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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THE "ONEROUS CLAUSE" DOCTRINE

THE RED HAND DOCTRINE IS UNLIKELY TO APPLY IN A COMMERCIAL CONTEXT

The "red hand" doctrine means that onerous or unusual terms contained in unsigned terms will not be binding unless fairly and reasonably brought to the counterparty's attention. *Amlin v King Trader* highlights that the doctrine – now known as the "onerous clause" doctrine – is unlikely to apply in a commercial context.

BACKGROUND

A charterer time-chartered a ship and took out a marine insurance policy. The ship later ground and an arbitral tribunal found the charterer liable in damages to the shipowner and its protection and indemnity club. The charterer, however, entered into insolvent liquidation and was unable to pay.

The question in *Amlin* was whether the insurer was liable to indemnify the charterer against its liability under the award or whether a pay first clause under the insurance policy was enforceable. The pay first (or pay to be paid) clause provided that the charterer must pay out before it could recover from the insurer.

RED HAND OR ONEROUS CLAUSE DOCTRINE

Among other things, the owner and the club argued that the pay first clause had not been incorporated into the contract because the clause was harsh, extremely unfair, onerous and commercially unreasonable, and it had not been fairly and reasonably brought to the charterer's attention. The Court of Appeal disagreed.

Terms may be incorporated into a contract by reference to another document, such as a party's standard terms. But the onerous clause doctrine provides that a particularly onerous or unusual term contained in a party's standard terms will not be binding where the counterparty is unaware of that term unless it was fairly and reasonably brought to the counterparty's attention. What amounts to fair notice is a question of fact that depends on the circumstances.

The Court of Appeal held that the clause was not particularly unusual in the context of marine insurance and, despite having a serious and significant effect in the event of insolvency, it was not sufficiently onerous to engage the doctrine. Not every burdensome clause is an onerous one and the court will be slow to intervene in a commercial contract between parties of broadly equal bargaining power.

REFLECTIONS

Amlin has implications for the enforceability of pay first clauses in a marine insurance context.

More generally, though, the decision highlights the high threshold for a clause to be onerous or unusual under the onerous clause doctrine.

It also shows that the onerous clause doctrine concerns notice and is unlikely to apply in a commercial context, particularly where a party has its own professional adviser. In practice, care should be taken when reviewing contract terms that may be hidden in other documents.

KEY TAKEAWAYS:

- Onerous or unusual terms in unsigned terms will not be binding unless fairly and reasonably brought to the counterparty's attention
- But the onerous clause doctrine concerns notice and is particularly unlikely to apply in a commercial context
- Not every burdensome clause is onerous, and the court will be slow to intervene in a commercial context

READ THE FULL CASE:

- MS Amlin Marine NV v King Trader Limited & Ors [2025] EWCA Civ 1387 (5 November 2025)

WHOSE TERMS?

BATTLES OF THE FORMS AND EXCLUDING TERMS IMPLIED BY LAW

> The parties in *Tullow v Vallourec* disagreed as to when, and on what terms, the contract was formed. The decision highlights the importance of the evidence as a whole when considering a "battle of the forms" or similar situations. It also demonstrates the importance of clear words when seeking to exclude terms implied by law.

BACKGROUND

The parties entered into a contract for the supply of tubing for water injection wells in an offshore oil field. The customer alleged that tubing supplied was defective and brought a claim for breach of contract. The parties disagreed as to the terms of the contract.

BATTLE OF THE FORMS

Where parties exchange offers on their standard terms in a battle of the forms, the "last shot" usually wins unless the parties objectively intended that it should not prevail.

In *Tullow*, the customer contended that the contract was concluded on the terms of a purchase order that incorporated an amended version of its standard terms and conditions. The supplier contended that the contract also incorporated its general conditions; it had included a copy when returning the signed purchase order and acknowledgement of order.

This was not a typical battle of the forms scenario: the contract was made against the background of previous negotiations, and the supplier argued that its general conditions overlayed (rather than replaced) the customer's standard terms.

The High Court noted the need to look at the evidence as a whole.

It held that inclusion of the general conditions was an administrative exercise with no contractual effect. Rather than make a counteroffer, the supplier had provided unqualified acceptance of the purchase order's terms.

EXCLUDING TERMS IMPLIED BY LAW

Among other things, the High Court also considered whether terms implied by the Sale of Goods Act (SGA) were excluded.

A warranty in the supplier's general terms sought to exclude any implied warranty or guarantee. Even if it had been incorporated, the drafting did not exclude the SGA implied terms. Parties can contract out of SGA implied terms expressly or by agreeing express terms inconsistent with them. But express exclusion of the SGA implied terms generally must refer to "conditions" to be effective.

