

# THE CONTRACTS OF CONSTRUCTION OF YACHTS AND PLEASURE CRAFT: AN ITALIAN PERSPECTIVE ON THE MOST RELEVANT LEGAL ISSUES

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*The aim of the article is to provide a general overview of the Italian legislation and practice on the legal topics concerning the contracts of construction of yachts and pleasure craft, including an analysis of the most commonly adopted contractual clauses.*

*After an introduction on the nature of the contract of construction in relation to the discipline of contracts of sale and contracts “for work and materials” (contratto di appalto), the issues of the transfer of title/property and the registration of contracts of construction under the provisions of the Italian Navigation Code will be considered.*

*Furthermore, the certification under Directive no. 94/25/EC as amended by Directive no. 2003/44/EC will be described together with an overview of the main differences compared to the classification of the Registries.*

*An analysis of the possible causes of dispute between buyers and builders will complete the article with some comparative remarks regarding the discipline of the guarantee for defects, the rejection and the termination in the contracts of construction of yachts and vessels.*

**Keywords:** yacht; construction; work and materials; sale; CE marking; classification; liability; registration; leasing; defects; guarantee; consumer.

## 1. LEGAL NATURE OF THE CONTRACTS OF CONSTRUCTION OF YACHTS AND PLEASURE CRAFT

The legal discipline of the shipbuilding contracts of yachts and pleasure craft as well as the discipline of the contracts of construction of commercial vessels is

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mainly dominated by the provisions set out by the practice of the market which tend to complete the provisions of law.

Freedom of the parties in negotiating has developed a series of contractual clauses which make difficult for the authors to provide a clear and undisputed classification of this type of contracts of construction.

Furthermore while in the market of commercial vessels international organizations and entities (such as BIMCO – The Baltic and International Maritime Council and CMAC – China Maritime Arbitration Commission) offer a well known and worldwide accepted standard forms to be used for starting negotiations on shipbuilding contracts, in the market of the construction and sale of yachts, standard forms are less adopted. The main consequence is that each builder of yachts tends to propose to a client its standard wording of contract which is quite commonly adapted to the specific type of craft built by the builder and its technical characteristics and performances.

As far as the contracts of construction are concerned, the main distinction is between the contracts for large or sophisticated yachts and those relating to small or medium size craft. The first type of contracts are normally very complete and detailed (particularly about the expected performances and the right of terminating the contract and refusing the yacht in case the performances are not met) while the second kind of contracts are less meticulous and comprehensive.

Obviously, the content of the contract has a relevant impact on the legal nature of the same.

### **1.1. The contracts of construction under English law**

In order to approach the issue of the nature and qualification of the contract under common law, in particular English law, it seems appropriate to start with the wording of a clause which normally introduces a contract of construction.

This clause cannot be considered as the only possible standard clause but it offers some hints on the main obligations of builders and buyers arising out of the usual contracts of construction of yachts.

*The Builder agrees to design, engineer, build, outfit, launch, complete and deliver to the Buyer a (xxx) m LOA meter fiberglass motor yacht, identified with the construction yard number (xxx) (hereinafter the “Yacht”) in accordance with this Contract, the Technical Specifications, the Standard Equipment and the General Arrangement Plans*

*which are attached to form an integral and substantial part of this Agreement. The Buyer undertakes to purchase and to accept delivery of the Yacht from the Builder according to the terms and conditions set forth in this Contract.*

English law is often chosen by the parties as applicable law: under English law the shipbuilding contracts are traditionally considered as agreements to sell future goods by description to which the Sale of Goods Act 1979 applies<sup>1</sup>.

Nevertheless, the House of Lords has doubted whether such interpretation is actually proper<sup>2</sup>; in fact the additional obligations to design, outfit and build may lead to a different hybrid qualification. The solution, agreed also by the authors, might be to consider that the freedom of the parties may include further obligations which may be defined as preparatory stages for the delivery and transfer of the property but the contract is still to be considered as a sale of future goods by description with the related legal consequences as far as warranties and conditions are concerned. However it may be that the above mentioned further obligations might lead the interpreter to consider the contract as a contract for work and materials.

The obligations set out in the contract are a full set of obligations which define a variety of services offered by the builder to the buyer; in the contracts of construction commonly adopted the builder agrees to design, engineer, build, outfit, launch, complete and deliver a yacht to the buyer.

