



Lawspeak...

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lawspeak@augustinbugg.com



Bugg's Boilerplate

When do we have a contract? The real difficulties in answering this question start to arise when we consider whether an agreement has really been achieved on the essential terms. If some matters are so critical that they must be agreed first of all, how do we identify these points?

The case this month is taken from the English High Court as reported in September this year. It helps to shed some light on the formation questions as well as an interesting side-issue of a key distinction between **description** and **quality**.

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

November, 2013

Do we have a deal? Issues in contract formation

A recent decision of the English High Court, *Proton Energy Group SA v Orlen Lietuva* [2013] EWHC 2872 (Comm), has raised basic issues on contract formation and forced the court to reconsider concepts of offer, acceptance and a "meeting of the minds" in a modern commercial environment.

In particular, the court was required to determine whether a binding contract had been agreed between the claimant, Proton Energy Group SA (P) and the defendant, Orlen Lietuva (O). P was a Swiss company which traded in oil and gas products. O was a Lithuanian company which refined petroleum. On June 14, 2012 P had sent an email to O with a "firm offer" to sell 25,000 tons of a crude oil blend, at a price "based on five quotations after the bill of lading date". The offer stated that all other terms were subject to P's standard CIF contract, but terms not indicated would be mutually agreed after negotiation. Technical distillation data concerning the oil blend was attached to the email. O responded by email stating "confirmed". P THEN sent a draft written contract to O. A delivery window of 10 to 15 July was agreed and P chartered a vessel to carry the product to O's terminal in Lithuania. However, on June 29, O sent a letter to P terminating negotiations. P claimed that O was in repudiatory breach by failing to open a letter of credit or take delivery of the cargo. O submitted that (1) no contract had come into existence; (2) if there was a contract, a condition precedent should be implied that it would only be binding if O was satisfied as to the origin of the product, to prevent it from breaching sanctions against Iran; (3) it would have been entitled to reject the cargo because testing showed that it was materially different from its description.

The court entered judgment in favour of the claimant and held that:

(1) The existence of a binding contract depended upon whether the parties had agreed on all the terms that they objectively regarded as essential for the formation of legally binding relations between them, *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 1 W.L.R. 753 and *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601 followed. The court held that a contract had in fact come into existence on June 14, 2012. It was a classic spot deal where the speed of the market required that the parties agree the main terms and leave the details, some of which might be important, to be discussed and agreed later. Overall the picture was clear. The language was that of commitment. P had contractually committed itself to its supplier as soon as the deal had been confirmed. That showed that it regarded itself as committed to O. O also saw itself as committed.

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(2) O had some concerns about the origin of the product, and properly so. It raised them with P, answers were given and the matter remained live in a discussion about the EU customs document T2L which was necessary for intra-EU transfers. However, there was no hint in the correspondence, particularly before the contract was entered into, to justify an implication of the term alleged. Terms were not implied because it would be reasonable or useful to do so, necessity was required, *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531, applied. There was no such necessity in the instant case.

(3) The specification of the product was not part of a sale by description. Description and quality were different notions. The distinction between those concepts was sometimes blurred but there was no such blur in the instant case. The contract confirmed a sale of "oil blend ... CN 2710". That was the description of the product. Clause 4 set out the details of the report of the analysis at the load port. That was the quality of the product. The document was consistent with the commercial reality that test results at the end of a voyage might differ from those at the outset.

(4) P's claim for breach of contract succeeded and O was to pay damages to be agreed. However, the court accepted O's evidence concerning the difference in value between the product promised and that which would have been delivered. O was therefore entitled to deduct \$133,214.62 from the damages payable to P.

In day-to-day business it is critical that the exact point of contract formation is always kept in mind and that it can be clearly identified. Similarly, the contractual terms must be agreed and if conditions are to be regarded as being essential or prerequisites to a contract (conditions precedent) that must be made clear. Otherwise, it can lead to the types of confusion we see in the Proton case. ▼

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 with Stuart Bugg

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

- 1. Masterclass on Contracts in English: Update 2013**
the latest cases and legal developments from this year
22-23 November 2013
NH Hotel Nürnberg City
- 2. Masterclass on Negotiations, Presentations and Meetings in English**
24-25 January 2014
Hotel Victoria Nürnberg
- 3. Introduction to Working with Contracts in English**
28 Feb.-1 March 2014
Hotel Victoria Nürnberg

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. ▼