

CONTRACT LAW UPDATE

November 2025

Welcome to the Slaughter and May Contract Law Update, providing insights into key developments in contract law for corporate and commercial practice.

In this edition, we consider the following.

NEGOTIATING CONTRACTS BY WHATSAPP

An exchange of messages or emails can give rise to enforceable contractual obligations, even in the context of high-value commercial arrangements. If the mandatory requirements for contract formation are met, the parties will be bound even if the agreement contemplates its own replacement with a more formal document.

CLAIMS UNDER WARRANTIES AND INDEMNITIES

A party's ability to bring a claim under a specific indemnity does not necessarily preclude a claim for breach of warranty under a share purchase agreement. A recent case also provides useful guidance as to how requirements often contained in notice provisions could be construed.

REMEDIABLE BREACH

A repudiatory breach cannot be cured at common law, but a material or persistent breach is not necessarily irremediable for a contractual right simply because it is also repudiatory. Determining whether a breach is remediable is a practical (rather than technical) exercise.

LOSS OF BARGAIN DAMAGES

A contractual right to terminate does not necessarily entitle a party to recover damages for loss of bargain (such as profit that would have been received). But it is open to the parties to negotiate contractual termination rights, and the consequences of termination (including the damages available) depend on the clause agreed.

ENFORCING PAYMENT OBLIGATIONS

Where a contract concerns several rights, the question of whether a payment obligation relates to particular rights or the complete bundle of rights is a question of interpretation. More than mere boilerplate, a no-set-off clause can allow recovery of payments due notwithstanding the counterparty's other potential claims.

JURISDICTION CLAUSES AND THIRD PARTIES

When considering the application of an exclusive jurisdiction clause to disputes with third parties, the starting point is whether the clause is drafted sufficiently widely to cover claims against third parties. Whether the Contracts (Rights of Third Parties) Act 1999 entitles a third party to enforce an exclusive jurisdiction clause remains unclear.

NEGOTIATING CONTRACTS BY WHATSAPP

Messages or emails could give rise to a contract

KEY TAKEAWAYS:

- Contracts can be made informally
- Even an exchange of messages or emails could give rise to a contract
- A short or informal contract can still be binding if it contemplates its own replacement with a full-form, formal written agreement
- If negotiations are intended to remain subject to contract, make that clear

In English law, the general rule is that contracts can be made informally and need not be signed or written down.

In commercial practice, contracts are, of course, often made in writing and signed by the parties, but businesses should be mindful that an exchange of messages or emails can give rise to enforceable contractual obligations. Recent cases demonstrate that an email exchange may even suffice in circumstances where a contract must be made or evidenced in writing, such as guarantees.

Background

A recent example of the general rule that contracts can be made informally can be seen in *DAZN v Coupang*. FIFA licensed broadcasting rights for the FIFA World Club Cup 2025 to DAZN. DAZN entered into negotiations for a sublicence with Coupang, which operates an Amazon-like e-commerce business in South Korea (including a Prime-style video streaming service called Coupang Play).

The parties negotiated in a series of WhatsApp messages before Coupang shared a summary of deal terms with DAZN by email. In response, DAZN confirmed by email that it would “accept Coupang Play’s offer” and “start contract drafting”. But DAZN later received a rival bid. The issue in *DAZN v Coupang* was whether the parties had already entered into a legally binding contract,

notwithstanding the fact that no formal documentation was ever finalised.

DAZN argued that no contract had been made. It contended that:

- I. the relevant email was not a contractual offer as it did not demonstrate an immediate willingness to be bound;
- II. DAZN’s supposed acceptance email was not unqualified; and
- III. there was no intention to create legal relations because any agreement was subject to DAZN and Coupang drafting and signing a formal written contract.

DAZN did not contend that the agreement failed for uncertainty.

The outcome

The Court of Appeal held that a contract had been formed by the parties’ email exchange, set against their WhatsApp messages and conversations.

In its judgment, the Court of Appeal emphasised that the parties in any negotiation are the masters of their contractual fate, both in deciding what terms are essential to create a binding contract and in deciding whether an agreement is subject to contract in the sense that it will not have legal effect until a subsequent full-form contract is signed.

