

YACHT FISCAL2007 — Finance, Legal & Tax Issues affecting Superyachts

Day 1 — 6th March 2007

Transactions and Contracts — Your Legal Position

- **MYBA contracts** Sales and purchase issues
- **Yacht Management contracts** The practicalities
- **New build contracts** The key issues
- **Crew and employment contracts** The reality
- **Legal issues: 2006 — 2007** Specific cases

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Nothing much has happened legally in 2006 — 2007; so you're not going to get anything like the detailed up to date talk like the previous hour and a half. As you've heard, we're going to start off with MYBA sale and purchase contracts. We've put together 4 issues that we think might be of interest to you — they're not exclusive so do raise other ones if you feel like it.

The first one is the issue of a personal or a corporate guarantee and indemnity, usually from the selling beneficial owner; why, when and whether you're going to get it. The second one is just practical issues relating to sea trial and condition survey — rights and liabilities when they are amended, when they're tweaked and whether you're going to get away with it, whether the market's actually going to dictate that at the moment. Thirdly is closing logistics — how do you actually do it, how do you get the right documents in the right place and how do you ensure that the people on board have got the capacity to sign on behalf of buyer and seller. And what happens when something goes wrong, which it often does, no matter how well you plan. The fourth one is just a legal issue on statutory and maritime liens — their enforceability and where a statutory mortgage, a priority mortgage, rests in relation to general maritime law, because you've often seen a warranty from the seller that the yacht is sold free of all liens etc. We're just going to touch upon what that means and how it fits in.

So that's the first topic we're going to cover. We've then been asked to talk about yacht management contracts, the practicalities. Most of these follow the standard version, so there aren't that many legal issues that arise out of it, they've all been done to death, as it were. So there aren't going to be very many that arise on that topic so I don't think there's going to be a huge discussion generated on it but we will fly through another four issues on it. The first one is general liability issues, in particular liability cap for the manager, when that can be extended, how it can be extended and what the practical fall back to the owner is. The second one is the liability of the DPA and whether exclusion may be possible in the event of a pollution claim, for example, and if it isn't, how the DPA has protection from the client, the ultimate owner. The third point is termination issues, under the contract. How you can

terminate, and what is payable at termination and there's a particular clause in the standard agreement that mentions that, which we'll discuss in due course. The fourth one, a bit more practical, a bit more up to date, managers as co assured. Why and what the practicalities are when there's a mortgage involved as well. This will bring us on to new build contracts and certainly because of the market, as we've heard this morning, and we all know, is buoyant new build contracts are where the three of us are having the majority of our practice at the moment. Four issues crop up regularly, whether you're advising yard or owner. The first one we're going to discuss is PC sums, how they work, why they're there, what the yard can use by developing the PC sum argument and how the owner can cap the exposure on them. The second one is liquidated damages against general damages, why liquidated damages, what are they, how do they work. Third one, again harping back to this morning's panel but passing of title, when and where, against security. So how those two interrelate and the fourth one, which may have been discussed this morning, negotiation of the contract to assist financing i.e. get the banks involved at the beginning, get them talking. Fourth topic. Crew and employment contracts. The reality is that neither of us three is particularly keen to talk about them but we will. Requirement for MCA approval is the first issue we're going to discuss, the second one is jurisdiction or shopping around to benefit usually the owner, third one mitigation of national insurance or social security liability and the fourth one is use of probationary periods as a convenient way of teasing out crew and being able to get rid of them quicker and easier if there is a problem. Then lastly, legal issues 2006 —2007. It says up on the board specific cases, but what we're going to be discussing with you are examples we've had during the course of the last year, where we can give you a practical new build scenario, or sale and purchase scenario, where issues have arisen that have been resolved. It'll be more interesting than the rest of it because it will actually have some tangibility. We're also going to completely glaze you over as well by discussing force majeure in VAT because the best way to discuss force majeure is by giving examples of what might be and what probably isn't. It's an undefined term so therefore you look at case by case examples of what might come in under it.

So that's what we're going to talk to you about. As Martin said, at the end of each of the first four discussion points we're going to stop and that's when questions will be invited on each of those points.

Because I put the agenda together I'm going to kick off on the first point, under a sale and purchase contract through MYBA, the standard industry document. The first point we're going to discuss there is the use of a personal or a corporate guarantee and indemnity. Now this is a document that the seller will often ask for in the addendum 1, list of documentation required at closing. And maybe half the time they are granted by the buyer. The buyer doesn't need to, he can knock back on that and resist if necessary. It isn't usually a deal breaker, and in the current market where the seller is in a stronger point it's easier for him to turn round and say no. Why do we have them? Well, ordinarily a yacht is owned through a single purpose vehicle company, that company has no other asset, and the warranty that's given in the sale and purchase agreement in clause 15 I think it is, comes from the selling entity, so where the selling entity represents and warrants that there are no claims or there's no mortgage outstanding, or there's no lien outstanding against the yacht that's being sold, the yacht is then sold, the single purpose vehicle seller receives the finances from the buyer and that money is then sent out of the SPV because it no longer has an asset and is spread around the owner's other bank accounts, or assets. In the best scenario the SPV is worthless, in the worst case scenario the SPV may have been dissolved. It may no longer exist. So any representation or warranty from it if it's no longer in existence or valueless is going to be worthless, and that is why a seller

may ask for a backup, a guarantee and indemnity, from the selling beneficial owner, the person who actually owns the yacht at the end of the ownership structure chain. Or a guarantee and indemnity from them. It may be a personal guarantee but these people hate those, so it is often a corporate guarantee from a cash rich company that that beneficial owner also owns. That's why those come in, and as I say, occasionally they're allowed, possibly half the time they get through. Again, the terms are negotiated and they're normally limited as to value and as to validity in terms of time.

[Panel]

Can I just add on that subject they're often listed specifically now — I think they're in the standard list of MYBA documents that are provided on delivery of a yacht so it's in that addendum 1 to the standard form of MOA which has given, since the current edition came out, a greater credibility in the market, people now see it in black and white in the very first version of addendum 1 that crosses their desk and somehow think that they have to give it. But I think the point is that there really is no other solution to the problem that James has described. If you've got some kind of lien and the standard form of MYBA guarantee is limited to liens that lead to an arrest of a yacht after delivery, if you've got such a lien and you've got a single purpose company with no other assets then there is no other protection you can get except to take a guarantee from someone who has the resources to defend or cover you for the claim. There is a type of insurance out there, I had an involvement probably about ten years ago in looking at the wording for a policy and it never seemed to go terribly far but it was lien insurance, which was meant to insure you against exactly this risk, the risk of there being some lien that arises that's brought home to bear, the yacht is arrested after you've taken delivery but the claim is nothing to do with you. The problem with that type of insurance is that, like all insurance, it's based on the disclosure you make to your underwriters, what disclosure do you have to make, do you have to make a disclosure of all material facts of which you're aware; which tends to mean that the very situation in which you feel you're going to need that insurance is the very situation in which, when you tell your underwriters, they won't want to give it to you or they will only give it to you at a cost that you're not willing to pay. So that's why the guarantee is really the only practical solution to that problem.

