

Don't put all your (Easter) eggs in one termination basket: a Good Friday for the Builder, but Buyers left hopping mad

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PRACTICES Litigation, International Arbitration, Commercial Contracts

Background

When the High Court has to consider the consequences of a termination of a contract, we always look at the case carefully to see what, if any, new arguments are gambolling in the fields of interpretation like spring lambs. This article considers the recent decision of the Commercial Court in *SLB v PAK* [2026] EWHC 449 (Comm).

Certain shipyards (“**Builder**”) had contracted with 10 SPV buyers (“**Buyers**”) to build and sell a series of 10 container and dry bulk vessels on materially identical shipbuilding contracts. While the judgment does not provide any details of the parties, it seems from a stock market announcement released on 3 March 2025 that the Builder was a number of subsidiaries of Yangzijiang Shipbuilding (Holdings) Ltd, which was a substantial shipbuilding presence in China. Eight of the Buyers appear to have been subsidiaries of a publicly traded company called Costmare Inc, whose 2025 annual report stated: “*Eight subsidiaries of the Company are engaged in litigation concerning the termination in 2022 of certain shipbuilding contracts due to the builder’s failure to provide the agreed refund guarantees within the set deadline.*”

As that annual report foreshadows, a dispute had arisen between the Builder and the Buyers. Article XA(f) of the contracts all required that a so-called ‘refund guarantee’ had to be issued by the Builder within 120 days. A ‘refund guarantee’, to be issued either by a first class bank, or well-funded parent company, is almost universally required by a buyer. Such a guarantee acts as security for the pre-delivery instalments that have to be paid by the buyer if (as is commonplace) the buyer does not obtain the security of having title to the vessel vesting in it prior to payment of the delivery instalment, and delivery itself. If the builder breaches the contract, the buyer can call upon the guarantor to repay the pre-delivery instalments. This is usually easier than pursuing the builder.

The contracts in question expressly provided that if:

“The [Refund Guarantee] is not delivered to the BUYER in accordance with the terms of this CONTRACT by no later than 120 days after the date this CONTRACT is amended, novated and restated or such later date as the BUYER may designate in writing from time to time” then “BUYER may terminate, rescind or cancel this CONTRACT by notice ... in accordance with the provisions of Article X”.

The Builder appears to have acknowledged in the ensuing arbitration that it did not deliver the refund guarantees and that this entitled the Buyers to terminate (as they did). However, while Article X (“*in accordance with which ...*” the termination was to take place) provided that the Builder was required to refund the pre-delivery instalments, it also said that after such refund “*... all obligations,*

duties and liabilities of each of the parties hereto to the other under this CONTRACT shall be forthwith completely discharged”.

The fact that termination “*completely discharged*” all liability was a problem for the Buyers in these contracts because the market appears to have risen after the contracts. The Buyers each sought to claim damages of “*between around USD 73 to 83 million for loss of profit and the cost of purchasing a substitute vessel*”, which is *prima facie* excluded by the wording of Article X.

To get around that, the Buyers sought to argue that they were entitled to terminate at common law on the basis that the Builder was in repudiatory breach of the contracts. If the Buyers could rely on a repudiatory breach then, per Lord Diplock in *Photo Production v Securicor* [1980] AC 827, “*there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future*”. Importantly that right would not be subject to the limitation under Article X, so the Buyers could seek to recover their loss of bargain damages. To argue that they had the right to terminate for repudiatory breach, the Buyers maintained that the obligation to provide a refund guarantee within 120 days was a “*condition*” of the contracts.

The significance of a condition

The significance of the term being a condition is that, as explained by Lord Scarman in *Bunge v Tradax* [1981] 1 WLR 711:

“A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end ... An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of breach ...”

The arbitral tribunal had already made a finding of fact that the failure to provide the refund guarantees within 120 days (so the breach relied on) was not so substantial as to entitle the Buyers to terminate, if Article X(A)(f) was just an innominate term as opposed to a condition. This being an arbitration appeal, the Buyers could not seek to go behind this finding of fact. Counsel for the Buyers got a drubbing on a few occasions for trying to do so:

“[43] Michael Ashcroft KC (who appeared together with Socrates Papadopoulos) at times impermissibly sought to go behind those findings of the Tribunal or to add to them. It is not open to the Buyers to do so ... [46] It is accordingly not open to the Buyers to advance any of these submissions which seek to undermine the Tribunal’s findings of fact and its findings as to the commercial background to the making of the SBC.”

