10. Implied Terms

This chapter discusses implied terms. Terms may be implied into contracts from three principal sources: statute, custom, and the courts. Parliament has, on a number of occasions, implied terms into contracts. The precise reason for the implication of the term depends upon the particular statute. It may be to give effect to the presumed intention of the parties; it may be to reduce uncertainty by enacting a default rule out of which the parties can contract if they do not like the term that Parliament has seen fit to imply; or it may be to protect one party to the transaction from the superior bargaining power of the other. Terms can also be implied into contracts by custom where the custom is certain, reasonable, and notorious. Customs and usages are an important source of obligations in commercial contracts. Terms implied by the courts can be divided into two groups, namely terms implied in fact and terms implied in law. A term is implied in fact when it is implied into the contract in order to give effect to what is deemed by the court to be the unexpressed intention of the parties and are implied because they are necessary to make the contract work. Terms implied in law ‘are those
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terms that are consistently implied into all contracts of a particular type because of the nature of the contract, rather than the supposed intentions of the parties’.

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