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Cover Story

Are intermediary brokers regarded as agents and owe fiduciary duties to the parties to a charterparty?

Introduction

It is trite that agents owe fiduciary duties to their principals, and an agent means one who holds power to affect the legal relations of his principal. In *CH Offshore Limited v Internaves Consorcio Naviero SA, Maritima Altair Petromar SA, Lamat Offshore Marine Inc.* [2020] EWHC 1710 (Comm), the court discussed whether intermediaries are agents and whether they owe any fiduciary duties.

Case background

The Plaintiff in the case was the owner of two vessels (the "**Vessels**") and its brokers were known as Seascope in the judgment. PDV Marina SA ("**PDVSA**") invited tender to enter into charterparties for two vessels from a number of entities which it considered might be interested and which included a company controlled by one of the Defendants. The invitation was in turn passed on to Seascope and the Plaintiff provided a proposed bid accordingly.

There were several rounds of negotiations but all bids pursuant to the tender expired as none of the bids complied fully with the requirements of the tender. However, one of the Defendants enquired whether PDVSA was still interested in the bid from the Plaintiff which had expired. Having obtained confirmation from the Plaintiff that it was interested in renewing its proposal to PDVSA, Seascope provided a proposal to the Defendants who then submitted it to PDVSA. PDVSA later informed one of the Defendants that the offer had been accepted subject to details, and negotiations continued.

One of the Defendants later learned that PDVSA was looking to charter a second vessel and the Plaintiff offered the second vessel to one of the Defendants through Seascope and that Defendant passed the offer to PDVSA. Subsequently, the agreements for commission between the Plaintiff and the respective Defendants were signed (the "**Agreements**"), and the Plaintiff and PDVSA signed the charterparties for the Vessels.

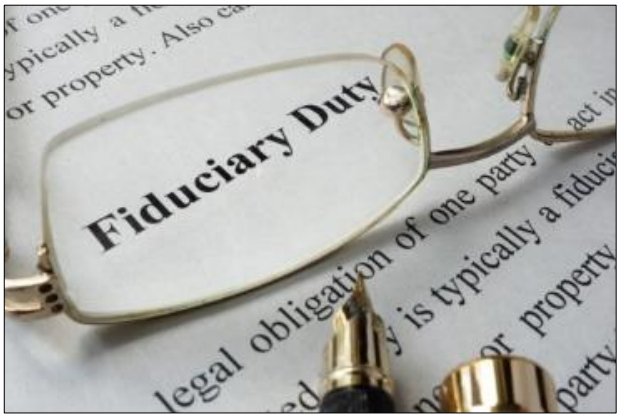
However, it was later discovered that a company within the PDVSA group has already entered into an agreement for two different vessels with another company so the Vessels were not needed. When no instalments of hire were made, the Plaintiff demanded redelivery of the Vessels. There were disputes as to the unpaid commissions under the Agreements and the matter went to arbitration. In essence, the Plaintiff alleged that the rate of hire paid by PDVSA under the charterparties was inflated by secret commissions, which were siphoned off by the Defendants in breach of the obligations owed to the Plaintiff.

The key issue before the Tribunal was whether the Defendants were to be treated as the Plaintiff's agents, either because they were the Plaintiff's brokers or because they were joint intermediary brokers. The Plaintiff argued that, if the Defendants were agents, the commission and the Agreements were unenforceable because they had been procured in breach of duty owed to the Plaintiff. If the Defendants were intermediary brokers, the Plaintiff then argued that their failure to disclose to the Plaintiff and PDVSA of the fact that they had an interest in keeping the spread between the rate of hire paid by PDVSA and the rate of hire as received by the Plaintiff as wide as possible to enable them to claim the maximum amount of commission was a breach of duty.

By a majority, the claims of the Defendants for commissions or damages under the Agreements succeeded. The Plaintiff then made an appeal to set aside the award.

Issue and the law

One of the questions before the court was: What duties are owed by an intermediary broker to its principals?



The court noted that the above question assumed that the relationship is one of agency which attracts fiduciary duties, so the court referred to *Bowstead & Reynolds on Agency* (21st Ed) and the relevant paragraphs reads: *"…not every person who can be described by the word "agent" is subject to fiduciary duties; and that a person who certainly is so to be described may owe such duties in some respects and not in others. Hence it is said that there may be a "non-fiduciary agent", and that in some functions an acknowledged agent may not act as fiduciary at all. Rather than talk of a "non-fiduciary agent" it seems better to say that where an agent does not act in a fiduciary capacity (e.g. because he simply carries out specific instructions), this is a reflection of the*

scope of his duties and the boundaries of the equitable rules."