## 1.2. The contracts of construction under Italian law

According to Italian law, as far as the nature and qualification of the contract are concerned, the contract of construction could be qualified as a contract of sale or - more frequently - a contract for work and materials (*contratto di appalto*)<sup>3</sup> with a distinction between custom yachts and series yachts.

As to custom yachts, the obligations set out in the contract of constructions describe the number of services offered by the builder to the buyer which normally include the builder's duties to design, build, outfit, launch, and deliver

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<sup>1</sup> On the nature of shipbuilding contracts under English law see Lorenzon – Coles, *The Law of Yachts and Yachting*, London, 2012, 2.

<sup>2</sup> See *Stoczniia Gdanska SA v. Latvian Shipping Co* in [1998] 1 Lloyd's Rep 609 and *Hyundai Heavy Industries Co. v. Papadopoulos* in [1980] 2 Lloyd's Rep 1.

<sup>3</sup> In general on the contracts for work and materials (*appalto*) under Italian law see Musolino, *La responsabilità civile nell'appalto*, Padova, 2003; Musolino, *L'appalto Internazionale*, Milano, 2003, pagg. 135; Rubino – Iudica, *Dell'appalto Art. 1655-1677, Commentario del Codice Civile Scialoja – Branca*, Bologna, 1992; Rubino, *L'Appalto*, Torino, 1980; Giannattasio, *L'appalto*, Milano, 1967.

the yacht as described by the technical specifications attached to the contract. Articles 241 and 856 of the Italian Navigation Code (which also apply to the construction of yachts and pleasure craft) refer to the provisions regulating the contracts for work and materials set out in articles 1665 et seq. of the Italian Civil Code. The set of obligations of a modern contract of construction may easily explain the reason why, under Italian law, the shipbuilding is considered as a contract for work and materials (*contratto di appalto*)<sup>4</sup>.

On the other hand, as far as the series yachts are concerned, it may be considered whether the obligations of a builder contained in the contract may be better reconducted to the category of sale of goods instead of the category of contract for work and materials, being the sale and the delivery the main obligations of the contract rather than its design, building and outfitting that may be negotiated with the buyer upon or after stipulating the contract of sale.

In fact it usually happens that the builder may deliver a yacht or a pleasure craft which is already completed and built and that is not customized for a specific client save for minor details like colour of painting, materials used for interiors and equipment. The minor details about the outfit are adapted to the specific client but do not represent the main activity and obligation of the builder.

## **2. THE CLASSIFICATION AND MARKING OF YACHTS AND PLEASURE CRAFT**

### **2.1. The framework of EU and Italian legislation on CE marking**

The yachts have to be built in accordance with and comply with the provisions of the European Directive in respect of recreational craft and components no. 94/25/EC as amended by 2003/44/EC Category A. The adoption of the Directive caused the abrogation of art. 4-13 of the Italian legislative decree of 18 July 2005, n. 171 (*Codice della nautica da diporto*) where rules regarding project, construction and putting into the market of recreational craft were adopted.

Directive 2013/53/EU has repealed Directive 94/25/EC (adopted in Italy by means of the legislative decree of 11 January 2016, n. 6). This Directive is aimed at laying down requirements for the design and manufacture of products referred to in Article 2(1) and rules on their free movement in the European Union

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<sup>4</sup> Inter alia see *Soc. Sicarma Shipping c. Wartsila North America Inc.*, Cass. 22.11.2013, n. 26260; *Giacalone c. Avvocato*, Cass. 29.08.1990, n. 8949; *Soc. Eserc. Cantieri c. Soc. Cispa Gas Transport*, Arbitration Award 08.01.1987 in *Dir. Mar.* 1988, 513.

and in, particular, for the purpose of our presentation: (a) recreational craft and partly completed recreational craft.

According to the Directive a “recreational craft” means any watercraft of any type, excluding personal watercraft, intended for sports and leisure purposes of hull length from 2,5 m to 24 m, regardless of the means of propulsion.

On the other hand, art. 14 of the Italian Code regulating the recreational yachts (*Codice della Nautica da Diporto*) sets out that the construction for pleasure yachts over 24 m is regulated by the rules of the Navigation Code.

Recital 29 of the Directive mentions that it is crucial to make clear to manufacturers, private importers and users that by affixing the CE marking to the product, the manufacturer declares that the product is in conformity with all applicable requirements and takes full responsibility thereof. The CE marking is compulsory for the following products when they are made available on the market: (a) watercraft (b) components (c) propulsion engines.

