clarity of the language used in the clause for which primacy is claimed and how obvious it is that there has been a mistake in leaving in a contrary standard provision.

More generally, the precedent approach depends on contracts being made on the same terms as those considered in prior cases. Contracting parties more typically adapt standard terms to their own needs. If so, the effect of their changes needs to be considered – in the context of the contract as a whole and the factual background particular to them.

In this regard, there may even be room for argument about what constitutes the factual background. For example, in ***The "Aconcagua Bay"***[13] , Knowles J appears to have regarded it as obvious that a BIMCO market circular about the meaning of the words "always accessible" in relation to a berth was relevant to construction (and indeed determinative in that particular case). But had both parties actually received that circular? Does it matter whether each contracting party could be expected to read circulars of this type? And why should they be conclusive, as opposed to simply being an opinion on the meaning of a particular form of words, in the same way as an academic article might express a view? These are the types of questions that may arise and are certainly not fully worked out by the headline statements made in the Supreme Court cases referred to above.

[9] [2019] EWHC 910.
[10] *Euronav N.V. v. Repsol Trading S.A. (The "Maria")* [2021] EWHC 2565.
[11] As described by Foxton J. in *Generali Italia SpA v. Pelagic Fisheries Corporation* [2020] EWHC 1228; [2020] LRIR 466.
[12] As in *The "Starsin"* [2004] 1 A.C. 715.
[13] [2018] 2 Ll.R. 381.

Looking even more recently at a 2022 case - *The Football Association Premier League Ltd v PPLive Sports International Ltd*[14] - where the High Court considered whether the Covid-19 pandemic was a material adverse change. The relevant clause provided that if the "*format of the competition*" undergoes a "*fundamental change which would have a material adverse effect*" then PPLive Sports could enter into negotiations for a reduction of the fees payable.

Due to the Covid-19 pandemic, PPLive Sports attempted to declare there had been a *material adverse effect*. The Court held that: "*the resumed season conditions and changes that were imposed as a result of Covid-19 were not "fundamental changes" to the "format of the competition" …. Accordingly, whether broadcasting the resumed season to the TV audience under the different conditions was more, or less, attractive to that audience, and whether it was less profitable to PPL to do so, does not impact on the issues that arise …. Put another way, the risk of profitability in broadcasting to the audience … rested with PPL under the terms of the two contracts, and the interruption to the season, and the way matches in the resumed season were played, did not change that*."

The sections that follow illustrate the approach to construction taken by the English courts, both generally and in creating and applying particular rules to resolve problems (such as the rules on implied terms). One consistent theme emerges: precise words matter. English contract law holds parties to the bargain that they actually made, rather than replacing it with the court's view of the bargain that it would have been reasonable for them to agree. As a result, all English law decisions on construction focus on the words of the parties' actual bargain.

Words are valuable under English law.

[14] *The Football Association Premier League Ltd v PPLive Sports International Ltd* [2022] EWHC 38 (Comm).

02

JOTS AND TITLES? PUNCTUATION AND COMMERCIAL CONTRACTS

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"*I worked all the morning taking out a comma – and I worked all the afternoon putting it back again*." Oscar Wilde's (probably apocryphal) riposte to a dinner guest who disparaged his craft as a writer displays a leisure that the drafters of commercial contracts do not always have in working out what they mean to agree. A fixture has to be agreed; a laycan met; an on-sale brokered. But even if Wilde was not being serious, the joke rings true: upon a comma, colon or dash can hang an entirely different meaning. That is no less true of contracts than it is of other forms of writing. A very small change can be the difference between victory and defeat.

Question mark: can the courts look at punctuation?

The answer now is an unambiguous "Yes", but this has not always been so. In some early cases, punctuation was excluded from the materials the court considered in determining the meaning of a written document.

In *Sanford v Raikes*[15], for example, a case from 1816 about construing a will, the question arose whether brackets marking off a phrase meant that those words did not form a part of the testator's will, but merely expressed his intention without creating an obligation. The court rejected the notion that the punctuation could affect the meaning: the sense was to be gleaned from "*the words, and from the context, not from the punctuation*".

By the early twentieth century, against a backdrop of increasing literacy, the courts were readier to hold that punctuation could make a difference. *Houston v Burns*[16] was another case about a will, in which a bequest was made "*for such public, benevolent, or charitable purposes*" as trustees thought fit. If the commas were given effect, "*public*" and "*benevolent*" purposes were distinct from "*charitable*" purposes, and the bequest was void because "*public*" purposes were too uncertain.

The House of Lords accepted that the punctuation could be looked at in a legal context as much as in any other: it was a "*rational part of English composition, and sometimes quite significantly employed*". The commas showed that these purposes had to be read as distinct from each other, and the bequest was therefore void.

Colon: when punctuation makes a difference

This may seem a foolish question: surely, if the parties have used different punctuation, the meaning should change? But just because the drafter has employed punctuation does not mean the court will give effect to it to reach a different result. Punctuation, like language, context and business common sense, is simply one of the indicators as to the correctness of a meaning. It is helpful to unpack that proposition by reference to examples.

