



Lawspeak...

A monthly Legal English newsletter on contract and commercial matters

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Bugg's Boilerplate

This month we have a mixed bag of legal issues ranging from the illusive common law contractual "good faith" to licensing issues.

If you have any comments or feedback on the subjects covered, the language or on any of my seminar workshops mentioned on page 2, just drop me a line.

Best regards

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All in Good Faith ?

The issue is whether or not parties expect a general reliance on principles of good faith in a contract. In the United States jurisdictions the Uniform Commercial Code *inter alia* has provided the statutory existence for a type of contractual good faith.* However, outside the U.S., a general Common Law duty of good faith in contracts has proved to be very elusive. The latest English cases seem, after some uncertainty, to have brought us back to the *status quo*.



In March 2013 in *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* the English Court of Appeal reversed a High Court judgment on appeal. That High Court decision, along with another first instance judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd*, seemed to have been seeking to establish that a general contractual duty to act in good faith could be implied as a matter of English law.

But the Court of Appeal has now significantly undermined the developments in *Yam Seng*. Although it is strictly *obiter* (i.e. *obiter dicta*, not part of the *ratio decidendi* or rule of the case), the Court of Appeal has restated the traditional doctrine that there is no general principle of good faith in English contract law. If such a duty is to exist as being implied into a contract, it could only be implied into a limited range of contracts, principally those of a fiduciary character. The court also stated that any implied duty not to exercise a discretion in an arbitrary, capricious or unreasonable way will only arise in a situation where a party had a real discretion to choose from a range of realistic options.

What this means in practice is that outside the U.S. and Civil Law jurisdictions, drafters of contracts cannot rely on a general implied concept of good faith in relation to contracts. Obligations to act in a reasonable manner and to give due regard to the interests of the other party, if required, should be expressly stated in the contract and defined as precisely and exactly as possible in the applicable situations. ▽

*Uniform Commercial Code § 2-103. Definitions and Index of Definitions. "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.



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Licensing: a sub-licence can survive its head licence

The English High Court has held in a recent software licensing case that it is possible in some situations for a sub-licence to remain valid despite the termination of the original head licence. The court's judgment seems to create a major exception to the principle of "nemo dat." (*Nemo dat quod non habet*, a legal maxim that "no one can give that which s/he does not have")

The High Court case is called *VLM Holdings Limited v Ravensworth Digital Services Limited* and the judgment was handed down on 13 February 2013. The facts of the case revolved around a dispute over the alleged exclusive nature of a licence to use software for online printing services. A parent company, VLM Holdings, had granted a software licence to its subsidiary, VLM UK which in turn granted a (sub-)licence to use software to an end user, Spicerhaart. When VLM UK went into liquidation, the licence from Holdings was terminated.

The court held that in the specific circumstances of this case, the termination of the head licence did not automatically bring the user sub-licence to an end.

This case makes it now appear more essential than ever to include an explicit provision in any (sub-)licensing arrangement to expressly address such situations. The contractual provision should allow for any existing sub-licence to be terminated at the same time as the head licence and, if desired, for the sublicence to be "transferred" (or novated) to a new head licence. ▽

Nürnberg Seminar Workshops 2013 with Stuart Bugg

Places (participants limited to 14 per seminar) are still available in the following seminars:

1. **Masterclass on Boilerplate Clauses in Contracts (NEW!)**
controlling liability with contractual clauses
13-14 September 2013
NH Hotel Nürnberg City
2. **German Law Contracts in English (NEW!)**
coming to terms with cross-border and cross-system contracts
20-21 September 2013
NH Hotel Nürnberg City
3. **Working with Contracts in English – Workshop**
an introduction to basic concepts of common law contracts
8-9 November 2013
NH Hotel Nürnberg City
4. **Masterclass on Contracts in English: Update 2013**
the latest cases and legal developments from this year
22-23 November 2013
NH Hotel Nürnberg City

REGISTRATION FORMS etc.: augustinbugg.com/en/we-do/seminars/

For further information on the above seminars and workshops please contact us by telephone +49 (0) 911 945 8867 or by email seminar@augustinbugg.com or see our homepage at augustinbugg.com/en/we-do/seminars/ for further details and seminar programmes. ▽