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Lawspeak...

A monthly Legal English newsletter on contract and commercial matters

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Bugg's Boilerplate

What's in a name? You'll find out in the first article and on page two there is a discussion on the English aversion to penalties (on and off the football pitch).

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

Have a good summer.

Best regards
Stuart Bugg

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A rose by any other name...

Although Shakespeare was not always an avid supporter of the legal profession (*The first thing we do, let's kill all the lawyers.**), he nevertheless had one common interest with lawyers: the use of language. Whilst we should not try to compare the literary merit of your average commercial contract with that of a Shakespearean sonnet, it is nevertheless true that both Shakespeare and legal professionals utilize the same toolkit: words.

However, whilst Shakespeare may have relied on puns, metaphors and imagery the drafter of the modern contract must shun all these devices. Indeed, the greatest enemies of the commercial contract are those things which Shakespeare loved the most: ambiguity and imagery. Modern contracts should be written in a direct, simple and consistent manner.

Consistency of language and terminology (use the same word or phrase for the same concept) is a key concept for modern drafting. Particularly in common law systems still relying on a literal interpretation of legal documents and excluding any external evidence for interpretation purposes, to abandon this concept could be potentially very dangerous –and expensive.

Unlike Shakespeare we should avoid a variety of terminology to exclude the potential for ambiguity. Consistency of terminology is paramount: make sure the "customer" does not become a "purchaser" or a "buyer" in your contract. Names are important. Use capital letters for defined terms.

In a recent case (now pending appeal)**consistency of terminology seems to have been ignored in the drafting of a contract. In that case the words "securities" and "debentures" were used in a document in a similar manner but there was no precise definition of the meaning(s) or any explanation of intended differences in meaning. The result is now even further costs and legal expenses as the matter progresses to the Court of Appeal.

Every year the courts are filled with innumerable unnecessary disputes resulting from poor quality drafting. The most common mistake to raise the ugly head of ambiguity is using two or more names to describe the same concept. Avoid that Shakespearean trap – and do not kill the lawyers either! But, with apologies to Romeo & Juliet, remember that a rose by any other name will not smell as sweet and your contract should certainly first of all define exactly what "the Rose" is in the definition section. The name does mean a lot.

* Dick the Butcher Henry IV, Part 2 Act 4, Scene 2)
**Fons HF (In Liquidation) v Corporal Ltd [2013] EWHC 1801 (Ch)

Lawspeak...

When is a penalty not a penalty?

Common law jurisdictions generally do not permit contractual penalties and any penalty clause in an English law contract will usually be regarded as being inequitable and therefore unenforceable. In another field of human activity, English national football teams are also well known for their sporting aversion to penalties. It is therefore somewhat ironic that a recent High Court case has allowed the operation of a "penalty" by confirming the limited established definition of the term "penalty" in contract law – and that was done in a case involving a football club!

Under English law a penalty clause relates to an excessive amount of money agreed for a contract breach i.e. the amount is disproportionately high in relation to the expected damage arising from such a breach and the money is therefore intended to punish and not to compensate.

In the recent case of Blackburn Rovers Football Club* it was held that a so-called "penalty clause" for premature termination of employment was not in fact a penalty in contract law. This was because it did not relate to a contract breach. The High Court confirmed that a sum of money payable under a contract on the occurrence of an event other than a breach of a contractual duty owed by the paying to the receiving party was not a penalty,

Do not mix up your liquidated damages and penalty clauses in common law contracts. Remember that if the courts regard the amount of money agreed to be too high or excessive there is a real risk of creating an unenforceable penalty – unless it does not relate to a breach of contract event.

*Berg v Blackburn Rovers Football Club & Athletic Plc [2013] EWHC 1070 (Ch)

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.

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