

Contract law update

July 2026

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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Damages for breach of contract will be available only where breach is the effective or dominant cause of loss. Third-party acts often break the chain of causation. The chain will not be broken if there is a contractual duty to prevent intervention, but only if it addresses the very type of intervention that occurred.

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Loss of bargain damages

Parties may agree recoverable loss

A contractual right to terminate for non-repudiatory breach does not necessarily entitle a party to recover damages for loss of bargain, but the consequences of termination depend on the contract. Loss of bargain damages may be available where an express compensation clause sets out what can be recovered for breach.

BACKGROUND

The parties entered into a contract using the most common standard form for the sale of second-hand ships. The buyers exercised a contractual right to terminate, and a “sellers’ default” clause required the sellers to make due compensation to the buyers for their loss and expenses.

The central issue in *The Lila Lisbon* was whether the buyers could recover loss of bargain damages in the absence of repudiatory breach.

A party exercising its common law right to terminate for repudiatory breach may recover loss of bargain damages, such as the difference between the contract price and the market price for making a substitute contract. A contractual right to terminate does not necessarily entitle the terminating party to recover loss of bargain damages.

CONTRACTUAL INTERPRETATION

The Supreme Court held that, as a matter of construction, the reference to “loss” in the default clause was general and unqualified. Loss of bargain was the most obvious form of loss that would be suffered following cancellation, and it was unclear what loss was intended to be compensated under the clause (if not loss of bargain).

That interpretation was supported by the context, including previous decisions and practice relating to the meaning of the standard form.

NON-REPUDIATORY BREACH

The “*Financings*” principle provides that loss of bargain damages cannot be recovered where a party exercises a contractual termination right rather than a common law right to terminate for repudiatory breach. The Court of Appeal decision (covered in a [previous edition](#)) expressed doubt as to how the principle applies to one-off sale contracts (compared with long-term contracts).

The Supreme Court did not comment on whether the principle is good law. Instead, *Financings* was distinguished as the agreement in issue expressly set out what the buyers could recover for breach and there was no reason to interpret the clause as excluding loss of bargain damages in the absence of words to that effect.

CLEAR WORDS REQUIREMENT

When construing contracts, there is a presumption that the parties did not intend to *exclude* common law rights or remedies and clear words are needed to rebut that presumption.

But there is no equivalent presumption where the contract confers *additional* rights on a party. The Supreme Court considered that there is no requirement for clear words to confer the right to recover loss of bargain damages where a party has, in fact, suffered a loss of bargain.

REFLECTIONS

The relationship between common law and contractual termination rights is complex. Where both common law and contractual termination rights may be relevant, care is often needed to terminate on the right basis.

The scope of the *Financings* principle is unclear, but *The Lila Lisbon* shows that express compensation clauses will be applied where the party has, in fact, suffered the relevant loss. When negotiating termination rights, consider including express drafting to clarify the losses for which damages will be recoverable.

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 damages that will be recoverable
- Consider express drafting to clarify whether damages for loss of bargain will be available

READ THE FULL CASE:

- Great Asia Maritime Limited v Orion Shipping and Trading LLC (*The Lila Lisbon*) [2026] UKSC 23 (22 July 2026)

Warranties as representations

Precontractual statements of fact

The same information could give rise to both a representation and a warranty. Giving a warranty does not, without more, amount to making a representation, but a false statement made in the form of a warranty could give rise to a claim in misrepresentation where it induces entry into a contract.

BACKGROUND

A false representation that induces a person to act or enter into a contract may give rise to an actionable misrepresentation. Representations fall to be contrasted with warranties, which are contractual statements or assurances. While breach of warranty claims sound in contract damages, a claim in misrepresentation may result in rescission of the contract and damages calculated on the tort measure.

Recent cases tend to suggest that statements in draft or preliminary documents using the language of warranty typically communicate what the seller is *willing to warrant* if the contract is entered into rather than any *representation of fact* for the purposes of a claim in misrepresentation. In some cases, however, such statements may amount to representations.

Hoffman v Finalto concerned the acquisition of Finalto by Gopher Investments. The CEO and COO of Finalto brought a claim against the buyer, arguing that they had been promised equity in the new holding company following the acquisition. The buyer counterclaimed for deceit, arguing that the CEO and COO had made false representations in a management warranty deed entered into before the acquisition.