The CE marking constitutes a presumption that the mentioned products bearing the marking comply with this Directive. It may also be added that the CE marking is positively considered by parties to the contract since it indicates the conformity of a product and it is the visible consequence of a whole process comprising conformity assessment.

The marking is compulsory for pleasure craft under 24 mt (hull length measured in accordance with the harmonized standard) and is effected by some entities (certifying body) authorized by each Member State.

## **2.2. The choice between Classification and CE marking of yachts**

As mentioned above, the marking is compulsory for yachts of hull length under 24 mt, being a necessary requirement of the product for being put into the common market; nevertheless, in addition to the CE marking, the parties may also agree in the contract to obtain a classification by a Registry, i.e. by a Classification Society.

The classification may be carried out by an independent Classification Society chosen by the parties among the members of the International Association of Classification Societies (IACS) to perform regular surveys of the yacht during the progression of the construction.

The Classification Society might coincide, as it happens for RINA, with the certification body which is authorized by the Italian authorities to provide the CE marking.

Art. 235 of the Italian Navigation Code sets out that the technical control on the constructions is carried out by RINA according to what is provided by the laws and regulations.

The choice between the CE marking and the Classification by a Registry may be relevant for contracts concerning yachts under 24 mt and may be an argument in the contractual negotiations. In fact a buyer may consider to ask the builder to provide – besides the CE marking which is compulsory – that the yacht is certified by a classification society.

The parties, in deciding the preferred option, will practically consider the positive and negative effects of the above-mentioned choice.

As a general note, the choice of having only the CE marking seems the easier and less burdensome option for both parties since this may imply also some smoother and straightforward negotiations. In fact the CE marking normally reduces the costs either for buyers or builders. The CE marking in fact does not expire and no further expenses have to be paid after the delivery of the yacht, since there are no periodical visits to be made.

It may be implied and concluded that the CE marking can possibly simplify some stages in negotiation of the contract somewhat empowering and holding responsible the builder towards the buyer.

Nevertheless, on the buyer's side, the choice to accept a yacht provided only with the CE marking has no doubt some disadvantages since no subsequent inspection is effected after the delivery of the yacht unless structural changes are made; in such case a buyer may consider preferable to have a periodical check on the yacht carried out by the Classification Society because this would put the owner in a better position as far as the use and exploitation of the yacht are concerned. However, this additional certification may imply further substantive costs.

Also the intervention of a Registry with classification purposes during the construction of a yacht will imply relevant expenses that, besides being normally paid by the builder, will increase the final price to be paid by the buyer.

On the other hand a yacht which is not certified by a Classification Society would provide less certainty and guarantee for second hand buyers, insurers or charterers in respect of the history of the yacht since, among other things, materials are originally checked and tested whilst maintenance of the yacht is not verified or checked. Therefore, a classification by a Registry might result in some advantages, among which the most relevant is surely that the yacht is checked during all stages of her life and not only when it is put available on the market.

In deciding to ask for the certification of a yacht by a Registry, the buyer should also take into consideration that their requirements are usually stricter and more severe than those required for obtaining the CE marking as is the case, for example, with safety and crew issues.

In fact CE marking just provides rules in respect of maximum persons on board in accordance with flag state provisions while the Registry provides a more complete discipline concerning crew, safety, the roles and the number of crew holding professional licenses.

### 2.3. Some hints about the liability of certifying entities

While important judgments referring to the liability, or non-liability, of Classification Societies have been issued in recent years<sup>5</sup>, the liability of the certifying bodies is a theme which has not been debated in depth by the Italian Courts.

One of the few decisions has been delivered by the Court of Piacenza<sup>6</sup> in respect of the qualification of the liability in a case regarding putting into the market of a product whose certification of conformity resulted to be incorrect.

Such decision maintained that the set of obligations of the certifying body are both the obligation to achieve a result and the best endeavor obligation in accordance with what is provided by the most recent case law of the Supreme Court of Cassation<sup>7</sup>.