In *DAZN v Coupang*, the parties had used the language of offer and acceptance, the acceptance email was entirely unequivocal, and the parties’ subsequent communications made clear that both parties thought they were contractually bound. There was nothing to suggest that the parties intended execution of a written document be a prerequisite to formation of contract and it was common practice in the industry to agree binding terms informally

even though those terms would later be replaced by a formal document.

Reflections

DAZN v Coupang is a reminder that informal negotiations can give rise to binding contractual obligations, even in the context of high-value sublicences, and that a legally binding contract may contemplate its own replacement by a fuller agreement.

Precontractual documents or correspondence should reflect the parties’ intentions: if negotiations are intended to remain subject to contract until a full-form agreement is signed, parties should make that explicit.

READ THE FULL CASE

- *DAZN v Coupang Corp.* [2025] EWCA Civ 1083 (8 August 2025)

CLAIMS UNDER WARRANTIES AND INDEMNITIES

A specific indemnity does not necessarily preclude a warranty claim

KEY TAKEAWAYS:

- Warranty and indemnity claims may coexist
- If an indemnity is intended to preclude warranty claims, include express drafting
- Notice clauses should be followed closely

The High Court's 154-page judgment in *Learning Curve* concerned a claim for breach of warranty.

Alongside warranties, contract parties often transfer the risk associated with specific issues using indemnities. But a party's ability to bring an indemnity claim does not necessarily preclude a claim for breach of warranty.

The High Court also considered the timing and content requirements for notification of claims. Although some recent judgments suggest that the courts take a practical approach when interpreting notice provisions, courts have applied these robustly in a long line of authority.

The application of any notice provision depends on the drafting of the contract in question, but the reasoning in *Learning Curve* provides useful guidance as to how common stipulations could be construed.

No double recovery: warranty and indemnity claims

Learning Curve acquired a company whose activities in England were substantially funded by the Education and Skills Funding Agency. The target was later found to have overclaimed funding and required to repay amounts to the ESFA through a "clawback".

Under the share purchase agreement, the sellers agreed to indemnify the purchaser in respect of the clawback, recovery or repayment to the ESFA of funds paid to any group company in a specified period. The sellers also provided warranties regarding the target's compliance with the funding rules.

The sellers reimbursed the purchaser the amount of the clawback under the specific funding indemnity, but the purchaser also brought claims for breach of warranties on the basis that breach of the funding rules had a substantial and ongoing adverse impact on the business.

The agreement included a no-double-recovery clause, which the sellers contended precluded any warranty claim relating to the clawback. Although the clause prevented the purchaser from recovering more than once in relation to the same matter, it was held that the agreement expressly contemplated that the purchaser may be entitled to bring both indemnity and warranty claims, with different liability caps for each.

Notice requirements as to timing

The agreement provided that any warranty or indemnity claim would be deemed withdrawn unless proceedings were commenced by a specified date. It was held that "by" meant "no later than" (that is, "up to and including" rather than "before") that date.

The clause also provided that, for this purpose, legal proceedings would not be deemed to have commenced unless issued and served, and the sellers contended that "service" meant bringing the claim to their attention.

The High Court disagreed: in the context of drafting relating to legal proceedings in an agreement governed by English law and under the English courts' jurisdiction, it required issue and service in accordance with the Civil Procedure Rules.

Notice requirements as to content

The sellers argued that the notice was invalid. The agreement required that written notice of any warranty claim give details of the nature of the claim, the facts and circumstances giving rise to it and a bona fide estimate of loss.

The initial notice identified claims under the funding indemnity and certain warranties, before an updated notice provided an estimate of loss. The claim form alleged breaches of further warranties and an alleged loss significantly higher than the previous estimate.

The High Court rejected the sellers' arguments. The agreement did not require any notice of claim to specify the particular warranties relied on. The parties could have included drafting to that effect; instead, the clause simply required details of the nature of the claim and the facts and circumstances giving rise to it.

Reflections

When drafting contracts, consider how risk allocation mechanisms hang together. If parties intend that an indemnity preclude warranty claims, make that explicit.

Notice provisions can be an effective way to prevent a claim, but timing and content requirements must be clear.

