



Lawspeak...

Augustin & Bugg

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Bugg's Boilerplate

"Sticks and stones may break my bones but words will never hurt me."

This a popular nineteenth century children's rhyme that tried to downplay the effect of words.

However, in law words are very powerful. This month we look at repudiatory breach, and the damage words can do to a contract relationship.

In addition, just in case you are planning some outdoor fun with your family and friends (with perhaps, a barbeque), we are including a practical seasonal example of modern rule drafting. Under Miscellaneous you can look at (part of) the Texas Administrative Code which sets out the legal limits on "outdoor burning" in the land of unlimited possibilities.

Happy reading (and grilling!)

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Nürnberg
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Repudiatory Breach

It is not necessary to actually breach a contract for your contract breach liability to arise. A clear declaration to the other party of refusal to perform an agreement (in the future) may be suffice to trigger a breach situation.

Imagine the hypothetical case of a supplier of equipment (Widgets Ltd) which agrees by way of contract (dated January 2, 2014) to furnish certain machines to be used by a company (Doogle plc) in its production plant. The parties agree on a delivery date of August 10, 2014. However, the manager of Widgets informs Doogle's CEO in May 2014 that because of in-house technical problems the delivery will be at least 6 months late and that the machine will have an output 10% less than the specifications in the contract order. What are the consequences? Must Doogle wait until 11 August, determine that the machines have not arrived and then terminate or sue for damages for late delivery (or when they finally arrive, for defective performance)? Not necessarily.

If a party gives clear and unequivocal notice that it will not perform an existing contract as substantially agreed the common law systems have the concept of "repudiation" (refusal to perform). That can be regarded as a (material) breach.

The recent English case of *Jet2.com Ltd v SC Compania Nationala de Transporturi Aeriene Romane Tarom SA* at the Court of Appeal [2014] EWCA Civ 87 has reviewed the established principles of repudiatory breach. The Court confirmed that where a party which had agreed to perform services for another renounced its obligations under the contract, damages fell to be assessed on the basis that it would have performed those obligations, notwithstanding any declared intention not to do so.

In other words the court said that the injured party should be put in the position it would have been in if the contract had been performed correctly by the repudiating party. Notwithstanding the general duties of mitigation of damage, this would involve the potential for claiming expectation damages for a (future) failure to perform as agreed.

In practice we have to be very careful when communicating with the other contract party. Any clear statement of a refusal or unwillingness to perform a contract in some substantial manner (e.g. "we will stop working until you pay us for the last stage of work") could even be interpreted as a repudiation in some circumstances. Unless a contract or the law specifically allows the party in question not to perform in certain circumstances, that party should not declare its intention to take such a course of action. If there is a repudiation the other party may then elect to treat this as a (material) breach and terminate and/or claim damages

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Outdoor Burning

German subtitle: "glühende Landschaft"

Texas Administrative Code §111.219

...(3) Burning shall be commenced and conducted only when wind direction and other meteorological conditions are such that smoke and other pollutants will not cause adverse effects to any public road, landing strip, navigable water, or off-site structure containing sensitive receptor(s). For the purposes of the rule, "structure containing sensitive receptors" is defined as follows: A man-made structure utilized for human residence or business, the containment of livestock, or the housing of sensitive live vegetation. The term "man-made structure" does not include such things as range fences, roads, bridges, hunting blinds, or facilities used solely for the storage of hay or other livestock feeds. The term "sensitive live vegetation" is defined as vegetation that has potential to be damaged by smoke and heat, examples of which include, but are not limited to, nursery production, mushroom cultivation, pharmaceutical plant production, or laboratory experiments involving plants.

(4) If at any time the burning causes or may tend to cause smoke to blow onto or across a road or highway, it is the responsibility of the person initiating the burn to post flag-persons on affected roads.

(5) Burning must be conducted downwind of or at least 300 feet (90 meters) from any structure containing sensitive receptors located on adjacent properties unless prior written approval is obtained from the adjacent occupant with possessory control.

(6) Burning shall be conducted in compliance with the following meteorological and timing considerations:

(A) The initiation of burning shall commence no earlier than one hour after sunrise. Burning shall be completed on the same day not later than one hour before sunset, and shall be attended by a responsible party at all times during the active burn phase when the fire is progressing. In cases where residual fires and/or smoldering objects continue to emit smoke after this time, such areas shall be extinguished if the smoke from these areas has the potential to create a nuisance or traffic hazard condition. In no case shall the extent of the burn area be allowed to increase after this time.

(B) Burning shall not be commenced when surface wind speed is predicted to be less than six miles per hour (mph) (five knots) or greater than 23 mph (20 knots) during the burn period.

(C) Burning shall not be conducted during periods of actual or predicted persistent low-level atmospheric temperature inversions.

§111.219

The authority to conduct outdoor burning under this regulation does not exempt or excuse any person responsible from the consequences, damages, or injuries resulting from the burning and does not exempt or excuse anyone from complying with all other applicable laws or ordinances, regulations, and orders of governmental entities having jurisdiction, even though the burning is otherwise conducted in compliance with this regulation.

*The Texas Administrative Code is available on line, but also see its implementation, for example, at http://www.co.travis.tx.us/fire_marshall/prevention/safety_tips.asp

Nürnberg Seminar Workshops with Stuart Bugg

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

- 1. German Law Contracts in English**
27-28 June 2014
Hotel Victoria Nürnberg
- 2. Legal English**
11-12 July 2014
Hotel Victoria Nürnberg
- 3. Introduction to Working with Contracts in English**
26-27 September 2014
exact venue in Nürnberg to be announced
- 4. Update 2014: Masterclass on Developments in English Contract Law**
5-6 December 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. ▸