

A franchise agreement between a franchisor and a franchisee was drafted by the franchisor. The franchisor, which had the greater bargaining power, drafted the majority of the agreement's terms in its own favor.

Two years into the franchise agreement, a dispute has arisen regarding an aspect of the franchisee's operations that the agreement does not address.

If the parties take their dispute to court and both ask the court to supply the missing term, how will the court likely proceed?

- A. It will rescind the agreement, because the terms of an agreement are for the parties to draft, not the court, and the parties apparently failed to execute a complete agreement.
- B. It will supply a term that is favorable to the franchisee, because any omitted terms should be construed against the franchisor as the original drafter.
- C. It will supply a term that is favorable to the franchisor, because had the parties initially considered the matter, the franchisor would have drafted the term in its own favor.
- D. It will supply a term that is reasonable for both parties under the circumstances.

Correct

Collecting Statistics

53 secsTime Spent

2023Version

Explanation:

Contract terms under common law

Term	Effect if missing
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Essential	No contract
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Nonessential	Gap-filler: court will supply reasonable term under circumstances
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Contract terms must be sufficiently certain and definite for the court to determine the existence of a breach and give an appropriate remedy. While the common law requires that all *essential terms* be covered for a contract to exist, a contract may still be formed when a **nonessential term is missing** if it appears that the parties intended to create a contract. In this situation, the **court will supply a reasonable term** under the circumstances to fill the gap.

Here, the franchisor and the franchisee entered into a franchise agreement. Two years into the agreement, there is now a dispute regarding an aspect of the franchisee's operations that is not addressed in the agreement. There is no indication that this involves an essential term of the agreement, and the parties clearly intended to create a contract. As a result, the court will likely supply a term that is reasonable for both parties under the circumstances.

(Choice A) Rescission would be appropriate if the parties had failed to enter into an enforceable contract. However, it appears that the parties agreed to all essential terms, so the court likely will supply a reasonable nonessential term—not rescind the entire agreement.

(Choice B) The canon of contract construction known as *contra proferentem* construes an *ambiguous* term's meaning against the party who drafted the contract. But here, the parties' agreement is silent regarding an aspect of the franchisee's operations, so the court may supply a reasonable term to address it.

(Choice C) The court will supply a term that is reasonable under the circumstances—not a term that the drafting party might have drafted in its favor.

Educational objective:

Under the common law, a contract must contain all essential terms to be enforceable. However, a contract may still be formed when a nonessential term is missing if it appears that the parties intended to create a contract. The court will then supply a reasonable term under the circumstances to fill that gap.

References

Restatement (Second) of Contracts § 204 (Am. Law Inst. 1981) (explaining that a court may supply a reasonable term under the circumstances when a term is omitted from the contract).

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