

«BUYING OR BUILDING
A SUPERYACHT IN ITALY:
LEGAL SCENARIO»

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FIRST CASE: SHIPBUILDING AGREEMENTS AND INSOLVENCY OF THE SHIPYARD

1. A client executed a contract for the construction of motor yacht with an Italian shipyard
2. The contract did not have a certified date.
3. Parties' signatures were not authenticated by a Public Notary
4. The contract was not registered with the Harbor Master having jurisdiction over the place where the shipyard was based
5. The yacht was almost ready for delivery and all payments were made
6. In the meantime, the shipyard was declared insolvent

➤ WHAT HAPPENED TO THE YACHT AFTERWARDS THE SHIPYARD'S INSOLVENCY?

According to Italian law, the client was not the owner of the yacht, because the registration process of the build contract with the competent Harbour Master had not been completed.

Therefore, the client had to take part in the insolvency procedure as guarantor of the shipyard.

To the contrary, another client of the same shipyard who completed the registration of the build contract removed the yacht from the insolvent shipyard and completed its construction at another shipyard.

FIRST CASE: SHIPBUILDING AGREEMENTS AND INSOLVENCY OF THE SHIPYARD

➤ WHAT ARE THE LESSONS THAT WE LEARN?

1. Owners shall be protected through the title over vessels under construction.
2. According to the Italian Civil Code, the ownership of the yacht is generally transferred to the buyer upon completion of final tests and trials and upon acceptance of the yacht by the buyer.
3. Therefore, the traditional contractual clauses («as construction progresses») are not sufficient to ensure the transfer of ownership to the buyer, especially in cases of insolvency of the shipyard.

➤ WHAT ARE THE ACTIONS TO BE PERFORMED IN ORDER TO ENSURE THE TRANSFER OF OWNERSHIP IN THE NAME OF THE BUYER OVER THE YACHT UNDER CONSTRUCTION?

- The shipyard shall file the so-called Construction Declaration, indicating the name of the shipyard and of the buyer, the date of execution of the shipbuilding agreement, the date of commencement of works, any other event related to the yacht's ownership.
- The shipbuilding contract shall be registered in the Register of Vessels Under Construction.
- According to article 242 of the Italian Navigation Code, «any deed of creation, transfer or termination of ownership shall be registered in the Register of Vessels Under Construction». Those deeds are usually known as «Acknowledgement Deeds» («Atti Ricognitivi»)

Such Acknowledgement Deeds shall be filed:

- a) in case the contract provides that the ownership of the yacht is transferred at a certain stage, when such stage is reached and therefore the ownership will be transferred accordingly;
- b) in case the contract provides that ownership will be transferred “*as construction progresses*”, they shall be filed in order to declare the stage of construction that has been reached.

FIRST CASE: SHIPBUILDING AGREEMENTS AND INSOLVENCY OF THE SHIPYARD

➤ HOW CAN THE BUYER OF A YACHT UNDER CONSTRUCTION BE PROTECTED AGAINST THIRD PARTIES?

1. Make sure that the contract includes a clause which grants the transfer of ownership in the name of the buyer.

2. The shipbuilding contract and an acknowledgment deed shall be immediately registered with the competent Harbor Master.

3. Further Acknowledgement Deeds for additional payments shall be also registered.

SECOND CASE: WARRANTIES

➤ FACTS

1. A sale agreement of a yacht was executed between an Italian shipyard and our client.
The Agreement was subject to Italian Law.
2. After the delivery of the yacht, **some serious defects have been noticed by our client.**
3. The agreement provided for a **conventional warranty of two years.**
4. Since the shipyard promised to repair the defects, but never did, **an arbitration proceeding was commenced.**
5. An arbitral award has recently been issued, **condemning the Shipyard to compensate damages.**

➤ ISSUE

The sale agreement was assigned to a new owner in order to enjoy the tax advantages provided under the Maltese leasing scheme.

According to Clause 14.3 of the Sale Agreement:
“None of the Parties shall be entitled to transfer any of its rights or obligations under this Agreement without the prior consent in writing of the other Party. However, the Client shall be free to assign any or all of its rights under this Agreement to any bank or financial institutions or other financier in connection with the financing of all or any part of the Contract Price.”

Both former and new owner were attributable to the UBO, but the shipyard objected that:

- a) The new owner was not entitled to request the warranty works, because the conventional warranty was in favor of the former one.
- b) The assignment was not communicated in writing, even though there was exchange of correspondence with the shipyard, evidencing that it was informed about it.

