



When “No Later Than” Is Not Enough: Calver J on Refund Guarantees, Conditions, Innominate Terms and Commercial Common Sense

Henry Ellis

16 March 2026

In *SLB and others v PAK and others* [2026] EWHC 449 (Comm), handed down on 2 March 2026, the Commercial Court has confirmed that a shipyard’s obligation to provide refund guarantees within a specified time was **not** a contractual *condition*, even in a high value and complex shipbuilding project.

Calver J dismissed the Buyers’ appeals under section 69 of the Arbitration Act 1996 and upheld 10 unanimous LMAA arbitration awards. The decision is an important reminder that, in modern English law, putting a deadline on a term is not necessarily enough to transform it into a condition carrying automatic loss of bargain consequences, particularly where there is an express cancellation right contingent upon the passage of that deadline.

The judgment will be of particular interest to those drafting shipbuilding contracts, project finance documents and other complex commercial arrangements involving security, staged payments and bespoke termination regimes.

Ten big boxships, one missing “condition”

The dispute on appeal between the parties concerned 10 individual shipbuilding contracts (“SBCs”), each for 12,690 or 15,000 TEU container vessels, novated to SPVs within a shipping group, C Inc (together, the “Buyers”). The 3 defendant entities were all part of Z Co, the largest private shipbuilder in its country of incorporation, operating large, modern yards with ultra large drydocks (the “Yard”).

Each SBC adopted a familiar structure: a contract price of around US\$ 83-100 million, with 30% payable in 3 equal pre delivery instalments and 70% on delivery. The first 3 instalments were expressly “*in the nature of advances*” and were to be secured by a Refund Guarantee (“RG” or “RGs”) in forms prescribed by the SBCs: an on demand guarantee from a first-class Chinese bank, automatically increasing as instalments were paid and expiring on delivery or a long stop date.

The critical provision was Article X(A)(f), which 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 and in any such a case, the BUYER may terminate, rescind or cancel this CONTRACT... in accordance with the provisions of Article X.”

It was common ground that the Yard failed to provide the RGs within 120 days. The Buyers terminated between 138 and 140 days after novation and commenced arbitration, claiming eye watering loss of profit (for lost hire) and loss of bargain damages (for the cost of purchasing substitute vessels) of circa US\$ 1 billion inclusive of interest because by the time of termination, the market for such vessels had risen very substantially. There was no dispute that the Buyers had a contractual entitlement to cancel, but the claim for loss of bargain damages depended on the Buyers establishing repudiatory breach.

The arbitrations

In the arbitration, the Tribunal formed of 3 highly experienced maritime arbitrators that included a retired English Court of Appeal judge, found that the Yard was in breach of Article X(A)(f) and that the Buyers had validly exercised their contractual right of termination. However, it held that:

- » The obligation to provide the RGs within 120 days was an innominate term, not a condition; and
- » on the facts, the delay was not repudiatory at common law.

As a result, the Buyers were confined to the contractual remedy under Article X - essentially restitution of any sums paid (a circa US\$ 3 million advance payment) plus interest with no entitlement to loss of bargain damages.

The Tribunal also dismissed the Buyers’ claims that the Yard was in renunciatory breach of the SBCs on the basis that their conduct as a whole evidenced an intention not to perform the SBCs.

Permission to appeal

In March 2025, the Buyers applied for permission to appeal under section 69 of the Arbitration Act 1996 which Foxton J (as he then was) granted on the following single question of law: whether the Yard's obligation in Article X(A)(f) to provide a RG within 120 days of the novation of each of the 10 SBCs was a condition.

Calver J's answer was an emphatic "no".

The legal backdrop: Bunge, Spar Shipping and the modern classification of contractual terms

The judgment begins with a careful review of the leading authorities on the classification of contractual terms, starting with **United Scientific Holdings v Burnley BC**, moving through **Bunge v Tradax**, and then firmly into modern Court of Appeal territory: **The Spar Capella (Spar Shipping)** and **The Arctic**.

