LEGAL INFORMATION AND ADVICE FOR SELLERS AND BUYERS

THIS LEAFLET

These notes have been written to guide RYA members when using yacht brokers in the course of the sale and purchase of a boat:

• as a broker’s client (when selling)
• as a broker’s customer (when buying)

and cover some of the questions most often raised with us by our members.

We attempt to give a sufficient legal analysis to inform Sellers and Buyers in straightforward transactions. Full analysis of difficult legal issues is beyond the scope of this leaflet, however we will endeavour to help members who have specific queries that are not covered here.

PROCEDURE

Please refer to separate flow chart.

ROLE OF BROKER

A broker’s business is to market the Seller’s boat which will include arranging viewings, negotiating the terms of sale, handling the paperwork and collecting and distributing the sale price. A broker may also carry out title and financial checks, provide documentation in support of the vessel's VAT status and evidence of RCD compliance.

However, the duties a broker undertakes on behalf of his client, the Seller, will vary from one broker to another, it therefore pays to ascertain just what checks the broker will carry out.

For doing this work the broker charges the Seller an agreed commission fee.

Broker Representation

There are two broker organisations the RYA works alongside with namely the Association of Brokers & Yacht Agents (ABYA), a section of the Yacht Brokers, Designers & Surveyors Association and the Boat Retailers and Brokers Association (BRBA) a group association within the British Marine Federation (BMF)
However, not all brokers belong to one or other of these. We recommend only using a brokerage that is a member of a representative organisation.

Standard Documentation

Both the ABYA & the BMF promote:

- standard contractual terms of business between Seller and broker in the form of a Listing Agreement;
- standard Sale and Purchase Agreement between Seller and Buyer;
- the Brokers' Code of Practice (‘the Code’), produced by the ABYA and the BRBA Code of Practice both of which regulate the way members conduct their business.

We advise potential Sellers and Buyers to familiarise themselves with key aspects of these documents.

Appendices:

A What is the YBDSA
B The ABYA Code of Practice
C The ABYA standard Listing agreement.
D The ABYA Agreement for the Sale and of a Secondhand Boat.
E The BMF Code of Practice
F The BMF Sale Agreement.
G RYA Publications
H Buyer Beware

The ABYA Brokers’ Code of Practice includes the following:

- The broker shall collect all available title documentation from the Seller which should include, RCD compliance, evidence of VAT status, registration, outstanding finance, Bills of Sale from previous owners and Builder’s Certificate. The broker should arrange for a new Bill of Sale from Seller to the Buyer to be completed and passed with all title documentation upon completion.
- The broker should provide a Sale and Purchase Agreement for use by the Seller and Buyer. Amendments to the Agreement should be agreed and initialled by both parties.
- The broker should check as far as possible whether there are any outstanding mortgages, liens or bills relating to the boat and should settle these from the completion monies before sending the balance to the Seller.
- The broker should send completion monies to the Seller as soon as practicable once the funds have cleared and all paperwork has been completed.

The BRBA Brokers’ Code of Practice includes the following:
The Broker shall use best endeavours to verify the complete history of ownership of second-hand craft offered for sale.

The Broker shall use best endeavours to verify (if possible) the VAT status of second-hand craft, advising prospective clients of any VAT liabilities that may exist in the absence of proof positive of VAT paid status.

The Broker shall use best endeavours to ensure that all craft offered for sale conform with relevant legislation (RCD etc.).

We believe that the following terms should be considered by the parties, and where relevant included in the Sale and Purchase Agreement:

- An undertaking by the Seller that he has the power to sell the boat, without the burden of any joint owners, mortgagee, or hire purchase company, attached to the boat, and that any defects have been declared.

- The broker should ensure that information given to a Buyer is accurate and has pointed out known defects to the Seller. Defects known to the broker must be pointed out to the Buyer and the Seller.

- The use of a Sale and Purchase Agreement for a second-hand boat is recommended for use on all occasions.

- The Sale and Purchase Agreement should include an inventory which itemises the fixtures and fittings included within the sale. The purpose of this is to manage expectations as to what the boat does and does not come with.