[Panel]

The only thing I think I'd add to that is, and it's really a question, actually, but as the stand-in I think I'm going to ask more questions than give answers, but because of the nature of liens, there are certain investigations that one can do obviously with regard to things like crew wages and things like that, but we'll talk about these I think in the fourth sub section of this part. But they're largely invisible and therefore the question arises, if one is going to get a corporate guarantee whether there is first of all going to be a cap on the amount of that guarantee so it may be that in principle sellers are willing to offer a corporate guarantee but they're not going to be willing for it to be unlimited, so there's a negotiation point. And I suppose the second question is in terms of timing — again, the liens can sit there for a very long time but the guarantor, because of his own obligations perhaps with the corporate entity and his own financing obligations or future plans may not want the guarantee to last for ever and so it may well be that you end up at a negotiation point where you feel comfortable that any liens that may have been incurred prior to delivery will have flushed themselves out by that point and be covered by the guarantee period.

[Panel]

Well the standard period in the MYBA form is one year, it lasts for one year.

[Panel]

Which should be sufficient.

[Panel]

Contrary to what I said before, you do other things to protect yourselves so for example I always make a point of getting a letter from each crew member confirming that they have no claim for wages or any other claim against the yacht. Now that's getting the answer from the horse's mouth, you're unlikely to face a crew claim. But otherwise in practice a yacht could in theory be liable to arrest in any of the places that she's been — you can take out a writ of arrest in any court anywhere in the world. There's no way that you can practically search in every court to find out whether there is a writ of arrest. So you just can't protect yourself otherwise.

[Panel]

You have to take a view and we've recently done one where the client bought a yacht off a Receiver from a Middle Eastern country and they had to take a view. There was advice given locally, there were indemnities given, there were representations and warranties made. But there's a degree of risk as many of these things are, and the price may just reflect that, if there's a great degree of risk involved in the selling position.

[Panel]

Although you actually get quite good protection by buying from a court sale, it's one of the ways of clearing up a lot of problems, depending on which court you're talking about.

[Panel]

It's a *very* Middle Eastern country.

[Panel]

I have a feeling I know the one you're talking about.

[Panel]

Which brings us to clauses 26 and 27. Sea trial and survey rights and obligations. I'll just quickly touch on this by way of introduction.

The bugbear for the seller under the MYBA contract is that, under the sea trial provision, the buyer has an unconditional right to reject. If they take the yacht out and they don't like it, for whatever reason — and there doesn't have to be any justification whatsoever, they might not like the colour of the taps in the bathroom, they've got a right to reject. Now the costs that are incurred as a result of that sea trial do come out of the deposit, and then the deposit is returned to the buyer. But that is what the sellers don't like, and as the market firms, and as the sellers find themselves in a stronger position they are beginning to attempt, more often than not, to amend that clause so as to remove that right to reject and to tie it in with the defect clause under the condition survey. Now that's like buying a secondhand car without being allowed a test drive, and the view is, while the buyer's got to beware of what they're buying

they've got to be given a reasonable chance to actually test it. I think the clause is fair as drafted and I think any attempt to knock it back is probably inappropriate. You shouldn't be asked to pay large amounts of money for something that you can't even sea trial and have an option to pull out if you don't like it. If you've gone through the sea trial then fair enough, the condition survey, where you have to prove a defect and that is actually defined in the contract, then that works, although again at the moment you're seeing a buyer trying to make it easier to withdraw at the condition survey stage by amending the defects clause from the "affecting the operational integrity of the yacht or her systems" which is what it says at the moment to introducing a figure, let's say €100,000 or €200,000 worth of defects either on their own or in aggregate, and if they can get their own surveyor, and of course there's a negotiation point there who's surveyor, buyer's, seller's or independent, if they can get their surveyor to confirm that the defects add up to over €200,000 or whatever it might be, there's an easier chance of pulling out. So those are areas where you do see these clauses amended. They are important clauses and I think they work as currently drafted.

[Panel]

I quite agree with that. I've grown to love the MYBA form. I mean I remember many years ago the first time I saw it I thought god, this is the worst contract I've seen for a long time. But you grow to love it because it has the beauty of simplicity, you don't have to read it each and every time, you look at the amendments (if any) and we've all been through the mill countless times with all of the possible disputes that there might be under each of these provisions, so you know where you stand. I was just saying to someone before we began that one of the things I like is the very uncertainty of it, because particularly in this area of clause 27, I mean who knows quite what is a defect that affects the operational integrity of the vessel? I can't tell you exactly what that means and I don't think you can define it in any scientific way but the very uncertainty of it tends to mean that it doesn't get litigated. People don't go to arbitration on that point because no-one feels 80 or 90% confident of his position, it invariably leads to a negotiation, sometimes the deal falls apart, the parties can't agree. Mostly it leads to a negotiation with something coming off the price or some repairs being done, and I think probably that's the role of an agreement like this. It should lead the bride and groom to the altar rather than forcing them into the courts.

[Panel]

I think both sides know at the outset that if they can find a surveyor that confirms that the particular problem affects the operational integrity of the yacht or that particular system then the other party is equally going to find someone extremely quickly who will say actually it doesn't make any difference at all. That's why, as Jay says, you don't end up arbitrating or litigating on it at all, the deal is done and that's what the agreement is meant to do.