The key principles explained by the Judge can be summarised as follows:

- » First, whether a term is a condition, warranty or innominate term is, in every case, a matter of construction of the contract in its context. Labelling a contract "commercial" or "mercantile" would not be sufficient to infer that the parties intended a stipulation to be of the essence.
- » Second, unless it is clear from the wording or the contractual scheme that a term is intended to be a condition (or a mere warranty), the starting point for the modern approach is that it is innominate. The courts should not be "too ready" to interpret terms as conditions.
- » Third, although time stipulations in mercantile contracts will often be conditions - **Bunge v Tradax** is the classic example – that is not because there is any rigid rule or presumption to that effect. In **Bunge**, the buyer's 15 day notice of readiness was a condition because it was a necessary condition precedent to the seller's ability to perform its obligations; the contract collapsed without it. That interdependence of obligations was critical.
- » Fourth, whilst certainty was of great importance (particularly in string contracts), it would be necessary to balance the need for certainty against the undesirability of treating technical breaches as allowing rescission for breach of condition.
- » Fifth, as Popplewell J and the Court of Appeal made clear in **Spar Shipping**, the presence of an express contractual termination clause complicates the analysis. Parties can achieve certainty about their right to end future performance without automatically importing the full common law consequences of repudiation. A carefully drafted contractual right to cancel could fulfil the desideratum of certainty whilst avoiding the full common law consequences of repudiation for trivial breaches.
- » Finally, if at the time of contracting it is foreseeable that breaches of a term could range from the trivial to the grave then that is the hallmark of an innominate term. A condition, by contrast, is a term where any breach, however small it may be, carries the same, serious consequence.

The contractual architecture: remedies by design

One of the most important features of Calver J's reasoning is his emphasis on the contractual scheme that the parties adopted. The SBCs were carefully negotiated instruments that allocated risk and remedies with some care.

Article III provided a detailed liquidated damages regime for delay in delivery. There was no price adjustment for the first 30 days of delay. Between 30 and 120 days, liquidated damages accrued at US\$ 26,000 per day; from day 120 to day 210, at US\$ 28,000 per day, with a cap at 180 days of liquidated damages after the initial 30-day grace period.

If delay reached 210 days, the Buyers acquire a contractual right to rescind, but even then Article III.6 made clear that if the Buyers rescinded under this Article, their only recourse was to refund of prepaid instalments under Article X. It was those refunds that were to be secured by the RGs. Importantly, Article X.3 provided that:

"Upon such refund by the SELLER to the BUYER, all obligations, duties and liabilities of each of the parties hereto to the

other under this CONTRACT shall be forthwith completely discharged.”

Article X(A) set out six events under the heading “*Financial Default of the Seller*”, including the failure to provide a RG within 120 days of novation or such later date as the Buyers may designate. As the Judge observed, some of these relating to “*defaults of the Seller which may very well be non-financial defaults*”. The occurrence of one of those “defaults” would lead to an entitlement to cancel – but, again crucially, “*in accordance with the provisions of Article X hereof*”, including Article X.3

The parties therefore did not only provide for cancellation. They expressly agreed what happens after cancellation. Each party would walk away with a clean slate once any refunds have been made. No residual claims, no lingering liabilities, no loss of bargain damages.

Payment, security and performance: no Bunge style interdependence

The Buyers’ central commercial point was that in a modern shipbuilding contract, the RG is the “*financial cornerstone*” (per Cooke J in ***The Hansa Murcia***) of the deal. Without it, they argued, it would be unthinkable for any rational buyer to release large pre delivery instalments to a foreign shipyard. If the Yard failed to provide the RG within the agreed 120 days, that must surely amount to a breach of condition.

Calver J recognised (as did the arbitrators) that the RG was a “*financial cornerstone*” of the project but did not agree that meant the parties intended Article X(A)(f) to be a condition, for two reasons:

- » First, as a matter of contractual allocation, the risk that instalments might be paid without security simply did not arise. Article II.4 expressly provided that the first three instalments were not “*due and payable*” unless and until the RG had been received. If no RG, then no obligation to pay; if no obligation, then no default by the Buyer. The SBCs themselves included the protection the Buyers said they needed. Their money was never at risk. Just as in ***The Hansa Murcia***, a delay in providing the RGs would not go to the root of the contract unless funds were “*imperilled*”. The contractual scheme meant that could not be the case here.
- » Second, the RG obligation was not interdependent in the ***Bunge*** sense. It was a condition precedent to the Buyer’s obligation to pay advances, but not to the Yard’s obligation to build and deliver the vessels. The SBCs did not allow the Yard to down tools or to otherwise extend delivery dates simply because instalments were not yet due. Delay in delivery attracted liquidated damages; prolonged delay gave the Buyer a right to cancel. The contractual mechanisms at play for late construction and late delivery ran quite independently of the security arrangements. Further, and unlike in ***Bunge***, the RG obligation and the Buyers’ obligation to pay the instalments were not interdependent in the sense that breach of the Yard’s obligation would indefinitely put the Buyers in default of theirs; to the contrary, the Buyers’ payment obligations would be deferred.

