

# Used,



EU Superyacht Acquisition

## not abused

The combination of enhanced purchasing power due an advantageous exchange rate between the dollar and Euro, plus EU yacht owners and institutions seeking to offload incumbent assets during the post-GFC hangover, has resulted in a fortunate opportunity for those in the Americas seeking an attractively priced superyacht. Prior to battling for a bargain, INVICTUS's legal expert expounds on the legal intricacies to ensure one is forewarned and forearmed...

# T

**The purchase of a** used superyacht is usually an adventurous undertaking for every owner and has to be mastered with calculation, expertise and sensitivity so as to ensure one is not "buying a pig in a poke.>> So what are the factors that need to be taken into consideration when an American or a non-European citizen wishes to buy a used superyacht in Europe?

In most of the cases, a desired used yacht is searched for and selected through international yacht brokers, or even through dealers who sell the yacht in their own name and on their own account. Though today it is not uncommon that one meets directly in the bank that owns the yacht due to non-

performing credit operations because of the seizure and have an urgent need to sell: either through brokers or with the help of internal specialists. Since yacht brokers are involved in the majority of superyacht sales and acquisitions, I wish to propose only two basic tips based on my different experiences with brokers:

**1-** No matter how service-oriented and dedicated a broker is, his business model has been designed to achieve, as efficiently as possible, a commission for procuring the yacht, as well as (possibly) an involved network of partners. Understandably, to safeguard their interests brokers place emphasis on a purchase contract right from the beginning, which in particular mentions the involved broker (often on behalf of

both buyer and seller or in a consortial deal) as a party besides the seller and the buyer. This is no bad thing; it protects the broker from other parties trying to insert themselves into the deal and ensures the buyer/seller are clearly aware of the commission claims. However, again and again I receive prefabricated and unnecessarily complex contract templates submitted by brokerage organizations, whose legal contents are approved by the parties by concluding the contract but normally, even the brokers have no idea what the regulations mean from the perspective of the individual parties they are favoring or putting at a disadvantage, let alone whether or not they are currently legal. Therefore, I suggest you go for contracts drafted individually, profession-



ally and customized for the situation. Unfortunately a broker may treat this with suspicion, suspecting disadvantages for themselves and their legal status. However, the templates provided by their own industry associations and organizations are often followed blindly. The "Memorandum of Agreement, approved by the Mediterranean Yacht Brokers Association" is often used in the EU and can be seldom used without basic modifications in individual cases, especially for a super yacht. It is certainly not a template where one must only enter parties, yacht and price details.

My advice: Conclude two separate contracts: one purchase contract for the yacht exclusively between the seller and buyer and one broker contract between the party concerned and their broker.

**2** - The broker agreement or agreements should thus contain clear and transparent provisions—*not* leaving anything ambiguous—regarding which broker is representing whose interests, which service is rendered for the benefit of which party, and who will pay which commission and when. The defined services can include the period before and up to the conclusion of purchase contract, during the Deal-Closings and possibly after-sales. Thus, any creditor will get a true picture of the brokerage serv-

ice and a debtor will understand a commission, plus what kind of services he receives for which outcome fee. It is also particularly important to define exactly when the commissions will become due and how will these be paid. I have seen cases occasionally where brokers have already transferred their commission at the beginning of a Deal-Closing as their first deposit and also possessed authorization for that. If problems then emerge, damages for instance are not rectified properly, the purchase is delayed considerably, but the broker has already been paid and commitment to expediting the situation wanes. It simply doesn't work.

#### THE EARLY APPROACH

If a yacht is in an early selection process, the first major hurdle is a due diligence of history as well as all documents relevant for the yacht, which are required for condition and risk assessment in a paper form. This document survey is a basic and an important step to check whether the yacht should still be taken into consideration or not.

If the yacht is short-listed, it is important for the parties to give a thought with seriousness and buying interest, as more extensive work and cost is required at this point, which no one intends to shell out for

without purpose or plan. How to best develop these interests formally, shall depend strongly on the circumstances of the individual case. A future owner can have the intention to secure the preemption of a yacht for a certain time, in particular, for the preparation of a detailed yacht survey. For this, an option of "Letter of Intent" or preliminary agreement is available which either does not force the conclusion of the main contract or facilitates exit from the business initiation without major problems.

If the future owner already draws a conclusion at an early stage of the deal that this yacht could be purchased by him, then it can be an absolute advantage for all the parties to conclude a master purchase agreement with a cancellation option in case of unsatisfactory yacht survey. Deposit payments can also be agreed upon in such a case and are refundable in case of an unsatisfactory survey and withdrawal. It goes without saying that besides the cancellation option depending on the survey result, it should also include the option, to renegotiate the purchase price or to define the maintenance and re-fitting work on the ship spent by the seller.

