



**COMPREHENSIVELY YACHTS**  
**HFW YACHTING INDUSTRY BRIEFING**

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**The HFW yachting team has been busy throughout 2020 and it has been encouraging to note the continued flow of new design contracts, new construction projects and the large number of second-hand sale and purchase transactions, all of which evidence the enduring attractiveness of yachting despite of or perhaps because of Covid-19. That is not to say that the Covid-19 pandemic has not impacted us and our clients. Quite apart from the dramatic changes to our own working arrangements, it has found us assisting clients with the multiple challenges they have faced, including managing the impact on their transactions and/or businesses, advising on crew transfer issues and dealing with a range of claims arising out of cancelled charters and delayed projects.**

We have had to find new ways to stay in touch with clients and the wider industry. Amongst other developments since we last wrote, we have re-launched our website<sup>1</sup>, grown our involvement in British Marine through our engagement in re-drafting their suite of standard contracts and, in a demonstration of the importance to our practice of yachting in the Asia-Pacific

region, joined the Asia-Pacific Superyacht Association (APSA).

Further, as part of our commitment to building practices and cultures that actively facilitate, cultivate and celebrate diversity and inclusion at all levels, we are supporting, on a pro bono basis, the development of the She of the Sea campaign and are delighted to have become signatories to the She of the Sea Pledge. For more information on the invaluable work being undertaken by this campaign and the pledge itself, please visit the She of the Sea pledge page.<sup>2</sup>

In this, our 6th edition of *Comprehensively Yachts*, we have taken the conscious decision to address matters other than those related to Covid-19. We kick things off with a brief look at various issues coming up in the next couple of months, including the requirement for yachts over 500gt to carry on board an Inventory of Hazardous Materials, the potential impact of Brexit on VAT arrangements and the extension in application of IMO Tier III NOx requirements from 1 January 2021.

We then consider the evergreen appeal of yachts as film locations and some of the issues we have encountered when supporting

owners and studios alike with film projects. From there we go on to discuss the Yacht Club de Monaco and Crédit Suisse's new Superyacht Eco Association (SEA) Index.

Although most people are now aware of the EU's General Data Protection Regulation, this has not stopped a stubborn failure in some quarters to comply with data protection regulations, particularly when it comes to the personal data of crew. On pages 7 and 8, our data protection team analyse such failure and what might be done to end it. Following this on pages 8 and 9 our marine insurance specialists consider the carriage of and risks associated with yachts as deck cargo. Finally, we wrap up this packed edition with an analysis of a recent case of real relevance to those managing or using marina facilities in the UK.

As ever, we hope you find the content useful and would be delighted to receive any comments or questions you might have.

<sup>1</sup> <https://www.hfwyachts.com>

<sup>2</sup> <https://www.sheofthesea.com/industrypledge>



## Yacht Recycling

Whilst yacht owners, designers and shipyards alike are increasingly thinking about the materials used in the construction and maintenance of yachts, the extensive life expectancies of most yachts and the attractiveness for refit, at least of steel hulled yachts, means that little consideration has yet been given by the yachting industry to the disposal of large yachts once they reach the end of their useful life.

We do not expect an increase in the number of large yachts being sent for recycling in the near future. However, with the growing size of the large yacht fleet and the number of yachts to be found in the EU or otherwise flying the flag of an EU member state, consideration will have to be given sooner rather than later to the application of the EU's complicated ship recycling regime (in particular the Waste Shipment Regulation and the Ship Recycling Regulation (SRR)) to the disposal of end of life yachts.

In the meantime, all those yachts over 500gt, whether operated as a pleasure vessel or a commercial yacht which fly the flag of an EU member state (or the UK) or which otherwise call at the port of an EU member state (or the UK) will, from 1 January 2021, be required to carry on board a valid and certified Inventory of Hazardous Materials (known as an IHM) to be compliant

with the SRR. Many yachts have the necessary arrangements in-hand to ensure compliance. However, there are some who, either by leaving it too late or otherwise failing to begin the process, will not have their IHM in place by the deadline. The EU Commission has generally indicated a tough line will be taken on compliance, the deadline having been well publicised since December 2018. However, the Covid-19 related travel restrictions have greatly hindered the completion of the necessary surveys in the run up to the deadline and there is now the real possibility of mass non-compliance across all vessel types. In light of this, the commercial shipping industry has been pressuring the EU to adopt a more flexible approach and the EU Commission has recently responded with guidelines on the enforcement of this element of the SRR.