The Judge also noted that the Tribunal had found, as a fact, that at the time of contracting there was no doubt about the Yard’s solvency or its ability to proceed with construction even if instalments were not immediately paid, and that the contracts would not “*fall into unworkable disarray*” without RGs. Calver J held the Buyers to those findings, following the decision in ***The Savina Caylyn*** to the effect that the only admissible facts on a section 69 appeal, including factual background for the purposes of any question of construction, were those found by the Tribunal.

“No later than 120 days”: deadline, yes. Condition, no.

The Buyers placed significant reliance on the wording “*by no later than 120 days*”. They argued this was classic long stop language, citing older authorities where “not later than” wording had been taken to make time of the essence.

Calver J accepted that this is, indeed, the language of a deadline. But that was not the end of the matter. The question remained: what, as a matter of contract, happens if the deadline is missed?

Two features were decisive:

- » First, Article X(A)(f) sits not in some standalone “*time of the essence*” clause, but within a “*Financial Default*” regime that enumerates various “defaults”, some of which (winding up, administration) were not even contended to be breaches, and

gave the Buyers a common response: the right to terminate in accordance with Article X. That was the context in which the deadline had to be construed.

- » Second, the 120 day deadline was expressly qualified by the words “*or such later date as the Buyer may designate in writing from time to time*”. This is the opposite of a rigid long stop. The Buyers were entitled to extend the deadline as often as they liked. As the Tribunal had put it, a deadline that can be moved unilaterally “*from time to time*” does not sit comfortably with any suggestion that time was of the essence.

Article X.3

Another “*strong factor*” in the Court’s reasoning was Article X.3. Having provided for termination in a variety of scenarios, and for refunds where appropriate, the SBCs then state, unequivocally, that:

“Upon 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 Buyers tried to argue that this clause would not apply where there was nothing to refund (for example, where no RGs had been provided and no instalments had been paid). Calver J disagreed. That would lead to an absurd distinction: accrued obligations would be discharged if the Buyer managed to pay one instalment before terminating, but not if it cancelled slightly earlier. The better reading, he held, was that Article X.3 expresses the parties’ intentions about the consequences of any termination under Article X: once any refund due has been made (or if none is due), the relationship is finished on both sides.

That is very difficult to reconcile with the idea that the same event - a failure to provide RGs within 120 days - was also intended to be a condition, giving rise to full common law loss of bargain damages. Why prescribe a mutual discharge if, at the same time, you intend one party to retain the right to sue for loss of bargain damages?

The outcome: no condition, no loss of bargain, appeal dismissed

Pulling these threads together, Calver J held that the Tribunal had applied the right legal test and that its conclusion was correct. In particular:

- » The obligation in Article X(A)(f) to provide RGs within 120 days (or any later date designated by the Buyers) is not a condition.
- » It is an innominate term, breach of which may or may not be repudiatory depending on its gravity and consequences in context.
- » In this case, the breach did not deprive the Buyers of substantially the whole benefit of the SBCs, especially given the contractual protections around instalment payments, delay, and termination.
- » The Buyers were therefore limited to the contractual remedy under Article X (termination and refund, with mutual discharge) and could not recover loss of bargain damages only because of the failure to provide RGs within 120 days.

The appeals were dismissed.

Permission to appeal

The Buyers applied for permission to appeal to the Court of Appeal under section 69(8) of the Arbitration Act 1996. On 13 March 2026, Calver J dismissed the Buyers’ application finding that following the judgment, there is no longer any question of wider public importance nor any special reason why this issue should be considered by the Court of Appeal.

For an appeal under section 69, the Court of Appeal has no jurisdiction to grant permission to appeal where it is refused by the first instance judge. That refusal of permission by Calver J therefore makes his judgment final.

Why this matters?

The decision is a timely reminder that sophisticated drafting will be respected. Where parties have gone to the trouble of constructing a detailed remedial regime, with staged remedies, express cancellation rights and an agreed consequence of termination, then the Court will be slow to superimpose a parallel, harsher common law regime unless the contract clearly calls for it. It is also another case in the growing body of jurisprudence that demonstrates that the modern approach in English law is not to construe terms as conditions unless the intention is clear, even where they are time stipulations in commercial contracts.