WARRANTIES AND PARALLEL REPRESENTATIONS

The High Court accepted that a warranty does not, without more, imply a parallel representation, but it held that statements in the management warranty deed amounted to representations because:

- i. the statements provided information unlikely to be within the buyer's knowledge;
- ii. the sequencing of execution meant that the statements were made prior to (and induced) entry into the sale and purchase agreement; and

- iii. certain clauses in the management warranty deed and disclosure letter indicated that statements in the deed constituted representations.

As a matter of fact, however, the representations were not shown to have been untrue or fraudulent.

REFLECTIONS

A warranty or statement about what the seller is willing to warrant does not, without more, give rise to a representation. But *Hoffman v Finalto* demonstrates the difficulty in identifying what amounts to something more. There is a risk that statements of fact made in transaction documents, disclosure letters or responses made during a due diligence process could amount to representations for the purposes of a claim in misrepresentation.

Entire agreement clauses often contain statements that, except in the case of fraud, neither party is relying on any precontractual statement and that no representations have been made. *Hoffman v Finalto* highlights the importance of including these express non-reliance and no-representation statements to prevent claims in misrepresentation. But fraud unravels all: a party cannot exclude liability for its own fraud in inducing a contract.

KEY TAKEAWAYS:

- A warranty does not, without more, carry with it a representation
- Statements of fact in transaction documents could amount to representations
- Claims in misrepresentation (save for fraud) may be prevented with effective "no-representation" and "non-reliance" drafting

READ THE FULL CASE:

- *Hoffman & Anor v Finalto & Anor* [2026] EWHC 921 (Comm) (21 April 2026)

Exercising force majeure

Unforeseeable events, notices and extensions of time

Force majeure clauses often cover unforeseeable events or circumstances beyond the parties' control. In this context, the test for "foreseeability" is one of practical probability rather than theoretical possibility. Where notice is a condition precedent to invoking force majeure, the affected party must comply with notice requirements to receive relief.

BACKGROUND

The parties contracted for the sale of Ukrainian corn using an industry standard form containing a force majeure clause for "prevention of shipment". Force majeure events included (among other things) unforeseeable and unavoidable impediments to transportation or navigation. Ships entering the Black Sea were subject to inspection. Delayed by a hiatus of inspections, the sellers invoked force majeure.

The key issues in *ADM v Inerco* concerned "unforeseeable" impediments, notice requirements and the impact on separate rights to extend time.

UNFORESEEABLE EVENTS

The arbitral tribunal accepted that suspension of inspections prevented performance. The question was whether that was "unforeseeable". The High Court agreed it was.

"Foreseeable" has a range of connotations, with words taking colour from context. Force majeure clauses allocate risk not specifically addressed elsewhere. Events expressly identified as force majeure (hostilities, acts of terrorism, etc.) are rare and unpredictable but not "unforeseeable" in the sense that they are unimaginable.

The test was not whether an event was theoretically possible but whether it was of negligible probability such that parties could not be expected to have allocated risk for it. While short inspection delays might be foreseeable, a prolonged delay was not.

NOTICE REQUIREMENTS

The clause suspended performance provided that the sellers served notice within a specified period following force majeure. The notice was late, but the tribunal held that non-compliance could be ignored: there was no prejudice to the buyers and technicalities should not prevail over commercial logic and natural justice.

The High Court disagreed. Compliance with the notice requirement was a condition precedent to relief.

- i. "Provided that" is, in this context, unmistakably the language of condition precedent.
- ii. The notice requirement served the commercial purpose of telling buyers where they stood and was not onerous.
- iii. Nothing implied a test based on substantial prejudice.
- iv. The condition precedent neither lacked commercial logic nor was unjust.

The more difficult question of whether force majeure occurred when inspections were suspended or only once suspension became prolonged was remitted to the tribunal.

EXTENSIONS OF TIME

The agreement contained a separate provision to extend the contract period for shipment. As a matter of construction, the suspension of performance by force majeure pushed back the timing for that extension. The seller was entitled to benefit from both the suspension of performance by force majeure and the further extension for shipment.

REFLECTIONS

ADM v Inerco highlights the importance of determining whether notification requirements are conditions precedent or standalone obligations. If a requirement is a condition precedent, the affected party must comply to invoke force majeure.

