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How to walk away – and how not to – under the MYBA Memorandum of Agreement

The second-hand yacht market is currently very active, with many yachts changing hands. When a yacht is sold, the standard form MYBA Memorandum of Agreement (the "**MOA**", the key provisions of which are set out at the end of this article) is often used to govern the sale process.

The mechanics of a sale under the MOA can be briefly summarised as follows:

1. The parties agree a Sale Price (box 6);
2. The Buyer pays a Deposit (10% of the Sale Price) (box 7 and clause 25);
3. A date is agreed (the "**Trials Date**") by which the Seller must have made the vessel available for sea trials and a condition survey (together, the "**Trials**") (box 9 and clause 26); and
4. A further date is agreed by which the sale must have completed (the "**Completion Date**"), following which the Deposit and the balance of the Sale Price are released / paid to the Seller. The MOA states that in relation to the Completion Date "*time being of the essence*" (box 12 and clause 30).

Under English law, "*time being of the essence*" means that the agreed Completion Date is a "condition" of the contract. As a result, even a small delay to the completion of the sale will enable the Buyer to terminate the MOA. To reflect this, Clause 20 provides that if the Seller does not deliver the vessel by the Completion Date the Buyer may terminate the MOA, recover the Deposit and claim other costs/interest from the Seller.

The situation may arise where, having entered into the MOA and paid the Deposit, the Buyer or Seller decides that it no longer wishes to proceed, and seeks to withdraw from the MOA. For example, the Buyer may have learned something about the vessel that makes the Buyer unwilling to buy it, or the

Buyer may have seen another vessel come onto the market which it would rather buy instead. Alternatively, the Seller may come to the conclusion that the Buyer is not serious about the purchase, or may have found an alternative buyer willing to pay more for the vessel.

Buyer withdrawal

Unless the MOA has been amended to allow the Buyer's withdrawal from the MOA (or the Seller agrees to let the Buyer out), the Buyer will not be able to lawfully withdraw from the purchase until the Trials have taken place. As stated in clauses 26 and 27 of the MOA, the Buyer has rights to terminate the MOA if the vessel proves unsatisfactory during the Trials – a wide discretion in the case of sea trials ("*if for any reason whatsoever ... the Buyer considers that the Vessel has not performed to his/its satisfaction*") and a narrower discretion in the case of a condition survey (there must be a significant defect which, in the view of the appointed surveyor, affects the operational integrity of the vessel/its systems or renders the vessel unseaworthy).

However, the Buyer has no right to terminate prior to the Trials taking place. If the Buyer were to try to walk away, the Buyer would, itself, be in breach of the MOA, likely resulting in the forfeit of the Deposit, which is likely to be substantial.

The only exception would be if the Seller evinced an intention not to be bound by the terms of the MOA (for example, if the Seller clearly states that it will not sell the vessel to the Buyer). This statement by the Seller would be a "repudiatory breach" of the

MOA. In such circumstances, the Buyer would have the option to accept the repudiation, bring the MOA to an end and then claim damages arising from the repudiation (including the Deposit, if not returned by the Seller).

But what if the Seller simply fails to make the vessel available for the Trials by the Trials Date? This would be a breach of the MOA, but probably not a repudiatory breach which would allow the Buyer to terminate and walk away. This would be a breach of the MOA, entitling the Buyer to damages for any losses suffered, if any, but the Buyer would have to continue with the MOA or else risk losing the Deposit if he were to walk away. Consequently, the Buyer would have to wait until the Completion Date passes (with no delivery) before terminating the Contract and benefiting by the provisions of Clause 20.

This might not matter too much if the Trials Date is very shortly before the Completion Date, but this could be significant if there is a long period of time between the Trials Date and the Completion Date where the Buyer would remain locked into the MOA for this period. The position would be further complicated where, although late, the Seller seeks to tender the yacht for Trials before the Completion Date. In those circumstances, care would need to be exercised by the Buyer to avoid unwittingly to have waived its right to reject the yacht where "*In the event that the BUYER or his/its nominee does not attend such Sea Trial or otherwise take advantage of this facility then the BUYER shall be deemed to have accepted the VESSEL...*" – Clause 26.

So as to ensure flexibility, when considering entering into a MOA for the purchase of a yacht, it may be sensible for the Buyer to amend the MOA so that:

1. Time is also made "of the essence" in relation to the Trials Date allowing the Buyer to terminate if the Trials are not made available by the Trials Date; and
2. Clause 20 also applies in the event that the Seller does not make the vessel available for the Trials by the Trials Date.

This should ensure that any failure by the Seller to make the vessel available for the Trials by the Trials Date will allow the Buyer to withdraw, recover the Deposit and claim the other costs allowed by Clause 20.