[Panel]

it's interesting, the American form differs from this one in that —I don't deal with it all that often but — whereas in the MYBA form you get a free right to walk away for any reason or for no reason at all after the sea trial, in the American form you get that right even after a condition survey. So it's much wider than this form. What I've seen in a number of cases is people trying to reverse the order of the sea trial and the condition survey and sometimes they do that for purely logistical reasons of when a surveyor is available and when the yacht can be taken out of the water and so on. But it has consequences and unless you're very careful in your amendments to the

contract to achieve that, you can really drive a cart and horses through the condition survey provision. I've had cases where people have done this, they've simply reversed the order of the sea trial and the condition survey and then they've gone ahead and argued about amendments to clause 27, the condition survey clause, and what a defect is going to mean and how long the parties have got to give their notices of rejection and so on. Completely overlooking the fact that by reversing the order the condition survey becomes irrelevant because the sea trial will happen afterwards and the free right to walk away for no reason at all survives the condition survey so it doesn't matter what you found there. I had another case recently that was interesting where the brokers who were instructing me had taken the buyer out on what they considered to be a sea trial but in reality was just a bit of a spin with a good lunch and a nice bottle of claret. The buyer had signed the contract but then got cold feet on the plane home and decided he didn't want to proceed with the purchase and the question was, had he had his sea trial or not? And the answer really was very simple. The brokers were absolutely convinced that the buyer had had his sea trial — he hadn't, because he'd had a spin on the boat before the contract was signed but clause 26 was still there, saying that he still had that right so had he really wanted to get out of the contract he could have insisted on having his sea trial all over again and walked away at that point. It's very important to keep in mind the sequence of these events and just what the rights flowing from each of these clauses is, and the danger of tinkering with them too much without careful thought.

[Panel]

Yes, they flow from each other pretty well at the moment and there is a knock on effect that is problematic. One issue that's being raised at the moment whereby a seller protects himself better is by asking for the sea trial to be carried out prior to the survey happening so that all parties are aware that the sea trial has happened before the contract has been signed, therefore the sea trial is accepted as is and the contract is only subject to the condition survey. Matt, do you have anything to add?

Matt

I think the only thing I'd add is sort of my background to start with was commercial shipping and I'm used to the much more prescriptive standard forms that you get, like the sale form, so I'm a little behind Jay in the sense that I'm coming round to the idea but I still find it a little uncomfortable. I think that the common message is that to take another spin on what Jay was saying is that ultimately all these forms are standard forms, so while it's true that you've got to be very careful, what you do to them is not actually going to do damage to the principal structure. At the end of the day these forms are there, these forms — the MYBA — obviously has a special conditions box specifically contemplating that you are going to tailor it to the needs of the specific deal and, more often than not, we see the special conditions box filled in often with remarks tailoring 26 and 27 to their needs, and the only message is, if you can do that it's absolutely fine and it's proper for the circumstances, but as they said, make sure that you're not actually damaging the integrity of those 2 provisions.

[Panel]

Moving on, because we're going slowly, the logistics point. Closing logistics. The only issue really here, it's not really legal, it's practical. I mentioned at the beginning how do you cover yourself where documents don't turn up, how do you make sure that the parties on the boat have got capacity to sign — the answer is of course to get a power of attorney from the selling and the buying companies to ensure that those on board — usually captains or brokers — have got the capacity to sign the protocol of

delivery and acceptance. So those at the closing meeting have got capacity to sign any documents are required, are unsigned or haven't been received from wherever the company might be based. That those at the closing meeting have got capacity to sign any of those documents. That's the way around it, otherwise you might need to take a view on faxed copies with an undertaking of originals to be received in due course.

[Panel]

Not much to add on that. I often think that there's very little law involved in what I do from day today and 95% of it is pure logistics. It's getting the parties ready to do what they want to do, and getting all their documents in order for the magic moment when completion has to happen. Most of the closings that I do are with other London lawyers such as James and Matt and others in this room; they tend to work pretty well, the reason being that it's a pretty small club of London and Monegasque — there's at least one Monegasque lawyer here that I've dealt with on a regular basis. Last minute wrinkles can be overcome on the basis of an undertaking and an assurance from one lawyer to another that something will be done.

[Panel]

Which brings us to maritime liens, statutory liens and mortgages. Matt, do you want to pick up?

Matt

Maritime liens. What are they? They are effectively an invisible, unregistrable, type of claim which each jurisdiction has selected — certain types of claim to which usually for public policy reasons it wants to give preferential status. It differs from jurisdiction to jurisdiction. In the UK I think there's about 5 types of claim which have maritime lien status, like crew's wages, salvage, master's wages and disbursements, damage done to another vessel, [plus bottomry and respondentia which I don't think have been used for about 100 years]. You can't register them, they're invisible. They nevertheless sit as claims against the vessel, they will pass with the ownership of the vessel, they will stay with the vessel, so they survive ownership transfer and they will usually from jurisdiction to jurisdiction take priority over a statutory form of mortgage.

[Panel]

Beneath a mortgage is a whole raft of liens, the most important possessory lien is the builder's lien, which is where a yard has retained possession of a yacht and for as long as it retains possession of the yacht it has a right over the owner. A statutory lien — the most important one there is supply to the yacht of any goods relevant or necessary for the operation of the yacht. That's the one that we will come across most often. So a quick touch upon liens.

[Panel]

When you hear the word lien think arrest, because the way you enforce a lien against a yacht is to arrest the yacht so those are the sorts of claims that you are worried about and that's why you take a personal guarantee from the seller when you're buying a yacht. It's not only those five liens that by law are capable of surviving a change of ownership, they're not the ones you're worried about, you're also worried about the claims that don't survive a change of ownership but which someone thinks is a good claim anyway so your boat gets arrested even for a bad claim, and that can

take some time to get cleared and the personal guarantee that you get from the seller will cover those liens as well, and the cost of getting the lien lifted.

[Panel]

That's the end of our quick touch upon the MYBA sale and purchase contract. As agreed we'll pause here briefly.

[from the floor]

Have you come across the issue about the buyer objecting to being liable for any negligence of the master during sea trials?

[Panel]

Only when you're acting, Duncan. It doesn't tend to happen, but the way you control it of course is by making the master not responsible for carrying out any instruction by the buyer that he deems to be negligent or inoperable or just plain stupid.

[Panel]

OK. Yacht Management Contracts. We've actually got very little to say about yacht management contracts. We'll come onto them later and answer any questions. They're nowhere as important as new build contracts, which are essential — I think that nearly all of us in the room are involved in them at the moment and the main issue that seems to jump out of them is PC (Provisional Cost) sums, that's a real issue for owner and yard. Looking at it quickly from an owner's point of view which is where I'm coming from most of the time, you tend to see this article carved out in the contract for items that may well be changing in terms of spec during the build process, so if we've got a three year build contract the audio visual typically, the navigational electronics systems are usually the areas that may develop during the course of three years, plus the interior design may well differ, the owner may change his mind on how he wants that done. So you often see those three areas particularly carved out by way of PC sums. Which is where a sum is given, plucked out of the air, as good an estimate as possible, is put into the contract and then there are provisions within the contract whereby that sum may be varied up or down depending on what finally goes on board. So it provides leeway within the fixed contract price for new updated equipment and/or change of mind in interior design. What can happen is that you can agree a price, you can agree a contract with a third party to perform within those specific areas and you can try and negotiate a position whereby you keep the eventual sum as fixed as possible and therefore as under control as possible but the big bugbear is labour costs. And how you build into a contract labour costs where you can provide for hourly rates, particular technicians — what we've seen happening over and over again, especially with yards that aren't particularly experienced in these areas, is where they've got an overrun on costs, they need to claw back some of that overrun so what they try and do perhaps is to put in a very high or perhaps over inflated figure for an hourly labour rate, which is extremely difficult for an owner to try and keep control of, yes he can see how many people are on board at a particular time but you can't control what's happening in the back office from time to time. So a recent way around it that we've seen is to ensure that every single contract based in relation to a PC sum item is for a fixed sum, is absolutely inclusive of all labour costs as well, is signed up by way of the change order mechanism under the contract which basically means that both parties agree to it before work commences on it. And for an owner that is a useful way of controlling the spend. The final way to control that situation is to insist that all the PC sum work is