SECOND CASE: WARRANTIES

The Sales Agreement also provided, under Clause 11.5, for liquidated damages in case of defects, specifically:

“It is agreed that, in the event of any defect connected with the warranty, the Shipyard undertakes to take prompt and proper steps to remedy to such defects, failing which the Shipyard shall be responsible for the following liquidated damages to be counted from the day of arrival of the Shipyard’s technicians when the Yacht is put at disposal in the premises of any suitable shipyard to be mutually agreed by the Parties which agreement shall not be reasonably withheld:

- *For the first 45 working days: no liquidated damages;*
- *From 46 up to 60 working days: €2.000,00 per day;*
- *From 61 up to 75 working days: €3.000,00 per day;*
- *From 76 working days: €4.000,00 per day.*

In any case, the maximum liability of the Shipyard per event triggering the warranty on account of the above liquidated damages caused by delay will be limited to the total amount of EUR 300.000,00 (three hundred thousand euros).”

➤ THE ISSUE COULD HAVE BEEN AVOIDED BY:

1. including more specific terms regarding the written consent of the assignment of the warranty clause;
2. providing for the validity in respect of any new owner of the yacht of the conventional warranty.

SECOND CASE: WARRANTIES

➤ WHAT HAPPENS IN THE ABSENCE OF CONVENTIONAL WARRANTIES?

1. Legal warranties, provided under the Italian Civil Code, apply.
2. Two different regimes are established for sale and shipbuilding agreements:

SALE AGREEMENTS	SHIPBUILDING AGREEMENTS
<ul style="list-style-type: none"> • The seller is obliged to guarantee the yacht against any defect which renders it improper for its use or significantly reduces its value. 	<ul style="list-style-type: none"> • The builder shall guarantee the yacht from defects or for non-compliance with the project.
<ul style="list-style-type: none"> • The owner may request the termination of the contract or the reduction of the price as well as the compensation of damages. 	<ul style="list-style-type: none"> • The owner may request the repair of damages at the builder's expenses, the reduction of the price; or the termination of contract (for defects which renders the yacht improper for its use). The compensation for damages may be only requested if the builder's negligence is proved.
<ul style="list-style-type: none"> • The deadline for claim of defects is eight days from discovery, which is not required if the seller has acknowledged the defects or has intentionally concealed them. 	<ul style="list-style-type: none"> • The deadline for claim of defects is sixty days from discovery, which is not required if the builder has acknowledged the defects or has intentionally concealed them.
<ul style="list-style-type: none"> • The limitation period is one year from delivery. 	<ul style="list-style-type: none"> • The limitation period is two years from delivery.

THIRD CASE: LETTER OF INTENT RELATED TO THE CONSTRUCTION OF A YACHT

➤ FACTS

1. A Buyer executed a **Letter of Intent related to the construction of a yacht with an Italian shipyard.**
2. The Letter of Intent included clauses with specific obligations, for example:
 - *e.g., The Buyer shall pay EUR, by way of deposit to the Shipyard, within and not later than If the yacht is not delivered because of the Buyer's default, the Shipyard will have the right to terminate the contract and retain the deposit paid by the Buyer.*
3. **The Buyer paid the deposit, but afterwards he decided to not continue the construction of the yacht (ie. He did not manage to obtain the finance to build the vessel)**
4. **An arbitration proceeding commenced:** the shipyard refused to repay the full Deposit to the Buyer
5. **The Arbitration Panel ruled in favor of the Shipyard, acknowledging the right of the latter to retain the deposit.**

➤ WHAT ARE THE REASONS BEHIND SUCH ARBITRATION AWARD?

Contrary to general rules of common law, the Arbitration Panel recognized that, in such specific case, the Letter of Intent was legally binding and had the actual effects of a proper contract, as it contained specific obligations.

In this case, the Letter of Intent was considered an actual Contract and did not have the sole function of demonstrating that negotiations had taken place with a commitment to sign a subsequent contract.

In addition, such principle was already stated by Italian courts, which ruled: *"The violation of such an agreement, as contrary to good faith, may give rise to liability for the failure to conclude the contract, which is to be qualified as contractual in nature due to the breach of the obligation assumed at the precontractual stage."* (inter alia, Italian Supreme Court, Joint Sections, Judgement no. 4628 of March 6, 2015).

THIRD CASE: LETTER OF INTENT RELATED TO THE CONSTRUCTION OF A YACHT

➤ WHAT ARE THE LESSONS THAT WE LEARN?

1. Buyers should be very careful about executing a Letter of Intent with a shipyard, since it could have the effects of a proper contract if regulated by Italian law
2. Therefore, Letters of Intent should be carefully examined before signing
3. Make sure that the Letter of Intent contains a clause regarding the applicable law.
4. If the Letter of Intent is executed with an Italian shipyard and in case of absence of the applicable law clause, Italian law will directly apply pursuant to Rome I Regulation.

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