SLAUGHTER AND MAY/

CONTRACT LAW UPDATE

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

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AGREEMENTS MADE SUBJECT TO CONTRACT

CONDITIONALITY REMOVED BY EXPRESS AGREEMENT OR NECESSARY IMPLICATION

> It has been said that a "subject to contract" agreement is no agreement at all. Labelling a document as "subject to contract" is not necessarily determinative of whether it creates a binding contract, but *Baltimore Wharf v Ballymore* demonstrates that the requirement to show the removal of such conditionality is a high bar.

BACKGROUND

The underlying dispute concerned the collapse of a roof. Baltimore Wharf, Ballymore and WSP engaged in settlement negotiations, exchanging drafts of a tripartite settlement agreement marked "subject to contract and without prejudice as to costs". Once Baltimore Wharf's solicitor confirmed by email that the settlement agreement was agreed, an execution version was circulated and signed by Ballymore and WSP. It was never signed by Baltimore Wharf.

The question in *Baltimore Wharf* was whether the settlement remained subject to contract pending Baltimore Wharf's signature of the execution version or whether its solicitor's email confirmation constituted unqualified, unambiguous acceptance that removed the "subject to contract" umbrella.

"SUBJECT TO CONTRACT" NEGOTIATIONS

Labels like "subject to contract" are not determinative of whether parties have entered into a binding contract. Whether there is a binding contract depends on whether the mandatory requirements for contract formation are met, including whether the parties' objective intention was to create legal relations.

Where negotiations are made subject to contract, it is generally understood that the parties do not intend to be bound until they have executed a formal written contract. The "subject to contract" reservation remains unless it is removed by the parties' express agreement or where such agreement is necessarily implied. Whether the parties have waived that reservation depends on the circumstances, but the requirement to show agreement or implication is a high bar.

In *Baltimore Wharf*, the High Court held that the bar was not met: there was nothing to show that the clear continued use of the "subject to contract" rubric in the travelling draft agreements was being abandoned by Baltimore Wharf (or the other parties). The email merely "accepting" the terms of a "subject to contract" agreement was insufficient to create a binding contract. The parties' conduct after the "agreement" was inadmissible for the purposes of determining whether a binding agreement was formed, but it was noted that such conduct was ambiguous at best.

REFLECTIONS

Determining whether a contract has been formed is a fact-sensitive enquiry. Including the phrase "subject to contract" in documents does not necessarily prevent a binding agreement; however, where negotiations are made subject to contract, the execution of a formal written contract is typically a condition precedent to any legal relations.

Baltimore Wharf is a reminder that, where parties have begun negotiations under a "subject to contract" umbrella, the court will not lightly hold that it has been removed. The fact that parties are close to a fully executed agreement does not mean that the umbrella ceases to have effect.

KEY TAKEAWAYS:

- A "subject to contract" label is not necessarily determinative of whether a contract exists, but it generally means parties do not intend to be bound
- Where negotiations begin under a "subject to contract" umbrella, that reservation is only removed by express agreement or necessary implication
- The court will not lightly hold that a "subject to contract" reservation has been removed

READ THE FULL CASE:

- Baltimore Wharf SLP v Ballymore Properties Limited & Anor [2026] EWHC 312 (TCC) (16 February 2026)

DEFINING THE SCOPE OF RELEASE

WIDELY DRAFTED SETTLEMENT APPLIED TO CLAIMS OF NEWLY ACQUIRED COMPANY

Visa v Luxottica concerned a settlement agreement. The definition of "settled claims" extended to future claims by companies that became associated only after the settlement agreement was executed. The decision underscores the importance of clearly defining the scope of releases and the limits of the "sharp practice" principle.

BACKGROUND

Litigation has been brought across several jurisdictions in respect of multilateral interchange fees (MIFs) paid in connection with card payments. Visa faced many MIF claims and prepared standard-form letters and agreements to deal with claims. Luxottica brought a MIF claim against Visa and the parties subsequently entered into a settlement agreement.