Delaying service gives a claimant time to assess its claim and loss; however, as the deadline draws nearer, the risk of failing to meet that deadline increases, and a claimant may be left with little (if any) time to serve an updated notice if its initial notice of claim fails to comply with contractual requirements.

Notice clauses should not be a technical minefield, but claimants should ensure that contractual requirements are followed, making clear that any list of warranties is non-exhaustive and the estimated loss is no more than an estimate.

READ THE FULL CASE

- *Learning Curve v Lewis* [2025] EWHC 1889 (Comm) (4 August 2025)

REMEDIAL BREACH

Repudiatory breach may be remedial under contractual term

KEY TAKEAWAYS:

- A breach may be remediable for the purposes of a contract term even if it is repudiatory and non-curable at common law
- Whether a breach is remediable is a practical question about whether the effect could be put right for the future
- Even material breaches can be remediable, but it may be impossible to put the genie back in the bottle in some circumstances
- When drafting, consider stating whether certain breaches will be irremediable

At common law, a repudiatory breach cannot be remedied (or “cured”), so remedial action by a defaulting party does not remove the non-defaulting party’s right to terminate for repudiatory breach. Alongside their common law rights, contract parties may also agree express termination or other rights for breach that are broader or narrower than the common law position. A contract may, for example, create rights arising following a substantial, material or persistent breach.

Contracts often provide that a termination or other right arises in respect of a breach which, if capable of remedy, has not been remedied within a specified cure period. As well as determining whether any particular breach is substantial, material or whatever the term requires, questions may arise as to whether the relevant breach was capable of remedy.

The decision in *Kulkarni v Gwent* demonstrates that a breach is not necessarily irremediable for the purposes of a contractual right simply because it is also a repudiatory breach that cannot be cured at common law.

Background

Kulkarni v Gwent concerned the application of a compulsory-transfer clause in a shareholders’ agreement. Under the agreement, a transfer notice would allow one party to acquire the other party’s shares in the company for the lower of:

- I. the subscription price paid; and
- II. the fair value of those shares as determined using a valuation mechanism.

The clause provided that a shareholder is deemed to have served a transfer notice immediately before or after the shareholder committing a material or persistent breach of the agreement which, if capable of remedy, has not been remedied within 10 business days of notice to remedy the breach being served by the board. Analogous drafting is often found in termination clauses, too.

The issues

It was alleged that Gwent had committed several breaches, some of which were repudiatory. The central issues were whether a deemed transfer notice had been triggered and whether a material or persistent breach that is also repudiatory is necessarily incapable of remedy for the purposes of the compulsory-transfer clause. In other words, whether Gwent could be compelled to transfer its shares.

As a matter of contractual interpretation, the 10-business-day remedy period would start to run only once a notice to remedy had been served; as no notice to remedy was ever served, it was held that the remedy period had not begun.

The Court of Appeal held that the fact that certain breaches of the shareholders’ agreement were also repudiatory in nature did not, in itself, render them irremediable for the purposes of the compulsory-transfer clause.

Reflections

Although the meaning of any particular clause depends on the words used and the relevant factual matrix, *Kulkarni v Gwent* provides useful guidance on breaches “capable of remedy”.

In line with previous authorities, the Court of Appeal emphasised that the exercise of determining whether a breach is remediable is practical (rather than technical). That exercise concerns whether the effect of the breach could be put right for the future, rather than removing any damage already incurred. Serious breaches will be harder to remedy, but the Court of Appeal echoed previous decisions in noting that even material breaches may be remediable. But remediation may be more difficult to achieve where third parties are involved; for example, if an asset has been transferred or confidential information disclosed, it may be impossible to put the genie back in the bottle.

When drafting contractual rights triggered by breach (including termination rights), consider which breaches are remediable for the purposes of the relevant right. It may be worth expressly stating that certain breaches that could have serious consequences are incapable of remedy to avoid any doubt and create a right to terminate without first having to provide an opportunity to remedy the breach.

Where a counterparty is in breach, consider whether that breach gives rise to a termination right at common law and/or rights under the contract. It may be necessary to respond quickly to start any contractual remedy period and, more generally, avoid the risk that the ability to exercise that right is lost.