In *The Captain Stefanos*[17], the punctuation of the clause was one of the key reasons the court reached the conclusion it did. An amended NYPE time charter put the vessel off-hire in the event of "capture/seizure**,** or detention or threatened detention by any authority including arrest" (emphasis added). The vessel was hijacked by pirates. Owners alleged that the words "*by any authority*" qualified both "*capture/seizure*" and "*detention*", with the result that as the pirates were not an "*authority*" the vessel was not off-hire.

The court rejected that construction: the positioning of the comma after "*seizure*", bracketing off the paired peril of "*capture/seizure*", told against Owners' construction. The court expressly distinguished this wording from other, similar wordings[18] that did not have the comma, which were not of assistance: different wordings did not assist where there was (as here) a comma.

Although the court considered that the punctuation was "*significant*", the case did not turn on the commas alone: the wording, structure and grammar of the clause were also factors in the decision. The comma was one of the indicators, though an important one.

A similar, though more muted, story arises from cases concerning off-hire provisions in different versions of the BALTIME charterparty form. As originally drafted, BALTIME provided that a vessel would be off-hire if it lost time due to specified causes. Time would nonetheless be for charterers' account "*in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention*" (emphasis added). Did the comma after "*rivers*" mean this extended to circumstances where a vessel

[15] 35 E.R. 808.
[16] [1918] AC 337.
[17] [2012] 2 Lloyd's Rep. 46.
[18] For example, *The Doric Pride* [2006] 2 Lloyd's Rep. 175.

grounded in a harbour or river where there was no bar? In *Magnhild v McIntyre Bros and Company*[19], the Court of Appeal held that it did.

Some forty years later, the relevant provisions of the BALTIME form had been updated to omit the commas and read "*trading to shallow harbours or to rivers or ports with bars*". The result was different: in *The Jevington Court*[20], time was not now for charterers' account unless the river had a bar.

The Jevington Court again underlines that it may not be the presence or absence of punctuation that alone leads to a different result. The structure of the clause and the grammar – in particular, the insertion of the word "*to*" before "*rivers*" but not before "*ports with bars*" – told in favour of the construction the court adopted. As in *The Captain Stefanos*, the court relied on other features of the clause to reach that conclusion.

Exclamation mark: the limits of punctuation

Consistently with the above approach, an argument from punctuation will not succeed if the other indicators from the contract are that the punctuation does not serve that purpose. In *Soufflet Negoce SA v Fedcominvest Europe SARL*[21], a GAFTA standard form had a clause for contractual notices. The final sentence in the clause provided:

> "*…In case… of resales/repurchases all notices shall be served without delay by sellers on their respective buyers or vice versa, and any notice received after 1600 hours on a business day shall be deemed to have been received on the business day following*" (emphasis added).

The sellers argued that the comma meant the second half of the sentence was freestanding and applied to all notices (with the result that the buyers had served a late notice).

The court rejected that argument, finding in the buyers' favour that the comma did not serve to separate the second half of the clause from the first. The sellers' submission was not persuasive as a matter of punctuation, because a full stop would have answered much better to the purpose of creating a freestanding provision. But it was also not persuasive as a matter of the language and structure of the clause as a whole, which told in favour of this provision being linked only to resales and repurchases.

The context in which the drafter has used punctuation may also indicate that the choice of punctuation is of no weight at all in construing the document.

In *Sammut v Manzi*[22], the Privy Council declined to attach any significance to the formatting or punctuation of a will typed on a computer where it was not clear that the testator himself (rather than a secretary) had been the person who typed it up, and therefore it could not be said that those features reflected his specific intention.

Likewise, in *Wood v Capita*[23] (discussed above generally), the Supreme Court rejected the submission that the presence in some places, and absence in others, of commas was a reliable guide to making only some, and not other, parts of an indemnity clause in a sale and purchase agreement between two sophisticated commercial parties subject to an additional pre-condition: "*both because there are no set rules for the use of commas and in any event the draftsman's use of commas in this clause is erratic*".

Full stop

The act of processing text to work out what it means is often, as the courts recognise, an impressionistic one. The meaning comes not from one piece of evidence alone but from fitting together text and context, words and grammar, syntax and punctuation. While the weight to be given to these elements may vary, each of them is a necessary ingredient – including punctuation. The point of punctuation is to make it easier to understand text by signposting the relationship between different elements, separating them or conjoining them to greater or lesser degrees. It is a "*rational part of English composition*" that is integral to working out the meaning of words.

[19] [1921] 2 K.B. 97.
[20] [1966] 1 Lloyd's Rep. 683.
[21] [2014] 2 Lloyd's Rep. 537.
[22] [2009] 1 WLR 1834.
[23] [2017] UKSC 24; [2017] AC 1173.

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03

SPECIFIC WORDS

HOW IMPORTANT AM I?

Headings and titles feature in most commercial contracts and are usually inserted to help introduce a section of text or an idea. *But are the selected words of any importance when it comes to interpreting and interrogating the contract?*

Typically, formal or professionally drafted contracts expressly stipulate headings are included for convenience only and are not material and/or shall not affect the interpretation or construction of the contract. It would therefore follow that those reading the agreement should not pay any (material) notice to what the headings say, instead focusing on the actual clauses or substance in the agreement.