The only option left for the Buyers was indeed to argue that Article X(A)(f) was a condition – such that *any* breach of the term (regardless of the consequences or seriousness) would entitle the Buyers to terminate.

The test to be applied

Whether a term is a condition is ultimately a question of interpreting the contract. Express wording can put the matter beyond doubt but is not indispensable. What matters is the “*... construction of that term in the contract in which it appears, in the light of the surrounding circumstances*”.

That means that each contract needs to be viewed on the basis of its own particular wording and commercial context. The authorities are replete with denigrations of counsel resorting to rely on numerous other cases to buttress their favoured interpretation. Per Leggatt J in *Tartsinis v Navona Management* [2015] EWHC 57 (Comm) at [62] it is:

“... seldom, if ever, helpful in deciding how to interpret particular contractual provisions to refer to a case in which a court has interpreted different provisions of a differently worded contract made in a different factual context.”

No presumption that time is of the essence in mercantile contracts

It has been said on occasion by the Court that in commercial or mercantile contracts, time was “*of the essence*” and that there was a presumption in favour of an obligation to do an act by a specified date being a condition.

One of the geneses of this suggestion is the case of *Bunge v Tradax* [1981] 1 WLR 711, where the Court considered that an obligation to give 15 days’ notice of readiness and the quantity to be loaded under a FOB contract (‘free on board’, where title in goods passes as they go over the ship’s rail) was a condition. Lord Lowry noted that “... *there are enormous practical advantages in certainty, not least in regard to string contracts.*” Many goods sold FOB are part of a string sale, where various sales and sub sales are back-to-back.

In *SLB v PAK*, however, Calver J rejected the Buyers’ argument that there was such a general rule: “*Labelling the contract to be of a ‘commercial’ or ‘mercantile’ character is not sufficient to infer that a stipulation as to time is of the essence.*”

The significance of certainty in commercial transactions

The Buyers sought to rely on the desirability of certainty to argue that the obligation to provide the Refund Guarantee within 120 days should be treated as a condition. The argument was that parties to commercial transactions should be entitled to know their rights at once and that, in the interests of certainty, a clearly expressed stipulation as to time ought to be strictly construed.

While Calver J adopted Gross LJ’s observations in *The Spar Capella* [2016] 2 Lloyd’s Rep 447 that certainty is “*a consideration of undoubted importance*” in the construction of commercial contracts, he was clear that it does not convey undue weight when determining whether a term is a condition or an innominate term. The reason for that is straightforward: if certainty were given too much weight, it would effectively create a presumption that **all** terms are conditions, because the operation of a condition will **always** be more certain than that of an innominate term. As Hamblen LJ explained in *The Spar Capella*, there is no such presumption; on the contrary, the modern approach is that a term is innominate unless a contrary intention is made clear.

The key, as Calver J and the Court of Appeal authorities before him emphasised, is to strike the right balance. On one hand lies the desirability of certainty; on the other, the undesirability of trivial breaches carrying disproportionate consequences. Classifying a term as a condition means the innocent party can claim loss of bargain damages regardless of the state of the market; but it also means that a breach of one day - here, providing the Refund Guarantee after 121 days instead of 120 - would entitle the Buyers to rescind the SBCs and claim potentially vast sums in damages.

Calver J held that where a contract has an express termination clause (even if it does not bring with it the full consequences of termination at common law), a “*more nuanced approach*” is called for. In

the present case, the interests of certainty were already fulfilled by the contractual right under Article X(A)(f) to terminate the SBCs and put an end to future performance obligations, without the full common law consequences of repudiation. As Calver J put it, the Buyer did not have to wait and see; he was not left in limbo. He could terminate after 120 days under the contractual machinery. It would simply have been more favourable to the Buyers if, at that stage, they could also claim damages for repudiatory breach - but there was no clear basis to suggest this had been agreed, and Article X(3) suggested otherwise.

Interdependence of obligations

The Buyers' argument that the Refund Guarantee obligation was interdependent with the Buyers' obligation to pay the pre-delivery instalments and, in turn, with the Builder's obligation to build and deliver the Vessels, was also rejected. If correct, then, by analogy with *Bunge v Tradax*, the obligation to provide the Refund Guarantee would probably be characterised as a condition, because (as Lord Roskill had put it) where a term has to be performed by one party as a condition precedent to the ability of the other party to perform an essential term, the term as to time for performance of the former obligation will in general fall to be treated as a condition.