Such guidelines re-iterate the need for compliance but allow the competent authorities in member states to take into account the impact of Covid-19 on the plans of non-compliant vessels. Those who can demonstrate that reasonable efforts have been made to procure an IHM before the deadline can expect an initial period of port state control flexibility, those who cannot risk the possibility of detention for non-compliance with little prospect of a waiver. Further, it is reasonable to assume that such flexibility will not

last forever and that compliance with this particular requirement of SRR will become the subject of a campaign by the members of the Paris MOU in the relatively near future.

Finally, those who manage and operate large yachts cannot rest on their laurels having procured an IHM. Going forward, IHMs will need to be carefully maintained following any refit and repair work and we can expect the yachting industry's focus on the regulations related to the disposal of end of life vessels to grow just as it has in the commercial shipping world.

## The Impact of Brexit

With attention focused on Covid-19 and more mainstream Brexit matters, there has been little clarity concerning the impact of Brexit on VAT paid yachts after 31 December 2020, that date marking the end of the UK's transition under the Brexit withdrawal agreement. With clients increasingly asking for advice on the subject, it was therefore welcome news when, in September, reports emerged that HMRC had responded to the combined lobbying efforts of the Royal Yachting Association (RYA) and British Marine on behalf of UK yacht owners with a one year extension to Returned Goods Relief. Such extension means that owners of VAT paid yachts may return to the UK at any point prior to 31 December 2021 without having to re-import their yacht into the customs

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territory of the UK and incurring potential further VAT liabilities.

Returned Goods Relief is a relief from import VAT/duty which is available to owners of goods which have been exported from the EU but which, prior to being exported, were “Union goods” (i.e. they were in free-circulation in the EU prior to their export, having either been originally imported into the EU or manufactured in the EU). The focus of the one year Returned Goods Relief extension is privately operated UK owned yachts that have been located outside of the UK.

However, notwithstanding the above, HMRC’s one year extension of the Returned Goods Relief period raises a number of questions. Firstly, on the basis that the maximum period of time which a yacht may be located outside the EU before returning to the EU is three years, HMRC’s extension would suggest that they consider 31 December 2020 to be the date when this three year period will expire. This in turn suggests that 31 December 2017 was the date of “export” and the period when Returned Goods Relief entitlement commenced. Of course, this is not the case for a vessel which has simply sailed from the UK to the EU, securing Returned Goods Relief on arrival into the EU, then remaining or partially remaining in the EU thereafter.

It is considered by some Brexit commentators that the period of export for UK goods located in the EU is Brexit day itself, i.e. 31 December 2020, this being the date when the UK and its goods are “taken out” of the EU. Were this the case, then owners would have until 31 December 2023 to return to the UK under Returned Goods Relief.

Further, it is concerning to see that HMRC appear to have very narrowly applied this extension to privately operated yachts, whereas Returned Goods Relief applies to a much wider class of goods.

Unfortunately, at the time of writing no specific legislation has been introduced into the Taxation (Cross-border Trade) Act 2018 (the UK’s post-Brexit Customs law) nor has a Statutory Instrument been issued as secondary legislation. Equally, no specific guidance on this matter has been issued by HMRC.

It is also concerning to see it suggested that, following the end of the transition period, the remaining EU27 may regard the flag of a yacht which was lying in the UK at the end of the transition period as a factor which is relevant to the owner’s ability to claim Returned Goods Relief upon the yacht’s return to the post-transition customs territory of the EU. From an existing UK perspective at least, a yacht’s flag has no impact on the continuing validity of a VAT

payment made within the current VAT territory of the EU.

Whilst it is encouraging to see the attention of HMRC and the EU27 turn to the yachting industry and in particular to yacht owners who have properly paid the VAT due on their yachts on the assumption that such payment would entitle them to free circulation throughout the Customs territories of the UK and the EU, these recent reports seem to pose as many questions as they answer and we look forward to receiving further clarity from HMRC and the EU27.