It was also held that an entire agreement clause (referring to "conditions") was inapt. Entire agreement clauses do not generally exclude terms implied by statute without clear words.

Although it has been suggested that entire agreement clauses may more readily be construed to exclude terms implied by matters "extrinsic" to the agreement, it was held that statutory implied terms are intrinsic and treated as having been set out in the contract.

REFLECTIONS

As well as highlighting the importance of clear correspondence, *Tullow* is a helpful reminder on excluding implied terms. An exclusion of terms implied by the Sale of Goods Act should refer to "conditions".

More generally, the line between extrinsic and intrinsic matters is unclear and, in practice, clear words should be used when seeking to exclude implied terms.

KEY TAKEAWAYS:

- In a battle of the forms, the last shot usually prevails
- Be clear as to whether correspondence is a counteroffer or acceptance of the counterparty's terms
- Clear words should be used when seeking to exclude terms implied by law

READ THE FULL CASE:

- Tullow Ghana Limited v Vallourec Oil and Gas France SAS [2025] EWHC 3059 (Comm) (20 November 2025)

TERMS IMPLIED IN FACT

NO ROOM FOR IMPLIED TERMS WHERE PARTIES EXPRESSLY ALLOCATED RISK

A term may be implied in fact where it is obvious or necessary for business efficacy. In *The Maltese Falcon*, no term was implied where a party took the risk that it would be unable to fulfil its promise. The decision highlights that the test sets a high bar and that terms will not be implied where the contract clearly allocates risk.

BACKGROUND

Leonis agreed to buy a yacht from Pleon. The parties also agreed that, around two weeks after purchase and delivery, Leonis would grant Pleon use of and access to the yacht for 61 days. The yacht then broke down during that period of use and access.

Although the contract for sale merely required Pleon to deliver the yacht as was, the agreement for access set a higher standard: Leonis agreed that the yacht would be seaworthy. The issue concerned the mismatch between those requirements.

TERMS IMPLIED IN FACT

Terms implied in fact are those implied into a particular contract to give effect to the parties' intention at the time they entered into the contract. A term may be implied in fact where it is so obvious that it goes without saying or where it is necessary to give business efficacy to the contract.

Leonis argued that there was a term implied into the agreement for access: its obligation as to the yacht's seaworthiness was conditional on the yacht having been delivered under the contract for sale having been properly maintained by Pleon.

An arbitral tribunal found that the period between delivery to Leonis and Pleon's use and access was too short to effect any transformative maintenance. A majority concluded that the term was to be implied in light of the practical impossibility of Leonis delivering the yacht in a condition other than she had been delivered under the contract for sale.

On appeal, the High Court disagreed.

It was held that the test to imply the term had not been met. Leonis chose to promise that Pleon would have use of and access to a seaworthy yacht. Even if the unseaworthiness was because Pleon had not properly maintained the machinery before the sale, Leonis took the risk that it would be unable to fulfil that promise. The purpose of the relevant clause in the agreement for access was to allocate risk and, understood in that way, there was no lack of business efficacy.

REFLECTIONS

The Maltese Falcon demonstrates that there will be no room for implied terms where parties have expressly allocated risk. The court cannot rewrite a bad bargain. When negotiating risk allocation regimes across related contracts, it is crucial to consider each in light of the wider context and ensure that those regimes hang together.

KEY TAKEAWAYS:

- A term may be implied in fact when it is so obvious it goes without saying or where it is necessary for business efficacy
- Business efficacy depends on the contractual purpose of the express agreement
- Terms are unlikely to be implied where commercial parties have expressly allocated risk

READ THE FULL CASE:

- Pleon Limited v Leonis Yachting Limited ("The Maltese Falcon") [2025] EWHC 3144 (Comm) (28 November 2025)

NO WAIVER OF CONTRACTUAL TERMINATION RIGHT

ELECTION REQUIRES ACTUAL KNOWLEDGE OF BOTH FACTS AND RIGHTS

URE Energy v Notting Hill Genesis concerned waiver by election. The classic example of election is the choice between termination or affirmation following breach of contract. *URE* demonstrates that a party can only elect to waive its right to terminate where that party has knowledge of both the relevant facts and the right to terminate.

BACKGROUND

URE and the Genesis Housing Organisation entered into an energy supply contract, which allowed URE to terminate in the event of an amalgamation (among other things). Genesis amalgamated with another entity and gave notice to (but did not seek approval from) URE. URE never objected and continued to perform the contract for around seven months before the parties' relationship deteriorated and URE terminated, citing the amalgamation.