However, in practice, headings are what a reader will first read when looking at a particular section, and therefore the text in the heading will (whether consciously or not) influence the reader's first impression of the clauses in question.

The courts have recognised this and found, on different occasions, that irrespective of a provision declaring headings shall be ignored, headings can be used as an interpretive aid. In particular, courts have held, irrespective of such an exclusion clause, headings may be considered where it could "*tell the reader at a glance what the clause was about*"[24], headings are admissible "*as descriptive of what the provision is about*"[25] and it would be "*impossible not to be assisted*" by a heading[26].

Notwithstanding the above, the usefulness of clause headings is less straightforward where the clause heading is inconsistent with what is said in the clause. In such a scenario, the courts will give respect to party autonomy and headings will not be allowed to alter what would otherwise have been the interpretation of the clause, to be read in full.[27]

Where there is a clause providing headings shall be ignored: the courts may allow themselves to be assisted by the heading where it is consistent with the clause read as a whole, but the courts shall ignore the heading if it is inconsistent with the content of the clause.

Without an express provision excluding the effect of headings, headings could materially influence contractual interpretation. This is because interpretation is all about trying to ascertain what bargain was struck and therefore the intention of the parties. Headings are plainly used in every day written correspondence to indicate or introduce the topic that is about to be discussed, and there is no reason why that general application ought to be ignored. So, where a clause is unclear or there are competing interpretations, the choice of heading may be relevant and helpful as a tool.

[24] *SBJ Stephenson Ltd v Mandy* [2000] FSR 286.
[25] *Doughty Hanson & Co. Ltd v Roe* [2007] EWHC 222 (Ch).
[26] *Citicorp International Ltd v Castex Technologies Ltd* [2016] EWHC 349 (Comm).
[27] *Gregory Products (Halifax) Ltd v Tenpin (Halifax) Ltd* [2012] 2 AER (Comm) 645.

COMMON WORDS & PHRASES

Where there is longstanding judicial consideration of particular words or phrases, the courts will be guided by those judicially accepted meanings when interpreting a contract. However, this does not mean the court will be rigid in its application, particularly where the present dispute has a materially different factual background. The courts will also respect the parties' freedom to contract, and there will be less room for courts to impose meanings to words where the contract sets out the intended definitions or where the contract refers to globally recognised and accepted sets of terms (for example, INCOTERMS).

In the absence of definitions, the starting point in construing a particular contract is to look at the words used and apply their ordinary and natural meaning.

'Force majeure'

Force majeure may be considered a boilerplate clause – i.e. a general clause that is included in most, if not all, commercial contracts. It is therefore not surprising that many of the words or phrases that are common across contracts in the commodity industry, feature in a force majeure (or a general exceptions) clause.

Firstly, looking at force majeure itself. It is a well-known legal phrase, and some may use the term invariably to refer to an event occurring beyond one's control which is preventing or is affecting performance. But despite the common usage, it is important to remember that there is no general or common law meaning of "Force Majeure" in English law. Force majeure is a contractual mechanism and so the definition, scope and application of a force majeure event will turn on what is said in the specific clause.

'Whatsoever'

Force majeure clauses will, almost always, contain a list of events considered to be or defined as a "force majeure event". Such a list often ends with "or any other cause" or "or any other cause whatsoever". Although strikingly similar, the additional "*whatsoever*" changes the meaning drastically. The rule of *ejusdem generis* (Latin for "*of the same kind*") will restrict the phrase "or any other cause" to be read in line with the list before it, so that it captures similar or alike events to those expressly listed. Whereas the addition of "whatsoever" will eliminate the restriction imposed by ejusdem generis and extend the scope of what may be a force majeure event.[28]

Mitigation

The most common express reference to mitigation is found in force majeure clauses, which impose an obligation on the affected party (or the party declaring force majeure) to take *reasonable steps* to limit or minimise the negative consequences of (i.e. to mitigate) the force majeure event.

What is reasonable will depend on the circumstances. A party will not be required to accept non-contractual performance in order to circumvent the effect of a force majeure event or similar clause. For instance, in *MUR Shipping BV v RTI Ltd*[29], the court held (albeit looking at the affected rather than unaffected party) that reasonable endeavours did not require a party to accept payment in a currency that the contract did not specify.

'Deficiency of men'

Case law is clear that 'deficiency of men' requires a numerical or physical insufficiency of officers/crew to safely operate the vessel. Typically, this would apply where there is insufficient crew on board the vessel.

But this will require consideration of the number of crew who are *able and capable* of working to operate the vessel. For example, where there is a deficiency of crew due to illness, but those infected remain on board (for example, isolating in their cabin), there could be a deficiency of men.[30] However, it would be insufficient if the deficiency was due to a plain refusal or unwillingness to work.

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[28] For completeness, a party seeking to rely on a force majeure clause must also pay careful consideration to the remainder of the clause. For example, some clauses will be triggered whether performance is 'affected' or 'hindered' or 'delayed', other clauses may only apply where performance is 'not possible'. Similarly, some clauses may require the affect to be 'caused by' or 'arise out of' the event in question, and there can often be carve outs to the applicability of the clause. These are further common words and phrases that have been judicially considered but go beyond the scope of this Pack.