Shortly after execution, Luxottica acquired GrandVision. GrandVision had previously issued a MIF claim against Visa. At the time its claim was made, GrandVision was unrelated to Luxottica. Visa knew that GrandVision was making a claim and Luxottica knew that GrandVision might become a related company, but neither could join the two pieces of the puzzle.

The agreement contained a wide definition of "settled claims", which extended to known or unknown MIF-related claims that Luxottica or any claimant associated company has or may have. The issues in *Visa* concerned whether, following Luxottica's acquisition of GrandVision, the settlement agreement extended to GrandVision's claim.

DEFINING "SETTLED CLAIMS"

The meaning of any contractual term depends on context. That the Luxottica settlement concerned a claim brought in the context of mass litigation formed part of the factual matrix. While the primary shared objective was to settle a specific claim, a secondary shared objective was to conclusively resolve other claims.

Luxottica agreed to ensure that claims by claimant associated companies were withdrawn and to indemnify Visa in connection with such claims. Although "claimant associated companies" was undefined, the agreement defined "associated company" to include past, present or future associated companies.

The High Court held that, read as a whole and in context, the agreement extended to cover claims by companies that became associated companies only after the agreement was executed regardless of whether those claims were known to the parties at the time of the contract. Visa was, therefore, entitled to damages for breach of the indemnity.

SHARP PRACTICE

Luxottica contended that Visa had engaged in sharp practice by agreeing to pay a fair settlement for a particular claim while including very wide wording in its standard-form agreement in the speculative hope that the settlement might extend to other MIF-related claims by Luxottica's corporate group.

The "sharp practice" principle prevents one party from relying on a general release where it knew at the time of the settlement that the other party had a claim and was ignorant of that claim. Its limits are not clearly defined. It was noted in *Visa* that, if the sharp practice argument applies, it usually applies to specific claims. A party needs a broader basis (such as rescission for misrepresentation) to render a whole agreement ineffective or a case for rectification to enforce an agreement on different terms.

The High Court rejected Luxottica's sharp practice argument. The agreement expressly covered both known and unknown claims. Negotiations were at arm's length, both parties were professionally advised and there was no inequality of bargaining power. The risk that Luxottica might be wrong about the consequences of the settlement was for Luxottica to assess.

REFLECTIONS

Visa demonstrates the importance of careful drafting when defining the scope of release in settlement agreements and, in particular, when defining associated companies.

It also confirms that the sharp practice principle is unlikely to apply where parties are professionally advised and have clearly considered the draft terms of settlement.

KEY TAKEAWAYS:

- General principles of contractual interpretation apply to settlement agreements
- Careful drafting is needed when defining the scope of release
- The "sharp practice" principle is unlikely to apply where the affected party is not vulnerable

READ THE FULL CASE:

- Visa Inc & Ors v Luxottica Retail UK Limited [2026] EWHC 615 (Comm) (17 March 2026)

UNDERSTANDING CONFUSION CLAUSES

HIERARCHY PROVISION DETERMINES WHICH TERM APPLIES

Where parties enter into separate but related contracts, questions may arise as to whether inconsistent terms in those contracts can be reconciled and, if not, which takes precedence. The Court of Appeal in *Tyson v GIC RE* construed a "confusion clause" as a hierarchy clause, giving precedence to the terms of the earlier contract.

BACKGROUND

Tyson provided captive insurance to its affiliate, Tyson Foods, and entered into several reinsurances. GIC reinsured Tyson on the Market Reform Contract (MRC) form and later agreed reinsurance agreements on the Market Uniform Reinsurance Agreement form ("certificates") covering the same risk.

While the MRCs provided for exclusive English jurisdiction, the certificates contained a New York arbitration clause and a "confusion clause", providing that the MRC takes precedence over the certificate in the case of confusion.

After a fire, GIC failed to confirm an indemnity to Tyson and sought to rescind the reinsurances for misrepresentation. The question was whether the dispute should be referred to arbitration under the certificates or the courts under the MRCs.

