Debt or damages? New UK Supreme Court decision on the Norwegian Saleform 2012

The UK Supreme Court has finally settled a long-running contract law debate, ruling that the "Mackay v Dick principle" does not form part of English law.

There has been long standing debate under English law about what is known as the "*Mackay v Dick* principle of law". This principle says that a condition of a contract, which if fulfilled would result in a debt being owed by a party to the contract, should be deemed fulfilled where that party wrongfully prevents the condition from being satisfied. This outcome prevents a party otherwise benefiting from their own wrongdoing. The "principle" arose out of the judgment of Lord Watson in a nineteenth century House of Lords judgment in a Scottish appeal: *Mackay v Dick* (1881) 6 App Cas 251. Since then, whether or not this principle actually exists has been a topic of debate.

A few weeks ago, the UK Supreme Court handed down judgment in *King Crude Carriers SA and others v Ridgebury November LLC and others* [2025] UKSC 39. The Supreme Court held that the "*Mackay v Dick* principle" does not form part of English law.

The other key principle from the case of *Mackay v Dick*, from the judgment of Lord Blackburn, that there is an implied duty to cooperate to ensure performance of the bargain, was not challenged and was described by the Supreme Court as "*uncontroversial*".

The facts

The case concerned MOAs for three tanker vessels on amended Norwegian Saleform 2012 forms. The MOAs required the Buyers to lodge deposits in a deposit account with a third party deposit holder and required both parties to provide all necessary documentation for the opening of the deposit account. The Buyers did not provide the documentation, which was a breach of contract. Therefore, the deposit accounts could not be opened and the deposits could not be paid into them.

The Sellers terminated the MOAs and claimed

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the deposit amounts in debt, relying on the *Mackay v Dick* principle. The Buyers argued that the Sellers had no claim in debt and could only bring a claim in damages. However, on assumed facts, the market price for the ships had gone up since the MOAs had been agreed so the Sellers had apparently suffered no loss.

The Sellers succeeded in arbitration, lost in the Commercial Court and won again in the Court of Appeal. The Buyers appealed to the Supreme Court, arguing that the *Mackay v Dick* principle did not exist in English law.

The decision

The Supreme Court unanimously allowed the appeal and restored the decision of the Commercial Court, holding that the Sellers only had a claim in damages, not in debt.

The key takeaway is that the Supreme Court held that the *Mackay v Dick* principle does not form part of English law. The Supreme Court reviewed the relevant authorities in detail and gave six main reasons for its decision:

1. Lord Watson in *Mackay v Dick* did not cite any English law authorities and instead relied on "*a doctrine borrowed from the civil law*".

2. Subsequent authorities are inconsistent as to the existence of the principle.

3. The principle could not be applied to all types of contract without undermining established law (e.g. the law on contracts for the sale of goods), but there is no principled way of excluding certain categories.

4. The formulations and explanations of the principle are all "fictional" (the condition is "treated" as fulfilled when it is not). The judgment states "*Fictions tend to obscure transparent reasoning and, wherever possible, should be removed*" (paragraph 66).

5. The law of contract in this area is based on the proper interpretation of the terms of the contract, rather than on "*fictional fulfilment of a condition precedent*". This is consistent with the importance of freedom of contract under English law and promotes certainty and predictability.

6. No injustice follows from rejecting the principle because the claimant will have a remedy in damages if a condition precedent is not fulfilled due to a breach of contract.

The Supreme Court then considered the Sellers' argument which relied on *Mackay v Dick* as an aid to contractual interpretation or the basis for an implied term, rather than a standalone principle of law. That argument also failed.

The Supreme Court considered existing case law on the presumption that a party should not be able to take advantage of its own wrong. It found that the cases dealing with this presumption are concerned with the situation where a party claims to be entitled to treat the contract as at an end or to obtain a benefit under it, and do not support a wider and more general presumption. Those circumstances did not apply here; the Buyers did not rely on their own breach to found or invoke a right under the contract. On the contrary, the Buyer's breach exposed them to a damages claim. The Sellers' implied terms arguments also failed because the proposed implied terms made the MOAs unworkable or would effectively rewrite the parties' bargain.

The Supreme Court also rejected the Sellers' argument that the deposits accrued upon the MOAs being agreed with the terms about the opening of the deposit account and the paying of the deposit being only "machinery for payment". It was held that the right to the deposit accrued at the same time as it became payable. In other words, the opening of the deposit account was a condition precedent to the accrual of the debt. This conclusion was supported by the Court of Appeal judgment in *The "Blankenstein"* [1985] 1 WLR 435, which concerned an earlier version of the Norwegian Saleform. The judgment underlines the importance of certainty and predictability in English law and brings welcome clarity to an area of long standing debate.