READ THE FULL CASE

- *Kulkarni v Gwent* [2025] EWCA Civ 1206 (26 September 2025)

LOSS OF BARGAIN DAMAGES

Parties may agree the consequences of termination

KEY TAKEAWAYS:

- Contractual termination rights do not necessarily allow recovery of loss of bargain damages for non-repudiatory breach
- But it is open to the parties to make express provision as to the consequences of termination, including the damages that will be recoverable

Damages for breach of contract seek to put the non-defaulting party in the position it would have been in had the contract been performed. Where the non-defaulting party exercises its common law right to terminate for breach, it may be entitled to recover damages for losses suffered as a result of the premature termination of the contract, including loss of bargain damages (such as the profit it would have expected to receive had the contract been performed).

A contractual right to terminate does not, however, necessarily entitle the terminating party to recover damages for loss of bargain. A termination clause allows the parties to determine circumstances in which a right to terminate arises, but terminating for, say, material breach under a contractual termination right may mean a claimant recovers less damages than would be available under the common law regime.

The question in *Orion v Great Asia* was whether loss of bargain damages for loss of profit could be recovered when an agreement was terminated for non-repudiatory breach. The Court of Appeal held that, under the contract in issue, they could.

Background

The parties entered into a memorandum of agreement for the sale of a vessel. The agreement required the sellers to give notice of readiness to load before a specified

cancelling date. The sellers failed to give the notice by the cancelling date and the buyers exercised a contractual right to terminate.

A “sellers’ default” clause provided that, if the sellers fail to give notice of readiness by the cancelling date or fail to be ready to validly complete a legal transfer, the sellers must make due compensation to the buyers for their loss and expenses if that failure is due to proven negligence.

Due compensation

As a matter of contractual interpretation, the Court of Appeal held that “due compensation” referred to compensation that is appropriate using the common law principles of causation, remoteness and mitigation, and that the natural and ordinary meaning of “loss” extended to the buyers’ loss of bargain.

In short, the buyers did not get the ship they had contracted for and, having lost the benefit of the contract, their loss was the loss of that bargain. The Court of Appeal considered it otherwise unclear what loss was intended to be compensated under the sellers’ default clause.

The Court of Appeal considered the so-called “Financings” principle (after *Financings v Baldock*) that loss of bargain damages cannot be recovered where a party exercises a contractual termination right unless that party can show that it exercised its common law right to terminate for repudiatory breach.

While acknowledging that some such principle exists, the Court of Appeal expressed doubt as to whether it applies in the same way to a contract for a single transaction, such as a sale (compared with a long-term contract, such as a hire-purchase agreement or lease), but noted that it remains open to the parties to make express provision as to the consequences of termination under a contractual right. In *Orion*, such express provision was found in the sellers’ default clause.

Reflections

The relationship between the common law right to terminate for repudiatory breach and a contractual right to terminate for breach is complex. Rights to terminate at common law or under a termination clause may coexist or be inconsistent and, where both rights could be relevant, care is needed to terminate for the right reasons. There is a risk that the terminating party is itself guilty of wrongful termination, and the approach taken may have a serious impact on the amount recoverable.

It is open to the parties to negotiate contractual termination rights, and *Orion v Great Asia* demonstrates that the legal effect of termination (including the availability of damages) will depend on the clause agreed. When negotiating a termination right that arises in the absence of any non-repudiatory breach, consider including express drafting to clarify whether loss of bargain damages will be recoverable.

READ THE FULL CASE

- *Orion Shipping and Trading v Great Asia Maritime* [2025] EWCA Civ 1210 (2 October 2025)

ENFORCING PAYMENT OBLIGATIONS

Severable payment obligations, conditions precedent and set off

KEY TAKEAWAYS:

- Whether a payment obligation relates to parts of the benefit expected in return is a question of interpretation
- No-set-off clauses can provide useful protection, ensuring a party receives payment even where there may be other disputes
- Conditions precedent will not arise where there is no link between one obligation and the other

Slaughter and May successfully represented Virgin in *Alaska v Virgin*, where the High Court granted Virgin's application for summary judgment for more than \$30m and refused Alaska Airlines' proposed amendments to its particulars of claim in a contractual dispute.