There is a clear finding of fact by the Tribunal that the Defendants were not acting as more than mere intermediaries and could not be regarded as agent of either party to the charterparties. Further, neither the Plaintiff nor PDVSA appeared to have interest in the precise amount of the commission which would be paid to the various brokers involved.

Given the above findings of fact, the court held that the Defendants were not agents in what *Bowstead* refers to as the "full legal sense" in that they did not have the power to bind either party. Further, the commercial relationship between the Plaintiff and the Defendants did not justify interference by the imposition of the full scope of fiduciary duties, and the nature of the intermediary relationship in the circumstances was such that it could not be said either of the party to the charterparties was entitled to the "single-minded loyalty" of the Defendants and the obligations of a fiduciary.

The court further doubted if the Defendants could be regarded as the Plaintiff's agent at all as they were not acting for the Plaintiff who had its own broker i.e. Seascope. Even if intermediary brokers owe some fiduciary duties, the scope of those duties is limited to reflect the limited role which they carry out. For pure intermediaries, their only role and authority was to transmit the communications of the one to the other. Accordingly, the duties on such intermediaries are to communicate messages honestly.

The Plaintiff argued that there was a breach of duty because the Defendants were pulling the parties apart by seeking to increase the differential between the amount paid and the net amount received. However, the court held that, if the only duty is to transmit communications honestly then no such duty was breached by the underlying commercial motivation on the part of the Defendants to maximise their commission, and in fact there was no finding by the Tribunal of dishonesty on the part of the Defendants. The Defendants who were not agents did not have a duty not to put themselves in a position of conflict.

The Plaintiff also sought to argue that the Defendants had a duty to disclose the full facts of the transactions. The court held that the only fact that the Plaintiff did not know was the commercial position of PDVSA which underlay the terms which were negotiated and agreed in the charterparties. Whilst the duty on an intermediary is to pass on communications honestly, the case laws do not support any wider duty to disclose details of the commercial position or the Defendants' "interest" (i.e. widening the spread between what is paid and received) when the mere rationale of their involvement was to earn commission.

Conclusion

This case clarifies intermediaries' positions and their duties. In sum, intermediary brokers are not agents and do not owe any fiduciary duty to the owners/charterers. Even if they are subject to some fiduciary duties, the duties are confined to communicating messages of the one to the other honestly.

Globalisation to be reshaped by coronavirus

World trade was slowing in 2018 as protectionist policies were put in place and the US-China trade war ramped up, and the lockdown measures introduced as a result of the cornavirus outbreak seems to have put the brakes on globalisation. In a report titled *Down But Not Out?* published by the Economist Group, the Economist Intelligence Unit believes that as multinational companies adapt to the current climate and build resilience into their operations, retreating from international commerce is unlikely to be desirable or profitable. The report suggests there will be a greater focus on diversifying supply chains away from a single country and instead throughout a region. This trend is already taking place in Southeast Asia, with countries such as Vietnam benefiting as interest shifts from China. Well-resourced companies will be better placed to build redundancy across multiple points in their operations. They also may benefit from having the capacity to act more slowly and deliberately, ensuring that their investments are equipped to pay off in the long term and respond to future crises. The report concluded that policymakers and country investment promotion offices would be wise to appeal to firms as they look for sustainable and diversified solutions. The result could well lead to a new chapter for globalization, with international commerce stretching more fully across the globe.

Antong owners get China stock market ban

Guo Dongze and his brother Guo Dongsheng, who respectively hold 35.76% and 18.56% stakes in the Shanghai-listed container shipping firm Antong Holding, were found responsible for a series of unreported loan guarantees, related party transactions and lawsuits. The Guo brothers received a lifetime ban from China's securities market after a serious breach of disclosure rules. Former chief financial officer Li Lianghai, who also involved in the misconduct, was prohibited from participating in China's securities market for five years. The Guo brothers already had their shares frozen by the Chinese court last year for alleged unauthorised use of corporate funds and provision of loan guarantees worth millions of US dollars. China Merchants Group later took over the de facto control of Antong in a bailout deal. As a major carrier in China's coastal trade, Antong boasts a fleet of 114 boxships with more than 140,000 teu in total capacity, ranking 16th in Alphaliner's top 100 liner shipping carriers list. It floundered in financial distress in recent years, with a net loss of RMB4.4bn in 2019. Antong is now in negotiations with creditors to further restructure its debt.