Generally, since a used yacht is purchased by the owner, "as seen and evaluated without special warranty and guarantee," (this may be different through



a dealer, see below) this technical survey, which is regularly financed by the prospective buyer, is of vital importance when buying a used yacht. All state defects and risks that cannot be determined with the help of the survey and which are not known, visible and have concealed defects, shall be borne by the buyer. This can become a seven-digit risk factor for a super yacht! A good survey should always be conducted by professional yacht experts and include an extensive sea trial; sailing yacht surveyors usually come with a special rig and sailing expertise. The survey covers the entire boat, hull, interior structure and in particular the entire engine and peripheral technology. Additionally, I suggest a detailed interview with the captain and crew to obtain information on usage, experiences, problems, repairs and maintenance. A conversation with the service providers may also prove to be helpful. The result of the survey—the condition of the yacht with all faults and defects, short and medium term repairs, or refitting work required—should be documented as a report.

#### LEGAL FRAMEWORK

With any conclusion of a contract dealing with international business relations, one of the key questions to be clarified from the beginning is 'which law ap-

plies', because it sets the regulatory framework, including all consequences that, depending/based on the chosen jurisdiction, exhibit great differences concerning the purchase right

The US buyers generally live in the jurisdiction of US law and may know a little about harmonized US federal law, but rather often not be aware of the different laws of the Federal States. The purchase right is one of the few harmonized legal areas and is standardized in Article 2 of the Uniform Commercial Code (UCC). Unlike the term 'Commercial Code', these provisions are not exclusively applicable to merchants, but for Sale of Goods contract concluded between a trader and a consumer. The purchase of a yacht by a private owner would thus also be covered under the UCC. For the conclusion of the contract, the UCC requires that the parties first reach an agreement. Such an agreement usually represents the precursor to the final conclusion. A legal contract exists only with the obvious concluding intentions of the parties. If a US buyer purchases a yacht in the EU, the US law will rarely apply. The sellers and their representatives generally insist on the law of a EU country. The continental European law characterized by the Civil Law in many EU countries, is known in contrast as a highly differentiated legal regulation of the different types

If a US buyer purchases a yacht in the EU, the US law will rarely apply. Sellers generally insist on the deal being closed under the law of a EU country.

A good survey should always be conducted by professional yacht experts and include an extensive sea trial; sailing yacht surveyors usually come with a special rig and sailing expertise.



Exchange rates and market forces have combined to make the purchase of used yachts in the EU highly attractive...

**An interesting draft option for a superyacht purchase agreement, one that covers the jurisdictions of USA–Europe, is the agreement of the application of the international UN Sales convention, together with individual modifications.**

of contracts. The law is highly codified and recognizes the finest types of contracts and their nuances, particularly in the purchase right. One of the fundamental differences between American and the highly codified continental European contract law is, that the American law attributes considerable weightage to objective explanation, encouraging the party to step away from an otherwise determinable consensual resolution. This is particularly evident in the American 'Parol Evidence Rule', whereby appropriate evidence of negotiations and external circumstances before, or upon, conclusion of contracts that are likely to create a different explanation of the objective content interpretation, are generally excluded.

In cases when the parties encounter two different national legal systems, the parties have a choice of law pursuant to the international law. In the absence of explicit contractual choice of law, the applicable law is determined mostly by the Rome Convention on the law applicable to contractual obligations, replaced as of 17th December 2009 by the EU Rome I Regulation. Absence of an explicit or implicit choice