[29] [2022] EWHC 467 (Comm).

[30] *Royal Greek Government v Minister of Transport (The Ilissos)* [1949] 1 K.B. 525.

'Mechanical breakdown' – case example

In *The "Ladytramp"*[31], the vessel was chartered to carry sugar for one voyage from Brazil. As the vessel approached, she learned that the terminal's loading machinery had been destroyed by a fire. Subsequently, loading was delayed for 30 days. Owners claimed demurrage and Charterers sought to rely on the exception: "*In the event that whilst at or off the loading place [...] the loading [...] of the vessel is prevented or delayed by [...] mechanical breakdowns at mechanical loading plants [...[time so lost shall not count as laytime.*"

Charterers sought to argue that damage from the fire caused the conveyor belt to no longer function as loading machinery – and hence, its 'mechanical breakdown'. The Court of Appeal ultimately held:

"The nature of the malfunction must be mechanical in the sense that it is the mechanism of the mechanical loading plant which ceases to function, or malfunctions, and causes the prevention of or delay to loading (and the consequent loss of time). This connotes an inherent mechanical problem, as distinct from a wider or external cause."

'Act of God'

This is a common phrase seen in sale contracts and charterparties within exceptions provisions, whether that be force majeure provisions, off hire clauses, general exceptions or otherwise. It is clearly an ingrained phrase, and we seek to consider here what it actually means, and whether it would respond to situations such as the Covid-19 pandemic and climate change.

'Act of God' has been said to mean "*such a direct and violent and sudden and irresistible act of Nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, he could not by any amount of care and skill resist, so as to prevent its effect*."[32] Thought to be one-off events without any human interference[33] and so historically, the phrase has been reserved for weather related natural disasters such as earthquakes and tsunamis.

Over the past couple of decades, climate change has increasingly received a lot of public attention and focus. As a 'weather related event', could it be classed as an 'Act of God'? We see three main hurdles to this. As there are many reports detailing the current effects and the anticipated effects of climate change, one may argue that parties who are entering into new contracts have the resources to learned of the expected effects and to guard against them from the outset. There is also, of course, the discussion about climate change being caused by humans, not an act of nature which could not be prevented. Further, we consider it could be very difficult – depending on the set of facts - to evidence that climate change has had the necessary direct impact on the particular contract to be relevant to any dispute.

One may also question whether the Covid-19 pandemic, or other pandemics, would be considered an 'Act of God'. Such a consideration may depend on the origination of the disease in question. There are some widely publicised views that the Covid-19 virus originated from and was leaked from a science lab. Other reports say the disease was transposed from animals. Even if you do not follow either of those theories, it is generally accepted that Covid-19 is transmitted human to human. Therefore, whatever way you look at it, the spread of Covid-19 (and likely any other pandemic) required human intervention. On a practical level, most of the contracts we have seen that were impeded during the Covid-19 pandemic were affected by state actions in response to Covid-19, rather than having been affected by the disease itself. So even if the virus is considered an 'Act of God', parties may still be presented with a hurdle of proving causation.

'War'

There is no statutory or common law definition of "war" or "hostile act". Looking at its natural meaning, we would expect the term "war" in a contract to connote a level of armed conflict between nations. The word would also need to be construed in a common sense way and given its ordinary business meaning. Often contacts will have specific war risks clauses and define relevant terms, which is always helpful to avoid disputes.

[31] *E D & F Man Sugar Ltd v Unicargo Transportgesellschaft MBH* (the "Ladytramp") [2014] 1 Lloyds Rep 412.
[32] ***Nugent v Smith (1876)*** 1 CPD 423 at 426.
[33] Lord Hobhouse in *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61.

Looking at the term "war" in the conditions of the modern world of trade which revolves around technology, one may ask whether the same would extent to cover cyber war or attacks – intending to refer to where computer technology is used to dispute the activities, often of a state or nation. We would expect there to be evidential hurdles, especially with establishing that a state (and which state) is behind the cyber-attack and who was the target.

We have not been able to find any judicial consideration of this in the context of charterparties or sale of goods, but we may find assistance from the insurance perspective. There are two US cases in this space - regarding disputed insurance coverage for losses caused by the 2017 'NotPetya' cyber-attack – which was widely attributed to the Russian military. In 2021, insurers in *Merck & Co v Ace American Insurance Company*[34] unsuccessfully argued they were not liable under the policy due to the exclusion for "*hostile or warlike action*". The court held that the war exclusion was intended to cover the traditional forms of warfare – i.e. the "use of armed forces" and acts of physical force - and not to state sponsored cyber-attacks. Insurers in *Mondelez v Zurich*[35] are running a similar argument, but as the case is ongoing (at the time of this publication) it remains to be seen if the same conclusion is reached.

The increasing inclusion of cyber clauses and specific war risks clauses is likely to indicate parties do not intend a general exclusion for war to extend to cyber-attacks. But, at the end of the day, whether or not a cyber-attack will fall within an exception of war, will depend on the contract wording and the circumstances of the attack.