### **Application of IMO Tier III NOx requirements from 1 January 2021**

The International Maritime Organization’s (IMO) Tier III requirements under Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL), have, since 1 January 2016, applied to all vessels over 500gt, with a keel laying date on or after 1 January 2016 and a marine diesel engine with a power output of over 130 kW when operating in a NOx Tier III emission control area (ECA). References to a keel laying date in this article mean the date on which a vessel’s keel is laid or which a similar stage of construction has been reached.

To meet the requirements of Tier III, a vessel must have NOx emissions around 75% lower than those set for Tier II. Current technology cannot achieve compliance by engine tuning



alone and alternative solutions, such as selective catalytic reduction units (SCRs), are therefore required. The size of the equipment required for such solutions means that Tier III compliance presents a particular challenge to yachts of between 24m and 40m, which are likely to lose a disproportionate amount of guest space in order to accommodate it.

A delay in the application of these requirements to vessels over 24m but under 500gt was therefore sought and secured by the International Council of Marine Industry Associations (ICOMIA) and various other IMO Member States until 1 January 2021. Efforts have since been made by ICOMIA and Turkey to persuade the IMO to mitigate the impact of Tier III requirements on smaller vessels, including a further extension to the application. However, these efforts were rejected earlier in the year and last month it was confirmed by the 75th session of the IMO's Marine Environment Protection Committee that the Tier III requirements will, from 1 January 2021, apply to all vessels (including yachts) with (1) a loadline of more than 24m, (2) an installed marine diesel engine with a power output of over 130 kW, (3) a keel-laying date on or after 1 January 2021 and (4) operating in an ECA.

With effect from 1 January 2021, the Baltic Sea and the North Sea will all be added to the existing North

America and US Caribbean ECAs. Further ECAs are expected.

In light of this change, we can expect Port State Control to take a greater interest in the Engine International Air Pollution Prevention (EIAPP) certificates of vessels whose keel was laid on or after 1 January 2021 with fines for non-compliance. In the meantime the impact of this regulation is being felt in a rush by some to secure construction contracts and lay keels before 1 January 2021.

#### **Yachts on film**

The use of large yachts as a means of depicting glamour and wealth in films, television dramas and documentaries is nothing new. Most have seen the various James Bond films featuring yachts, or even Sky Atlantic's recent *Riviera*, with its portrayal of Monaco life! For those yacht owners prepared to share their yachts with the public, these can be exciting and lucrative projects. However, when a film company chartered a yacht for filming, certain things need to be taken into account by each side when negotiating the charter agreement.

The first thing to be considered is the form of charter. Whilst the standard MYBA Charter Agreement is insufficient on its own for these purposes, it is a familiar set of terms and is therefore a good starting

point from which significant further development will be required.

Filming brings with it an increased risk of damage to the yacht (or its crew or a third party), particularly using helicopters, drones or tenders, and the yacht owner and its insurers will need to be alive to the careful apportionment of risk and liability. The yacht owner will also need to consider the risk that the production might not be a hit, or worse: that it results in a negative portrayal of the yacht and those associated with it.

The film maker will want to ensure that the yacht is a well-run charter yacht, with minimal likelihood of disruption to the expensive and carefully controlled filming schedule. It will want to be insulated as far as possible from the risk and consequences of delays howsoever caused, including by machinery breakdown, detention or even arrest.

Film charters often result in an intensive period of activity for yacht and crew but are commonly fairly short in duration. However, they do pose the risk of disruption to the yacht's schedule. Due to the high costs involved in assembling a film crew and cast for a period of filming, a film maker may look to exclude the yacht owner's ability to sell the yacht before the completion of the charter, to increase liquidated damages in the event of a delayed or cancelled charter and even to include a right

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to extend or book another charter period to complete filming if it runs over, without restriction and at a pre-agreed rate.

Filming typically requires a large film crew (for a Hollywood blockbuster this could be somewhere between 100 and 200 crew in total), so special dispensation from the yacht's flag state and insurers will need to be obtained by the yacht owner, and consideration given as to how such arrangements are dealt with in the charter agreement. The film maker will want certainty on such dispensation. Before the charter is signed it may want the yacht owner to have procured evidence that such dispensation will be forthcoming or at least have confirmation that such dispensation will be procured by a date well ahead of the charter commencement date, with a right of termination if no such dispensation is forthcoming. Conversely, the yacht owner may face difficulty in getting the dispensation far in advance of the charter commencing, as it will be dependent on the flag state receiving and being comfortable with details of the charter arrangements and documentation such as health and safety risk assessments, much of which may not be available until close to the start of filming.