Virgin America and Virgin entered into trade mark licensing agreement setting out the terms on which Virgin America could exclusively use the Virgin brand to operate an airline in the US. The agreement provided for the payment of a minimum royalty to Virgin. Virgin America later merged with Alaska, with Alaska succeeding to the agreement. Once Alaska ceased using the Virgin brand, issues arose as to whether it remained obliged to pay royalties to Virgin. Slaughter and May successfully represented Virgin in previous proceedings, where the Court of Appeal held that it did.

Background

Alaska subsequently brought proceedings for alleged breach of the exclusivity obligation owed by Virgin. Virgin counterclaimed for outstanding minimum royalties, and the issue in this application concerned whether the minimum royalty payments were due if Virgin had breached its exclusivity obligation. In *Alaska v Virgin*, the High Court held that Virgin was entitled to payment.

Severable payments and total failure of consideration

Alaska argued that the minimum royalty payment was a severable payment due only in respect of the (allegedly breached) exclusivity obligation, allowing it to claim total failure of consideration.

Severability allows the court to allocate parts of a payment to parts of the benefit expected in return. As a matter of contractual interpretation, though, the High Court held that the royalties were paid in return for the full bundle of rights Virgin provided, which included rights to use and sublicence, as well as rights of exclusivity.

The High Court considered that Alaska's argument mischaracterised the minimum royalty payment as a separate payment obligation; instead, it provided a "floor" for a single payment obligation under the agreement. In short, the payment was not severable and Alaska's total failure of consideration argument failed.

Circuity of action and set-off

Despite this conclusion, the court went on to consider Alaska's defence of circuity of action. With a defence of circuity of action, a defendant argues that it would be immediately entitled to recover from the claimant the amount sought from it because of some separate legal entitlement to that sum. That may be a right to payment under an indemnity, for example.

In *Alaska v Virgin*, Alaska argued that, under the defence of circuity of action, it was under no obligation to pay the minimum royalty because it would be recoverable in an unjust enrichment claim on the grounds of a total failure of consideration. It was, however, held that the wording of a no-set-off clause was sufficiently wide to extend to Alaska's putative right to recover in unjust enrichment. Although a no-set-off clause does not prevent a party from contesting whether the sums in issue are actually due, it can cover circuity defences and did in this case.

Conditions precedent

The High Court also considered whether entire performance of Virgin's exclusivity obligation operated as a condition precedent to the minimum royalty payment obligation. Although a condition precedent need not be explicitly labelled, the absence of such language was considered noteworthy. Absent an express term, a condition precedent may arise where:

- I. for practical reasons, one obligation must be performed before the other can arise; or
- II. the second obligation is the direct quid pro quo of the first.

Neither of those conditions was met. There was nothing to link performance of the exclusivity obligation with the minimum royalty payment and Alaska's proposed interpretation would lead to a commercially very surprising outcome, where any non-trivial breach of the exclusivity obligation would allow Alaska to use the marks with no obligation to pay. The court also rejected any implied term that the minimum royalty would not be payable if there is a breach of exclusivity.

Reflections

The decision in *Alaska v Virgin* provides a clear application of the law on whether part of the consideration payable under a contract is severable for the purposes of arguing a total failure of consideration. It also demonstrates the benefits of including a no-set-off clause. Although often considered mere boilerplate, an effective no-set-off clause can ensure that a party receives payment even where there may be other disputes.

READ THE FULL CASE

- *Alaska v Virgin* [2025] EWHC 2505 (Comm) (3 October 2025)

JURISDICTION CLAUSES AND THIRD PARTIES

Wide drafting may cover third-party claims

KEY TAKEAWAYS:

- Anti-suit injunctions may support no-liability clauses
- A widely drafted jurisdiction clause may cover claims against third parties
- It is unclear whether jurisdiction clauses bind third parties under the 1999 Act

Contracts often contain an exclusive jurisdiction clause, conferring jurisdiction on a chosen court to the exclusion of the jurisdiction of all other courts. These are regularly enforced by English courts by way of an anti-suit injunction preventing proceedings in an excluded jurisdiction. In *J.P. Morgan v Werealize.com*, which is the latest dispute in a long-running series, the High Court granted anti-suit injunctive relief preventing proceedings in Greece.