The Lila Lisbon - Caselaw Update

The UK Court of Appeal confirms recovery of loss of bargain damages under Clause 14 of Norwegian Saleform 2012

Following up on my article covering the Commercial Court's judgment in the November '24 edition, on 2 October the Court of Appeal delivered a landmark judgment in *The Lila Lisbon*, clarifying the scope of sellers' obligations and buyers' remedies under the Norwegian Saleform 2012 ("NSF 2012") when delivery is delayed beyond the cancelling date. This decision overturns the earlier ruling of the Commercial Court and significantly impacts the drafting and interpretation of ship sale agreements.

Background

By way of recap on the facts, Great Asia Maritime Limited ("Buyers") and Orion Shipping and Trading LLC ("Sellers") entered into a Memorandum of Agreement dated 4 June 2021 on amended NSF 2012 wording for the sale of the vessel *M/V Lila Lisbon*. Clause 14 of the MOA mirrored the standard NSF 2012 wording and provided:

Clause 14 – Sellers' Default

[A] Should the Sellers fail to give Notice of Readiness in accordance with Clause 5(b) or fail to be ready to validly complete a legal transfer by the Cancelling Date the Buyers shall have the option of cancelling this Agreement...

[B] Should the Sellers fail to give Notice of Readiness by the Cancelling Date or fail to be ready to validly complete a legal transfer as aforesaid they shall make due compensation to the Buyers for their loss and for all expenses together with interest if their failure is due to proven negligence and whether or not the Buyers cancel this Agreement.

The original cancelling date was 20 August 2021 and later extended to 15 October 2021 without prejudice to Buyers' right to claim damages under Clause 14. Sellers failed to tender Notice of Readiness ("NOR") by the extended cancelling date, prompting buyers to cancel under Clause 14. Sellers subsequently fixed the vessel on a voyage charter with Vale, and Buyers arrested the vessel on 24 September 2021. Buyers then commenced arbitration seeking damages, including for the difference between the market price and the contract price (loss of bargain damages) as a result of the sellers' failure to deliver by 15 October.

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The Award

An arbitration tribunal initially held that Buyers had validly cancelled the MOA under Clause 14(A) and awarded them damages based on the difference between the market price and the contract price (loss of bargain damages).

The Commercial Court's Decision

The Commercial Court (Dias J) reversed that decision, holding that:

- Under the terms of the MOA, Sellers did not have a positive obligation to tender NOR or to be ready to deliver by the cancelling date.
- Clause 14 did not permit recovery of loss of bargain damages. Compensation under Clause 14 was confined to accrued losses and wasted expenses up to cancellation, excluding future or market-based losses.
- Any obligation to meet the cancelling date was not a condition, so no repudiatory breach arose.

Dias J granted permission to appeal to the Court of Appeal on the first two grounds. The Commercial Court's conclusion that the obligation on Sellers to meet the cancelling date was not a condition, remained unchallenged.

Court of Appeal Decision

The Court of Appeal has now unanimously reversed the first-instance decision, holding that:

1. Sellers under NSF 2012 must exercise reasonable diligence (based on an implied obligation) to deliver the vessel by the cancelling date. The Court drew an analogy with an owner's obligation to meet laycan under a charterparty[1] .

2. Where sellers fail to deliver by the cancelling date due to proven negligence and buyers cancel, this is equivalent to non-delivery, the buyer can recover damages for loss of bargain under Clause 14(B).

Importantly, the Appeal Court did not disturb the finding that the obligation to deliver by the cancelling date is not a condition, meaning Sellers' failure does not amount to repudiatory breach.

Key Takeaways

- For buyers, the Court of Appeal's decision strengthens their position under NSF 2012 such that loss of bargain damages are now recoverable even without repudiatory breach.
- For sellers, there is now greater exposure to market-based claims for delayed delivery.

Conclusion

This judgment represents a significant shift in the interpretation of Clause 14 of NSF 2012. In light of this Court of Appeal decision, parties negotiating ship sale agreements should carefully consider their contractual provisions and their strategies around cancelling dates and compensation clauses in the MOAs.

Nordisk remains available to assist Members with any queries regarding this judgment or its implications. Please do not hesitate to contact us.

1 The Democritos [1976] 2 Lloyd's Rep 149

Navigating Perilous Waters - BIMCO Updates War Risk Clauses

BIMCO updates War Risk Clauses for charters — a welcome review in today's global shipping climate.

Earlier this year BIMCO published updated versions of its War Risk Clauses, both CONWARTIME 2025 (time charters) and VOYWAR 2025 (voyage charters). This has been a long running project which began in 2022, and which is particularly relevant against the current geo-political landscape. With the Russian invasion of Ukraine and the attacks against shipping in the Red Sea, war risk clauses have come under the spotlight.