Cruise ship deliveries may be extended with orders at record high

According to Lloyd's List Intelligence's latest Shipbuilding Outlook, Coronavirus has had huge impacts on the cruise and ferry sectors and this will be reflected in shipbuilding orders and deliveries this year. Prior to the coronavirus outbreak, the Cruise Lines International Association industry group predicted 32 million passengers would travel on cruise ships this year, up from 30 million in 2019 and a record year. It was against this backdrop of heightened demand that orders for new cruise vessels accelerated in recent years and why the current order book for the sector currently stands at a record high. However, six months into the year, with cruise operations suspended indefinitely and many lines putting ships into layup, those deliveries as well as those in the long-term order book could be brought into question. It is expected that many deliveries of new cruise vessels will be delayed in 2020. The pandemic has put pressure on travel and tourism businesses ahead of the summer season in the northern hemisphere. Even though the cruise ship companies have an unusually loyal customer base, eager to travel again, the risks of catching coronavirus and the added impact of social distancing rules at sea place a significant burden on operators. The industry not only faces the maintenance costs of keeping ships in good shape for when holidays can restart but also significant cash outflows as customers claim refunds for cancelled trips. Even with the expected delays in deliveries, the fleet will grow too fast, given that the demand all but disappeared with the pandemic. New orders will therefore be few. Removals from the fleet, however, will likely be firm due to a combination of decreased demand and the fact that the average age of cruise ships globally is quite old, particularly for smaller vessels.

Singapore to invest in dozens of maritime startups

As part of an initiative backed by the Maritime and Port Authority, maritime start-ups in Singapore are to get S$50m (US$36m) of new investment. Seeds Capital, the investment arm of Enterprise Singapore, will oversee the development which aims to drive the growth of the maritime sector through technology and innovation. It will invest in more than 50 startups that develop solutions to improve operational efficiency and safety across the different segments of the maritime sector. Enterprise Singapore, a government agency championing enterprise development, believes that strengthening the capability of the maritime sector will in turn enhance the resilience of key economic pillars such as the logistics, manufacturing and wholesale trade sectors, which are reliant on smooth and efficient global supply chain routes.

Fimbank Plc v Discover Investment Corp

[2020] EWHC 254

In this case, the freezing order obtained by way of *ex parte* application was discharged by the Court on the basis that there was no good arguable case on the merits. The Court considered the claimant's failure in providing an accurate and full picture of facts to be a significant failure that the freezing order shall be discharged.

In this case, the defendant, Discover Investment Corp ("**Discover**"), was the owner of the vessel "Nika" (now "Nord") which transported a cargo of wheat from Ukraine to Egypt under the bills of lading. The claimant, a Maltese bank named Fimbank Plc ("**Fimbank**"), claimed that it became the lawful holder of the bills of lading pursuant to agreements with AOS Trading DMCC ("**AOS Dubai**"), the ultimate buyer, under which Fimbank financed AOS Dubai's purchase of the cargo. AOS Trading and Shipping ("**AOS Egypt**") was named as the notify party on the bills of lading.

The cargo was discharged by Discover in Egypt to AOS Egypt which was then consigned to a bonded warehouse pending delivery to AOS Dubai's buyers. Fimbank alleged that the cargo was later released upon the presentation of forged bills of lading. Fimbank still held the original bills of lading and received no payment. The matter was reported to the police in Egypt and Fimbank notified Discover of a possible claim under the bills of lading.

Subsequently, the parties negotiated a standstill agreement, under which Discover promised not to sell or otherwise transfer title to the vessel, and Fimbank promised not to arrest or otherwise interfere with the use or trading of the vessel during a standstill period. Nonetheless, Discover completed a sale of the vessel for €5.8 million under an MOA concluded during the standstill period.