For those drafting shipbuilding and other project based contracts, three practical messages stand out:

- » First, if you truly want a time limit to be a condition, say so clearly and make the rest of the remedial scheme consistent with that intention. Do not expect the court to infer a condition from words such as “no later than” in isolation. As the Judge observed, the “starting point is...the language of the clause”.
- » Second, be conscious of interdependence. Where the ability of one party to perform depends squarely and obviously on a timely step by the other - as in **Bunge** - a time stipulation is far more likely to be treated as a condition. Where, as here, the contract has been written to function even if a particular deadline is missed, that argument is much weaker.
- » Third, think carefully about what you put into your termination and discharge clauses. Article X.3, which might have looked like routine boilerplate, turned out to be one of the Yard’s strongest points. If you agree that all “obligations, duties and liabilities” are to be “completely discharged” upon termination and refund, you may find it difficult later to argue that you also preserved a full suite of common law damages for that same termination event.

Henry Ellis of Quadrant Chambers, along with Sean O’Sullivan KC and Alexander Wright KC, both of 4 Pump Court acted for the successful Yard in the appeal, instructed by Stephenson Harwood.

Simon Croall KC, Henry Ellis and Jamie Hamblen of Quadrant Chambers, and Sean O’Sullivan KC of 4 Pump Court acted for the successful Yard in the arbitration. They were instructed by Stephenson Harwood, the team was led by Paul Ho in Shanghai and Vernon Sewell in London, assisted by Shirley Li and Evans Fei (Shanghai) and Galina Usorova and Neeraj Melwani (London). In the appeal, led by Paul Ho and Vernon Sewell assisted by Neeraj Melwani and Evans Fei.



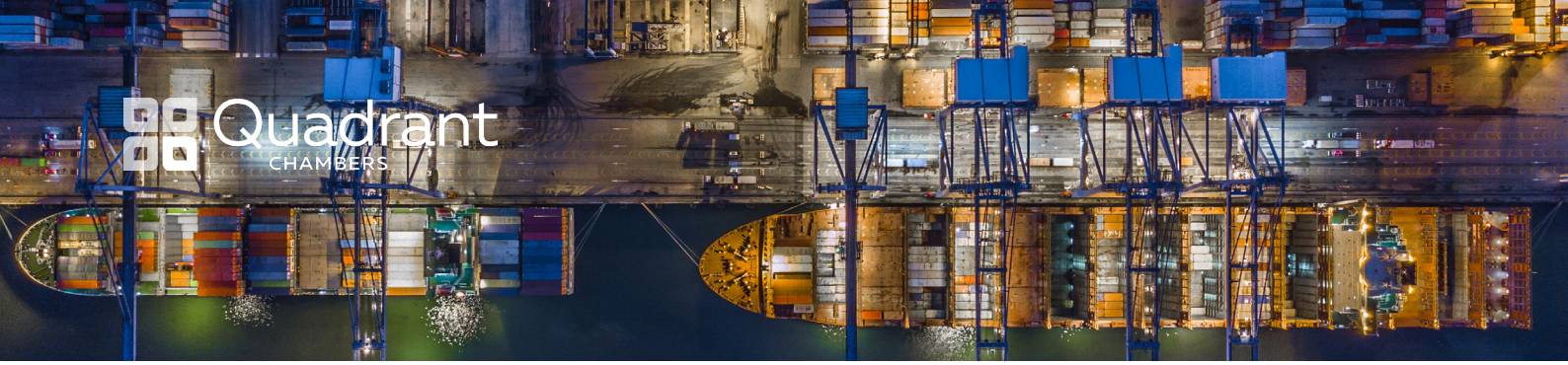
Henry Ellis

“Henry is unquestionably a lead counsel of his age and experience. He an excellent advocate and extremely clever at analysis of the adversarial position before trial.” (Legal 500, 2026)

Henry has a broad commercial practice spanning shipping, commodities, international trade, energy/offshore and construction (shipbuilding) litigation. He appears in the Commercial Court and the Court of Appeal and regularly acts in confidential arbitration (LMAA, LCIA, SIAC, SCMA, HKIAC, ICC and ad hoc). Henry is consistently recommended in all the major legal directories (Chambers UK, Legal 500 and Legal 500 Asia Pacific) as a leading junior barrister for shipping and commodities, where he is described as “the best shipping junior of his level of call”, “wise beyond his years” and “clearly destined for silk”.

[>See Henry’s full profile here](#)

henry.ellis@quadrantchambers.com



 Quadrant
CHAMBERS