Therefore, the best endeavor obligation of the certifying body is not to guarantee the conformity of the product but to guarantee the correct and careful

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<sup>5</sup> See in particular *Lloyd's Register c. Argos Shipping Agency*, App. Genova, 18 July 2014, in *Dir. mar.*, 2014, p. 635, Berlingieri, *Dir. comm. internaz.*, 2015, p. 845, Lopez De Gonzalo and *Dir. mar.*, 2016, p. 125, Riccomagno. On the case of m/v "Erika" see: Cour de Cassation, 25 September 2012, no. H 10-82.938, in *Droit Maritime Français*, 2012, p. 985; P. Bonassies, *L'arrêt Erika*, in *Dir. Mar.*, 2012, p. 1271, L. Schiano Di Pepe, *Brevi note (di diritto del mare) in tema di immunità delle società di classificazione a margine della Corte di Cassazione francese nel caso Erika*, in *Dir. Mar.*, 2012, p. 1281; F. Berlingieri, *Sull'applicabilità dell'art. III.4 della CLC 1992 alle società di classificazione*, in *Dir. Mar.*, 2012, p. 1288, P. Bonassies, *L'arrêt Erika et la compétence des juridictions françaises*, in *Droit Maritime Français*, 2012, p. 995, P. Delebecque, *Aspects civils de la décision Erika*, in *Droit Maritime Français*, 2012, p. 1000, B. Bouloc, *Décision Erika : Quelques réflexions d'un juriste pénaliste*, in *Droit Maritime Français*, 2012, p. 1007, F. Berlingieri, *Les sociétés de classification peuvent-elles bénéficier de la canalisation prévue à l'article II.2 de la CLC 1992*, in *Droit Maritime Français*, 2012, p. 1015 and P. Bonassies, *Réflexions d'un juriste français sur le jugement "Erika"*, in *Dir. Mar.*, 2008, p. 249.

<sup>6</sup> Court of Piacenza, 3 May 2012, n. 297.

<sup>7</sup> Supreme Court of Cassation, Sezioni Unite, 28 July 2005, n. 15781.

fulfillment of the verification contractually agreed. On the other hand, the obligation to achieve the result implies the necessity for the certifying body to guarantee the accuracy which grounds the issuance of the certification.

The Court of Piacenza stated that the certifying body which certified the conformity of a product not having the requested requirements is contractually liable for damages incurred by his client which put a non-compliant product into the market.

Other decisions have reached different results: the Court of Monza<sup>8</sup> maintained that the liability of the certifying body is the best endeavor obligation and therefore its contractual liability must be confined to ascertaining the actual performing of the requested services and the right to obtain the agreed fee with the exclusion of any liability for the utilization, by the client, of the result of the certification.

The authors<sup>9</sup> have discussed the consequences of non-conformity of the certification. The final buyer of the product may claim for the nullity of the sale contract due to breach of the imperative rule set out by first paragraph of art. 1418 of the Italian Civil Code with related consequences as far as refund and damages are concerned.

A further interesting aspect is that pertaining possible criminal liability for unlawful certification of CE marking on yachts. The Supreme Court has clarified that the unlawful certification cannot be qualified as commercial fraud as per art. 515 of the Criminal Code but as regulatory offence according to art. 56 paragraph 3 of the legislative decree of 18 July 2015 N. 171<sup>10</sup>.

### 3. THE ITALIAN LEGAL SYSTEM ON REGISTRATION OF YACHTS

Another relevant topic concerning the construction of yachts is their registration.

In this respect, art. 238 of the Italian Navigation Code sets out that the contracts of construction have to be registered in the Public Registry for vessels under construction<sup>11</sup>.

<sup>8</sup> Court of Monza, 3 February 2004, n. 431.

<sup>9</sup> See N. Furin, A. Ippolito – *La sorte giuridica dei contratti relative a macchine non conformi alla marcatura CE – ISL, Igiene e Sicurezza del Lavoro*. 8-9/2011, 639-644).

<sup>10</sup> Supreme Court of Cassation, Sez. III, 10 June 2015, n. 42460.

<sup>11</sup> On the transfer from one registry to another see *Castagnola c. Monte Paschi Siena*, Tribunale Milano, 23.12.2014, in *Dir. Trasporti*, 2015, 513, n. Tullio and on the form of the contract see *Fall*.



There is no special register for the yachts under construction, which are therefore registered in the same register as the commercial vessels, while for yachts under 24 mt the registration is not compulsory.

The Registration of yachts is strictly connected and linked to the issue of transferring the property. The registration in fact makes it clear on whose behalf and in whose name the yacht is built.

If not otherwise provided by the parties in the contract, the property on the yacht is transferred from the builder to the buyer when the protocol of delivery and acceptance is signed (i.e., when according to art. 1665 of the Italian Civil Code the yacht is accepted by the buyer)<sup>12</sup>.

