

Ship Sale and Purchase: deposits not lodged, a debt or damages?

April 12, 2024 Fiona Cain, Milad Amani

PRACTICES Shipping Dispute Resolution, Ship Sale and Purchase, International, Shipping

The 2012 Norwegian Saleform (the “**NSF 2012**”) continues to form the contractual basis of the majority of vessel sale and purchase transactions (despite the introduction of SHIPSALE 2022).

Clause 2 of the NSF 2012 requires the buyer to lodge a deposit in an interest-bearing account with the deposit holder “*as security for the correct fulfillment*” of the agreement. The deposit, which will be 10% of the purchase price unless otherwise stated, must be lodged within 3 banking days of the agreement being signed and the deposit holder (which if not specified by the parties, will be the seller’s bank) confirming that the account has been opened. The clause also provides that the parties are, without delay, to provide the deposit holder with all the necessary documentation to open and maintain the account and that the deposit will be released on the joint instructions of the buyer and seller.

Such a clause has recently been considered by the English courts in the case of *King Crude Carriers SA and other companies v Ridgebury November LLC and Others* [2023] EWHC 3220 (Comm). The case concerned the sale of four tankers under agreements all concluded with materially identical (amended) NSF 2012 terms (the “**MOAs**”). After the parties had signed the MOAs, the buyers failed to provide the documentation required to open the deposit accounts and to lodge the deposits. The sellers, after tendering notices of readiness, gave notice cancelling the MOAs and commenced arbitration. The sellers sought to recover the amount of the non-lodged deposits from the buyers.

The arbitral awards were appealed to the Commercial Court, where the sellers argued that the condition precedent in Clause 2, i.e. the provision of the relevant documents to enable the accounts to be opened, should be treated as satisfied, on the basis of the doctrine of *deemed fulfilment*. This would assist the seller in its claim to recover the deposit as a debt rather than as damages (i.e. the full amount of the deposit without having to prove loss as they would for damages). The doctrine of deemed fulfilment dates back to Lord Watson’s judgment in the 19th century Scottish case in *Mackay v Dick* (1881) 6 App Cas 251, where the payment of the purchase price was subject to the condition precedent of the machine passing a test, which it did not, so the buyer did not pay. However, as the buyer failed to provide the agreed testing environment for a test to be completed, the court decided that the condition precedent was deemed to have been fulfilled because of the buyer’s lack of co-operation.

When it came to the sale of the vessels under the MOAs, the buyers argued (and the court agreed) that the condition precedent of confirmation of the opening of the interest-bearing account had not been established and as such the buyers were not obliged to lodge the deposit. The sellers considered that, without the doctrine of deemed fulfilment, the buyers were able to rely on their own failure of not providing the necessary documents in order to avoid lodging the deposit or to rid themselves of the MOAs without consequence. This was rejected by the court. The judge found that although the sellers did not have a right to recover the non-lodged deposit as a debt when they terminated the MOAs, they did have an entitlement in damages. Clause 13 of the NSF 2012

provides that on the buyer's default in these circumstances, the seller is entitled to "*compensation for their losses and for all expenses incurred together with interest*". The amount of damages that the sellers were seeking in the case was not disclosed in the judgment and its determination was remitted back to the tribunal.

SHIPSALE 2022

The level of compensation that a seller is entitled to in such a situation, is an issue which is now recognized in SHIPSALE 2022, where clause 18 expressly states that where a deposit is not lodged and the seller terminates the agreement, the seller has the right to claim from the buyer "*an amount equivalent to the Deposit*" as well as "*claim further compensation from the Buyers*" if the deposit does not cover the seller's direct losses and expenses plus interest. However, like clause 2 in the NSF 2012 and in the case, the deposit only has to be lodged after certain conditions have been satisfied. As a result, the outcome of the case would not have been altered if the parties had contracted on the basis of SHIPSALE 2022, rather than NSF 2012.