The updates whilst not intended to make radical changes, have introduced some changes which make the clauses more charterer friendly than the previous 2013 versions.

At the outset it is important to note that the revisions do not intend to make any change to the level of risk required or the test for determining whether Owners have the right to refuse to proceed. That remains as per the 2013 version, which was itself amended following the decision in *The Triton Lark*[1] . Nor has there been any change to the mechanism for triggering the clauses. Under CONWARTIME and in contrast to VOYWAR, there is no requirement for any escalation in risk/danger since the date of fixing and it is irrelevant whether the war risk existed at the time of entering into the charterparty or arose thereafter.

The following is a summary of the main changes introduced in the 2025 clauses.

CONWARTIME

Subclause (a)(i) and (ii) New definitions of "Area" and "Insurance Costs" have been included. The latter is now defined as being additional war risk premiums and additional kidnap and ransom, which are taken out for the specific voyage.

Subclause (b) The liberty to leave an area has been grouped in with the list of other liberties not to proceed or continue through areas affected by War Risks, to ensure the standard for all is the same.

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1 Pacific Basin Ihx Ltd v Bulkhandling Handymax AS [2012] EWHC 70 (Comm). For further explanation of this case see Piracy Update – Sulu Sea : Nordisk Skibsrederforening

Subclause (d) Clarifies the reimbursement provisions.

Owners are now required to notify Charterers of Insurance Costs "*as soon as practicable and, if possible, before the Vessel enters an Area exposed to War Risks*".

There is a new requirement, which if requested by Charterers, Owners have to demonstrate they have used "*reasonable endeavours*" to obtain appropriate cover and terms, including premium. This promotes transparency but opens the door to the possibility of Charterers disputing the premium.

The final paragraph clarifies that Charterers only have to reimburse the net amount, getting the benefit of any discount or benefit applied, such as no claims bonuses.

Subclause (e) introduces a requirement to provide evidence that payment of any additional wages or bonus has in fact been made to the crew.

Subclause (f)(vi) has added a new liberty to sail in convoy through an area exposed to War Risks. Whilst convoys have been more associated with piracy, the situation in the Red Sea highlighted the possibility they could similarly be used in war risk areas and affords the same protection to Owners.

The liberty clause also now states that the Vessel will remain on hire in all of the listed events.

Subclause (g) The time given to Charterers to nominate an alternative safe load or discharge port has been extended to 72 hours (from 48 hours).

VOYWAR

For consistency, some of the changes made to CONWARTIME have been duplicated in VOYWAR:

- The same definitions of "Area" and "Insurance Costs", **subclause (a)**.

- The time given to Charterers to nominate alternative safe ports has been extended to 72 hours, **subclause (b)** and **(c)**

- The requirement to notify Charterers of Insurance Costs "*as soon as practicable" and "if possible before entering an Area exposed to War Risks*", along with the clarification that Charterers are only required to pay the net amount and get the benefit of discounts or benefits received for the voyage, **subclause (e)(iv)**.

- The requirement to demonstrate, if requested, that Owners have used reasonable endeavours to obtain appropriate cover and terms, including premium, **subclause (e)(ii).**

Subclause (c) and (d) The previous 2013 version included a pro-rata increase of freight where the route taken increased by 100 miles. With the situation in the Red Sea and the resulting diversion round the Cape, which significantly increased voyage length, it was considered that this created unreasonable results. That regime has now been replaced by a freight adjustment, based on the increase (or saving) in time and/or expenses with, as documented by Owners. The additional 100 mile threshold has been removed. This aims to create a more balanced result. Payment or reimbursement (as the case may be) is due within the later of 7 days of receipt of Owners invoice and issue of bills of lading. Owners have a lien on the cargo for the adjusted freight. Note that the parties need to consider whether the payment terms for the additional freight payment/reimbursement fit with the existing freight payment terms under the charterparty.

A new liberty has been added, which allows the vessel to leave an area where it is exposed to War Risks, whether the risk existed at the time of or after entering the area, **subclause (f)(vi)**.

Nordisk is always available to assist our Members should they require assistance with issues pertaining to war risks.

Norwegian Pay Mandate on Ships Sparks ESA Surveillance Case

Norway's law imposing local pay on foreign-flagged ships has sparked a legal clash with European authorities, who say it breaches EEA rules.

In July 2025, certain amendments to the Norwegian Act of the General Application of Collective Agreements (In Norwegian, "Allmenngjøringsloven") (hereinafter referred to as the "**Act**") came into effect, with the aim of making the wage conditions for seafarers onboard foreign flagged ships that operate in Norway similar to those that work on NOR-registered Vessels[1]. For NIS or foreign flagged vessels, the regulation applies to those vessels that are occupied in *coastal trade*, in Norway. In short, the following type of trades were included[2] :

(i) Ships that carry cargo or passengers between mainland Norwegian ports, thereby excluding those that transport cargo or passengers exclusively to or from a foreign port.