WAIVER BY ELECTION

Following breach, the innocent party typically has a choice: elect to terminate or to affirm and continue the contract. That election may be communicated by words or conduct, and a party may be deemed to have elected to affirm a contract where it has continued to perform the contract, for example.

Election arises only where the relevant party is aware of the facts giving rise to the relevant choice. The issue in *URE* was whether that party must also have actual knowledge of its right to elect, even where that arises from an express contractual right. In other words, whether a party could be held to have elected to affirm a contract where it was unaware of its contractual right to terminate. The Court of Appeal held that it could not.

It had not deliberately avoided discovering the right, but URE had only skim read the contract and was unaware of the right to terminate for amalgamation until it sought legal advice. The High Court held that, although URE knew about the amalgamation and continued to perform the contract, there was no waiver by election as URE had not appreciated that it had the right to terminate.

The Court of Appeal agreed. It is a general principle that a party must have knowledge of its right to elect. In *URE*, continued performance was not an election to affirm because URE did not know it could terminate. It was irrelevant whether the right arose as a matter of law or contract and there is no rule of law that, for the purposes of waiver by election, a party is deemed to know the terms of its contract.

URE was, therefore, entitled to seize on the amalgamation to terminate the contract (and claim a contractual termination payment).

REFLECTIONS

Despite the outcome in *URE*, parties should not be complacent when seeking to exercise termination rights.

A contractual right may, for example, be construed as lapsing after a reasonable time. It will often be difficult for a party to contend that it was unaware of its right, and it will be presumed that a party who has legal advice is aware of its rights. More generally, an estoppel may prevent termination where the terminating party has unequivocally represented that it will not enforce its rights (regardless of whether that party realises that it is doing so).

URE also highlights that, in practice, where a counterparty has rights triggered by a merger or amalgamation, a party looking to merge or amalgamate should consider seeking consent in advance to avoid the counterparty seizing the opportunity to exercise those rights at a later stage.

KEY TAKEAWAYS:

- A party will not be held to have waived its contractual termination rights unless it has knowledge of the facts and its right to terminate
- Courts will be sceptical that a commercial party is unaware of its rights, but that scepticism will be more limited where a right is buried in the small print
- Where a counterparty has rights triggered by a merger or amalgamation, consider seeking consent in advance of any merger or amalgamation

READ THE FULL CASE:

- URE Energy Limited v Notting Hill Genesis [2025] EWCA Civ 1407 (10 November 2025)

TERMINATION FOR REPEATED DEFAULT

PARASITIC CLAUSES AND INDUSTRY STANDARD FORMS

The Supreme Court in *Providence v Hexagon* held that a contractual termination right in a construction contract was parasitic on a related clause, accruing only where that related clause applied. It also noted that, when construing industry standard forms, archaeological digging into past editions is to be discouraged.

BACKGROUND

The parties entered into a construction contract incorporating the JCT Design and Build Contract, a widely used standard form. Under the JCT contract:

i. If the employer is in default of certain obligations, the contractor may give notice specifying the default (clause 8.9.1).

ii. If that default continues beyond a specified cure period, the contractor may give further notice to terminate (clause 8.9.3).

iii. If the contractor for any reason does not give that further notice, but the employer repeats a specified default, the contractor may then terminate by notice (clause 8.9.4).

In *Providence v Hexagon*, the employer had missed a payment. The contractor gave notice of the specified default as described in i, above. The employer paid in full during the cure period, so the right described in ii did not accrue. It then missed another payment and the contractor sought to terminate for repeated specified default as described in iii.

PARASITIC CLAUSES

The question was whether the right to terminate for repeated default was independent of that relating to continuing default. In other words, whether the contractor could terminate for repeated default even though its right to give further notice for the initial default had not accrued.

The Supreme Court held that it could not. The right to terminate for repeated default (in iii) was parasitic on the right to terminate for continuing default (ii). The contractor could only terminate for the repeated default if the employer had failed to cure the earlier specified default within the cure period.

Its reasoning turned on the drafting in question. Among other things, the Supreme Court noted that, had it been intended that the termination right for repeated default arose irrespective of whether the right to give further notice was engaged, the drafting would not have mentioned the previous clause. It also rejected the Court of Appeal's attempt to create symmetry between the parties' contractual termination rights, which were deliberately drafted differently.

INTERPRETING INDUSTRY STANDARD FORMS

The Supreme Court commented more generally on the interpretation of industry standard forms.