- The Buyer should check and ensure that he understands the particulars of sale and the Sale and Purchase Agreement and employ a qualified marine surveyor to carry out a full condition survey.

- The broker should make sure that a surveyor is entirely independent i.e. the surveyor should have no connection with the Seller or Seller’s broker.

- The Buyer is advised to instruct a surveyor who belongs to one of the professional bodies that requires its members to carry Professional Indemnity insurance.

- Buyers are also advised to have an engine trial conducted and arrange to see the boat afloat if possible, and also carry out a sea trial.

- Buyers should be aware that they are responsible for the costs associated with sea-trial and lift out/in for survey.

- Brokers should keep sales proceeds entirely separate from their own business account in a bona fide designated Client Trust Account to protect the Buyer’s money.
There should be an exchange of documents (e.g. Sale and Purchase Agreement, Title Documents and Inventory) and transfer of purchase monies, a completion date and a procedure for delivery. We advise our members to obtain a copy of the RYA Guidance Notes on Title Checking.

With regard to the purchase monies, there should be a term inserted into the Agreement which stipulates that the broker will not release the purchase monies to the Seller until the Seller has delivered to the broker all title documentation, including the registration document, signed Bill of Sale, any relevant mortgage release and details relating to the VAT status of the boat, Builders Certificate (if available), and any RCD/CE compliance paperwork.

The VAT status of a boat is a complex issue. We would therefore advise our members to log onto the VAT area of the RYA website for further information.

Broker’s ‘Legal Liability To Disclose Information’

In the RYA’s view, there is no general legal obligation on either Seller or broker to disclose the existence of defects to a prospective Buyer, unless, of course, they are asked a specific question, which is why a survey is essential.

Nevertheless the RYA, the BMF and the ABYA believe that it is good practice for a broker to fairly represent a boat being offered for sale and should therefore disclose any defects made know to them by the Seller.

A standard disclaimer will be included in the brokers Agreement with the Seller, the purpose of which is to protect a broker against complaints by a Buyer that the broker’s published particulars of a boat are wrong, in circumstances where the broker has relied on the Seller’s information when writing those particulars.

Sale Proceeds – Client Trust Account

Although it is rare for a broker to fail to account for the proceeds of sale, both Seller and Buyer may be at risk of a substantial loss should the broker become insolvent or otherwise default without having effectively separated his firm’s money from that of the Seller/Buyer. As there is no regulatory procedure for the handling of money within the industry the broker should maintain a separate Client Trust Account and operate accounting procedures which enable the sale and purchase monies to be traced and identified.

Both the ABYA and the BRBA require their members to maintain and operate such accounts.

The RYA recommends that its members only instruct a broker when satisfied that sale and purchase monies are handled in this way.

Delay In Accounting For Proceeds Of Sale
The ABYA Code obliges the broker to account for net proceeds of sale as soon as is ‘practicable’ once all paperwork has been completed. If the title has not cleared, possibly because the Seller has not signed and sent the Bill of Sale, the broker has to hold on to the proceeds until he has everything in place. What is ‘practicable’ is open to interpretation and we would advise the parties to agree to use reasonable endeavours to complete the necessary paperwork and transfer of completion monies.

**Agreement**

The RYA recommends that, when instructing a broker, a Seller should discuss the form of Agreement that the broker will offer a prospective Buyer. Although the Agreement may be negotiated through the broker, it is made between the individual Seller and Buyer. Boat sales require a properly drafted Agreement which fully sets out the obligations of both parties.

The RYA recommends that its members always enter into a Sale and Purchase Agreement.

**Registration**

Some brokers offer a registration service and a Buyer may wish the broker to transfer the ownership of a registered boat on his behalf. A Buyer can instruct the broker separately on this issue so that he is acting for the Buyer alone when he transfers title.

If the Buyer, or his professional advisors, or the broker have adequately investigated title then transfer of registry should be straightforward.

The RYA’s view is that the broker’s role is limited to acting for the Seller only, although the broker does have a duty of care to the Buyer.