chartered out to a third party company, not done by the yard direct, to ensure that there really are no labour concerns at the end.

Jay

It's always a problem area and I've never found that there is a complete solution to it because if it were just a question of knowing exactly what was going to be built or installed — the complete interior is often dealt with as a PC sum as well, and if you knew exactly what that interior was going to involve, what materials were going to be used, what the furnishings would look like, what the interior elevations would be and it was simply a question of costing it, that wouldn't be a problem at all. But the problem is you don't really know what you're going to get for that sum, so you've got the technical part of the yacht, and then the interior dealt with as a PC —sometimes by reference to another yacht built by the same yard so we will allow €4million to give you an interior equivalent to such and such a yacht, but of course the interior is not going to be the same as that other yacht, it's got to be different. What if more expensive materials are used, how do you keep a lid on the cost of that interior. I think it's a real problem for an owner to go in with a PC sum like that. I think it's much better, if you possible can, to define the specification in full detail for the whole yacht so you have an ordinary fixed price turnkey arrangement. But then you can go to the other extreme of course, and I've got 2 or 3 projects on at the moment for owners who are doing the entire thing on a time and materials basis, two in Canada and one in New Zealand at the moment. It's very difficult to pin the cost of that down, but the owners are banking on the fact that by doing it that way they will get a cheaper overall cost. So long as they can keep the controls on what is happening — and you don't just need to control the hourly rate that's applied per man-hour of labour, you also need to control how many hours are being spent. It means having a much bigger investment in project management, having people permanently at the shipyard, having an audit facility where — the one I've got in New Zealand is the one that's the most highly developed, but time sheets are vetted against the amount of work that is done, there's a certain amount paid each month which is a notional figure that's reckoned to represent what's been done in the month but then it's subject to an audit and so that month gets adjusted in the following month based on the audit for the previous month. Very complicated but it seems to be working quite well, and if you are prepared to approach it in that very controlled way I think you can achieve what you're looking for. But it has to be very controlled.

[Panel]

Yes — to all the project managers out there, it is becoming more and more the norm now, the time and materials basis. It's giving rise to a new expert, which is the economic project manager; there aren't enough of them out there at the moment and if you could develop your practices so as to provide them it would assist us a great deal! It's the financial expert, the financial project manager.

[Panel]

The only thing I'd add is that I think both James and Jay are saying is that it's the no surprises principle. Whether you're doing it on a time and materials or whether you're in effect mitigating or trying to control the costs once things have begun, is one thing. But where particularly an inexperienced yard has got things spectacularly wrong at the outside and therefore what you're doing after that is simply trying to mitigate what was cost which you hadn't anticipated, that's where we get into real problems. And as a matter of law, just simply because the figure that they assumed was going to be the provisional costs sum is wildly different to the figure that it's actually going to be

when they come across it a year later isn't necessarily a test that they've done anything wrong indicator. What you've actually got to see as a matter of law if you want to actually pursue a claim against them is actually whether they've been negligent in the way that they put together that estimate, and that's very hard to pursue.

[Panel]

Which leads us to liquidated damages against general damages.

[Panel]

Well, if I start with general damages, which are where if there is a loss you claim for the loss under normal rules, it has not been pre agreed, whereas liquidated damages is where there is a pre agreement between the parties as to what the remedy and what payment will be in respect of certain fixed amounts of loss. I think liquidated damages in some ways need to be looked at as to what it is that you're trying to achieve. Are you trying to achieve certainty with liquidated damages, in other words if you take speed, are you trying to say that with liquidated damages we know that if it gets to a certain 10, 11 or 12 knots that you know that the owner says at that point I want out, so liquidated damages provides a useful way of creating effectively a bottom line. Are you trying with liquidated damages to incentivise the builder to perform. Another way of looking at liquidated damages is to say that it's actually a builder's clause, it gives them comfort so that they say well fine, we don't want to be stuck in a position where, if we don't hit the specification in relation to certain benchmark criteria we're left in this uncertain world where the owner might seek to just pull the plug on the contract. We're going to build in a certain amount of fat where we can slip a little bit and therefore it sometimes can be seen as a builder's clause. I think that the other thing you must look at when you look at liquidated damages is that often people get very pent up about having as many different criteria and benchmarks as you can, noise, vibration, the list can go on and on, trying to get little chunks of money and sort of tap away. I think it's important to step back when you're almost sort of half way through your negotiation of liquidated damages and say what would be the case if I got a vessel which was almost at rejection on every single one of these liquidated damages criteria but in each case didn't give me the right to reject. What sort of vessel would that be? What would be its value and would I want it. So you have to look at it as a whole, as well as each individual bench mark criteria.

[Panel]

I agree with Matt that you need to look at liquidated damages clause from the point of what you're trying to achieve. I do some work for shipyards as well as owners and I invariably hear at the beginning from the shipyard we don't want to give any liquidated damages at all. They see them as penalties. They call them penalties now. For technical reasons we lawyers are not allowed to call them penalties because penalties are against the law under English law, but I think it illustrates the way that shipyards see them. They think they are penalties, they think they are being hit over the head with these sums if the vessel doesn't achieve its speed, in reality most of the time they are limiting their liability. What they fail to realise is that if a yacht doesn't meet her speed, or a better example, her range, the shipyard is liable to a claim for damages, the actual loss that the buyer has suffered, and if you think of what range means — well in the commercial world we don't talk about range we talk about fuel consumption because that's really what it is — it's how much fuel you're burning. And if you think of the life of a yacht, 10, 15 or 20 years and all of that extra

fuel that's been burned, the actual loss that could potentially be claimed is enormous. So the liquidated damages are a limitation of the shipyard's liability. It's not all one sided, it's not all in favour of the shipyard because it makes it much easier for the buyer to make a claim in respect of range deficiency, or speed deficiency, or vibration, it doesn't have to prove what its actual loss is, its loss is pre calculated in advance and if it proves speed deficiency it simply recovers what's there. So if you can strike the right figure which is a reasonable limitation of the shipyard's liability but not an excessive one, and a reasonable recovery for the loss that's been suffered but not an excessive one, liquidated damages are a good thing all round, in my view.