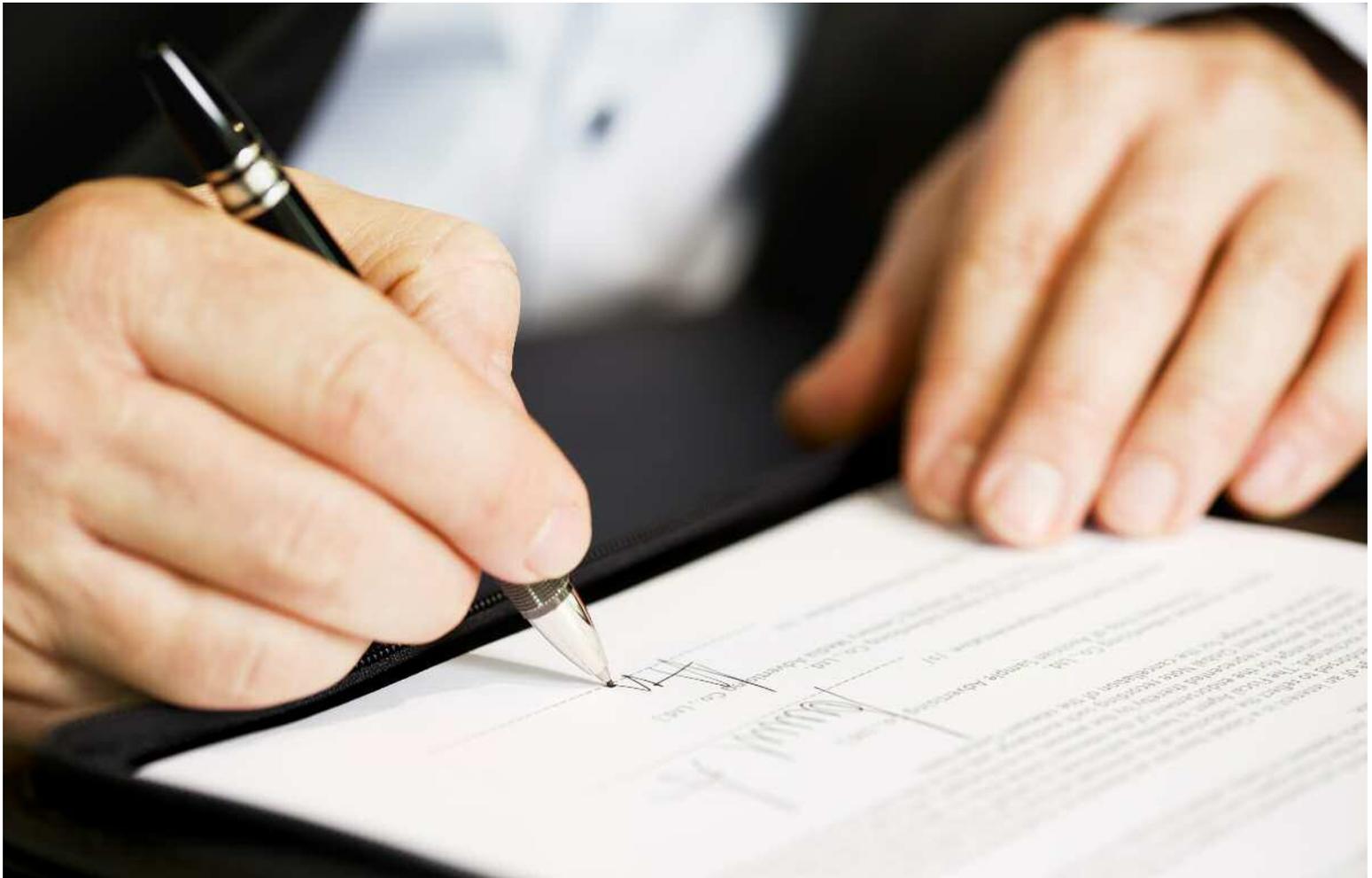
of law by the parties is subject to the Rome I Regulation—in this case the contract to the law of the country with which it is most closely connected. In principle, this mainly refers to the country in which the party who is to render the contracted service has his habitual residence, or is the principal place of administration, i.e. the location of the seller or even the delivery and handover location of the purchased yacht. This presumption provision can be disregarded only if a close connection with another country can be proven under certain circumstances.

An interesting draft option for a superyacht purchase agreement, one that covers the jurisdictions of USA–Europe, is the agreement of the application of the international UN Sales convention, together with individual modifications and complementary application e.g. of Swiss law.

The UN Sales Convention (CISG – Convention on the Limitation Period in the International Sale of Goods) is a purchasing law stipulated by UNO which is applicable when the seller and buyer of international B2B commercial transactions are based in two different

states. To date, 78 countries have ratified the CISG. These include almost all European and American States as well as Russia, China, Japan and Korea.

The Limitation Convention applies only to international transactions and avoids the recourse to rules of private international law for those contracts falling under its scope of application. The Limitation Convention establishes uniform rules that govern the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against another party, in order to assert a claim arising from the contract or relating to its breach, termination or validity. By doing so, it brings clarity and predictability on an aspect of great importance for the adjudication of the claim. Most legal systems limit, or prescribe a claim from being asserted after the lapse of a specified period of time, to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost. It also aims to protect against the uncertainty that would result if a party were to remain exposed to unasserted claims



**The Limitation Convention establishes uniform rules that govern the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against another party.**

for an extensive period of time. The Limitation Convention applies to contracts for the sale of goods between parties whose places of business are in different States if both of those States are Contracting States, or when the rules of private international law lead to the application to the contract of sale of goods of the law of a Contracting State. It may also apply by virtue of the parties' choice.

CISG is not applicable for international yacht purchases, but can be agreed upon as applicable and a law existing in many languages.