**Standard Disclaimer For Particulars**

Buyers often express to us their concern that after close inspection of a boat the particulars of sale offered by a broker do not accurately describe it. It is usual for a broker to include in his Agreement a form of disclaimer for particulars of sale. This is sensible and reflects the respective legal positions of Seller, broker and Buyer. This is why a survey is recommended.

**Legal Basis Of Code**

Although both the ABYA and the BRBA Code of Practice sets out requirements to be observed by brokers, these are requirements of the respective Codes, and are not legally enforceable (by either Seller or Buyer) against brokers who do not comply. The Codes reflect the terms of the standard brokerage agreements, but a Seller/Buyer (and indeed a broker) should look to those agreements, rather than the Codes, for enforceable redress.

Nevertheless, the ABYA and the BMF are willing to investigate complaints against members and will, within its resources, attempt to facilitate resolution of a dispute. In a serious case they may discipline and even expel a broker for breach of the Code.
We suggest potential Sellers and Buyers familiarise themselves with key aspects of the ABYA and the BRBA Agreement for the Sale and Purchase of a Secondhand Boat, to ensure that they are aware of the terms contained within them and of any specific clauses or differences in the Agreement provided by the Broker.

**CONTRACTUAL RELATIONSHIPS**

A Seller makes two separate Agreements:

- a Listing Agreement, which deals with the relationship between Seller and broker, and states their duties to each other; and
- (if the broker is successful in finding a Buyer) a Sale and Purchase Agreement (between Seller and Buyer), which states the terms on which the boat will be sold.

The broker, though referred to in the Agreement, is not a party to it. He is acting as an agent, unless the boat is a part-exchange sale.

The Buyer also usually makes two types of Agreement:

- the Sale and Purchase Agreement (between Seller and Buyer); and
- a contract with a surveyor (and perhaps also with an engineer) for survey and testing of the boat and its equipment.

The Buyer does not have a direct contractual relationship with the broker, unless the broker is subsequently engaged by the Buyer to carry out a specific task (such as a transfer of registration).

The RYA strongly recommends that members have the boat surveyed prior to purchase. Boats are expensive and liable to deterioration and damage. In most cases the only way to check the boat's condition is to have a survey done, and the results will often determine whether a sale proceeds smoothly, has its terms renegotiated or is terminated. If a Buyer does not have a survey done, but relies on his own experience, and faults are subsequently discovered with the boat the chances of the Buyer having any form of redress are small. When buying second-hand from a private individual, the onus is completely on the Buyer to ensure that the boat he is buying is in a satisfactory condition, or that he is fully aware of the condition of the boat, prior to completing the sale. A warranty is usually provided by the selling brokerage for sales of part-exchange boats.

The following professional surveyors organisations, amongst others, are able to conduct boat surveys, and members may contact them if they wish to get details of surveyors in their area. Under the terms of membership of these organisations its surveyors are required to carry Professional Indemnity insurance. It is a good idea when considering instructing a surveyor to check with him that he does have Professional Indemnity insurance.

**The Yacht Brokers, Designers and Surveyors Association**

www.rya.org.uk
INSTRUCTING A BROKER (when selling a boat)

Choosing A Broker

Some of the issues to consider when choosing a broker might include:-

- whether the broker is a member of the ABYA/the BRBA;
- whether the broker has professional indemnity insurance;
- whether the broker operates a separate Client Trust Account;
- whether the Seller will continue to have the use of the boat while it is on the market;
- a location convenient for potential Buyers;
• the experience a broker has in marketing a particular type or make of boat (well known builders often offer brokerage specialising in their designs; there are brokers who specialise in classic or wooden boats etc); and
• the marketing and business methods of the broker.

Brokerage Agreements

To avoid misunderstanding, or at least limit it, use a clear and comprehensibly written Agreement setting out the terms by which the broker will market the boat. Both the ABYA and the BRBA produce a Listing Agreement, although many brokerages may use their own version. The terms of a standard document of this kind may be varied by agreement with the Seller and the time to consider doing so is before it has been signed, not afterwards.

It is important for you to know whether the Agreement, the broker is offering you, is the ABYA or the BRBA standard or whether it varies and, if so, in what respect.