INTERPRETING THE CONFUSION CLAUSE

The High Court construed the confusion clause as a hierarchy clause. Where parties enter into one contract followed by another, whether the latter supersedes the former and which prevails in the case of conflict depend on the parties' intention. Parties may expressly state the extent to which one contract is subject to the other.

In the Court of Appeal, the dispute concerned the circumstances in which the confusion clause applied. GIC argued it was not applicable in cases of confusion between the MRCs and certificates but rather where confusion arose out of the certificate itself.

The Court of Appeal disagreed and upheld the High Court decision. As a matter of construction, it seemed much more likely that the parties intended to refer to confusion as between the provisions of the different contracts than confusion as between terms within one of those documents.

Among other things, GIC's interpretation would lead to a truly bizarre outcome: if the certificate contained irreconcilable terms providing for A and B, the MRC would prevail even if it provided for neither A nor B but C. Although parties are free to choose that approach, it was noted that it seems so unusual and irrational that one would expect it to be clearly spelt out.

RECONCILING THE CLAUSES

GIC also argued that both clauses could take effect by reading down the jurisdiction clause as providing for an auxiliary or supervisory jurisdiction over the arbitration.

Although the Court of Appeal recognised that a contract must be read as a whole and every effort should be made to give effect to all its clauses, where there are separate documents with inconsistent terms, whether the parties have agreed an inconsistency or hierarchy clause is very significant.

In *Tyson*, cutting down the jurisdiction clause would give precedence to the certificates, which is the opposite of the parties' agreement.

REFLECTIONS

Where parties enter into multiple agreements, consider which terms prevail in the case of inconsistency. *Tyson* demonstrates that a hierarchy clause can have a significant impact on the resolution of disputes.

Where there is inconsistency between documents and a hierarchy clause applies, the court will apply that clause rather than strain to reconcile the two.

KEY TAKEAWAYS:

- Consider interactions between related contracts and which prevails in the case of inconsistency
- Ensure that inconsistency or hierarchy clauses are clear
- The court will not strain to reconcile inconsistency between documents where a hierarchy clause applies

READ THE FULL CASE:

- Tyson International Company Ltd v GIC Re, India, Corporate Member Ltd [2026] EWCA Civ 40 (5 February 2026)

TIME OF THE ESSENCE

CLASSIFICATION OF TERMS IS A QUESTION OF CONSTRUCTION

> The classification of terms is a question of construction which has a significant impact on the parties' ability to terminate and the damages recoverable following breach. *SLB v PAK* highlights that stipulations as to time are generally innominate and the importance of clear drafting where parties intend that time is of the essence.

BACKGROUND

Appeals were brought against arbitral awards relating to novated shipbuilding contracts. The issue concerned the classification of the seller's obligation in each contract to provide letters of guarantee within 120 days from novation or by a later date designated by the buyer from time to time.

The arbitral tribunal held that the obligation was an innominate term and not a condition. The seller's failures to obtain the guarantees did not, therefore, amount to repudiatory breaches. The buyers were entitled to exercise contractual termination rights; however, absent repudiatory breach, they were unable to recover loss of bargain damages.

CLASSIFYING CONTRACT TERMS

Contract terms may be conditions, warranties or innominate terms. Any breach of a condition (regardless of its nature or consequences) entitles the non-defaulting party to terminate, whereas breach of warranty sounds in damages but does not give rise to a termination right at common law. Breach of an innominate term entitles a party to terminate only if the nature and consequences of the breach were sufficiently serious to constitute a substantial failure to perform. The classification of a term is a matter of construction, but the default position is that a term is innominate.

If time is "of the essence", the provision stipulating the time for performance is treated as a condition. Conversely, where time is not of the essence, breach will only justify termination where it amounts to a substantial failure to perform.

It was noted in *SLB v PAK* that time will not be of the essence unless:

i. the parties expressly stipulate that conditions as to time must be strictly complied with; or

ii. the nature of the subject matter or the surrounding circumstances clearly show that time should be of the essence.

BREACH OF STIPULATION AS TO TIME

The High Court held that the obligation to provide a guarantee within 120 days was not a condition.