The prohibition on photo shoots at clause 13 of the MYBA charter agreement will need to be addressed along with the need for express

agreement on intellectual property rights and photograph release. So too will any restrictions the yacht owner may have on filming in certain areas of the yacht or any requirement for the yacht owner's approval of footage.

One would expect the usual confidentiality provisions to also be increased. On a film charter we worked on last year, even as the lawyers, we were not allowed to know anything about the film, so we were as interested as anyone to see the film released this summer.

Whilst there is much to be considered, the issues can generally be addressed to the satisfaction of both sides and we expect a return to this exciting and lucrative charter work as and when the Covid-19 situation improves.

### **Superyacht Eco Association (SEA) Index**

22 September 2020 saw the launch of the Superyacht Eco Association (SEA) Index by the Yacht Club de Monaco and Crédit Suisse. Based on the Energy Efficiency Design Index methodology published by the International Maritime Organisation's (the IMO), the immediate aim of the SEA Index is to provide a metric for measuring the environmental impact of yacht design and use. Its ultimate aspiration goes further: to become the global industry standard for the ecological rating of all large yachts, going beyond the measurement of air

pollution to become a multifaceted sustainability index.

The SEA Index has overlap with the commercial shipping industry's Poseidon Principles, launched in June 2019 by a group of leading ship finance banks to establish a means of collecting, assessing and disclosing ship emissions data, in order, ultimately, to align their investment portfolios with both the IMO's greenhouse gas emissions reduction targets, and those ship owners demonstrating real commitment to the decarbonisation of their fleets.

The intention behind the SEA Index is to encourage the yachting industry to innovate and to generate new products based on ecological rating, creating incentives for builders and owners to move towards yachts with a lower environmental impact and fuel consumption. Some of the potential concrete results include emission based port fees and financing parameters.

The SEA Index is ambitious but it is off to a strong start with support drawn from a wide variety of influential players in the industry. Its voluntary nature is a challenge, as is the fact that it does not apply to the whole fleet. Currently applying only to yachts over 40m, it does not set down any mandatory standards, nor does it seek to be prescriptive. Instead, it aims to encourage voluntary technological innovation and development. Such



initiatives are to be encouraged and we, like many, will be hoping this is an effective catalyst to cultural change amongst the yachting industry's key stakeholders and the wider industry as a whole.

### **Crew Data and GDPR**

Since coming into force in May 2018, the EU's General Data Protection Regulation (GDPR) has been a recurring theme in law firm briefings and most organisations are now well versed in what it takes to comply with their obligations under it. However, we have recently seen a spate of incidents involving the sharing of personal data belonging to yacht crew, including sensitive medical information, which indicates that for some, there remains work to do. We have also found that many seafarers employment agreements currently in use on yachts have not been updated or otherwise do not adequately deal with GDPR and that many yachts do not have developed privacy policies in place for their crew. This is particularly the case for those yachts which are not run by large yacht managers.

Given the serious repercussions for those organisations failing to comply with GDPR (namely fines of up to the higher of EUR 20 million or 4% of annual global turnover), we felt it worth briefly recapping the issue.

The nature of crew employment and technical management arrangements in the yachting industry presents various specific challenges for GDPR compliance. For example:

- Several different entities may use personal data relating to the same individual for different purposes. Owners, crew employers and managers, yacht managers, insurance brokers and underwriters may all from time to time have access to and use the personal data of crew members.
- 'Special category personal data', such as that relating to the health of crew members will often be used for employment and insurance purposes. Special category personal data receives enhanced protection under the GDPR and should be treated accordingly.
- It is common for the registered owners of yachts to be incorporated and crewing arrangements to be based in offshore jurisdictions. Even those yachts with a wholly EU structure often operate outside of the UK and EEA. In each case the GDPR's complex rules on the transfer of personal data outside the UK and EEA are frequently likely to apply.

