English High Court Accepts Classification of Refund Guarantee Obligation As Innominate Term in Shipbuilding Dispute

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The English High Court recently confirmed in *SLB and others v PAK and others* [2026][1] that the obligation to provide refund guarantees in shipbuilding contracts within a specified timeframe constitutes an innominate term, not a condition. As a result, under the terms of the shipbuilding contracts, the buyers were entitled to terminate the contracts but not to loss of bargain damages.

Refund guarantees are generally considered to be the financial cornerstone of a shipbuilding project. They provide a buyer with security in the event they rescind the shipbuilding contract and the builder is unable to refund the instalments that have been paid. However, this obligation will not automatically be considered a condition simply because they are commercially important. Their classification will depend on the broader contractual context, including the relationship between the refund guarantee and the buyer's payment obligations, and whether the parties have otherwise protected the buyer through express rights or conditional payment provisions.

Background

This case arose from ten shipbuilding contracts between the buyers (special purpose companies) (the "**Buyers**") and the shipyard (the "**Yard**"), each for the construction of a container vessel (the "Vessels"). Under Article X(A)(f), the Yard was required to provide refund guarantees to secure the pre-delivery instalment payments within 120 days of novation[2] . The Yard failed to provide the refund guarantees within the timeframe, and the Buyers terminated the shipbuilding contracts because the Yard was in "financial default" under Article X(A)(f) because:

"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".

It went on to provide that, in the event of default, the Buyers could terminate the shipbuilding contracts and the Yard would have to repay any sums paid by the Buyers, plus interest.

The Award

The Buyers commenced arbitration claiming loss of bargain damages of between approximately US$73 million to US$83 million per Vessel. The Tribunal held that the obligation to provide refund guarantees was an innominate term, not a condition, and accordingly the Buyers were not entitled to such damages. The Buyers appealed.

The Appeal

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Mr. Justice Calver dismissed the Buyers' appeals, affirming that Article X(A)(f) was an innominate term rather than a condition. The court applied the established principles in *The Arctic* [2019][3] and *The Spar Capella* [2016][4] , which provide that a term is innominate unless it is clear from its wording or context that it is intended to be a condition and caution against courts being too ready to interpret contractual clauses as conditions. In reaching its conclusion, the court had noted that there was nothing in the wording of the clause to suggest that the parties intended it to operate as a condition, nor were there any commercial or practical considerations within the contractual framework that required such a classification.

The court's reasoning turned on several key factors:

Contractual wording: There was nothing in the wording of the clause to indicate the parties intended it to operate as a condition. The 120-day time limit simply denoted a deadline; it did not convert the term into a condition by way of a longstop date. Furthermore, the clause permitted the Buyers to extend the deadline "*from time to time*", indicating that the parties did not intend to treat the time limit as entitling termination at common law regardless of the seriousness of the breach.

Lack of interdependence: The court rejected the Buyers' argument that the refund guarantee obligation was interdependent with the payment of instalments and the delivery of the Vessels. Unlike in *Bunge v Tradax* [1981][5], where it was found that one party's performance was a condition precedent to the other party's ability to perform an essential term, the payment obligations for the first three instalments under the shipbuilding contracts did not arise until the refund guarantees had been delivered, meaning the Buyers' position was already protected by the shipbuilding contract. Additionally, the Yard remained obliged to build the Vessels regardless of whether the refund guarantees had been provided; failure to deliver the refund guarantees did not entitle the Yard to delay construction.

Buyers' funds not imperilled: While refund guarantees are considered the "financial cornerstone" of most shipbuilding contracts, the failure to provide them here did not imperil the Buyers' funds because they had no obligation to pay the pre-delivery instalments until the refund guarantees were delivered. The court had found in *The Hansa Murcia* [2012][6] , on which Calver J relied, that it was only if buyers faced a real risk of losing the instalments it has paid will the failure to provide a refund guarantee go to the root of the contract.

Contractual termination clause: The inclusion of an express contractual termination right was a strong factor supporting the innominate term classification. As in *The Spar Capella*[7], the court considered that certainty was provided by the contractual right to terminate for non-provision of the refund guarantees without providing for the full common law consequences of repudiation in the shipbuilding contracts.

Disproportionate consequences: The court noted that it made no commercial sense for a one-day delay in providing a refund guarantee to entitle termination with full damages, whereas substantial delays in delivering the Vessels (up to 209 days) would only trigger liquidated damages under the shipbuilding contracts.

Practical Implications

This decision confirms that whilst refund guarantees are commercially significant to shipbuilding projects, the obligation to provide them is likely to be classified as an innominate term rather than a condition. This limits a buyer's remedies if the builder fails to deliver the refund guarantees on time;

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a buyer may be able to terminate the shipbuilding contract, but loss of bargain damages will not automatically follow.

Each case will depend on the precise wording of the shipbuilding contract and the factual matrix, but in determining whether this is the case, the English courts will consider factors including: the terms of the relevant contract, the presence of express contractual remedies, the degree of interdependence (or independence) between obligations, whether the innocent party's substantive interests are genuinely imperilled by the breach and where minor or technical breaches could trigger disproportionate consequences.

[1][2026] EWHC 449 (Comm).
[2]Each of the shipbuilding contracts were novated because they had originally been entered into by the same original buyer.
[3][2019] 2 Lloyd’s Rep 603
[4][2016] 2 Lloyd’s Rep 447
[5][1981] 1 WLR 711
[6][2012] EWHC 3104 (Comm)
[7][2016] 2 Lloyd’s Rep 447

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