



## Should your yacht contracts be checked by a maritime litigator?

Spoiler alert: my answer is "yes", and I will get to some reasons later.

I started my career as a commercial shipping litigator, handling shipping disputes of all kinds, including many commodities arbitrations under trade rules and LMAA arbitration rules. I could write a book about the eccentricities of some of the people I've come across in the shipping and yachting world!

I remember acting for one client who drove around in a gold-plated Rolls-Royce. He was an excellent lunch companion with a well-funded credit card (he always insisted on paying!). That was his reward for the extreme risks he took as an oil trader back in the 1980's.

In fact, on my wedding day, he called up because his company's shore tanks in Rotterdam, full of US spec gasoline, had been arrested, and what could I do to help? I calmly passed the buck upwards to my then boss, who (not wanting to miss my wedding) gave a personal undertaking to provide a guarantee. Not the promise one would usually expect to be made on a wedding day.

That took considerable courage! I hope the wedding did not disappoint.

And then there were the Italians, whose priorities at the time did not always align with the needs of the case we were handling.

To be clear, I very much appreciated multiple visits to Rome where their HQ was situated, to take witness statements in their very large insurance case, gather documents and enjoy strolling around that eternal city. But come summer, they were off, court demands notwithstanding – very sensibly, they take their annual vacations very seriously!

Another shipping line client of mine had a chief executive who, when I first met her, said "*Quentin, I want to talk about sex*". She didn't of course, it was just a tactic to get my attention!

In amongst all this diversity, I learnt a lot about litigation risk, and how essential it is to make the right choices early on in a deal, to reduce the inevitable risk in complex international transactional work.

A lot of these issues happened during my 14 years as partner at Simmons & Simmons. When I founded Bargate Murray, I did so with the aim of developing my then nascent superyacht practice in a fresh environment.

I can say that the environment was good, but my landlady's insistence on testing the latest beverage she had acquired from her latest trip to Italy, usually at around 11AM, was not necessarily conducive to my concentration.

A drink at 11AM, or a client who wants to raise somewhat inappropriate topics for discussion, pales into insignificance commercially when compared to an after-thought dispute resolution clause inserted at the last minute in a complex contract.

You couldn't make up some of the stuff I get to read.

So wearing both my superyacht and my commercial shipping litigator hats (on top of the festive Santa hat I wear at this time of year), here are some suggestions on issues to think about when drafting yachting agreements:

1. Don't mix substantive and procedural law in your yacht agreements. What this means is that if you choose English law to govern your agreement, you should also ensure that you choose English courts or arbitrators to hear any dispute. In my experience, it is important to align the law chosen to govern the contract with the expertise of those who are going to interpret it. Surprisingly perhaps, this does not always happen.
2. Choose arbitration if confidentiality is important. Use sensible and appropriate arbitration rules, such as [YCA](#) or the [LMAA](#) for yacht or maritime disputes, and I would also advise insisting that the language of Arbitration is English and the seat in London.
3. Also consider arbitration if international enforceability is important. For example, you can enforce an English award of arbitration in the US using the New York Convention 1958, whereas there is no treaty right to enforce English judgments in the US. Instead, you have to start fresh proceedings in the US, seeking enforcement, a process that takes longer and is far more complex compared to enforcement of an arbitration award under the New York Convention 1958.

The location of your counterparty, and where they hold their assets, should be understood and taken into account. I have lost track of the number of times enforceability of any judgment or award has not been considered by those who drafted the relevant contract. A judgment is of little use if you can't enforce it.

There are, of course, ways of mitigating enforcement risk if it is properly appreciated at the pre-contract stage. Many yacht contracts do provide for the provision of refund and performance guarantees, the transfer of title in the incomplete yacht and supplies for the yacht, and its registration as a yacht under construction on the relevant register.

From the builder's point of view, their security is usually through ensuring stage payments are paid on time, are front-loaded, and sometimes requiring a reciprocal guarantee from the buyer.

4. Whilst I am a huge fan of arbitration in yacht disputes, it is not the best choice for everything, so also include a reference to expert determination for purely technical disputes. Expert determination allows for the appointment of an individual who is familiar with the relevant specialist or technical issues to resolve a dispute, such as paint, a common issue with yachts. It is usually cheaper and quicker than full-blown arbitration, which is best left for more complex disputes that require different skills.

Moreover, different experts can be selected for different issues if the expert determination clause is drafted to allow for that eventuality.

5. Finally, the best advice to drafters I can give is to ensure a litigator, or someone with litigation experience, is involved in writing or checking the dispute resolution clause at an early stage. Indeed, it's often a good idea to get a litigator to review the entire agreement, as they'll know the kinds of clauses that may cause problems, and can suggest alternative wording to avoid complex and costly disputes. Prevention is far better and cheaper than trying to find a cure later. On the subject of prevention, I would urge you to read an article written by my colleague, Andrew Giles, in this very same newsletter, on how you can avoid a dispute arising once you've got the actual agreement in place. A Merry Christmas and Happy New Year to you All!



#### **QUENTIN BARGATE - Founder, Chief Executive Officer**

Quentin, the firm's founder, leads its superyacht and dispute resolution practice areas. With over 35 years' experience, and a winner of many industry awards, he is widely acclaimed as a leader in the industry.

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