Technical words – case example

A technical word should be given its technical meaning, unless there is something in the contract or context to suggest otherwise. But technical meanings are not always straightforward and could be interpreted differently depending on the context and the parties involved.

In a Canadian case[36], the meaning of the word "petroleum" was disputed. The defendant had sought to exercise its rights to "petroleum" underneath Mr Borys' land, those rights having been reserved by the seller when the land had been sold to Mr Borys. Mr Borys argued that the reservation was restricted to the "petroleum" substance and did not include the "gas" contained within the solution (that gas being owned by Mr Borys). This led to a very technical dispute, considering the scientific and the vernacular meanings of the word, and the different states of the substances when underneath and above ground. The ultimate question was not whether petroleum and gas are two separate substances, but what is included in each substance. After two previous judgments, the Supreme Court of Alberta agreed with the trial judge that whilst petroleum and natural gas were, by common usage, two different substances, the reservation of petroleum underground did include the gas in solution in the liquid as it exists in the earth.

[34] (No UNN-L-002682-18).
[35] (No 2018-L-11008).
[36] *Micheal Borys v Canadian Pacific Railway Company and Another* [1953] A.C. 217.

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04

MUCH ADO ABOUT NOTHING - IMPLIED TERMS

MUCH ADO ABOUT NOTHING - IMPLIED TERMS

An implied term is a term in a contract which is not actually written down. Implied terms can arise as:

- a matter of fact (i.e., the parties to a contract would definitely have included such a term in their contract had they thought about it at the time);
- a matter of law (i.e., as a natural consequence of the parties' formal relationship, such as that between an employer and employee or landlord and tenant);
- from usage or custom (i.e., where the use of such terms is notorious and certain in a market); or
- as a result of statute (for example, the Consumer Rights Act 2015 is automatically incorporated into all agreements made between consumers and traders).

Implied terms which arise as a matter of fact are those which provide the commercial court with the most exercise. Contracts which are negotiated between sophisticated parties with the assistance of lawyers rightly endeavour to account for all possible contingencies and can run for hundreds of pages in this pursuit. Even so, often situations arise which catch the parties by surprise. The general position in these circumstances, where there are no express terms in the contract which might have assisted with the unexpected event, is to do nothing at all and let the loss fall where it lies. Occasionally, however, one of the parties to the contract might say '*hold on a second, even though it is not spelt out, it is blindingly obvious that in this situation this is what should have happened – you are in breach of an implied term*.' And in very rare instances the court will agree.

The high bar to meet

While the court may on occasion find that a contract does contain an implied term, it will not do so readily; the bar is set very high. The court does not like to invent contracts or to change a bargain that has been struck; and a term will not be implied into a contract merely because it is more fair or because the parties might have agreed to it had it been suggested to them at the time.

There are two principal tests:

1. *the officious bystander test*, where the court will imply a term if it is so obvious that it goes without saying, so that if an officious bystander suggested it to the parties, they would both round on the intruder and say "Oh, of course!"[37]; and,
2. *the business efficacy test*, where the court will imply a term if it is necessary, in the business sense, to give efficacy to the contract[38].

It is acknowledged that these tests overlap, and that they can be applied cumulatively or alternately:

> "[F]*or a term to be implied, the following conditions (which may overlap) 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; (5) it must not contradict any express term of the contract*."[39]

Whatever test is applied, it is axiomatic, however, that the outcome reflects the objective common intention of both parties at the time of contracting.

[37] *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206.
[38] *The Moorcock* [1889] 14 PD 64.
[39] Lord Simon of Glaisdale with the majority in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 A.L.J.R. 20 at 26.

Indifferent to contract interpretation?

Lord Hoffman stated in Att-Gen of Belize v Belize Telecom Ltd[40] that:

> " *...in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such provision would spell out in express words what the instrument read against the relevant background, would reasonably be understood to mean*"[41]

and that the earlier tests:

> "[are] *best regarded not 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 meant, or in which they have explained why they did not think that it did so.*"[42]

These statements represented quite a pivot in this area of the law: the various tests being reduced to a single formula; and the suggestion that the implication of terms in a contract was no different to the interpretation of contracts. This naturally caused quite a stir; not only as a matter of principle, because these two exercises had until then been thought of as quite distinct (perhaps even opposites, as one deals with what has been expressed (however unclearly), the other with what has not been expressed), but also practically because if this were the case then this would have an incredibly liberalising effect on the implication of terms. Whereas with the interpretation of contracts, the court is principally concerned with what a given term in a contract *reasonably* means; where a term is implied it must be *necessary* to the extent that without the implied term, the contract would lack coherence.