The obligation was not stated to be a condition and the language of deadlines was insufficient to render it so. The fact that the deadline could be extended by the buyer militated against the term being construed as a condition.

Although the guarantee was a "financial cornerstone" of the project, it did not follow that the obligation constituted a condition. The contractual risk allocation meant that a delay in providing the guarantee would not go to the root of the contract and the obligation was not interdependent with payment and delivery obligations: it could not be said that any delay in providing the guarantees would derail the contracts.

The termination clause was also a strong factor in favour of treating the obligation as an innominate term. It provided that the buyer could terminate if the seller failed to deliver the guarantee, setting out the consequences of any such termination.

REFLECTIONS

SLB v PAK is a reminder that the default position is that a term is innominate, but time may be of the essence where parties expressly provide that conditions as to time must be exactly complied with, by implication from the circumstances or due to the nature of the subject matter.

Where they intend that a stipulation as to time be a condition, parties should expressly state that time is of the essence and consider the interaction between that stipulation and other terms.

KEY TAKEAWAYS:

- Contract terms are generally innominate
- Time is not generally of the essence, but it may be where expressly agreed or by necessary implication
- Where a term is intended to be a condition, include express drafting and consider the interaction with other terms

READ THE FULL CASE:

- SLB & Ors v PAK & Ors [2026] EWHC 449 (Comm) (2 March 2026)

TERMINATING INDEFINITE AGREEMENTS

DISTINCTION BETWEEN PERPETUAL AND INDEFINITE AGREEMENTS

In *Zaha Hadid*, the Court of Appeal held that an "indefinite" agreement could be terminated by either party on reasonable notice, even though the contract gave only one party express rights to terminate. The decision illustrates the distinction between perpetual contracts (that bind parties forever) and indefinite contracts (that may be brought to an end).

BACKGROUND

The company that operates Zaha Hadid Architects entered into a trade mark licensing agreement with the Zaha Hadid Foundation allowing the company to use certain trade marks. The company intended to renegotiate the terms of the agreement with the foundation and contended that it had the right to terminate the contract on reasonable notice.

The agreement was expressed to continue indefinitely unless terminated earlier in accordance with the duration and termination clause. The duration and termination clause provided that the foundation could terminate the contract on three months' notice or with immediate effect in the event of non-payment, material or repeated breach or insolvency. It provided no reference to termination by the company.

The question in *Zaha Hadid* was whether the company was entitled to terminate the trade mark licensing agreement. The High Court held that the company was not entitled to terminate the contract because the contract contained no express right for it to do so. The result was that the company would be locked into the contract forever. The Court of Appeal disagreed.

PERPETUAL AND INDEFINITE AGREEMENTS

The Court of Appeal adopted the two-stage reasoning from the House of Lords decision in *Winter Garden Theatre*, which draws a distinction between perpetual and indefinite agreements.

The first stage is to determine whether, as a matter of construction, the agreement was intended to run in perpetuity (whether in all circumstances or in some defined circumstances) or for an indefinite period. If the contract is intended to run in perpetuity, absent express terms, there is no room for an inference that a party could terminate on reasonable notice. Conversely, an agreement intended to run for an indefinite period necessarily and within its own terms contemplates that it can be brought to an end at some unspecified time.

The second stage is that, if an agreement was intended to run for an indefinite period, it necessarily follows (as a matter of construction or implication) that a power to terminate on reasonable notice forms part of the parties' intentions.

The Court of Appeal in *Zaha Hadid* held that, as a matter of construction, the agreement was indefinite. The agreement was expressed to continue indefinitely and interpreting the agreement as continuing forever unless terminated by the foundation was contrary to business sense. Where a contract expressly mentions some things, it is often inferred that other things of the same general category not expressly mentioned were deliberately omitted; however, the Court of Appeal did not consider that maxim of interpretation determinative.

REFLECTIONS

Zaha Hadid highlights a crucial distinction between "perpetual" and "indefinite" contracts. Absent express terms, there is no room for an inference that a perpetual contract could be terminated on reasonable notice. By contrast, an indefinite contract necessarily empowers parties to terminate on reasonable notice.