Where More Than One Broker Is Involved

A Seller may try to improve the chances of finding a Buyer by placing the boat with more than one broker. Brokerage practice reflects this; where more than one broker is, or may be, instructed, the Agreement is termed an ‘Open Listing Agreement’. Sellers should clarify for themselves the differences between the Central Sole Listing Agreement and the Open Listing Agreement (particularly as to payment of commission, and minimum period of engagement). Each broker will have his own Agreement and Sellers should ensure they advise each broker that they are placing the boat with other brokers and check the terms.

A broker may decide to share the work of marketing the boat between one or more other brokers, who will then act as sub-agents, or ‘shared brokers’. Such an arrangement should be distinguished from the separate appointment by the Seller of two or more brokers to market a boat.

A Seller may wish to market his boat privately as well as through his broker. If this is the case the Seller should ensure this is factored into his Agreement with the broker.

DEALING WITH A BROKER (when buying a boat)

Broker As Agent

The legal consequences of agency are complex. From the point of view of a prospective Buyer of a boat it is perhaps best to regard the broker as:

• a readily available source of information on boats currently for sale;
• a person who is easily contactable and with whom arrangements for viewing can usually be speedily made;
• a person with whom a Buyer can conduct frank negotiations, including stipulations for title and related matters, without the risk of upsetting the sensitivities of the owner;
• the person who will receive payment on behalf of the Seller.

An effective broker will be able to do all of this while providing a degree of guidance and support to the Buyer. An experienced Buyer will acknowledge the assistance of the broker in facilitating the sale, while recognising that, however helpful the broker is, his first duty is to his client, the Seller. The Buyer should therefore bear this in mind when proceeding with the purchase.

The BRBA and ABYA expect their members to use best endeavours to investigate title including outstanding finance, when instructed to market a boat, and in doing so they incur a duty to Buyers to do the work properly.

However, not all brokers will investigate title, we therefore urge you to check this with the broker.

It is important to note that it is impossible to guarantee title on a boat; a title investigation by the broker, the Buyer or even solicitors (if instructed) is based on a due diligence exercise. Members may wish to obtain a copy of the RYA’s Guidance Note on Title Checking for further information.

An agent’s legal authority to bind his client comes from the express terms of their Agreement and the terms implied through the general law and particular commercial practices. From the Buyer’s perspective, it is best to take a pragmatic view and ensure that the broker refers the important decisions relating to the negotiation of price and the setting of the terms of the sale Agreement to the Seller. Important decisions should always be recorded in writing.

**Dealing Direct With The Seller**

The extent to which a Buyer has an opportunity to deal with the Seller direct will vary between transactions and brokers’ practices. It should be recognised that Sellers will often have employed a broker because they cannot or do not wish to deal with the sale themselves. However, that said, there may be times when it is beneficial for the Buyer to talk direct with the Seller. Direct contact with a Seller should be made via the broker. Key understandings reached through direct discussions with a Seller should, after further negotiation with the broker, be reflected in the terms of the Sale and Purchase Agreement or passed onto the broker in writing if agreed after having signed the Sale and Purchase Agreement.

**Pre-Contract Negotiations**

Buying a boat is not a process governed entirely by cold logic and it can be difficult for a Buyer to resist the temptation to conclude negotiations as soon as the subjective decision is reached that the boat is what he is looking for. But all too often a Buyer makes the deal before considering points that, on reflection, are recognised to be important e.g.
- does the boat fulfil the Buyers requirements;
- does it have the cruising range required;
- what evidence of title and tax status will be required;
- whether the agreement should be unconditional or subject to survey and/or sea-trial;
- whether the boat will be physically accessible on completion, not merely when first seen and inspected;
- what the detailed arrangements for payment, and discharge of any mortgage will be.

A prudent Buyer should take his time on the purchase and assemble a list of requirements, discuss these with the broker before agreeing to buy, and then amend the standard form of Agreement to reflect any additional terms agreed.

“Buyer Beware” is a Guidance Note, produced by the RYA, outlining issues to consider when buying a boat. It is produced here in Appendix H. It is always useful to know the general procedure that the broker will be following, so you can ensure that all the usual checks are being done. Remember the broker is acting for the Seller not for you, but of course it is in everyone’s interest that all is in place to ensure a satisfactory outcome.

