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Superyacht webinar – A guide to the sale and purchase of yachts

Introduction

On Thursday, 10 February 2022 Stephenson Harwood's superyacht team hosted a panel discussion, chaired by Ezio Dal Maso, a senior associate in the firm's Paris office, on the process that goes into buying and selling second-hand yachts. The topics covered ranged from financing and surveying yachts to sellers' and buyers' rights under the new Mediterranean Yacht Brokers Association ("**MYBA**") Memorandum of Agreement ("**MOA**"). The speakers were:

- Toby Maclaurin – Sales Director at Ocean Independence;
- Valentin Martin – Surveyor at Navalmartin;
- Guy Huss – Senior Business Development Manager UHNW at Banque Internationale à Luxembourg ("**BIL**"); and
- Kirsty MacHardy – Partner at Stephenson Harwood in London.

This article summarises the key points raised during the panel discussion.

The Superyacht Market

At the beginning of this month, Bloomberg published an article titled "*World's Super Rich Drive 77% Surge in Superyacht Sales Last Year*". Indeed, the sale of 887 superyachts in 2021 was driven not only by low interest rates and the Covid-19 pandemic, but also by the bumper markets that fuelled USD 1 trillion in gains for the world's 500 richest people. While the US has been a key player in terms of this creation of wealth, issues surrounding (i) the focus on European yacht builders with a more up-market luxury brand perception, (ii) the complexities and tax-implications of delivery outside the US for non-American buyers, and (iii) the private banking limitations encountered

by US-based buyers, has allowed the rest of the world to participate in the surging market.

As Toby Maclaurin noted, in the past the industry has been subject to a history of booms and busts and it is difficult to forecast how long for this trend will last. It is against this background that the merits of a second-hand yacht purchase need to be assessed by reputable experts in their respective areas.

Brokers

Toby pointed out that brokers are increasingly faced with the phenomenon of "speed buying and speed chartering", whereby the record number of transactions are required to be done in record time. The concern raised as a result is whether the client is buying the right yacht and doing so on the right commercial terms. While broker accreditation is a crucial step in achieving this, brokers hope that the industry does not become so over-regulated that the traditional role of providing impartial and unbiased advice and building trust can no longer be fulfilled.

Surveyors

Val Martin shared his experience in dealing with the increased speed of transactions that also impacts the way in which surveyors carry out their work. For example, the prospect of a sea trial lasting only four hours is one that is fraught with risk. This is because the transaction will undoubtedly involve several checks that need to be carried out. These range from pre-purchase technical condition surveys, which detect any malfunctions, pending repair jobs, emissions data and the condition of engines, metal thickness, pipes leakage, corrosion, and osmosis, to sea tests aimed at checking noise levels, vibration values and fuel consumption. While the resulting survey report will help guide the buyer with price negotiations, it also means that surveyors are often faced with immense pressure to process large

quantities of data within a short time span. The surveyor's job is further complicated by the fact that there are several domains in which wear and tear and fatigue are particularly difficult to identify as part of a S&P survey. This includes the fatigue of a diesel engine and the wear and tear on a paint job, which are measurable to an extent, as well as other aspects like underlying cracks in a yacht's structure that are more difficult to reveal. Essentially, no stone can be left unturned when surveyors advise their clients.

Lenders

It is important to note that the role of the lender is not to provide *funding* for a yacht acquisition to those who cannot afford to buy, operate, or maintain a yacht over time, but to provide *solutions* to owners and buyers. Such solutions range from leveraging a depreciating asset, optimizing cashflow, and using liquidities to invest in assets gaining in value to producing returns on investments.

In performing this role, the lender compares the yacht, its main form of security, against several factors. First, lenders analyse the average time that would be needed to sell the yacht, as the goal is to cover the loan exposure but also to minimize operational expenditure and limit the potential depreciation. Second, the yachts must be built to technical and security standards permitting a commercial registration. Third, lenders consider the size of the vessel. BIL, for example, focusses only on yachts between around 30 to 75 metres, thereby excluding the low end and top segment of the market due to risk concentration considerations.

In conducting such reviews, lenders like BIL often rely on other experts, including in-house and external legal counsel, to ensure that the yacht acquisition and its finance and loan implementation are handled securely and swiftly.

Lawyers

The very active second-hand yacht market means that lawyers, including our team at Stephenson Harwood, have extensive experience with the provisions of the standard form MYBA MOA, which is often used to govern the sale process.

The new MYBA MOA form implements the following changes, the mechanics of which are likely to have an impact on the way in which yacht transactions are carried out:

- There is now a new express warranty in Clause 15, which pertains to the description of the yacht. This places the onus on the

seller to ensure that the yacht is accurately described, as a breach would otherwise be actionable.

- Clause 17 now makes clear that the sea trials and the condition survey cannot commence until the deposit has been paid. This makes commercial sense particularly for sellers who want to keep hold of the yacht until the buyers are "locked in".
- As discussed in more detail below, there have also been some changes to Clauses 26 and 27, which deal with the buyer's right to terminate the MOA if the vessel proves unsatisfactory during trials.

Buyer's withdrawal

Unless the MOA has been amended to allow the buyer's withdrawal (or the seller agrees to release the buyer), the buyer will not be able to lawfully withdraw from the purchase until the sea trials have taken 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.

After the sea trial, the buyer has the very wide right to terminate under Clause 26 if for any reason whatsoever the buyer considers that the yacht has not performed to its satisfaction. If the buyer does exercise this right it is entitled to have the deposit returned, save that the buyer will have to pay incidental costs, such as those incurred at the specific request of the buyer during the sea trials. Importantly, if the buyer wishes to reject the yacht it must provide notice of rejection within 24 hours of completion of the sea trials otherwise it is deemed to have accepted the yacht. Similarly, if the buyer does not carry out the sea trials, it is deemed to have accepted the yacht.

Clause 27 provides for a narrower discretion whereby the buyer is entitled to undertake a condition survey. Provided that this reveals 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, the buyer has seven days from completion of the condition survey to give written notice either requiring the seller to make good the defect or rejecting the yacht.

After the condition survey there may be issues post-delivery if, for example, the yacht is not in the same condition or if defects are discovered that are beyond fair wear and tear. However, under Clause 28 the yacht is treated as unconditionally

accepted either on express acceptance of the yacht or where there is deemed acceptance after the agreed date by which the seller must have made the vessel available for sea trials and a condition survey. This avenue is therefore quite limited in nature. Alternatively, the seller's warranty under Clause 15 that the yacht is free from any debt, claim, mortgage, lien and encumbrance at the time of delivery, may require the seller to indemnify the buyer for any losses arising where, for example, the yacht is arrested due to a previous debt.

Seller's withdrawal

In turn, the seller's right to terminate arises where the buyer fails to pay the deposit or, following an acceptance of the vessel after the trials, the balance of the sale price. In addition, Clause 31 permits the seller in these respective circumstances to claim compensation for provable losses and expenses reasonably incurred plus interest, and to retain the deposit.

Conclusion

In a hot market (as currently exists) buyers and sellers should not only be aware of the factors impacting the work of brokers, surveyors, and lenders, but also the legal avenues available for them to properly protect their positions. It is the market awareness of skilled experts and legal advisors that can truly guide clients on the sale and purchase of second-hand yachts in a forward-looking and all-encompassing manner.

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