Necessity vs reasonableness

In *Marks & Spencer v BNP Paribas*[43] the Supreme Court weighed in and affirmed that, while reasonableness is necessary before a term can be implied into a contract, it was not sufficient in itself. The touchstone should always be necessity and not merely reasonableness. The court further clarified that this was not a test of "*absolute necessity*" but rather, whether without the term, the contract would lack coherence.[44]

Success stories

- *The Moorcock* (i.e., the genesis of the *business efficacy test)* - the court found that within a contract for the use of a wharf it was an implied term that the wharf was safe to use.
- *The New Hydra*[45] - the High Court, finding for Owners, held that in a time charter which contained a formula for the hire rate based on an index rate which included an adjustment for the difference between size of the vessel in the index and the vessel chartered but made no provision for what would happen if the index itself changed during the charter period, a term should be implied into the charter that the hire rate was to be based upon the average of the published routes of the index and, if necessary, a reasonable size adjustment to reflect any difference in earning capacity resulting from the difference in size should also be implied.

...and less successful stories

- *Al Jaber v Al Ibrahim*[46] - the claimant had agreed to lend $30 million to the defendant in connection with the launch of a broadcasting service but the agreement contained no provision for whether the loan would bear interest. The Court of Appeal declined to imply a term that interest should accrue. It

[40] [2009] UKPC 10, [2009] 1 W.L.R. 1988.
[41] Ibid at 21.
[42] Ibid at 28.
[43] *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72.
[44] Ibid at 21. The Supreme Court affirmed that the guidelines in BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (cited above) are good law.
[45] [2021] EWHC 566 (Comm).
[46] [2018] EWCA Civ 1690.

held that an implied term that the loan should bear interest was not necessary to provide business efficacy to the contract; the loan was quite capable of being mutually beneficial to both parties as it was.

- *Priminds Shipping*[47] - the court held that a shipper who handed over to a ship's master a draft bill of lading which stated that the cargo was "clean on board" and "shipped at the port of loading in apparent good order and condition" was not providing any warranty that this was the cargo's actual condition. Presenting the bill was no more than an invitation to the master to make their own assessment of the cargo. There was no implied indemnity against the consequences of the statement's inaccuracy.

It is difficult to convince the court that there is an implied term in a contract. You will have to show that you and your counterpart most certainly would have agreed to the inclusion of the term had you simply been alerted to it, while at the same time having to contend with your counterpart (a) arguing the exact opposite; and (b) stating plainly that if you had wanted to agree that term you would have written it down. That last argument becomes all the more compelling the longer and more detailed a contract is. Nevertheless, it is not impossible. If you find yourself on these shores, believing that a term needs to be implied into your contract for it to make sense, ask yourself, without this implied term, where is my contract? Has it simply turned into a bad deal or is it now incoherent? If you lean more towards the latter, you may be in with a fighting chance.

[47] *Priminds Shipping (HK) Co Ltd v Noble Chartering Inc Motor Vessel Tai Prize* [2020] EWHC 127.

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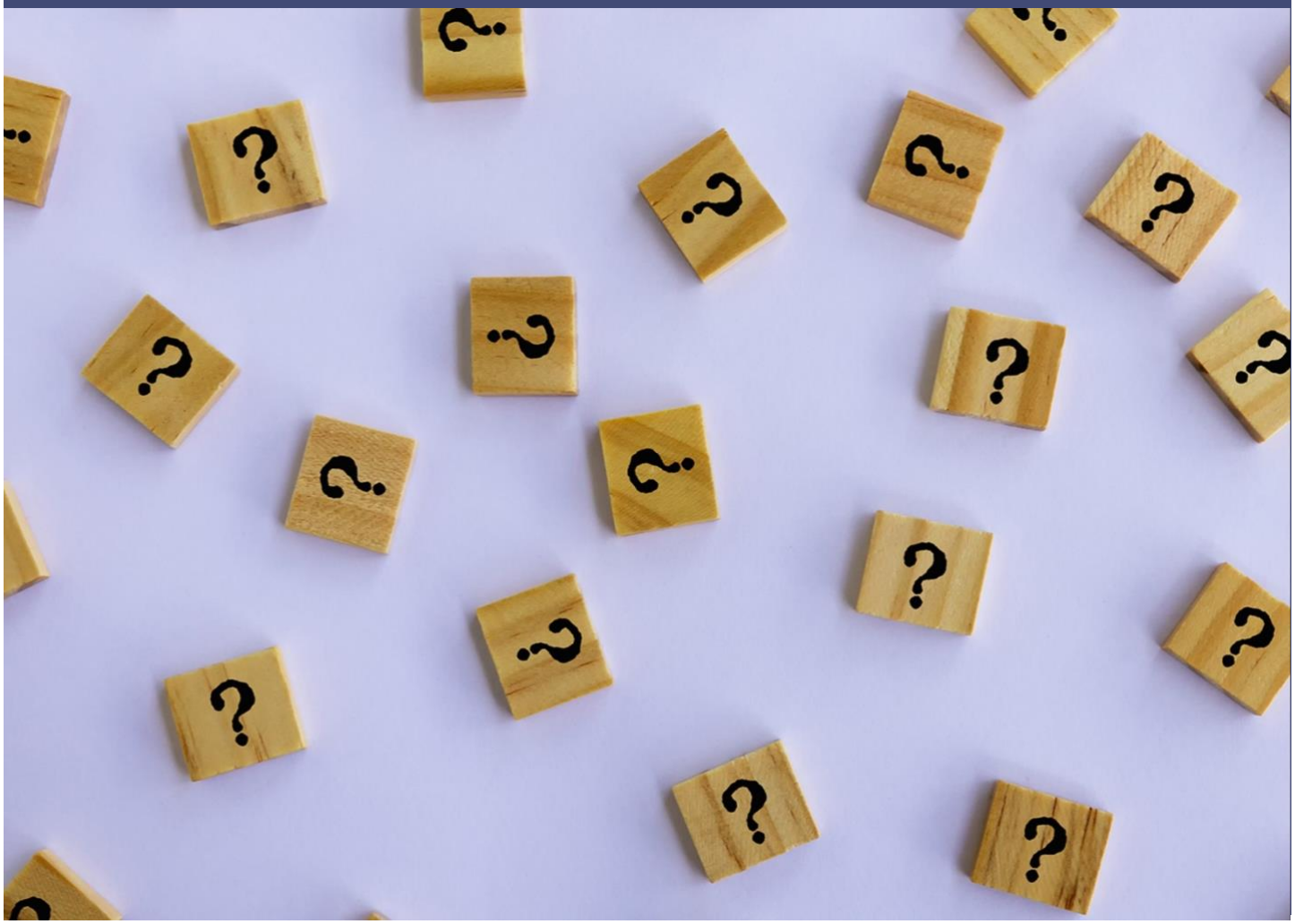
05