Whilst there is no 'one-size fits all' approach to ensuring compliance when it comes to the handling of

crew or, indeed client personal data, the following points should be borne in mind by all organisations handling personal data:

- Have the individuals whose personal data is held been informed about how their personal data will be used, and their rights in relation to their personal data?
- Have the data sharing relationships between different parties been considered. In particular:
  - Have the individuals been informed which parties may receive their personal data; and
  - are appropriate contractual terms in place in order to ensure that shared personal data is protected in accordance with the GDPR?
- If special category personal data will be used, or transferred to another entity, has a legal basis for this use or transfer been identified? In certain cases there may be a statutory legal basis available, but in other cases it may be necessary to obtain consent from the individual.
- If personal data will be transferred outside of the UK or EEA, does a valid safeguard or exception protect the transfer of that personal data?

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- Have appropriate technical and security measures been put in place to protect personal data?

Whilst GDPR compliance can be complex, the awareness by individuals of their rights and the enforcement of data protection rules by the regulators across the UK and EEA has increased significantly since the introduction of GDPR. All yacht owners, crew employers, management companies, insurance brokers and underwriters, and indeed any other company handling personal data, must have in place a robust compliance programme or otherwise risk a potentially serious and costly breach of GDPR.

## **Carriage of yachts as deck cargo**

The carriage of yachts as deck cargo frequently saves time and avoids the inevitable wear and tear of a long ocean passage. It also allows the movement between cruising grounds of yachts which might be unable to make such a passage under their own power, or whose owners are simply unwilling for them to do so. However, as a number of recent cases have shown, carriage of a yacht as deck cargo is not without its risks.

In the spring of 2019 the charterer of a large racing yacht arranged, via its agents, to ship the yacht to Europe as deck cargo with a leading transporter of yachts. Unfortunately, the yacht's cradle collapsed and the yacht was lost overboard in mid-Atlantic during

a period of adverse weather. The loss was blamed on deficiencies with the cradle itself, which had been ordered by the yacht's owner and assembled by its crew.

A yacht's Hull and Machinery (H&M) cover is usually suspended whilst the yacht is carried onboard a vessel as cargo and gives way to the carrier's insurance. A carrier will usually have in place an open cargo annual policy under which it will declare the yacht as cargo and name the yacht owner as an assured.

Theoretically the yacht owner can claim under this policy should the yacht suffer damage, during the course of carriage. However, such insurance is usually rudimentary in terms of cover and this combined with the terms of the contract of carriage may make it difficult for a yacht owner to claim against a carrier for loss or damage suffered.

The carrier's insurers will have defences to potential liability available to them which are out of the control of the assured yacht owner. For example, the insurer may resist a claim on the basis of a material non-disclosure, which the yacht owner may find difficult to rebut and leave it without recourse. This because the yacht owner will have handed the yacht to the carrier, who declares the cargo to the underwriter and the terms upon which this declaration is made (if indeed it is made at all) are unknown to the yacht owner.

There are multiple opportunities for things to go wrong in the carriage of yachts as cargo, from accidents arising during their lifting and re-floating, to failures in their lashing and cradles caused by extreme weather or otherwise.

Yacht owners are advised to check both their respective H&M and Protection and Indemnity (P&I) policy coverage, which may be described as an “all risk” policy but in reality, includes various carve outs. To avoid confusion, yacht owners should check the parameters of insurance coverage under the applicable insurance policies with a broker or legal adviser and to offset any risk of a shortfall in coverage it may be prudent for a yacht owner to take out separate cargo insurance themselves.

Yacht owners should also be clear as to apportionment of liability between themselves and the carrier, throughout the various phases of operation associated with the carriage of a yacht. This is pertinent where the yacht owner is required to provide its own cradle and/or lashings (as is common practice). Such arrangements potentially obfuscate the obligations and responsibilities of the parties involved in the process of loading the cargo and without care, there is real scope for gaps in coverage to emerge where responsibility passes between the parties.