Fimbank aimed to pursue arbitration under the bills of lading and obtained an *ex parte* freezing order against Discover. During the *inter partes* hearing for Fimbank's application for the continuation of the freezing order and Discover's cross-application for the discharge of the freezing order, the Court considered that the effective cause of loss was not the shipowner's discharge of the cargo but rather Fimbank becoming a victim of a fraud that had nothing to do with the shipowner. Important evidence like a tripartite stock management agreement between AOS Dubai, Fimbank and a third party was not produced nor referred to in the *ex parte* application. The Court found that the factual position disclosed by the evidence and

leading to those conclusions was significantly fuller and materially different from that presented in the *ex parte* application. The factual circumstances known to Fimbank were not fully disclosed, which were factual circumstances material to any serious consideration of the merits of the claim, and the Court was thereby disabled from giving proper scrutiny *ex parte* to the proposition that Fimbank had a good arguable case on the merits.

The Court also took the view that even there was a real risk of dissipation of assets in this case, the lack of full and frank disclosure by Fimbank on the standstill agreement was sufficient to justify the discharge of the freezing order.

Therefore, the freezing order was discharged on the basis that there is no good arguable case and the factual circumstances relevant to the possible merits of Fimbank's intended substantive claim were not fully and fairly presented to the Court in the *ex parte* application. The Court further emphasized that, even if the Court concluded that the merits were sufficient to pass the good arguable case threshold, they would not be sufficiently strong to outweigh the overall justice considering the failure in presenting the facts fully and fairly.

Keppel FELS Ltd v Owner of the vessel "SONGA VENUS"

[2020] SGHC 74

This case sheds light on the priority of the claims and payment out of the proceeds of sale of a vessel, in particular, where a claimant has a possessory lien over an arrested ship in respect of a claim which, but for the possessory lien, would have priority only as a statutory lien in admiralty, and whether the claimant's costs incurred in enforcing a claim be accorded the same priority as the possessory lien or the statutory lien.

The Plaintiff, Keppel FELS Ltd ("**Keppel**"), offered various services to the vessel, Songa Venus ("**Vessel**"), which include repairs, modifications, supply of materials, equipment and berthing. Since the owner of the Vessel failed to pay for the services provided, Keppel commenced *in rem* action against the Vessel and acquired an order for the arrest of the Vessel. The Vessel was subsequently sold *pendente lite* "without prejudice to [Keppel's] possessory lien over the Vessel, if any", and Keppel was awarded the sum of US$1,169,370 in the final judgment after the Vessel was sold for US$3,749,463.14. The Court also held that Keppel had a possessory lien over the Vessel since part of its claim related to the said services.

After that, the intervener, Songa Offshore SE ("**Songa**") instituted a separate *in rem* action against the Vessel to recover the sums outstanding under a seller's credit agreement which was secured by a second preferred mortgage over the Vessel. Songa obtained US$34,200,000 in the final judgement.

Keppel made the present application for determination of the priority of claims and payment out of the sale proceeds. Keppel submitted that the costs attributable to the portion of Keppel's claim for which Keppel had a possessory lien should be accorded the same priority as Keppel's judgment debt in respect of the portion of its claim for which it had a possessory lien ("**Disputed Costs**"). Songa submitted that the Disputed Costs should be accorded the same priority as statutory lien.

It is undisputed that, as a general rule, in actions against the proceeds of sale of property arrested *in rem*, costs have the same priority as the claim in respect of which they have been incurred. The issue here was whether the proper application of the general rule should result in the Disputed Costs being

accorded the same priority as a possessory lien or a statutory lien.

The Court considered that a key principle is that the determination of priority is an equitable jurisdiction, the admiralty court therefore has adopted a broad discretionary approach by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstances of each case.

In principle, a possessory lien holder may retain possession of the *res* until he has been paid what is due to him, in return for its release. Since the possessory lien holder need not initiate legal proceedings to enforce the possessory lien, such payment for the release of the vessel would be a full payment without incurring any legal costs to enforce the underlying claim protected by the possessory lien. Nonetheless, once the possessory lien holder surrenders the vessel to the admiralty court, he would have to commence an in rem action against the vessel, in order to obtain a judgment so that he could participate in the distribution of the proceeds of the judicial sale of the vessel. Therefore, in order to make good the admiralty court's undertaking to put the possessory lien holder "exactly in the same position as if he had not surrendered the ship", the admiralty court ought also to protect the possessory lien holder's costs incurred in the said in rem action to the same extent as the possessory lien itself.