[Panel]

The one that we haven't touched upon is in relation to delivery, and there are two ways of looking at it. One is to try and ensure that the yard performs as it said it could do at the outset. The other way to look at it is why beat them up if they can't deliver something as everyone expected. Why force them to finish it too quickly and therefore cut corners. Again, with liquidated damages as opposed to general damages on delivery I actually think that liquidated damages work better for a yard. Liquidated damages are meant to be a genuine pre estimate of the owner's loss, or the loss of that party. Now if you tell the yard that you absolutely must have your yacht delivered by a particular date because you must have it at a particular event and that if you don't, you will have to charter something of equal size, value, etc, your liquidated damages are never going to be the same amount as the chartering of an equal yacht would have been. You're never going to get them at that higher level, the yard will shy away from it. So I do think that under general damages law you could claim for that, under liquidated damages you're just not going to get it.

[Panel]

Just going back to the delivery point, if you asked the question of each individual owner with regards to delivery, if it doesn't come on the delivery date how is it going to affect you practically? Now often what you get is, they say well, if it doesn't come by this particular date then I'm going to lose this particular time. OK, fine, we can organise a charter of an alternative yacht, that's fine. But the other thing is, it's going to come 3 weeks later, I'm going to be stuck with the ownership, the liability, the cost, but not the enjoyment of it. So one thing that we've done in the past is something that we call a sleeping beauty clause, where we've just said if they don't deliver by a particular date then it's the responsibility of the yard then to effectively look after the vessel, keep it under wraps, keep it safe and the contract effectively goes into freeze and the delivery date, which is really then just the closing documents and obviously a sort of final condition survey, is put back let's say 3 or 4 months to the time when the owner would next want it. That way he has an alternative charter opportunity plus the liability and cost is kept with the yard, so it's just another way that it's sometimes achieved.

[Panel]

Does John play the role of Prince Charming under that clause?

[Panel]

Every time, yes!

[Panel]

Passing of title against security. This rather depends on where you're building it, I think. When does title transfer under the contract — is it at the beginning, is it half way through, is it along with each stage payment or is it at the end. And coupled with that, how much security are you getting from the yard in relation to the amounts of money that you paid up front. As I say, it does depend on the reputation of the yard, it depends on the finances of the yard, it depends I think a lot on the experience of the yard. We're seeing at the moment a lot of yards jumping into this area and great, more scope for clients, but a lot of them are doing it from a starting point of not having a huge amount of experience, and equally not having a huge amount of financial backing so with their first build perhaps they're coming in at a very cheap contract price, perhaps they're offering a lot of security in respect of that yacht in order to persuade someone to sign up with them in the hope that others will follow thereafter. As a result of that, the financial fat that they had in the first place is all being used perhaps to guarantee the stage payments that they've offered on the first yacht. So anyone coming in thereafter may not get sufficient security. So that's why I say it often depends on the yard and their experience. How does it work? Well, this is somewhere you need to have a look at where title is transferring, again you need if you're financing — this is an area where you would like to involve the bank at the outset to determine what sort of security they're looking for. They would say privately they're looking for a minimum of 20 to 25%, so they're looking for security throughout the build contract 3 year period or whatever it might be, of at least 25% of what is going to be paid at the end, or what has been paid to date. Again, it's linked to the point at which title transfers. If title is transferring earlier on in the build process rather than late on, then you're going to want security from the yard by way of refund guarantees from the bank. Probably up to the point at least at which the value of the hull that is under construction is equal to the amount that you have invested in the yard at that point.

[Panel]

I find it's not a simple question to design a security package for a yacht. With commercial ships, with which we all also deal, it's pretty straightforward. You go to a Japanese or Korean or Chinese shipyard to build a tanker or a bulk carrier and they give you a refund guarantee, or a series of refund guarantees that cover all your pre delivery instalments. The first thing is that those shipyards can give that sort of security because they've got government backing, the banks that are issuing these things are export credit institutions often set up and backed by the government. You don't get that in yachts, there are not that many shipyards that are able to provide full refund guarantees for all the pre delivery instalments. The second question is a different one. When you're dealing with a commercial ship it's basically a commodity in the sense that if you don't get your tanker from shipyard A you can go and buy the same thing from shipyard B and you can go and buy much the same thing on the secondhand market to tide you over for the period of the delay that you're going to suffer. And there may have been some movement in the market for which you'll need compensation but you're dealing with commodities. I think with yachts even when you're dealing with a shipyard that can provide a full series of refund guarantees you don't necessarily just want your money back, certainly you don't just want your money back when you've got to an advanced stage of construction, once the boat's in the water, once you can see through to the end of the project and your dream as an owner being realised, your yacht is almost ready for delivery even if it's going to cost you a bit more, even if it's going to be a bit later than you'd hoped. So I don't think a refund guarantee is necessarily the full answer. They make it much easier to finance a deal, and with the shipyards with whom I work I always encourage them to arrange refund guarantees if they can for that reason, and for all the advantages that we heard about this morning that finance brings to a project. It just oils the wheels

and makes it easier it for a shipyard to achieve a sale, if they can make it easy for a financing bank to get involved. But from an owner's point of view, you've got to try and work out what your owner is looking for or what you as an owner are looking for. I think a structured package where you've got a financial instrument of some kind, a refund guarantee in the earlier stages when you can't possibly show value for money in the thing that been built, but at a certain point, as James says, and certainly once the boat is in the water, and you can start thinking about taking it elsewhere for completion, then the passing of title starts to become attractive, when you can actually get your hands on the physical thing that you want, take it somewhere else and finish it. And then what you want is a guarantee of some description, not for all of your pre delivery instalments but for the inevitable extra cost of completing the boat somewhere else. It will cost you money to take it somewhere else, it will cost you money to pay someone else to take over the job. And depending on where the shipyard is, that point in time may be different. I had a case recently of a shipyard which was effectively landlocked and so you knew that it was going to be very difficult to get that boat to sea, or to take it anywhere else to complete it, so then your point in time at which you can release your financial security is much later. It all depends on the circumstances.