FUTURE OF WORDS



FUTURE OF WORDS

The nature and content of contracts will inevitably develop and change over time. Whilst we expect the current principles of contractual interpretation to remain good tools, common law will inevitably need to develop to adapt to the future world of contracts. The biggest disruptor that we (currently) foresee is 'smart contracts'. We seek to explore the impact of smart contracts below.

What is a smart contract?

A smart contract is a contract written in 'computer language' or 'programming code'. The terms of an agreement (for example a sale contract) are written into lines of code across a distributed, decentralised Blockchain network. If all the necessary details are correctly input into the code (such as currency, payments, obligations, property titles, assets and licenses), its execution and enforcement can be fully autonomous.[48]

Smart contracts are executed based on external data feeds called “oracles”, which provide information to "*monitor the fulfilment of the terms of the contract*".[49] Oracles are the link between the contract 'code' and the actual performance of the contract in the real world.[50]

The use of Blockchain adds extra security, and so it is expected that smart contracts will minimise or extinguish the risk of fraud and censorship.[51]

An illustration

An example of how a smart contract might work is thinking of it like a vending machine.

A smart contract, like a vending machine, will have predetermined outcomes programmed into it. To get the desired product, a party must insert the right amount of money into the vending machine – if not, the product will not be released. [52] A commercial example is that of insurance. The insurance policy terms would be written into code, and if the insured event were to occur, it would be verified and uploaded to the blockchain, which would trigger payment to the named beneficiaries.[53]

In the commodities sector

We expect smart contracts will be crucial for the evolution of the commodities sector, enabling many arduous and time-consuming tasks to be streamlined, and with that eliminate some of the risks relating to the use of language and words, either in contracts or trade documents.

For example, the physical commodities trading industry is heavily reliant on physical paper documentation, which is not only time-consuming but also prone to human error and delays. One report suggests that 65-70% of documents presented for letter of credit evaluation are rejected on first presentation.[54] These material discrepancies cause inefficiencies in the global trade system and inevitably lead to disputes. As discussed above, smart contracts will have predetermined outcomes programmed into them, which has the potential to reduce these statistics.

In Singapore, the Commodities Intelligence Centre ('CIC') – a global trading platform for physical commodities - was launched in October 2018. CIC aims to "revolutionise" the trade of commodities through *"deal matching, trade finance, supply chain logistics, track and trace and global trade compliance*". [55] CIC has collected data from South East Asia, China, Hong Kong, Taiwan and Russia and has exceeded 2 billion trade records covering more than 100 countries (including the USA).[56] We expect

[48] As per RSK (https://blog.rsk.co/faqs/).
[49] Kristian Lauslahti, Juri Mattila and Timo Seppala, Smart Contracts – How Will Blockchain Affect Contractual Practices? (ETLA Research Institute of the Finnish Economy, Helsinki, Finland, 2017) at 17.
[50] 'How Blockchain Smart Contracts Are Reinventing the Insurance Industry' (2021) by Nasdaq.
[51] 'Rise of the Smart Contract' (2019) by Forbes.
[52] 'Smart Contracts Alliance and Deloitte, Smart Contracts: 12 Use Cases for Business and Beyond' (2016).
[53] 'Upgrading blockchains: smart contract use cases in industry' (2016) by Deloitte.
[54] "New Frontiers in US Trade Finance" (2021) by Flow (by Deutsche Bank Corporate Bank).
[55] 'Commodities Intelligence Centre (CIC) Sees 26% Jump in Registere' (2021) by Bloomberg.
[56] CIC's website (https://www.cic-tp.com/about).

to see a rise in similar platforms across the world as the technology develops and as the international industry becomes more familiar and accepting of smart contracts.