(ii) Cruise ships operating solely between mainland Norwegian ports, or exclusively from a single Norwegian port, excluding vessels that call at Norwegian ports as part of voyages to or from foreign ports.

(iii) Ships that provide services in Norwegian Territorial Waters by the mainland, excluding fishing vessels as well as naval and state vessels.

The Norwegian Maritime Authority (Sjøfartsdirektoratet) supervises compliance with the wages and working conditions in accordance with the Act and may also undertake inspections, detentions and fines of the Vessel should non-compliance become evident.

The changes to the legislation received a substantial amount of criticism when proposed. Both the Norwegian Shipowners Association and Nordisk were critical of the proposed changes and argued that it was, at best, doubtful whether Norway had the ability to make the changes with

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1 The changes were made through "Lov om endringer i allmenngjøringsloven og petroleumsloven mv. – LOV-2025-06-20-109»

2 Allmenngjøringsl. § 2 (2)

reference to the current obligations that Norway has as party of the EEA Treaty[3],[4].

It should be noted that the EFTA Surveillance Authority (ESA), responsible for monitoring compliance with the EEA rules, was consulted by the Norwegian government prior to the proposed legislation changes were made. In that consultation, ESA concluded that the draft was in breach of EEA law[5]. This was also highlighted in the preparatory works in connection with the proposed changes to the Act. Despite the clear warning from ESA, the Norwegian government simply said that they are of the view that the proposed changes to the Act were in line with Norway's obligations under the EEA. The law was passed in June 2025, and for ships entered into force on 1 July 2025.

On 5 November 2025, ESA informed the Norwegian Ministry of Trade, Industry and Fisheries that ESA, on their own initiative, were opening a case against Norway concerning the changes to the Act[6]. ESA's view remains that the proposed changes to the Act: (i) violates the principles of the Maritime Cabotage Regulation and the Maritime Transport Regulation, which sets out that "*all matters relating to manning*" shall rest with the flag state, not the host state. ESA are of the view that "*all matters relating to manning*" also includes wages, whilst Norway argues that this only reals with size and qualification of the crew and not manning.

(i) including mandatory pay rules establishes a restriction on the freedom to provide services. ESA are of the view that the main objectives, being protecting the Norwegian labour market and preventing unfair competition, are not overriding public interest justification under EEA law. Furthermore, Norway has failed to demonstrate why these changes are required, thereby also failing to evidence the proportionality and necessity of the proposed measures.

(ii) represents non-compliance with the Port State Control Directive, in so far as Norway has extended the right to inspect whether vessels subject to port state control adhere to the newly introduced changes to the Act. ESA's view is that only a specified set of items may be checked under the Port State Control Directive, and inspections for wage conditions are outside the scope of the same.

The Norwegian Ministry of Trade, Industry and Fisheries were given until 5 December 2025 to provide a response. Upon receipt of the same, ESA would consider whether initiating infringement proceedings in accordance with Art. 31 of the Agreement between EFTA States on the Establishment of a Surveillance Authority and Court of Justice would be done.

It therefore seems that the last word in this case is yet to be said. Nordisk will continue to monitor the situation and keep its members updated of any further developments.

3 Nordisk's response to the proposed changes can be found here: nordisk-legal-services.pdf

4 The Norwegian Shipowners' Association's response to the proposed change can be found here

5 Prop. 88 L (2024-2025) Endringer i allmenngjøringsloven og petroleumsloven mv. (allmenngjøringslovens anvendelse på innenriks skipsfart og rettighetshaveres plikt til å sørge for norske lønnsvilkår på skip) i p. 11

6 The full letter may be found here

DATES FOR THE DIARY
ANNUAL NORDISK MEMBERS SEMINARS

Next year Nordisk is hosting the annual Members Seminars on the following dates:

Bergen
Tuesday 20 January - Hotel Norge, Nedre Ole Bulls plass 4

Gothenburg :
Tuesday 27 January – Elite Plaza Hotel, Västra Hamngatan 3

Oslo:
Tuesday 03 February – Norges Rederiforbund, Rådhusgaten 25

In these seminars, colleagues will explore key considerations when assessing litigation, review a recent case on damages, and provide an up-date on sanctions and the impact on the day-to-day operations of shipowners and charterers.

Invitations have already been sent so do please sign up and we look forward to seeing you there.

Photos:
Photos: Courtesy of (c) Kees Torn https://www.flickr.com/photos/68359921@N08/ (page 1, 3), Mats Sæther (page 5, 7)