[Panel]

Finally, negotiation of the contract to assist financing. Well, we've heard about refund guarantees. They obviously would need to be assignable to a bank. We've also heard about requirements for security, it does assist, and the other point I think is to make sure that the contract is freely assignable to a first class bank if financing is going to be included. It is worthwhile getting a bank involved during the negotiation process just to make sure that these areas are picked up on, and understood by the bank and the yard.

[Panel]

Again, with the shipyards that I work with, I try to encourage them to structure their contracts in a way that makes them easy to finance. There are certain things that you can always predict that a bank will want. They will want certain acknowledgements from the shipyard confirming that they accept the role of the financing bank, they will want to get some advance warning of a serious breach by the buyer before the shipyard exercises a right of termination, so build those things into the contract and life is much easier and the projects are much easier to finance. But you do have to be careful because sometimes, with some banks, none of them represented in this room, I'm pleased to say, do if I may say, take the micky. I mean some of the American banks I find can be quite difficult — they will come in and really quite ignore the contract that has been signed and say well we want the following dozen additional rights and insist on them. It can be very difficult and very unpleasant to try and explain to them that they're coming in far too late to try to change a contract that's already been signed. So I think fairness on both sides is what's called for, ask for what is reasonable but not too much.

[Panel]

I suppose the only other element I'd add to that is in terms of what's typical in the shipbuilding contract which you should keep an eye on when thinking about financing is the mechanisms for triggering payments. Quite often you'll see that if someone hasn't been thinking about their financing, the payment triggers, the milestones and the mechanisms for timing of payment won't necessarily dovetail with what the bank can necessarily achieve easily. So that's another area where you've just got to make

sure that you either ideally speak to your financing bank first or you're very conscious of the fact that there's going to be certain conditions precedent that the bank is going to require before it's going to release the funds. It may want to release the funds direct to the yard.

[Panel]

Yes, but that can also be an example of what I was just talking about. One thing I often find with American banks when they come in is that you have in the contract the normal milestone provision where the shipyard certifies that something has been done and the buyer's representative then has to countersign that or failing that it gets referred to a technical expert of some description — maybe the classification society, and then the American banks will come in and say no, we insist that the bank has the right to send a surveyor in to second guess everything that's happened, and decide whether in the bank's opinion the stage has been completed satisfactorily. I always resist that because I think that the bank's relationship then is with its client and that it should be agreeing with its customer who the buyer's representative is going to be and not trying to put a whole new layer over the top of what has been agreed before further controls.

[Panel]

Yes, the yard's got no obligation whatsoever to vary the contract that's already been signed and the responsibility in that situation is on the bank's adviser to advise the bank that what's being asked for is simply not going to happen. It doesn't happen as often as it should with some of the American banks.

[from the floor] from Fraser Yachts

I wasn't here this morning and I'm pretty sure you've already discussed about the MYBA charter agreement. I don't think it's something new about it. I have 2 questions on the MYBA charter actually agreement on the relationship with the charter marketing agreement. First one is how far legally a party should go in identifying itself when we know that in a MYBA charter agreement you may have an issue of confidentiality and if you want me to develop it I can — I can give you a practical example of it. And the second is under the charter marketing agreement what is exactly the liability of the charter marketing broker. Do you think it exists — can we talk about general diligence, or duty of diligence. Is for example the charter marketing broker responsible for the yacht going in a cruising area even though accepted by the insurance that is not by the flag accepted for that yacht.

[Panel]

OK, the first question was the identity of the charter guests. Was that right?

[from the floor] Fraser Yachts

No, the identity of the owner. Let me give you an example. You have under the MYBA charter agreement you might have a charterer client which is representative by the charter broker and on the other side you have the owner, and the agreement already was going to be signed by the charter marketing agent or broker, who is going to be in most of the cases the stakeholder. My question is, you have an issue of confidentiality in the sense where the MYBA charter contract the parties are the owner and the charterer. But can you for example, if you as a manager, or the charter marketing broker, you don't want to reveal the identity of the owner that you

are representing, on that contract. Can you just put c/o Fraser Yachts, and the company name?

[Panel]

Well, aren't you going to be dealing with a company owner, the legal owner, the registered owner is likely to be a company so the company's name will appear on the charter documents. I can't see any situation whereby you should need to release the identify of the beneficial owner whatsoever. You've got no obligation to do so.

[from the floor] Fraser Yachts

No, but only the identity of a company, the name of a company, and not any address, what I'm referring to is c/o Fraser Yachts.

[Panel]

You could say that, but there is unlikely to be much of an issue in releasing what is only going to be a P.O. Box address in the Cayman Islands or the BVI. You're not going to find out the identity of the beneficial owner that way.

[from the floor] Fraser Yachts

No, but what about the identity of the owner company? And what about in case of notice, for example, from the charterer. I'm just wanting to find out what is the liability, for example, for a managing company in that case. If you have a notice from the charterer, if something goes wrong, OK?

[Panel]

Anybody can do a transcript of registered entries search against that yacht. All they need to do is look at where it's registered. If they carry out a transcript of registered entries search on that registry they will get the name and address of the legal owner.

[from the floor] Fraser Yachts

What about the second question?

[Panel]

Just on the first question, what you do not want to do is put Fraser Yachts as the name of the owner, because then you become an agent for a principal whose name you have not disclosed. And that puts you in the firing line directly.

[from the floor] Fraser Yachts

Of course. But you can just give your address.

[Panel]

I don't think there's much point in doing that. It's often the case, brokers often put their own address, the buyer's name or the seller's name or the charterer's name c/o Fraser Yachts etc — the only purpose of putting an address down is to identify the party. And it's not a perfect way of identifying the party, but it's not a bad way

because you go to Fraser Yachts — have you every heard of XYZ Ltd — oh yes, they were a client of ours. So you've identified the client.

[from the floor] Fraser Yachts

What about if we cannot find after the owner?

[Panel]

If you cannot find the owner?

[from the floor] Fraser Yachts

Yes, what about involvement of the manager if there is a claim if for example the owner is not findable right after. Are we going to be as the owner for the charterer?

[Panel]

I would have thought not, unless you've done something that makes you the target rather than the owner.

[from the floor] Fraser Yachts

And the second question ?

[Panel]

Sorry, I thought the second question was the liability of the charter broker which Jay just answered.

[from the floor] Fraser Yachts

Yes, but it was from — I will talk with Jay.

Martin

Any more questions? Jay can I ask you a question — the time and materials project in New Zealand. Who decided on that? Who was the decision broker to go that route?