KEY TAKEAWAYS:

- Force majeure clauses address rare and unpredictable events
- Where force majeure requires unforeseeability, the test concerns practical probability rather than theoretical possibility
- If relief is available “provided that” notice is given, relief will be available only if notice is given

READ THE FULL CASE:

- *ADM Industries Centers Ltd (t/a ADM Israel) v Inerco Trade SA* [2026] EWHC 1873 (Comm) (23 July 2026)

Penalties

Enforceability of default interest rate

A clause imposing a secondary obligation, which arises upon breach of a primary contractual obligation, will be unenforceable if it amounts to a penalty. There is a strong presumption that commercial parties are best placed to decide what is legitimate, but whether a provision amounts to a penalty is a value judgment.

BACKGROUND

Houssein concerned the enforceability of contractual interest. The owner of a property portfolio entered into a loan agreement with an unregulated moneylender. The loan provided for a contractual rate of interest at 1% per month, rising to 4% following an event of default.

Following *Makdessi*, the test for a penalty is whether the clause imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.

In 2023, the High Court held that the default rate of interest was a penalty. The Court of Appeal held in 2024 that the judge's approach to the question was wrong, and the question was remitted to the High Court. In doing so, the Court of Appeal reiterated the importance of the following questions.

- i. Was there a secondary obligation engaged upon breach of a primary obligation?
- ii. What is the extent and nature of the legitimate interest of the promisee in having that primary obligation performed?
- iii. Having regard to that legitimate interest, was the secondary obligation exorbitant or unconscionable in its amount or effect?

DEFAULT INTEREST

Following the remitted hearing, the High Court held that the default interest was not a penalty. The judge identified the strong initial presumption that properly advised parties of comparable bargaining power are the best judges of what is legitimate. The judge then considered each relevant event of default in turn, finding that the default rate was not extortionate by

reference to the lender's legitimate interest in the performance of the primary obligations that triggered it. High rates may seek to deter defaults, but a party may have a legitimate interest in deterring a breach of contract.

Whether a provision amounts to a penalty is a value judgment. A first-instance judge's evaluative judgment will be overturned only where there is an identifiable flaw that undermines the cogency of its conclusion. No such flaw was identified and the decision at the remitted hearing was upheld by the Court of Appeal.

REFLECTIONS

Whether a clause is a penalty is a question of construction that depends on the terms and circumstances of the particular contract. In a commercial context, there is a strong presumption against finding an unenforceable penalty and the burden of proving that a clause is a penalty will not be lightly discharged.

When drafting secondary obligations, consider drafting the clause so that any extortionate aspect could be severed or expressly identifying the promisee's legitimate interest to reduce the risk of a secondary obligation constituting a penalty.

KEY TAKEAWAYS:

- A secondary obligation is unenforceable where it imposes a detriment out of all proportion to any legitimate interest in enforcing a primary obligation
- Between commercial parties, there is a strong presumption against finding an unenforceable penalty
- Consider including severance drafting or identifying the reasons for the clause to reduce its vulnerability

READ THE FULL CASE:

- *Houssein v London Credit Ltd* [2026] EWCA Civ 830 (1 July 2026)

Nomination or appointment rights

Interpreting board seat rights in context

“Nominate” could mean either to propose or to appoint. The effect of a contractual right to nominate a director depends on context. In *Magic*, a right to nominate a director allowed the shareholder to select a board member rather than merely nominate someone for consideration by the company.

BACKGROUND

The issue arose in connection with an unfair prejudice petition brought by Magic against The Greater Good Fresh Brewing Co, a start-up company selling home-brewing kit. Magic had invested in the company and obtained from it a nomination agreement providing that Magic would be entitled to nominate someone to the board. Magic needed to have a seat on the board to satisfy certain exchange control regulations.

Magic nominated a director, but the director later decided that he was not in a position to be on the board. The parties then disagreed as to whether Magic was entitled to have its subsequent nominee *appointed* to the board or merely entitled to *nominate* someone.

NOMINATION OR APPOINTMENT

In the Insolvency and Companies Court, the judge held that Magic was merely entitled to nominate someone. That decision was upheld by a High Court judge, who held that it was, at most, a *one-off* ability to make such nomination with (perhaps) an obligation on the company to consider that nomination for the purposes of appointment.

