

## Am I important (to your Superyacht project)?



**Quentin Bargate**, the Senior Partner of Bargate Murray, the award winning Luxury Asset Law Firm, and a superyacht lawyer for longer than he cares to remember, would like to think so.

Here he explains why.

Am I important to your superyacht project. That is the real issue I seek to address in this, the Monaco Yacht Show 2017 edition of our newsletter.

Well, It is my view that, to the prudent owner, yard, broker, or bank (and hopefully others too) yes I am – or at least, I and others like me, specialist superyacht lawyers, are.

Let's focus on the new build yacht project. Like any major project, it requires specialist support in order to protect the "investor's" money and mitigate the risks their ownership may present. It just so happens that that one of them floats!

With that in mind, you begin to understand the reasons why a good superyacht lawyer with relevant experience (along with other good professionals) is essential to the success of a yacht project and the protection of the owner's "investment" in all senses of the word.

The following (non-exhaustive) examples, drawn from my and my colleagues experience in recent yacht construction projects will, we hope, shed some light on our role as superyacht lawyers, and answer the question posed above.

Here are some more general considerations that should be borne in mind at the outset of the project:

- A yacht is a high value asset that will probably be built overseas, and possibly also owned by an SPV domiciled in a third jurisdiction.

- Subject to international regulation and control.
- Involves substantial fiscal outlay prior to delivery – perhaps in excess of Euro 200m – and therefore a credit risk.
- The build will require the use of skilled project managers, designers, third party suppliers for the fit-out, all of whom should be engaged on terms which protect the owner’s interests (including their confidentiality).
- There are VAT and local tax considerations, which tend to be exacerbated if the yacht will be commercially chartered in the EU.
- An owner not in the least interested in hassle or legalities (that's our job)!

We would need to write a book to explain how a good superyacht lawyer would address each of the above points in detail. Accordingly, we have focussed below on a handful of the most important points to negotiate in a construction contract on behalf of the owner to protect their money, and manage credit risk.

1. **Stage payments** – The shipyard will invariably try and “front-load” the contract so as to oblige the owner to pay the majority of the contract price early in the build process, at a time when there is no intrinsic value in the part built yacht. There is usually scope for negotiation here, the aim of which is to spread the size of the stage payments and “back load” the agreement.
2. **Title** – It is essential to ensure that title in the yacht passes to the owner well before the delivery date. In the nightmare scenario of the shipyard going bust, this will go some way to protecting the owner's interests and preventing the yacht from being used to satisfy the claims of any higher ranking creditors.
3. **Insolvency** – Linked to both of the above points are the further ways in which an owner can be protected in an insolvency event. There are five key elements to this:
  - a. Procure a **refund guarantee** from the parent company of the yard covering the first two stage payments in the event that the owner became entitled to terminate the contract (due to the insolvency of the yard or otherwise). This secured the repayment of upfront stage payments at a time when there is little of else of tangible value to show for the payments.
  - b. On receipt of a particular stage payment (usually the third) the parent company should also provide a **performance guarantee**, obliging it to “step into the shoes” of the yard and procure the delivery of the yacht.

- c. As touched upon above, procure **title in the part complete yacht**. This way, at its option, the owner can elect to take the project to another yard to complete construction.
  - d. Ensure the owner has the **right to take possession** of and/or use the shipyard's facilities too complete the yacht. Whether or not such a clause is enforceable will depend upon the place where the yacht is being contracted. It is intended to work together with the passing of title clause.
  - e. **Registering the yacht as a vessel under construction** with a top quality ship registry such as the Cayman Islands. This makes the owner's interest in the yacht a matter of public record which is helpful, but not determinative, in proving title.
4. Fourth, just how much is the yard proposing to **charge by way of uplift** to manage "owner's side" elements of the contract, such as items of owners supply? Can you negotiate a better deal? Don't pay 15% where 5% might be enough.
  5. Fifth, **delay** can be a major issue – how much does the yard commit to pay for late delivery, and how much of a grace period do they want before any damages become payable? If a yard tells you they can deliver the yacht in three years, and it actually takes four, you'll want compensation for delay (think of lost charter hire and inconvenience), but you may find the yard have capped their liability at an unrealistically low figure. Also, how long do you have to wait before you are entitled to terminate the agreement for delay?
  6. Sixth, **VTC's** or variations to contract. It is of course quite normal for owners to make changes to certain elements of the design or build and it is important to have in place an effective VTC procedure that does not unduly penalise the owner for changes. It is also desirable to ensure that changes that reduce cost or time are credited to the owner – so it is not one way street, but balanced.
  7. Seventh, **quality standards**. While the specification will set out the detailed requirements for the newbuild, the contract remains of critical importance in establishing the overriding quality standards for the build, by reference to classification society standards and more general quality standards your lawyer, working with your technical experts, can help to define to avoid later dispute.
  8. Eighth, **insurance**. The yard will insure the yacht while it is being built and before delivery. Just how good are these key security documents? In our experience there is often work needed to ensure the owner has the required level of protection.
  9. Ninth, check the **dispute resolution clause** – unfashionable, but vitally important. If there are problems with the build that cannot be resolved amicably by discussion, who will be asked to resolve them? Some yards will be flexible, others less so, but

choice of governing law and how disputes are resolved – arbitration, expert determination, courts etc. – are of fundamental importance. It's no good having a great contract and specification if it is subject to an unknown and possibly unreliable system of law or jurisdiction, yet this is often treated as an afterthought.

10. Tenth – As above, we could keep going as there are many other key points that should be considered. The fact of the matter is that we have only scratched the surface of the superyacht lawyer's work here. We hope, however, that it goes far enough to explain the difficult question posed at the beginning!

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