Jay

It was the owner. Who is quite an experienced builder of yachts. An owner builder and he was convinced that he could do a better deal that way. I think he'll be proved right. The build is quite far advanced. I think he's doing all right. He's picked a good shipyard to do it with. If you picked the wrong shipyard you could have real problems no matter how careful you are in your planning. But you can have very bad experiences on a turnkey project if you pick the wrong shipyard.

Martin

How do you pick a shipyard ?

Jay

Out of a hat!

[from the floor] Ayuk

One question that I have and I'd like the opinion of the panel. Being on the side of the beneficial owner who is asking us invariably to form a company for a new build or for the purchase of a yacht, increasingly we are finding contracts that are standard form contracts that have been issued by a shipyard and in one or two cases the beneficial owner will already have signed the contract. The contract that has been drafted includes the name of the beneficial owner and the name of the company, and the expectation is that both will sign the contract. I find it difficult dealing with those particular contracts particularly from a VAT registration point of view because quite often you have to submit the contract as evidence of ownership of the vessel or intent to trade, as the case might be. The justification from the shipyard is that they need the beneficial owner to guarantee that particular contract. I would have thought that a side letter or a different sort of PG arrangement would be much preferred.

[Panel]

If one of us three is involved that won't happen. You're never going to get a beneficial owner to sign up to expose all his other assets to this. It's very rare under a yacht building contract

[Panel]

I get them, not all the time, but I get them.

Ayuk

I have seen them, and that's worrying. Is that because they don't involve lawyers at an early stage?

[Panel]

I think it must be the excitement of the beneficial owner to get the contract signed, because I mean in a sense you spend time and money setting up these ownership vehicles and then you completely undermine it by having the beneficial owner putting himself personally on the hook for the contract by signing it in his own name and his own capacity.

[Panel]

It's the same issue as we were discussing this morning with yacht finance. You want the beneficial owner's signature on it, not necessarily because you intend to enforce that guarantee for its full tenure but because you want to focus somebody's attention on the project. The other reason, from a shipyard's point of view I think it can be a useful thing is, that there is an increasing practice of people signing up for contracts and then flipping them on before delivery and I suppose what's wrong with that, why shouldn't you be able to flip on a contract and make a profit? Arguably it's trading on the shipyard's name and reputation and why should someone trade on those and take all the profit without any upside for the shipyard. I don't think you can win that argument either way. The other reason that you might object to it is that if the buyer is free to sign the contract to anyone at all, you don't know who you're going to end up in bed with, so the only way you can really control it is by keeping a personal

guarantee — from the person with whom you as the shipyard think you are doing the deal.

[Panel]

So there's your answer, Ayuk. The yard, yes, would like it, but the owner would be advised not to do it.

[from the floor]

Maybe I was sleeping — you're not going to talk about crew contracts?

[Panel]

We can do that — but it's 6 o'clock and we've got 2 more subjects to talk about.

So, very quickly on crew contracts then. It says The Reality. Well, we've got requirement for MCA approval here — the long and short is that if you've got a UK flagged yacht or if you've got an Isle of Man flagged yacht and those yachts are operating commercially, then there is a requirement for your crew to be employed under MCA or Isle of Man approved contract agreements. They are obtainable, you can submit your standard version to the MCA, you then wait 18 months and you finally get something back with MCA approved stamped all over it. The reason those are there is to ensure that the contracts are compliant with all UK maritime employment legislation, they are there to protect the interests of the crew — the actual terminology is "seafarer" —interesting to note here that seafarers are crew members, not the captain. The captain does not need an MCA approved contract but the crew members do. Anyway, the MCA are there to ensure the crew members are protected, that they're not being beaten with unfair and unnecessarily aggressive provisions in their crew employment contract, it is a legal requirement, and if you're a UK flagged yacht that is operating commercially, but don't have MCA approved crew contracts you run the risk of being stopped by Port State authority and being detained. It does happen — I've had cases where it's happened. The same goes for the Isle of Man but the Isle of Man will simply rubber stamp your MCA approved contract anyway and say we're fine with that. Obviously most of the yachts are Cayman — perhaps BVI — flagged; the question then is, would you need them under Cayman and BVI law. The answer is no, because at the moment their employment legislation is nowhere near as advanced as that of the UK and Isle of Man. They haven't got the capacity or indeed the legislation behind them to give approval for a crew contract so they don't. But they're very happy if you use your own MCA approved contracts on those boats. You don't need to, you can actually put in a Cayman law or BVI or even a UK law contract with really aggressive provisions in it and it won't particularly matter under Cayman or BVI law.

[Panel]

Do you want me to do the jurisdiction? I think the main jurisdictional issue is that as far as which law will govern the crew contract, the default position, is the law of the flag under which the yacht is registered. But that can be ousted or trumped if there is a "close connection" with another jurisdiction. What can constitute a close connection could be that the seafarer may be of a nationality — let's take French, as an example — you might have a Cayman Island vessel where you have purported to write your crew contract under Cayman law but the crew member in particular is a French national and the vessel may actually spend most of its time in the French jurisdiction.

In that case, potentially it may well be that the French employment laws would govern, and that's something just as a practical measure you need to watch out for.

[Panel]

Yes. And the example to give on jurisdictional issues is of US crew members. The reason that insurers don't like them is because US law and in particular the Jones Act will ensure that if there is going to be a claim by an aggrieved crew member either for a personal injury or for an employment issue, and there is no other link to the US, other than the fact that the crew member is a US national, that crew member can bring a claim in the US, the court in the US will take jurisdiction and is likely to try to apply punitive damages which will be some horrendous jury award in the first instance, which is usually appealed, but insurers don't like it because they don't want to be exposed to the extent of that claim. Which is why, unless they are US flagged, yachts rarely have US crew members on board.

The third point under crew and employment contracts was mitigation of national insurance and social security liability. Quickly, it's a hot topic but we're going to fly through it. There is a two way liability here, the employer has a liability to pay national insurance, the employee has a liability to pay social security if he or she wants to. The employee may choose to pay and many of the crew who are non EU but are based here do choose to pay social security in France so as to benefit from the social security benefits they might get. An employer clearly won't want to pay its liability unless it absolutely has to, you can structure the employment regime so that you can avoid paying an employer's liability to pay national insurance. The way to do it is to make sure that everything is out of the EU. That's the flag of the yacht, the owning company of the yacht, the employing company of the crew members if it's a different company from the owner of the yacht and crucially the bank account through which the crew members are paid must also be outside the EU. Now we often use Channel Island companies to do so — there was a point earlier on about Channel Islands not perhaps being as outside the EU as might be, but at the moment it does work. So that's a very quick way of avoiding the payment of national insurance.

