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Lawspeak...

A monthly Legal English newsletter on contract and commercial matters

Vol 1, No. 4 September 2013 lawspeak@augustinbugg.com

Bugg's Boilerplate

The scene above has nothing to do with law. But sometimes it is just nice to enjoy a very late summer's day. The photograph was taken yesterday at the old Main-Danube canal near Nuremberg. But back to business…

In this edition of Lawspeak we examine "warranties" and "representations." We also look at the issue of the recent trend to overusing indemnity clauses in contracts.

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.

Best regards
Stuart Bugg

30 Sept. 2013

What are "warranties" and "representations"?

In everyday situations the word "warranty" is often used to mean a promise of quality often supported by repair or replacement obligations. However, in English contract law the same word has been given at least two technical meanings by the courts:

a) an undertaking of fact given under a contract and,
b) a term which is not of fundamental importance to a contract and therefore, unless agreed otherwise, the breach of which will not automatically lead to a right of termination.

In relation to the first meaning of contractual undertakings of fact, we often find a heading "representations and warranties" in contracts. Is there a difference between the two.

Yes, there is. Although our U.S. cousins may not always be of the same opinion, under English law a representation is a **pre-contractual** statement of fact made as an inducement to enter into a contract. A warranty relates to a **contractual** undertaking.

This difference was confirmed recently in the case of *Sycamore Bidco Ltd v [1] Sean Breslin [2] Andrew Dawson [2012] EWHC 343 (Ch)* where the court held that statements made in a contract were not representations because the parties had not expressly referred to them as such.

In the *Sycamore* case the judge described "a conceptual problem" in treating contractual provisions as representations. In order to make a claim for misrepresentation, it is essential that the claimant was induced by the representation to enter into the contract. There is therefore what the judge called "a timing problem" because something that is contained in the agreement (and therefore has no effect until the agreement is signed) cannot be said to have caused the agreement to be entered into. However, the judge left open the door to contracting parties expressly providing that certain statements were to be treated (also) as representations.

It is critical in drafting contract to identify where and undertaking is a "warranty" or a "representation" or both. The difference is important since misrepresentations claims, if successful, could lead to a rescission of the contract whereas a breach of warranties could lead at worst to termination.

Lawspeak...

Indemnification

Indemnity clauses are very fashionable in modern contract drafting. In the last 10 years the use of general indemnity or "hold harmless" clauses to cover "all losses" has risen dramatically. But such provisions are potentially very dangerous for the party granting the indemnity. This is because in English law indemnities are usually regarded as creating liabilities of debt (as opposed to contract law liability for breach of contract).

A claim in debt provides the indemnified party with some substantive and procedural advantages that do not apply to a claim for damages for breach of contract. For example:

- in an action for the recovery of a debt, the plaintiff only needs to establish that the event triggering the obligation to pay the sum sought has occurred. In an action for damages for breach of contract, it is up to the plaintiff to establish that both a breach of contract has occurred and that the damages being claimed have, in fact, been suffered, which may require expert evidence to be adduced; and

- in an action for damages for breach of contract, the plaintiff will not be able to recover loss to the extent that it has not taken reasonable steps to mitigate its loss. It will also not be able to recover loss that the law considers to be too remote. These rules of mitigation and remoteness do not apply to an action for the recovery of a debt.

As the indemnifying party, do remember to always limit your indemnity obligations as far as you can. If possible, avoid giving an indemnity at all if an action under contract law would be available in any case. When setting up a contract try to ensure that an indemnity clause is limited to situations where it is really necessary e.g. infringing of third party IP rights

Stuart G. Bugg practises law in Nürnberg, Germany with the law firm of Augustin & Bugg. He is specialised in contract and commercial law and is also qualified as a barrister and solicitor (New Zealand) and solicitor (England & Wales). Stuart has been actively involved in legal and communication training for both lawyers and non-lawyers for many years and has written several books and articles on the subjects of contract law and Legal English.

Legal

Augustin & Bugg GbR
Allersbergerstr. 185
90461 Nürnberg
Tel. +49 (911) 945 88 88
Fax +49 (911) 945 88 90

lawspeak@augustinbugg.com
www.augustinbugg.com

Nürnberg Seminar Workshops 2013 with Stuart Bugg

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

1. **Working with Contracts in English – Workshop**
   an introduction to basic concepts of common law contracts
   8-9 November 2013
   NH Hotel Nürnberg City
2. **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.