J.P. Morgan v Werealize.com

JPM and Werealize.com are shareholders in Viva Wallet, a Greek fintech company. JPM, Werealize.com and Viva Wallet entered into a shareholders' agreement, which contained an exclusive jurisdiction clause in favour of the English courts and a "whole agreement" clause limiting the liability of the parties and their representatives (including Viva Wallet directors).

JPM brought proceedings in Greece against a cofounder of Viva Wallet and certain of its directors, claiming that the directors' conduct rendered JPM's shareholder rights effectively worthless. The High Court held that the limitation of liability in the whole agreement clause gave rise to an implied term to the effect that the directors could not be sued in a jurisdiction that would otherwise render ineffective that limitation. The decision in *J.P. Morgan* establishes that an anti-suit injunction may be available in support of such no-liability clauses.

Among other things, the High Court also considered the interaction between jurisdiction clauses and the Contracts (Rights of Third Parties) Act 1999. In its 1996 report preceding the 1999 Act, the Law Commission considered the implications for jurisdiction and arbitration agreements one of the most difficult issues faced in its project on reform of third-party rights. Although arbitration agreements were ultimately expressly addressed, the 1999 Act remains silent on jurisdiction clauses. More generally, section 1(4) of the Act requires a third party enforcing its rights under the Act to do so subject to, and in accordance with, any other relevant terms of the contract.

In *J.P. Morgan*, it was held that section 1(4) was not intended to put a third party in a position to enforce and be subject to an exclusive jurisdiction clause.

The decision in *Campeau*

The approach to the 1999 Act in *J.P. Morgan* can be contrasted with obiter comments in *Campeau v Gottex*.

In *Campeau*, OE Waste and Geco Holdco entered into a share purchase agreement. Mr Campeau was a director of the target and allegedly a de facto director of OE Waste. The agreement was governed by English law and the jurisdiction clause provided that the parties irrevocably conferred exclusive jurisdiction on the English courts to settle any dispute which may arise out of or in connection with the agreement, including non-contractual obligations. Campeau was not a party to the share purchase agreement but was expressly identified as a beneficiary of certain protections, including a waiver by OE Waste of claims against him.

OE Waste commenced proceedings in Luxembourg against Campeau for fraud and misrepresentation. The question was whether a dispute regarding Campeau's rights under the agreement falls within the scope of the exclusive jurisdiction clause, which would allow Campeau to serve a

claim form on OE Waste without the court's permission under the Civil Procedure Rules.

The High Court held that there is a good arguable case that it does. As a matter of contractual interpretation, the jurisdiction clause was drafted widely enough to cover disputes with third parties and the dispute in question could readily be described as a dispute arising out of or in connection with the agreement.

In *Campeau*, the High Court also considered in obiter whether the jurisdiction clause was a relevant term for the purposes of the 1999 Act, such that Campeau's rights under the agreement were subject to the exclusive jurisdiction clause. It considered that the jurisdiction clause was a relevant term, as it was wide enough to apply to a dispute between the parties. The third party was, therefore, subject to the condition of having to adhere to the jurisdiction clause when bringing proceedings to enforce its rights under the agreement.

Reflections

When considering the application of an exclusive jurisdiction clause to disputes with third parties, the starting point is whether the clause is drafted sufficiently widely to cover claims against third parties. In contrast with the approach in *J.P. Morgan*, the High Court's comments in *Campeau* support the view that a third party may also be entitled to enforce a widely drafted exclusive jurisdiction clause under the 1999 Act.

READ THE FULL CASE

- *J.P. Morgan International Finance v Werealize.com* [2025] EWHC 1842 (Comm) (18 July 2025)
- *Campeau v Gottex Real Estate Asset Fund (I) (OE Waste)* [2025] EWHC 2322 (Comm) (12 September 2025)

KEY CONTACTS

If you would like to discuss any of the above in more detail, please speak to your usual Slaughter and May contact or a member of our commercial contracts team.

If you would like to receive the Contract Law Update on a quarterly basis, please email subscriptions@slaughterandmay.com.



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