



Lawspeak...

A monthly Legal English newsletter on contract and commercial matters

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Bugg's Boilerplate

This month our first article is about telling the truth and **affirming** instead of **swearing an oath**.

The law is filled with magic phrases with resulting legal effects. But sometimes the magic can become an illusion. Read the second article on **subject to contract** to find out why.

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

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Do you always have to swear?

Parents encourage their children to actively avoid it. Nevertheless, throughout the ages impatient and rebellious youths (as well as the not-so-young) have become noted for their excessive use of swear words as part of the common vocabulary. In this context to swear means simply to use offensive language, especially as an expression of anger, defiance or frustration.

Swear words have left their mark on the popular mythology of history – even outside the English language. In *Les Misérables* Victor Hugo records the reply of Pierre Cambronne at Waterloo when called upon to surrender the French forces: "Merde!"

However, in a legal sense things are hopefully not quite so dramatic and you can freely "swear" in many situations. The Oxford Dictionary tells us the origin of the word used in this meaning in the Germanic languages: Old English *swerian* of Germanic origin; related to Dutch *zweren*, German *schwören*. To swear here means to give a declaration or an "oath" (a solemn undertaking to a religious deity). The phrase frequently used is to "swear on oath" (U.S. "swear under oath") Again, the Oxford Dictionary explains the source of the word "oath": Old English *āth*, of Germanic origin; related to Dutch *eed* and German *Eid*.

In Common Law jurisdiction statutes usually control the exact form and procedure for making binding declarations or oaths. In modern times the "sworn oath" (which involves a religious declaration) has been supplemented by a non-religious form of "affirmation." So, today you do not have to swear; it is possible to make an affirmation. This is the case, for example, in New Zealand under the Oaths and Declarations Act 1957:

Right to make affirmation instead of oath... Every person shall be entitled as of right to make his affirmation, instead of taking an oath, in all places and for all purposes where an oath is required by law, and every such affirmation shall be of the same force and effect as an oath.

In the above situation an "affirmation" should not be confused with a confirmation or even certification of a signature.

It is very important to check applicable local laws related to the making of oaths and declarations and the related procedural and form requirements. Remember that the German "Notar" has no exact equivalent in Common Law countries and you may need a justice of the peace, a notary public, a commissioner for oaths or even a mere solicitor to administer a binding declaration. ▽

Subject to contract

The phrase "subject to contract" is commonly used in Legal English to mean that any agreement will require a final (signed) contract document in order to become legally binding. In this regard the phrase "subject to contract" provides protection against contract formation without a written document being signed. It is used frequently by lawyers.

A recent case in the High Court (*Newbury v Sun Microsystems* [2013] EWHC 2180 (QB)) confirmed this understanding. In this case it was decided that the words "to be recorded in a suitably worded agreement" did not have an equivalent legal effect to "subject contract." The alternative formulation used in the *Newbury* case was held to have had the effect of stating that after its formation the contract would be subsequently recorded in a written form and it did not prevent contract formation upon agreement.

But beware, because the phrase "subject to contract" alone is not a 100% protection against contract formation. Lewison J stated in *Confetti Records (A Firm) and others v Warner Music UK Ltd (trading as East West Records)* [2003] EWCH 1274 (CH) that the settled meaning of the phrase "subject to contract" being that the parties intend an agreement should not be binding until a formal contract is entered into can be displaced by a "very strong and exceptional case".

The case of *Rugby Group Ltd v ProForce Recruit Ltd* [2005] EWHC 70 (QB) was an example of such a strong and exceptional case. In the *Rugby* case the parties subsequently acted as if a contract had in fact been created and commenced the performance. Accordingly, the conduct of the parties in acting on the terms of the "subject to contract" agreement resulted in the court concluding that there was an implied binding agreement

In negotiation situations be sure to indicate clearly if and when a binding contract is to be formed. The magic phrase, "subject to contract" is a useful device in this regard. But remember that circumstances and subsequent conduct will strongly influence the extent of any protection this phrase may give against premature contract formation and the magic effect could very well disappear. ▽

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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
Nürnberg
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. ▽