**General Advice on Sales Agreements**

For many years the standard form of Agreement for sale has been the ‘Agreement for the Sale and Purchase of a Secondhand Boat’. This form of Agreement, which seeks to fairly balance the interest of Buyer and Seller, reflects the well-established practice of buying boats ‘subject to survey’.

An area that causes concern from time to time is the definition of ‘material defect’ and how to decide whether a defect is in fact material or not. It is well worth both parties taking some time to think about this issue before signing the Agreement, and perhaps trying to reach a joint definition.

The broker will hold a deposit (commonly 10% of the purchase price) on the making of the Agreement, either as stakeholder or agent (see below). Should the Buyer withdraw, citing what the Seller considers inadequate evidence of defective condition, the Seller is in a strong position because, if the broker is holding the deposit as stakeholder, he has authority to retain the deposit until resolution of the dispute; if he is holding as agent he may well have already transferred the monies to the Seller. A Buyer may therefore wish to consider negotiating arrangements for having the boat surveyed without an obligation to purchase.

Adequate arrangements should be made to protect the Seller against damage done during survey (including patch removal of protective coatings and unpaid haul-out costs). A prospective Buyer will need to organise survey arrangements carefully so as to minimise the time between incurring survey costs and making an unconditional offer to buy. A Buyer may well encounter resistance from Seller and broker to this procedure, and will need to assess carefully whether ‘other interested parties’ are in fact likely to materialise. The Buyer pays all survey and lift out fees.

Both the ABYA, the BRBA and the BMF produce a Conditional and Unconditional Sale and Purchase of Secondhand Boat Agreement.
The broker should discuss the suitability of a particular form of Agreement with the Seller and advise on its terms. The broker should also provide a Buyer with a draft of the Agreement before inviting him to sign it. The Buyer may wish to contact the Legal Team at the RYA for advice on the Agreement or may wish to instruct a solicitor before signing the Agreement. When the Agreement has been made each party should retain their own identical copy of the signed Agreement and the Schedules to it. The easiest way to do this is to make up two identical copies, for each party to sign theirs and then exchange them. Policies for exchange of Agreements may vary from broker to broker.

When the Parties receive their copy of the Agreement for the Sale and Purchase of a Secondhand Boat, they should read through the following notes, with the Agreement in front of them. These notes discuss the role of the broker within the terms of the standard Agreement.

- **Association membership**

  The broker should disclose whether he is a member of a representative organisation. It is useful for a Buyer to know whether the broker is a member of an organisation which requires compliance with a Code of Practice and in particular imposes an obligation on the broker to operate a Client Account.

- **Payment of deposit: broker as ‘stakeholder’**

  The deposit will either be paid to the broker as ‘stakeholder’ for the parties or as ‘agent’ for the Seller.

  In essence holding as a ‘stakeholder’ means that the money is held on behalf of both parties, it cannot be handed over to either party without the consent of the other.

  A broker who acts as a stakeholder should not pay the deposit to the Seller until the sale is completed, but should retain the deposit in his Clients’ Trust Account until either:

  - he accounts to the Seller for the net proceeds of sale after deduction of his fee;
    or
  - the deposit is returned to the Buyer after he rescinds within the terms of the Agreement;
    or
  - there is a dispute which requires resolution which may be achieved by discussion between the parties or may require mediation, arbitration or a court decision, and the broker is ordered either to return the deposit, or pay it (net of his fee) to the Seller.

  Where a broker holds deposit monies as ‘agent’ for the Seller, the Seller is entitled to call upon the monies prior to completion of the transaction. If, in accordance with the contract, the Buyer exercises his option to withdraw from the purchase, it may be difficult securing the return of his deposit in circumstances where the Seller has
already used the deposit monies. For this reason, the RYA recommend that deposit monies are held by the broker as ‘stakeholder’ for the parties.

- **Completion**

  The Agreement should contain a clause dealing with arrangements for completion of the sale. The Seller is not generally required to complete a Bill of Sale until the boat has been ‘accepted’ by the Buyer. Buyers should take care to ensure the broker knows whether he has formally accepted the boat and this should be conveyed in writing. Stating to the broker that the sea trial was “great” can be deemed to be acceptance.