The buyer is entitled to claim for damages as per the CISG only if the seller fails to fulfill one of his duties as per the contract and without any other requirement and in particular due to a fault of the seller.

CISG proves beneficial even for the seller. For instance, by force of the German law, a recourse may claim an extension of the warranty up to five years. However, the CISG does not know of any such provision. Moreover, the CISG allows cancellation of the contract after delivery only if there is a "substantial" breach of contract by the seller and is declared within



**Amongst the long list of questions that should be answered in the contract stage is that of delivery, but also consider the yacht's route and clearing for tax implications!**

a reasonable time. The CISG is open for individual contractual changes, which can be designed in such a way that both the buyer and seller can have favorable legal positions in a balanced manner.

- Material-content of the CISG is a very good and flexible legal basis for both the buyer and the seller, since it allows withdrawal of provisions favorable to the other party in the contract.
- With only 101 articles, the CISG established a comprehensive but well arranged and easy to develop basis upon which to prepare international purchase contracts and eliminated the confrontation of private international law that is not easy to handle in practice.
- The CISG gives highest priority to a state-contractual set of rules and thus provides a transparent framework for the preparation of international purchase contracts.

In the event that a largely codified legal system is chosen, the parties-unlike in the US and Anglo-Saxon legal system-must not write separate 'Contract Codes', but can concentrate on specific content, right and obligations and modifications.

Therefore, the focus of a sale contract for a used superyacht should be the exact specification of the delivery target state of the yacht for Deal-Closing. This mainly includes the agreement of the work to be performed, if necessary overhauls, as well as obtaining manufacturer warranties possibly after overhauls, any guarantee, warranty, especially when buying from a dealer.

In addition to the technical condition of the yacht, the legal status and number of submitted certificates must be regulated in particular. These can be, for example: Engine Power Declaration, International Tonnage Certificate, Safety Construction Equipment, MCA Compliance, ISM System Classification certificates International, Suez Canal tonnage certificate, International load line certificate, Safety radio certificate, International oil pollution certificate, Shipboard oil pollution prevention plan, Certificate of Commercial Yacht Inspection, MCA code compliance, Radio



Certificate, MARPOL Annex V Garbage Certificate, MARPOL Annex I, International Oil Pollution Prevention Certificate, MARPOL Annex IV, International Sewage Pollution Prevention Certificate, MARPOL Annex VI, International Air Pollution Prevention Certificate and Anti-Fouling Systems Certificate.

The following points are important from the point of view of regulation:

What documents must be submitted in which form before, during or even after the closing?

Where and how is the delivery of the yacht to be conducted and what is the risk of loss from doing so; with which Register does the yacht travel?

What are the arrangements for the handover, how should the handover procedure be executed: deregister/register?

What is the payment procedure?

How will the completion take place: Which surveys are possibly required for a new flag at the place of handover?

Is the captain handing over and how does the transferring and training of a new captain take place?

The same shall apply for the crew?

Is a mortgage registered?

Lastly, I just wish to point out some sensitive and financially significant turnover tax-relevant aspects particular to yacht purchase, to avoid unnecessary tax payment during the acquisition and to avoid getting in the EU-existing taxation:

- The delivery/transportation of a yacht is considered complete when the yacht has reached its destination. The overall circumstances and circumstantial evidence is closed in the respective destination country. I had a case where a US owner purchased a yacht in Scandinavia which was expected to travel to the

Caribbean under its own power via Stockholm, Kiel (Germany), Southampton, Gibraltar, Cannes, Sardinia, Spain (Gran Canaria). Germany had been specified as the destination owing to errors in the treaty and in the customs clearance papers of the yacht: "The ship departs Kiel via Stockholm." The so-called "clearance" documented that the ship was in Kiel for two days and then in Martinique, St. Lucia, Antigua and St. Maarten. Based on a control report of the Finnish Tax Administration, a sales tax was levied for intra-Community acquisitions. It was assumed that the yacht was intra-Community acquired in the first country of destination Germany, which meant 19% VAT. An expensive and avoidable mistake!

- If a yacht is traveling for more than three years outside the EU, it loses "the good of the community character," as formulated by the customs, and must be taxed again! This means that EU-taxed boats, which are no longer stationed within the EU for more than three years, have lost their community character and must thus be taxable again in the community. The community character is retained if it can be proven that the boat was brought within the limits of any EU country before the end of the three-year period. Thus, the three-year period would have been renewed.

- Any non-EU citizen who operates a yacht in EU waters should not exceed 18-months. After this period he must leave the EU limits, but can re-enter later.

#### **CONCLUSION**

The purchase of a used superyacht in the EU can be as complex as their construction (see my article in INVICTUS Issue 10). Expensive mistakes and avoidable delays can be avoided however, provided one seeks out professional assistance!