Whether a contract is perpetual or indefinite is a matter of construction. When drafting or interpreting contracts of unspecified duration, close attention should be paid to that distinction to clarify or determine the parties' intention.

KEY TAKEAWAYS:

- Perpetual and indefinite are not synonyms
- Absent express terms, a perpetual contract cannot be terminated on reasonable notice
- An indefinite contract necessarily empowers parties to terminate on reasonable notice

READ THE FULL CASE:

- Zaha Hadid Limited v The Zaha Hadid Foundation [2026] EWCA Civ 192 (27 February 2026)

REASONABLE NOTICE FOR TERMINATION

ENABLING AN ORDERLY END TO THE RELATIONSHIP

Anheuser-Busch International v Commonwealth Brewery provides guidance on how to determine what amounts to reasonable notice for termination in the absence of an express term setting out the notice required. Where a requirement of reasonable notice is implied, the length of notice that is reasonable depends on the circumstances in which notice is given.

BACKGROUND

Anheuser-Busch International (a subsidiary of AB InBev) and Burns House entered into an oral contract for the sale and distribution of beer in the Bahamas. The distribution agreement was never recorded in writing and may have developed over time.

30 years later, the supplier terminated the agreement on about three months' notice. The agreement contained an implied term that reasonable notice of termination was required. The question in *Anheuser-Busch International* was whether the period of notice given was reasonable.

At first instance, it was held that reasonable notice would have been 15 months. On appeal, the Bahamian Court of Appeal held that three to six months constituted reasonable notice. The Privy Council agreed and held that the notice given was reasonable.

REASONABLE PERIODS OF NOTICE

Having examined the authorities, the Board identified several propositions.

i. Whether there is an implied term requiring reasonable notice of termination is assessed by reference to the circumstances when the contract is made.

ii. The implication of a reasonable period of notice serves the common purpose of the parties when the contract is made. In most circumstances, the purpose is to allow the recipient of the notice to adjust its business to the termination of the arrangement.

iii. Where reasonable notice of termination is required, the length of notice that is reasonable is assessed in the light of the circumstances at the time notice is given.

iv. The factors relevant to that assessment depend on the parties' circumstances and the markets in which they operate. In most cases, those factors will be relevant only to the extent they affect the orderly winding up of the relationship and the recipient's opportunity to adjust its business.

The Board emphasised that some factors carry more weight than others in a multifactorial assessment and that each case turns on its facts.

But the Board identified a non-exhaustive list of factors that may be relevant, including the formality of the contract, the duration of the relationship, its significance to the recipient's business, the extent to which the recipient has invested resources into the relationship or incurred extraordinary capital or business expenditure, other difficulties in terminating the relationship, and any obligation to continue to perform during the notice period.

The Privy Council considered that the first instance court erred in focussing on the period in which termination of the distribution agreement reduced the recipient's profits. The purpose of reasonable notice is not to protect the recipient from all loss of profit resulting from the termination; rather, its "chief purpose" is to enable the parties to achieve an orderly end to their relationship. Here, the balance of the relevant factors pointed towards a relatively short notice period being sufficient.

REFLECTIONS

Anheuser-Busch International provides useful guidance on assessing what constitutes reasonable notice for termination. It highlights that an implied term requiring reasonable notice typically concerns the orderly end of the relationship rather than protecting a party's profits.

Where a requirement of reasonable notice of termination is implied, what amounts to a reasonable period of notice may be difficult to predict. In practice, parties should ensure that contractual termination rights are contained in express terms and notice requirements are clear.

KEY TAKEAWAYS:

- Whether a term requiring reasonable notice of termination is implied depends on the circumstances when the contract is made
- What amounts to reasonable notice depends on the circumstances when notice is given
- The purpose of an implied term requiring reasonable notice typically concerns the orderly end of the relationship rather than protecting a party's profits

READ THE FULL CASE:

- Anheuser-Busch International Inc & Anor v Commonwealth Brewery Ltd (The Bahamas) [2026] UKPC 8 (2 March 2026)

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.

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