  Practices vary from broker to broker but usually a Bill of Sale will be prepared and signed once the Seller and Buyer are contractually bound to complete the sale and purchase. However, some brokerages may well require a signed but undated Bill of Sale to be prepared early on in the negotiations to be held on file in readiness for completion (especially if, for instance, the Seller is likely to be out of the country at the time of completion).

  Buyers should note that most standard Agreements require the Seller to provide the broker with ‘such other documents as are set out in the schedule’. A Buyer should satisfy himself about ownership before committing himself to the purchase. We suggest he asks the broker to show relevant papers (and perhaps hand over photocopies, suitably marked such as previous Bills of Sale, a transcript of the boat, VAT documentation) before the Agreement is signed. The documents required by the Buyer are then listed in the Schedule and should be checked on completion.

  The papers to be handed over should include a receipt for all outstanding yard or marina charges, made up to completion date.

- **Payment**

  The Standard Agreements provide for payment of the balance of the price to the broker. This payment, to the Seller’s authorised agent, is (for the Buyer) as good as a payment made to the Seller. Ownership of the boat usually passes when the payment is cleared in the payee’s account (broker’s Client Trust Account).

  A convenient form of payment is the same day electronic bank transfer system routinely used in property conveyancing. The parties will need to set this up, exchanging account details a few days in advance of completion. Most banks will make a charge for this service.

  A Buyer should not expect the boat and its papers to be handed over against an uncleared cheque. Bank drafts and building society cheques are not always accepted without clearance. A convenient and acceptable procedure is for the documents to be handed over against the cheque, and for the keys and authority to take the boat away to be handed over when the cheque has been cleared.
The broker will usually hold the title documents to the Buyer’s order. Such wording allows for the situation where the Buyer has engaged the broker to deal with a transfer of registry. In most cases the Buyer will make sure he receives the title documents and the keys to the boat at the time that he pays for it.

Once an effective transfer of ownership has taken place, evidenced by the handing over of the Bill of Sale as receipt for the purchase money, the Buyer is then the owner of the boat. Any dispute the Seller has over money will be between the Seller and broker.

MONEY LAUNDERING

By virtue of various pieces of legislation institutions, businesses and individuals are responsible for reporting potential money laundering acts.

In order to comply with the Money Laundering Regulations 2003 any business that deals in cash payments of 15,000 euros or more is required to be registered as a High Value Dealer.

A broker may not accept cash payments in order not to have to register as a High Value Dealer.

Businesses must establish procedures to confirm the identity of new clients and maintain records of client identity verification.

DISPUTE RESOLUTION

Any disputes that may arise either between the parties or between the parties and the broker which cannot be resolved by negotiation may, with the written agreement of the parties/broker, be referred to mediation or arbitration or indeed the parties may issue legal proceedings. Both the RYA the ABYA and the BRBA can be contacted for further information on this issue.

Members may find the following further reading useful:

- Buying a Secondhand Boat – The Legal Aspects*
- Buying a New Yacht – The Legal Aspects*
- A Short Guide to Buying a Boat
- New and Used Boat Buyers Guide

*These publications are available for purchase from our website under Shop, or by phoning the Despatch Dept. on 023 8060 4136.

CONTACTS:

RYA Website: www.rya.org.uk
If you have any queries, questions or comments on the information contained in this leaflet, kindly contact the Legal Team on 023 8060 4223 or legal@rya.org.uk.

**RYA Responsibility Statement:**

The RYA Legal Team provides generic legal advice for RYA members, affiliated clubs, class associations and Recognised Training Centres. The information contained in this Guidance represents the RYA’s interpretation of the law as at the date of this edition. The RYA takes all reasonable care to ensure that the information contained in this Guidance is accurate and that any opinions, interpretations and guidance expressed have been carefully considered in the context in which they are expressed. However, before taking any action based on the contents of this Guidance, readers are advised to confirm the up to date position and to take appropriate professional advice specific to their individual circumstances.