In practice the parties often decide to agree on a different solution and in particular to stipulate that the title on the yacht and all equipment (already installed on board or to be installed) is transferred from the builder to the buyer in proportion of the installments paid; this implies some advantages for the buyers especially in case of possible difficulties of the builder. In fact, the buyer's position would be stronger in case of builder's breach of contract or bankruptcy or composition procedures<sup>13</sup>.

On the other hand, this is the way by which the builders can avoid the costs of refund guarantees<sup>14</sup>, usually requested by buyers, for the installments already paid.

This does not mean that the position of the buyer is really that stronger since he could in any event face serious difficulties in enforcing a decision against a yard in distress or a yard which went bankrupt, dealing with problems arising out of being the owner of a non-completed hull. Furthermore, there could also be the issue of possible claims advanced by subcontractors and suppliers of the equipment (owned by the buyer) not installed on board and not properly labelled (with the number to the hull they refer to). This happens particularly for masts, engines or other valuable components.

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*Soc. Cantieri Alto Adriatico c. Soc. Merzario*, App. Venezia, 18.02.1993 in Dir. Trasporti, 1994, 567, n. Formica Ainis and *Soc. Merzario c. Fall. Soc. cantieri Alto Adriatico*, App. Trieste, 23.07.1986 in Dir. Mar., 1987, 79.

<sup>12</sup> Inter alia *Interstate Trading co. c. Fall. Soc. S.M. Italian Yachts*, Tribunale Pesaro in Riv. Dir. Internaz. Priv. e Proc., 2002, 457 and *Min. difesa c. Soc. Tecnaval*, Cass. 07.02.1996, n. 984 in Giust. Civ., 1996, I, 1637, n. Grigoli.

<sup>13</sup> Inter alia *Min. II. Pp. c. Fall. Soc. Tecnaval*, Cass. 29.04.1998, n. 4350 in Fallimento, 1999, 507, Giust. Civ., 1999, I, 871, n. Grigoli and Dir. Trasporti, 1999, 589, n. D'orsi and *Soc. Cipriani Shipping c. Baltic Shipping Co.*, Trib. Livorno, 18.11.1996, in Dir. Mar. 1998, 433.

<sup>14</sup> In general see Davis, *Refund Guarantees*, Oxon, 2015.

#### **4. THE REJECTION OF THE YACHT AND THE TERMINATION OF THE CONTRACTS OF CONSTRUCTION**

The rejection of the yacht and the termination of the contract are further issues which need to be considered, both, from the builder's and the buyer's side.

##### **4.1. The trials and the acceptance or rejection of the yacht**

In fact, most shipbuilding contracts concerning yachts and pleasure craft, as it happens for the commercial vessels, incorporate detailed provisions setting out an agreed procedure by which the yacht is to be finalized by the builder and accepted by the buyer.

Following the completion of trials, the builder will usually be required to submit the results obtained to the buyer and, as the case may be, to the classification society. No substantial difference from the contractual point of view can be found between clauses about trials for yachts and commercial vessels.

In both cases, although the precise form and substance of trials will depend on the type of the new building, the results will typically incorporate details about physical characteristics of the craft and its performances at sea.

The buyer usually takes part in the trials in person and is assisted by his representative and consultants.

Following the completion of the trials and the formal submission of the trial results by the builder, the buyer is permitted a limited period of time for evaluating the results and to decide to accept or reject the yacht. In case no decision is communicated within the agreed number of days, the contracts usually provide that the yacht is considered as accepted by the buyer.

In case of rejection the builder has to decide whether to remedy the problems raised by the buyer or to challenge his rejection as unjustified.

In the yachting market (as it is for large scale shipbuilding contracts), especially with reference to the custom yachts, it is quite exceptional for the yacht to comply precisely with the contract and the specification at the time of her initial presentation to the buyer.

Therefore, in order to avoid disputes at delivery, sometimes contracts provide that yachts cannot even be rejected for minor non-conformities that the builder will remedy during the guarantee period. In such case, the buyer will be obliged to accept the yacht and the parties will probably sign a list of defects together with the protocol of delivery and acceptance.

Furthermore, contracts of construction normally provide liquidated damages (up to a certain critical level that usually gives right to the buyer to terminate the contract) in case some standard levels concerning speed, noise and vibration are not met. This is to avoid further long and expensive remedial works that may not give the expected result for the buyer.