As a result, the Court found in favour of Keppel and considered it just, equitable and principled, to accord the Disputed Costs the same priority as the portion of Keppel's claim for which it had a possessory lien.

Splitt Chartering APS v SAGA Shipholding Norway AS

[2020] EWHC 1294

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In this case, the issue concerns whether the fourth claimant namely Stema Shipping (UK) Ltd (“**Stema UK**”) satisfied the meaning of “the operator” of a ship in Article 1(2) of the Convention on Limitation of Liability for Maritime Claims 1976 (“**Convention**”) in order to limit its liability under the Convention. The Court has provided valuable guidance on the meaning of the phrases “the manager of the ship” and “the operator of the ship” in Article 1 of the Convention.

In December 2015, the railway line between Dover and Folkestone was damaged by storms. Stema UK was then contracted by a consortium called the South-East Multi-Functional Framework (“**SEMFF**”) to provide rock armour for repairs. Stema UK purchased the rock armour from its associated company called Stema Shipping A/S ("**Stema A/S**"). The third shipment of rock armour was transported on the barge STEMA BARGE II which was owned by Splitt Chartering APS (“**Splitt**”). The barge arrived at Dover on 7 November 2016 and was anchored. However, the barge began to drag its anchor on 20 November 2016 because of the storms. Unfortunately, an undersea cable owned by RTE Reseau de Transport d’Électricitié SA ("**RTE**") had been damaged by the anchor of the barge during that time.

RTE claimed for damages and it is undisputed that the claim of RTE was subject to limitation pursuant to Article 2 of the Convention. Whilst RTE accepted that Splitt and Stema A/S were entitled to limit their liability, it denied that Stema UK was also entitled to limit its liability. In particular, RTE did not accept Stema UK to be an operator of the barge as it took the view that the operator should have a “direct responsibility for the management and control of the ship” and it did not believe Stema UK had done anything to operate the ship. RTE considered that Stema A/S should be the operator instead of Stema UK. Nevertheless, Stema UK argued that it was the operator of the barge as well as its manager if necessary.

Although the principal debate concerned the meaning of “operator”, the Court considered appropriate to have some understanding of the meaning of “manager” of a ship, who shall be the person entrusted by the owner with sufficient tasks involved in ensuring that a vessel is safely operated, properly manned, properly maintained and profitably employed to justify describing that person as the manager of the ship.

Regarding the meaning of “operator” of a ship, Stema UK argued that it includes those who operated the machinery of the vessel and those who sent those persons on board to operate the machinery of the ship, which was “more physical” and involved “the business of doing” rather than “telling people what to do”. On the other side, RTE submitted that it is the person or entity which had direct responsibility for the management and control of the ship as regards the commercial, technical and crewing operations of the ship.

The question before the Court was whether the ordinary meaning of “the operator of the ship” in the context of the Convention could include those who physically operate the ship or those who cause the ship to be physically operated. The Court held that the ordinary meaning of “the operator of a ship” includes the “the manager of a ship”, as well as the entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of the ship’s business.

On that basis, the Court held that it is appropriate to treat Stema UK as the operator of the barge as its employees were the only persons on board who were operating the machinery for a period of two weeks to ensure that it was safely ballasted. Therefore, Stema UK was entitled to limit its alleged liability under the Convention.

COVID-19: How does it affect your shipbuilding contract (SAJ form)?

Introduction

The recent worldwide lockdown due to COVID-19 has caused disruptions to the shipping industry in manifold, from shipbuilding, charter-party to cargo delivery and etc.

This Q & A intends to discuss the impacts of the COVID-19 lockdown on parties to shipbuilding contracts, particularly for those adopting the shipbuilding contract in the Shipbuilder Association of Japan (SAJ) form (the "**SAJ Contract**").

Article VII of the SAJ Contract specifies the delivery date of the finished vessel. Many time-sensitive issues, such as the date of payment, the date for removing the vessel from the yard, the insurance coverage period and the determination of parties' respective rights to rescind the SAJ Contract are hinged on the delivery date. Therefore, any delay to the actual delivery date can potentially create chain reactions on other time-critical issues.

If the shipbuilder is late in the delivery of the vessel, can a buyer rescind the SAJ Contract?