Seller withdrawal

As above, the Buyer has a route to get out of the MOA once the Trials have taken place where it has a wide discretion to reject the vessel. However, the Seller has no such route. The only way the Seller can

withdraw is if the Buyer fails to pay either the Deposit or (following an acceptance of the vessel following the Trials) the balance of the Sale Price.

As above, if the Seller fails to comply with its obligations under the MOA, the Buyer will be able to recover the sums provided for in Clause 20. Further, if the Seller commits a repudiatory breach of the MOA, the Buyer will be able to claim damages caused by that breach.

If the Seller wishes for more flexibility, it may be sensible for the Seller to amend the MOA so that the Buyer's obligations, including payment, are made "time of the essence" (thereby allowing the Seller to cancel the MOA if any obligation is not met), or include a provision allowing the Seller to terminate for its own convenience at any time (although the Buyer is likely to resist this amendment).

Conclusions

If not amended, the MOA contains potential pitfalls for the unwary Buyer or Seller. In a hot market (as currently exists) Buyers should be aware that they cannot withdraw from an MOA until at least the Trials have taken place. Conversely, Sellers should be aware that as long as the Buyer complies with the payment deadlines, the Seller cannot lawfully withdraw from the MOA. For these reasons, it is likely to be prudent for the parties to consider amendments to the standard from MYBA MOA in order to properly protect their positions.

MYBA MOA – Key clauses

Clause 20:

If the SELLER fails to deliver the VESSEL and the documentation in accordance with Clauses (18) and (21) of this Agreement the reasonable expenses of the BUYERS Condition Survey in accordance with Clause (27) and the BROKERS remuneration become solely the obligation of the SELLER and the Deposit shall be released to the BUYER with interest, if any. The BUYER shall be entitled to claim from the SELLER further compensation for provable losses and expenses reasonably incurred following from such failure of the SELLER, together with interest thereon at the rate of Libor + 2% per annum.

Clause 25:

Within four banking days of the signing of this Agreement the Deposit of 10% of the Sales Price shall be paid by the BUYER to the Stakeholder and held subject to the terms and conditions of this Agreement. Interest, if any, is to be credited to the BUYER.

Clause 26:

Prior to the date at [box] (9) and prior to the VESSEL being placed ashore for the Condition Survey, the SELLER at his/its own expense is to make the VESSEL available to the BUYER for a Sea Trial of a maximum of four hours duration at a time to be mutually agreed between the parties hereto. It is at the BUYERS discretion to take advantage of this facility. In the event that the BUYER or his/its nominee does not attend such Sea Trial or otherwise take advantage of this facility then the BUYER shall be deemed to have accepted the VESSEL subject to Clause (27). Notwithstanding what is contained elsewhere in this Agreement, if for any reason whatsoever and in his/its discretion the BUYER considers that the VESSEL has not performed to his/its satisfaction on the Sea Trial and he/it does not therefore wish to proceed with the purchase, he/it shall give written notice of his/its rejection of the VESSEL to the SELLER or the BROKER within twenty-four hours of completion of the Sea Trial or prior to the placing of the VESSEL ashore for the Condition Survey as mentioned in Clause (27) hereof, whichever shall be the sooner. In the event that notice of rejection is given by the BUYER, all expenses incurred by the BUYER, if any, in relation to such Sea Trial shall be payable and shall be paid from the Deposit and the balance of the Deposit shall be returned to the BUYER forthwith and this Agreement shall thereafter be deemed null and void. If such notice of rejection is not given, the Sea Trial shall be deemed to have been to the BUYER'S satisfaction.

Clause 30:

On or before the Completion Date identified at [box] (12) herein, subject to any extension agreed pursuant to Cause (27(a)(i)). the Deposit shall be released and the BUYER shall pay the balance of the Sales Price to the SELLER or the BROKER, as indicated and required by the SELLER, by means of a bank transfer to the designated account and order of the SELLER on delivery of the VESSEL in exchange for the documentation set out in Addendum One.

Clause 31:

Should the Deposit not be paid in accordance with Clause (25) the SELLER shall have the right to cancel this Agreement and the SELLER shall be entitled to claim compensation from the BUYER for provable losses and expenses reasonably incurred, together with interest thereon at Libor + 2% per annum. If the BUYER fails to pay the balance of the Sales Price on or before the Completion Date in accordance with Clause (30), the SELLER shall have the right to cancel this Agreement forthwith, in which case the Deposit with interest, if any, shall be released to the SELLER and the BROKER(s) and shared equally on a 50:50 basis between the SELLER and the BROKER(s) following deduction of any outstanding expenses relating to the Sea Trial and the Condition Survey, as agreed liquidated damages. Thereafter the SELLER shall not be entitled to any further claim for compensation from any party under this Agreement.

Contact us



Kirsty MacHardy

Partner, London

T: +44 20 7809 2440

E: kirsty.machardy@shlegal.com