Language

Instead of contracts being written in natural language, smart contracts will need to be written in computer 'code', for example Python, JavaScript, or Solidity. The programming currently used is 'If This Then That' (IFTT) technology - a service that allows a user to program a response to an event.[57] For the code to be complete, it theoretically needs to be written in a strict format with clear 'black or white' outcomes. Accordingly, the expectation is that the possibility of errors will significantly reduce, and as such, so will disputes concerning contractual interpretation. Moreover, the real-time assessment of contractual performance (through an 'oracle', mentioned above), assists to monitor non-compliance, again reducing the possibility of errors and future disagreements.

Even if a dispute does occur, smart contracts are expected to still have benefits over conventional contracts. The increased visibility and reconciliation offered by the Blockchain is likely to bring about a substantial reduction in the time and effort required to resolve disputes. For example, IBM estimates that by embedding more of the conventional supply chain on the Blockchain, the time required by a business to investigate and resolve a dispute will be reduced by 65 per cent, which in real time is a reduction from 40 days to fewer than 10.[58]

Work in progress...

Presently, smart contracts are viewed with caution, especially as they are not yet in a general form that ensures the necessary legal elements of a contract are met: offer, acceptance, consideration and intention. Therefore, statute will need to be introduced to enable smart contracts to have the necessary legal effect.[59]

The 'black and white' nature of smart contracts brings rigidity to contracts. While this may seem desirable initially, some argue that a rigid execution of contractual terms constrains the flexibility of parties to agree to modify performance for whatever reason.[60]

In their current format, the code written is essentially only a translation of rights and obligations under conventional contracts – if there is confusion in the conventional contract, it will just be translated into the code.[61] For example, there are numerous types of clauses that contain 'grey areas' – often at the request of one party, that will take on a more "*precise meaning during the course of performance*".[62] Force majeure clauses are a perfect example of such a grey area, often drafted in a general sense. Whilst a smart contract may have several oracles to feed into its decision making, how does the smart contract determine whether an event that has occurred has reached the level required by the force majeure event or that a duty to mitigate has been complied with? The UK's Law Commission recommends the standard rules of contractual interpretation should be utilised to resolve grey areas where text has been translated into code.[63] For smart contracts that are written in low level code, the Law Commission proposes a slight variation of the reasonable person test, to the "*reasonable coder*" with Lloyd's of London agreeing it is "*necessary to apply the standard of a reasonable person with knowledge of the relevant code in order to ensure a rational outcome*".[64] In the future, smart contracts will be written entirely in code by communicating computers, likely without any human input. For these smart contracts, the Law Commission stated that "*since such code is unintelligible even to an expert coder, its meaning will have to be discovered by running it*". In other words, the code means simply what it does when it is executed.

[57] 'What are smart contracts on blockchain?' (https://www.ibm.com/topics/smart-contracts).
[58] 'IBM Trials Blockchain For Supply Chain Dispute Resolution' (2016) by Forbes.
[59] Muharem Kianieff , 'Blockchain Technology and the Law', Taylor & Francis (2019).
[60] Jeremy M. Sklaroff, 'Smart Contracts and the Cost of Inflexibility' (2017), University of Pennsylvania Law Review 263.
[61] 'Smart Contract Mistakes: Implementation Bugs & Pitfalls (2018) by Applicature.
[62] Muharem Kianieff , 'Blockchain Technology and the Law', Taylor & Francis (2019).
[63] UK Law Commission – Smart legal contracts, Advice to Government, November 2021.
[64] UK Law Commission – Smart legal contracts, Advice to Government, November 2021.

The future evolution

Smart contracts are anticipated to evolve in the following fashion.[65]

1. A contract using natural language, in the form of a contract that we know and see today. However certain functions, such as payment, will be coded.
2. Additional (and more complex) functions will be based in code.
3. A contract written in code, with supplementation of natural language. For example, it may be that the overarching contract is written in natural language, but the numerous underlying schedules are automated.
4. Contracts entirely written in code, without any input of natural language. The code would be legally recognised and enforceable, without the need for extra documents or authorisations.

A final comment

It is clear that the words and language used today will remain in use for quite some time yet. Smart contracts should not be drafted purely by coders as a programming exercise, without the input of lawyers who will be best placed to advise on legal compliance and the commercial reality the agreement is supposed to reflect.[66]

However, smart contracts and blockchain developments will undoubtedly have an impact on the contractual language used, with apparent benefits in decreasing trade inefficiency and reducing disputes.[67]

Technology will likely develop to the point in which the language used will be a programming language. Whilst there is still both legal and technological hurdles to overcome, a world in which delivery is ordered, made and paid for – all written in code and on a decentralised public ledger – is certainly possible and inevitable.

Nonetheless, we are, at the very least, many years away from code being able to determine more subjective legal criteria, such as when a contract would be terminated due to frustration, duress, or undue influence.[68]

[65] 'An Introduction to Smart Contracts and Their Potential and Inherent Limitations' (2018) Harvard Law School Forum on Corporate Governance.
[66] Muharem Kianieff , 'Blockchain Technology and the Law', Taylor & Francis (2019).
[67] 'Blockchain and smart contracts' (2017) by PwC.
[68] 'Smart Contracts: What lawyers really need to know' (2019) by The Legal Technologist.

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