When construing contracts, primacy is often given to the natural and ordinary meaning of the text, but words must be understood in light of the overall purpose of the clause and the wider factual matrix.

Although “nomination” can be distinguished from “appointment”, the right to “nominate” had to be construed in context. The Court of Appeal noted that the ordinary meaning of “nominate” could mean either to *propose* or to *appoint*. But the agreement made clear that Magic was entitled to nominate

someone *to the board* (rather than merely nominate someone for consideration) and a mere right to nominate with no corresponding duty to appoint would render the agreement redundant. That conclusion was further supported by the factual matrix: Magic needed a seat on the board to satisfy exchange control regulations.

Similarly, it was held that the right was a continuing one. Magic’s right was not a one-off that ended when the nominee left office. The alternative interpretation exposed Magic to the risk of offending the exchange control requirements that were a central reason for the nomination agreement.

REFLECTIONS

The decision in *Magic* demonstrates the importance of both text and context when construing a contract. While the language used by the parties is the point of departure, meaning is sensitive to context. For those drafting and negotiating contracts, *Magic* highlights the importance of clear drafting to avoid the risk that different judges reach different conclusions when interpreting the same text.

KEY TAKEAWAYS:

- Both text and context are crucial to contractual interpretation
- Different judges may reach different conclusions when interpreting the same text
- Clear drafting is crucial to avoid ambiguity

READ THE FULL CASE:

- Magic Investments SA v Broadbent & The Greater Good Fresh Brewing Co Limited [2026] EWCA Civ 711 (5 June 2026)

Intervening acts

Third-party fraud breaks chain of causation

Damages for breach of contract will be available only where breach is the effective or dominant cause of loss. Third-party acts often break the chain of causation. The chain will not be broken if there is a contractual duty to prevent intervention, but only if it addresses the very type of intervention that occurred.

BACKGROUND

Logix agreed to purchase two aircraft engines from Siam Aero. Fraudsters used fake email addresses to intercept correspondence between the parties during negotiations and procured that the buyer paid the purchase price to an account controlled by the fraudsters rather than the seller.

The buyer sought to recover its loss from the seller on the basis that the loss was caused by the seller's assumed breach of a binding confidentiality clause contained in a letter of understanding.

BREAKING THE CHAIN OF CAUSATION

It was not in dispute that the buyer's loss would not have occurred "but for" the seller's breach of the confidentiality clause. The issue in *Logix* was whether the intervention of third-party fraudsters between breach and the relevant loss broke the chain of causation.

A voluntary act of a third party intervening between breach of contract and the relevant loss will normally break the chain of causation. In *Logix*, the seller's breach of the confidentiality clause was part of the *opportunity* for the fraud, but it was not the *cause* of the fraud. The third-party fraudsters had broken the chain of causation.

Following *Macmillan*, the buyer argued that the intervention of a third-party fraudster does not break the chain of causation, so the seller remained liable. The Court of Appeal disagreed. The chain of causation will not be broken by a third-party act where there is a contractual duty to prevent its intervention, but there was no such duty: the seller's confidentiality obligation was concerned with protecting the parties

from the risk of documents and information falling into the hands of competitors rather than providing protection against deceit by fraudsters. A contractual duty to prevent fraud only precludes a break in the chain where it specifically concerns the very fraud that was in fact perpetrated, such that the loss was effectively caused by the breach, within the scope of duty and not unlikely to occur.

REFLECTIONS

Damages for loss following a breach of contract will be available only where breach was the effective or dominant cause of loss. *Logix* illustrates that breach must be more than a mere opportunity or occasion for loss.

Although the chain will not be broken by third-party acts where there is a duty to prevent such intervention, the duty must specifically address the very type of intervention that occurred. Consider express drafting to address specific risks (such as fraud or cyber) rather than relying on general confidentiality clauses and ensure that verification procedures are followed.

KEY TAKEAWAYS:

- Voluntary third-party acts intervening between breach and relevant loss normally break the chain of causation
- The chain will not be broken where there is a specific duty to prevent the very intervention that occurred
- Consider drafting addressing specific risks (rather than general confidentiality clauses) and ensure verification procedures are followed

READ THE FULL CASE:

- *Logix Aero Ireland Limited v Siam Aero Repair Company Limited* [2026] EWCA Civ 510 (29 April 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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