In *Bunge*, that interdependence was clear: the sellers could not nominate the loading port until the buyers had given 15 days' notice of probable readiness, and so the contract simply could not be performed in accordance with its terms unless the notice was given. This was, as Lord Roskill stated, "*the most important single factor*" in the conclusion that the relevant term was a condition.

Calver J, however, rejected the Buyers' analogy to *Bunge*. The alleged interdependence between the Refund Guarantee and the payment of instalments did not exist. The payment obligation in respect of each of the three pre-delivery instalments under Article II.4(a)-(c) did not come into being if the Refund Guarantee was not provided; the Buyer's obligation to pay was simply deferred. If the Builders breached its obligation to provide the Refund Guarantee, the Buyer would not in turn be in breach of its own obligation to pay. Its position was, as counsel for the Builders put it, "*already baked in*" to the contractual machinery.

The obligation being an innominate term did not make the Contract commercially unworkable/absurd

Having concluded that the obligation to provide the Refund Guarantee was an innominate term, Calver J turned to address the Buyers' contention that this characterisation would make the contracts commercially unworkable. The Buyers painted a picture of a world in which a cynical yard could drag its feet in providing the Refund Guarantee while prioritising new, more lucrative contracts, leaving the buyer with only two unattractive options: rescind the contract with no entitlement to damages, or wait and see, not knowing whether the Vessel would ever be delivered.

Calver J was unpersuaded. The answer, as the Builders pointed out, was that this scenario ignored the comprehensive contractual remedies which had been agreed by the parties. The contracts dealt with delay, liquidated damages, and ultimately an option to terminate the contract. Any feet-dragging by the Builders was addressed by those contractual mechanisms, and if such conduct ultimately evinced an intention not to build the Vessel, then the Buyer would be able to terminate the contracts for repudiatory breach and claim loss of bargain damages in the ordinary way. The contracts were not, as the Buyers suggested, turned into a mere "*option*" by the innominate characterisation.

Furthermore, the arbitral tribunal had made a crucial factual finding - which the Court could not go behind - that “*while the absence of a refund guarantee and instalments would, as a matter of commercial reality, impede practical progress it was incorrect to suggest that the [contracts] would fall into unworkable disarray unless the obligation was construed as a condition*”. The contracts contained express provisions with agreed timescales addressing delay in progress, delay in providing the Refund Guarantee, and also delay in delivery, including liquidated damages and a range of rights of cancellation.

Calver J addressed the Buyers’ complaint that classifying the term as innominate would require them to maintain cash tied up indefinitely, in case the Refund Guarantee suddenly materialised and they were called upon to pay instalments within five days. The arbitral tribunal had rejected this submission on the facts, finding that there was “*no clear evidential weight for this argument*”. While not a point raised by Calver J, the Buyers would also presumably be entitled to recover damages for any additional costs incurred in maintaining financing over an extended period due to the Builder’s breach.

Conclusion

The judgment in *SLB v PAK* serves as a reminder that contractual termination rights and their consequences must be carefully considered at the drafting stage. Where a contract contains an express termination clause, the court will not lightly imply that contractual obligations are a condition carrying the full panoply of common law remedies. This has significant practical implications: if a party wishes to preserve its right to immediately terminate and claim loss of bargain damages upon termination, this must be clearly stated in the contract. Relying on a general understanding that “*time is of the essence*” in commercial contracts, or that obligations linked to payment should be treated as conditions, is not likely to work. The modern approach, as confirmed by Calver J, is that a term will be treated as innominate unless a contrary intention to make it a condition is made clear by the contract.

For parties contemplating terminating a contract, the decision is equally instructive. The first question must always be: what are the available grounds for termination, and what are the consequences of each ground? Where a contract provides an express right to terminate - as the shipbuilding contracts did in *SLB v Pak* - that right may be exercised with confidence, but the remedies available upon such termination may be limited to those expressly set out in the contract. To access the full suite of common law remedies - including loss of bargain damages - it will be necessary to establish that the defaulting party was in repudiatory breach. Careful analysis of whether that burden has been discharged will be necessary. It may be that a stitch in time, helping to demonstrate that the breach will be very long lasting, almost certainly saves many more stitches down the line.