Lastly, governing law and jurisdiction are further points of concern in the





carriage of yachts. In a recent case, carriers procured the issue of a seaway bill, which conferred exclusive jurisdiction in the carrier's principal place of business (i.e. Germany). However, the booking note between the consignee and the carrier contained an exclusive jurisdiction clause (EJC) in favour of the English Courts. In its ruling, the English Commercial Court held that there was a contract between the consignee and the party engaged by the consignee to arrange the carriage, which incorporated the EJC. Governing law and jurisdiction provisions should always be scrutinised carefully to ensure compatibility.

There are a number of things yacht owners and consignees can do to reduce the risk associated with the carriage of yachts as deck cargo and at very least we encourage them, before entering into the contract, to:

- Obtain a copy of the carriers' insurance.
- Confirm the exact location and therefore applicable jurisdiction of any handover.
- Be certain as to what their responsibilities are and that they have adequate insurance up to the point of each risk transfer.
- Check the extent of their own H&M and P&I cover and if needs be procure additional insurance to cover the operation.

### ***Holyhead Marina Ltd v. Peter Farrer & others [2020] EWHC 1750 (Admlty) handed down on 7 July.***

Earlier this year the UK's Admiralty Court handed down a ruling of significant interest to yacht owners and other UK marina users and operators following the destruction of Holyhead Marina and the loss of or damage to 89 vessels moored there during Storm Emma in 2018. The owner of the marina (the Claimant) had sought to limit its exposure to the circa £5,000,000 in claims by issuing a Limitation Claim under s.191 of the UK's Merchant Shipping Act 1995 (the Act) against the owners and insurers of the lost or damaged vessels (the Defendants). The Claimant sought a declaration of its right to limit its liability at 500,000 Special Drawing Rights in a manner similar to the right of a ship owner under the 1976 Limitation Convention.

The Defendants resisted the claim and argued that (1) the Claimant was not the owner of a "dock" as required by the Act; (2) the Claimant had lost its right to limit liability because the loss and damage resulted from the Claimant's personal and reckless act or omission; and (3) that the limit of the Claimant's liability should be assessed by reference to the tonnage of the largest UK ship to use the wider harbour in which the marina was based.

In response, the Claimant brought an application to strike out such arguments and/or for a summary judgment before the UK's Admiralty Court, the response to which is important both for owners and operators of yachts and marinas in the UK.

The Court held that a marina, notwithstanding its lack of connection with commercial shipping, is a landing place and so is within the extended statutory definition of dock. Therefore, the Claimant could limit its liability for damage to property, including vessels. Such a broad interpretation of s.191 by the Court will be of real concern for marina users and their insurers. Marina operators will now be able to limit their liability to the point that the amount of damages they are liable to pay to yacht owners may be insufficient to cover the cost of repairing or replacing damaged or lost yachts.

The Court highlighted that the Defendants' case that the Claimant has lost its right to limit its liability was "weak and implausible" and expressed the view that they would "very probably fail". However, it refused to dismiss this defence summarily and allowed it to go to trial. This decision provides some hope to yacht owners trying to break the right to limit, albeit subject to first overcoming a high hurdle by proving that the loss, which occurred,

resulted from the marina owner's personal act or omission or otherwise recklessness and with knowledge that the damage will probably result.

The Court dismissed the Defendants' argument that the limit of the Claimant's liability should be assessed by reference to the tonnage of the largest UK ship to use the entire harbour. It held that "the area over which the Claimant discharges any functions" was the marina itself and did not include the entire area of the harbour.

Whilst the judgment may serve to reduce the considerable premiums paid by marinas in the UK, it may conversely drive up the cost of insurance for vessels berthed in UK marinas. Owners of such vessels should pay closer attention to ensuring that they have in place insurance sufficient to cover the cost of any salvage operations and environmental liabilities related to their vessel, as well as the repair or replacement of their vessels.

#### EDITOR



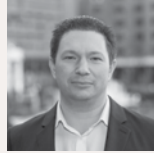
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## COMPREHENSIVELY YACHTS

The HFW yacht team has been an integral part of the yacht industry for over 30 years and has a physical presence in many of the major yachting jurisdictions. The enduring relationships developed with the owners, builders, designers, financiers, insurers, brokers and managers of yachts, our in-depth knowledge of the yacht industry and our international reach ensure we are pre-eminent in the field. For more information on HFW's yacht team and the services we offer, please see [www.hfwyachts.com](http://www.hfwyachts.com)

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