The admissible background context may include explanatory notes, as well as previous judgments and practice relating to earlier versions of the standard form. But the Supreme Court discouraged an examination of the "archaeology of the forms". Although some amendments might be made in response to changes in law or circumstances, it is wrong to compare versions of a standard form on the assumption that parties consciously chose one over the other to achieve a particular result.

Where parties use an industry standard form, it is generally intended that their rights and obligations should be consistent with those of others using the same form and should reflect the intentions of those who drafted the standard form. Standard forms should be interpreted consistently and, subject to bespoke amendments, are unlikely to be affected by the intentions of parties to a particular contract.

REFLECTIONS

The decision in *Providence v Hexagon* is particularly significant for the construction industry, and it reiterates the approach to interpreting industry standard forms generally.

The interpretation of any clause depends on the contract in question, but the Supreme Court's reasoning also highlights the use of parasitic drafting. When drafting, consider whether it is intended that one clause is engaged only if a different clause applies or has not been complied with or whether those clauses should operate independently.

KEY TAKEAWAYS:

- Under the JCT Design and Build Contract, a contractor cannot terminate under clause 8.9.4 if the right to terminate has not accrued under 8.9.3
- An industry standard form should usually be interpreted consistently for all parties using it
- When drafting, consider the interaction between clauses and whether these should be parasitic or independent

READ THE FULL CASE:

- Providence Building Services Limited v Hexagon Housing Association Limited [2026] UKSC 1 (15 January 2026)

DAMAGES AND RES INTER ALIOS ACTA

NONE OF YOUR BUSINESS

In *The Skyros*, shipowners sought damages when vessels were redelivered late. The owners had agreed to sell the vessels and would not have chartered them out even if they were delivered on time. But the sales were *res inter alios acta* (things done between others), so the owners could still recover substantial damages.

BACKGROUND

The parties agreed the latest times for redelivery and, before those dates, the owners agreed to sell the vessels to third-party purchasers. The vessels were redelivered late and the charterer paid hire at agreed rates, but the market rate had significantly increased. The owners claimed damages for the difference between the agreed and market rates.

An arbitral tribunal held that the owners were entitled to substantial damages, despite the fact that the owners would not and could not have agreed to enter into any further charter fixtures – they had agreed with the purchasers not to.

The High Court disagreed, holding that the owners could not recover substantial damages because they had precluded themselves from taking advantage of the market rate.

The Court of Appeal applied the principle of *res inter alios acta* and restored the arbitral award.

RES INTER ALIOS ACTA

Where a party sustains loss by reason of breach of contract, the purpose of damages is to put it, so far as money can, in the same situation as if the contract had been performed. Damages generally reflect the difference in the market value of the goods or service that the claimant should have got and what they actually got.

While remoteness concerns *how much* of its loss a claimant can recover, the principle of *res inter alios acta* concerns *what* the claimant has lost and requires that some aspects of a claimant's actual position be disregarded when assessing damages. Those matters are collateral because they arise independently of the circumstances giving rise to the loss.

In *The Skyros*, whether the owners could have chartered the vessels had they been delivered on time was *res inter alios acta*. In other words, that the owners had agreed to sell the vessels and could not, in fact, have taken advantage of the increased market rate was none of the charterer's business. The owners were, therefore, entitled to damages under the normal measure, that is, the difference between what they should have got (the market rate) and what they actually got (the agreed rate).

USER DAMAGES

The Court of Appeal reached its conclusion applying the ordinary compensatory principle but also commented in obiter that user damages would not be available.

User damages may be available where a person has wrongfully used another's property without causing any pecuniary loss: they take something for nothing, and the owner is entitled to payment assessed by reference to the value of that wrongful use.

User damages are most common in the context of tort and, although much of the same reasoning could be applied, the Court of Appeal declined to extend their availability to a novel situation.

REFLECTIONS

The Court of Appeal emphasised that the application of the *res inter alios acta* principle was a beneficial outcome that promotes certainty in commercial dealings, avoiding the incentive to take every case to arbitration in the hope that matters would turn up in disclosure.

The Skyros also demonstrates the primacy of the normal measure of damages, even where that may result in a windfall for a party.

But *The Skyros* addresses complex issues in the law of contract damages, and the High Court decision prompted considerable commentary. The Court of Appeal decision may not be the end of the matter.

KEY TAKEAWAYS:

- The normal measure of damages compares the market value of the goods or services promised and those actually received
- The principle of *res inter alios acta* means collateral matters are disregarded when determining loss
- User damages are only available in limited circumstances

READ THE FULL CASE:

- Skyros Maritime Corp v Hapag-Lloyd AG [2025] EWCA Civ 1529 (28 November 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.

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