Obviously, this process will be influenced also by the general principles governing the contract.

As per Italian law, the provisions concerning the contracts for work and materials will be considered applicable (if not otherwise stipulated by the parties). The buyer may decide to reject the yacht or to condition the payment of the price to the remedy of all defects as provided by art. 1460 of the Italian Civil Code, provided that such rejection is not against good faith<sup>15</sup>. The Judge will have to decide as a matter of fact whether the refusal to pay the price is proportionate or is against good faith.

With reference to English law, the rules concerning the delivery and acceptance of goods under contracts of sale will apply. In *Docker v. Hyams* the contract provided that “*After the completion of ... survey, if any material defect or defects in the yacht or her machinery shall have been found, the Purchaser may give notice to the Vendor...of his rejection of the yacht by indicating the nature of the defect or defects...the Vendor shall forthwith either indicate his willingness to make good such defect or defects without delay or make a mutually agreed cash allowance in lieu...’*”<sup>16</sup>.

#### **4.2. Termination by the builder due to buyer’s default**

From the builder’s point of view, as a general note, it may be maintained that he would be reluctant to terminate the shipbuilding contract save for very serious cases, among which the most important one is the severe delay in paying an installment price. This, in particular, because in most shipbuilding projects the primary source of financing for the builder lies in the pre-delivery installments of the contract price payable by the buyer.

The amount and timing of pre-delivery installments payable by the buyer, however, vary significantly from project to project and very much depends on the complexity of the construction.

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<sup>15</sup> See particularly Cass. 26 November 2013, n. 26365.

<sup>16</sup> *Docker v. Hyams*, [1969] 1 Lloyd’s Rep 487.

Under Italian law, the parties may decide to agree in the contract a term after which the builder can terminate the contract if the buyer delays the payment of the relevant installment, and this term should be defined as an essential term under art. 1456 and 1457 of the Italian Civil Code<sup>17</sup>.

In practice, normally, the contracts of construction provide two different terms in case of delay in paying an installment of the contract price: after the first term, the builder will usually have the right to stop the construction of the yacht until the payment is done, whilst after the second and longer term he will have the right to terminate the contract.

If no specific clause is agreed by the parties, according to Italian law the builder will have the right to terminate the contract only if the delay is not a minor delay. Which delay is of minor significance, will be a matter of fact.

#### **4.3. Termination by the buyer due to builder's default**

Delay in delivery of the yacht is one of the most common and typical events which may lead the parties to discussion and legal controversies. This aspect has some specific peculiarities strictly connected to the yachting sector. In fact, delay in delivery may have negative consequences for the utilization of the yacht during the summer season and also in relation to lost chartering opportunities.

Therefore this peculiar situation is reflected by the relevant clause and the liquidated damages agreed by the parties.

The amount of liquidated damages is agreed by the parties bearing in mind the intended use of the yacht and the expected date of delivery. If the agreed date of delivery is in an off-season period, a grace period of time after the expected date of delivery with no liquidated damages is quite often accepted by the buyers. The grace period may be also quite long since in this way buyers avoid the off season costs (such as berthing and security checks).

After the grace period, the parties normally agree daily amount as liquidated damages and when the delay exceeds a certain number of days the buyer will have the right to terminate the contract. While according to article 1453 of the Italian Civil Code, the buyer in terminating the contract would have the right to ask damages, many shipbuilding contracts (as it happens in case of contracts of construction for commercial vessels), provide a cap for penalties and liquidated damages.

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<sup>17</sup> For the English law regime see Curtis, *The law of shipbuilding contracts*, Oxon, 2012, p. 40 and following.

Other aspects are relevant and may cause liquidated damages or termination: speed, noise, vibration and serious aesthetic defects. The last three elements are strictly peculiar of the yachting market and are quite far from the series of defects which could be of interest in building of commercial vessels.

In this regard, art. 1668 of the Italian Civil Code provides that the buyer may terminate the contract in case the defects are such to make the yacht completely unfit for the use for which it has been built (*del tutto inadatto alla sua destinazione*)<sup>18</sup>.

In order to avoid this range of controversies it may be advisable to proceed with proper negotiations and with drafting correct clauses such as those regarding painting, materials and supplies as well as reference to the high standard level of quality of the shipyard<sup>19</sup>.