In general, under paragraph 4 of Article VIII of the SAJ Contract, a buyer may rescind the SAJ Contract if the delivery is delayed more than 210 days after the delivery day stipulated in the SAJ Contract. The buyer has a choice either to rescind the contract or to consent to a postponement of delivery date to a specific future date understood and agreed by the parties.

If the delivery of the vessel is delayed for less than 210 days, the delivery date will either be extended for "permissible delays" specified in Article VIII or give the buyer a right to reduce the contract price for the vessel for "impermissible delays" as set out in Article III.

Is the worldwide lockdown due to COVID-19 a permissible delay for the delivery of the vessel?

Paragraph 1 of Article VIII of the SAJ Contract stipulates that if, at any time before the actual delivery, either the construction of the vessel or any performance required as prerequisite of the delivery of vessel is delayed due to a list of "permissible delays" which includes epidemics and quarantines, the delivery date shall be postponed for a period of time which shall not exceed the total accumulated time of all such delays. COVID-19 and the worldwide lockdown

will likely fall within the category of epidemics or quarantines as permissible delays and give rise to a right for the shipbuilders to extend the delivery date.

However, if the delay in delivery happened prior to the COVID-19 or the cause of the delay is irrelevant to the COVID-19 lockdown, then shipbuilders will not be entitled to claim any extension of the delivery date under Article VIII.

What is the procedure required for shipbuilders to claim extension of the delivery date?

Under paragraph 2 of Article VIII, the shipbuilder will need to notify the buyer within 10 days after the occurrence of any cause of delay for which it claims entitlement to the postponement of the delivery date. Similarly, the shipbuilder will also have to notify the buyer within 10 days after the date of ending of such cause of delay. This strict notification duty means that shipbuilders should closely monitor the development the worldwide government lockdown policy to prevent inadvertently losing their right to claim for extension of the delivery date.

The shipbuilder should also notify the buyer of the period, by which the delivery date is postponed by reason of such cause of delay, with all reasonable dispatch after it has been determined, failure of the buyer to object to such postponement of the delivery date shall be deemed as a waiver of its right to object.

Is the shipbuilder entitled to claim extension of the delivery date if permissible delay and non-permissible delay occur contemporaneously?

Yes. Under paragraph 3 of Article VIII, if permissible delay(s) and other delays of a nature not specified in paragraph 1 of Article VIII occur together, the shipbuilder will still be entitled to claim postponement of the delivery date.

Under paragraph 3 of Article II of the SAJ Contract, buyers pay shipbuilders the Contract Price by four installments. The 1st installment is paid upon issuance of the government license for exporting the vessel. The 2nd installment is paid upon keel-laying of the vessel. The 3rd installment is paid upon launching of the vessel. The last installments is paid upon delivery of the vessel. However, due to the economic downturn caused by the COVID-19 lockdown, some buyers fail/refuse to pay for the Contract Price for short of liquidity and some even refuse to take delivery of the vessel.

What can the shipbuilder do if the buyer fails to pay for any/all of the installments of the Contract Price or refuse to take delivery of the vessel?

Under paragraph 1 of Article XI, the buyer shall be deemed to be in default of performance of its obligations under the SAJ Contract if it fails to (a) pay any of the 1st to 3rd installments to the shipbuilder within 3 days after such installment

becomes due and payable, (b) pay the 4th installment to the shipbuilder concurrently with the delivery of the vessel, or (c) fails to take delivery of the vessel when it is duly tendered for delivery by the shipbuilder under Article VII.

Under paragraph 2 of Article XI, for any default in payment, the buyer shall pay the full amount with interest on such installment from the due date to the date of payment to the shipbuilder. For the failure to take delivery of the vessel, the buyer shall be deemed in default of payment of the 4th installment and shall pay interest thereon.

Under paragraph 3 of Article XI, the delivery date is automatically postponed for the period of default by the buyer; and if the default by the buyer continues for a period of 15 days or more, the shipbuilder may rescind the SAJ Contract and retain any installments paid to it.

Upon rescission of the SAJ Contract, under paragraph 4 of Article XI, the shipbuilder will be entitled to sell the vessel to a third party and claim for loss and damages against the buyer if they exceed the amount of the forfeited installments paid by the buyer.

Conclusion

The legal implication of different events under the SAJ Contract is by no means straightforward and legal advice should be sought whenever necessary to protect your rights.

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