## 5. AN OVERVIEW ON THE APPLICATION OF THE ITALIAN CONSUMER CODE TO THE YACHT INDUSTRY

When the buyer is a physical person the provisions of the Italian Consumer Code (Legislative Decree 206/2005) will be considered applicable in case of contract of sale or construction of yachts or pleasure craft, being their price or dimension completely irrelevant.

This assumption could seem surprising but according to the definitions contained in art. 3 of the Code, the “consumer” is any physical person who acts with non-commercial or non-professional purposes while the “product” is any product intended for the consumer (excluding some peculiar goods that are completely different from yachts or pleasure craft).

For the purposes of this article, it may be noted that this provisions, according to art. 128, set out that the contracts for work and materials are regulated as the contracts of sale.

Furthermore, all provisions of a contract providing differently from what the Consumer Code contains will be considered automatically substituted by the provisions of the law.

In particular, art. 132 of the Consumer Code provides for a two-year guarantee. The consequence would be that any guarantee of less than 2 years would

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<sup>18</sup> See Court of Livorno, 31 July 2001 as to liability for defects in construction of a yacht.

<sup>19</sup> See Court of Salerno, 28 October 1992. See also, as to foreign jurisdictions, Court de Cassation (France), 6 July 1999.

be automatically replaced by a guarantee of 2 years while no article sets out a proper discipline for the guarantee applicable to the remedial works.

It may be actually questionable whether the yachts are to be considered as consumer goods. In fact, arguably in the intention of the law, yachts were meant to be among the “goods” which had to be regulated by these provisions. In any event art. 128 of the Consumer Code provides a broad indication of “Consumer goods” among which also yachts could be included.

The Courts gave some interesting indications: Court of Appeal of Naples (11 January 2017) stated that, for a leasing company, the rules of the Consumer Code do not apply the ordinary rules concerning the contract of sale (art. 1490 and 1492 of the Civil Code). This is also in case of assignment of the shipbuilding contract.

## 6. CONCLUSION

As pointed out, the construction of yachts and pleasure craft are rather complex transactions and the content of the relevant contract clauses reflect such complexity also considering that these goods may be considerably more expensive if compared to commercial vessels. This is particularly true for sophisticated and technologically advanced yachts<sup>20</sup>.

Although the contracts of construction of yachts may be not substantially different from those concerning the vessels, such contracts contain significant differences that are mainly connected to the fact that the expected performances required by a yacht owner are completely different from the essential performances needed by a shipowner. This has to be considered in drafting and interpreting a shipbuilding contract for the yacht.

Notwithstanding the fact that the market has provided for different standard forms of contracts of construction that are the result of the practice in the sector, the choice of the governing law is always a fundamental decision that may lead to different consequences that have to be considered while negotiating.

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<sup>20</sup> On the shipbuilding in general see: Bruce, *The Business of Shipbuilding*, Oxon, 1999.

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**Sažetak:**

## **UGOVORI O GRADNJI JAHTI I PLOVILA ZA RAZONODU: TALIJANSKA STAJALIŠTA O NAJZNAČAJNIJIM PRAVNIM PITANJIMA**

*Cilj ovoga članka je dati opći pregled talijanskog zakonodavstva i prakse o pravnim pitanjima koja se odnose na ugovore o gradnji jahti i plovila za razonodu, uključujući analizu najčešće prihvaćenih ugovornih klauzula.*

*Nakon uvodnih napomena o prirodi ugovora o gradnji i usporedbe s ugovorima o kupoprodaji te ugovorima o djelu ("contratto di appalto"), razmatrat će se pitanja prijenosa vlasništva i stvarnih prava te upisa ugovora o gradnji u skladu s odredbama talijanskog Pomorskog zakonika.*

*Nadalje, opisuje se certifikacija plovnih objekata po Direktivi br. 94/25/EZ kako je izmijenjena i dopunjena Direktivom br. 2003/44/EZ te se daje pregled glavnih razlika u odnosu na klasifikaciju upisnika.*

*U završnom dijelu članka analizirat će se mogući uzroci spora između kupaca i graditelja uz određene primjedbe u pogledu jamstva za nedostatke, otkaza i raskida ugovora o gradnji jahti i ostalih plovila za razonodu.*

**Ključne riječi:** *jahta; ugovor o gradnji; ugovor o djelu; kupoprodaja; oznaka CE; klasifikacija; odgovornost; upis; leasing; nedostaci; jamstvo; potrošač.*