[Panel]

The last point we're going to talk about is probationary periods simply to say that when you're taking a crew member on trial you can build in, even under an MCA approved agreement, a probationary period of say 3 months during which you need only give say 7 days' notice, so if things aren't going to work out, do use them, they're OK under English law, the MCA will allow them, you've got a fairly long time to assess that crew member, a short time to let them go, it works.

Martin

Is that June July and August?

[Panel]

If you time it right, yes!

[Panel]

The only comment I'd make on the probationary period is something we came across recently — is to take care when drafting the contract. Even though you can place in your probationary period rules that certain rights — like rights to take leave cannot be

actually taken until after the probationary period has expired — it is unlawful to purport to say that those rights do not accrue right from the moment that that crew member is taken on. It's a fine distinction when you see it in the written word, but it makes a difference to the clause being unlawful and lawful.

[from the floor]

Something to bear in mind and that's day workers. I just wondered what you guys think of, or what advice you would give, to your boat owners about the fact that an enormous amount of day workers are paid cash in hand to come and work on the boat and the liability implications of that to the beneficial owner?

[Panel]

Having discussed the matter we don't think it's a good thing! And we'd refer it to an employment lawyer.

[Panel]

I can try a quick answer. I think as far as the owners and managers have a responsibility for the vessel to be put to sea in a seaworthy condition and the crew competence is a necessary part of the definition of seaworthiness, both from the legislation and also the insurance point of view, so if there is any question as to the competence of that crew, or even the managers' or owners' lack of due diligence into the competence of that crew, it could affect both the lawfulness against the convention's legislation law, and their ability to claim under insurance. That's one aspect.

[from the floor]

If you have a Lloyds medical you aren't required to have the part A for day workers but you are required to have the part B so you need to tell the insurance company, at least the level at which you're going to have day working crew on board, otherwise you would not be covered for them.

[from the floor]

Would it be worth having some sort of indemnity for day workers on board the boat?

[Panel]

I think the first part is yes, the more the merrier. Yes, an indemnity is great, but to an extent of actually what value that indemnity is going to be in the event of a claim where substantive loss is suffered and the insurers won't pay out, yes it's nice to have it, it focuses attention, but whether or not it actually gives you any concrete comfort is a different question.

[Panel]

Legal issues. This is really going to be examples of thorny areas that have cropped up in the last 12 months that we thought you might be interested in hearing.

In particular we were going to discuss force majeure, which is not a defined term, it depends very much on what you want to make of it, and as a result of that it leads to

case law and what is or what is not force majeure may well depend on the circumstances. Jay told a good story when we discussed this the other day.

[Panel]

Well, very funny [for a lawyer]. Normally you come to the force majeure clause and you have a great long list of force majeure events and depending on which side you're representing you take a view and you have things like strikes, and I always say if I'm acting for an owner that strikes are not force majeure events because the shipyard should have control over its own workforce, at least unless they're national strikes over which the shipyard can't do anything. I was negotiating with someone from the Indian subcontinent and we got to the force majeure clause and I was expecting the usual battle and the first item on the list was Act of God. And the fellow turned to me — oh no no no Act of GODS. I had to agree that one.

[Panel]

You get things like government policies and an example that's cropped up recently was someone who was trying to take money out of his country of residence; previously he's been able to do so but the law has recently changed, he's now no longer able to do so, how is he therefore going to pay instalments? Is that going to be a force majeure event? Well, was it reasonably foreseeable is probably the answer to that. If he knew it was coming, no, if it came out of the blue, it could be. Another one we've had recently — heat.

[Panel]

You see, James, in that situation I don't think I'd agree that. Because I think force majeure is physical events, it's earthquakes, that sort of thing. I don't think I would ever allow force majeure in relation to a simple obligation to pay.

[Panel]

For a yard you wouldn't. For an owner who is trying to get money out of the country, and a policy suddenly changes and makes life difficult?

[Panel]

It makes life difficult but I would not normally allow force majeure for a simple obligation to pay.

[Panel]

So you can see, it does lead to argument!

Heat is another one. We recently had a yard asking for force majeure where the temperature was consistently over 37° for 5 consecutive days. But the yard was in an extremely hot country. Had it been Holland, perhaps yes. I think it may have been Turkey. Again, it's a point for discussion. That's the sort of areas that give rise under force majeure. The real issue though that arises out of a contract that flows from force majeure is whether the delay that accrues because of these events is actual delay to the construction of the project, so, where you have the insolvency of a supplier, let's call it the person who's going to be supplying the crane that takes the toys on and off the deck, and that insolvency event, that supplier becoming insolvent, 3 days after the contract has been signed, and the yard attempts to claim 3 months'

force majeure because of that insolvency, because the contract says it can, insolvency of a subcontractor, the owner has to make sure that the contract specifies that any such delay that comes out of a force majeure event actually affected the project. Actually affected the critical path of the build process. Because if it doesn't, you're going to face a whole raft of force majeure claims that may have had absolutely no relevance but provide a convenient excuse to justify the overrun that would have happened in any event.

[Panel]

The other thing is, from an owner's point of view, you'd want to hear about the force majeure event as soon as possible, because I have had cases where everything is going along apparently normally and then towards the end of the project the shipyard realises it's going to be late and suddenly out of the woodwork comes a whole list of force majeure events that allegedly happened months, or sometimes even a year or more, ago. Well nobody can remember the circumstances, nobody can argue meaningfully about whether the events happened, how long they last, whether they had an effect or not, whether reasonable steps were taken to overcome them. And it's an unwinnable argument by either side. So I think a good provision is to say that if force majeure is going to be claimed, the owner needs to know about it within say a week of it happening. Not necessarily the full details, because you don't necessarily know them all until the dust has settled. But an indication that a force majeure event is happening or has happened and then as soon as possible after, a claim for how much delay you think it has caused, and then from the shipyard's side, you want to hear back from the owner as well. If the owner has grounds for objection, then he should make those fairly promptly and not leave those until it's all too late. You can often just park the issue, you make your claim for force majeure, the objection is made in return with basic reasons given, and then if the yacht is delivered on time you never need to discuss the matter again. But at least you've laid down a marker of your claim and objection at the time when it's fresh in everybody's minds.

[Panel]

It's important also to put a cap on it, I think, and that works for both parties as well. I remember back in the early 90s and these were commercial contracts, but I was acting for owners who had ordered ships in the former Yugoslavia, in Croatian yards, which were affected by UN sanctions at the time of the civil war there, and these were obviously defined force majeure events, but they went on and on and on. But because they were defined force majeure events they weren't what we call frustration, which is a different legal concept, when a contract is made utterly impossible to perform. These were accepted as force majeure events which would give the shipyard an excuse not to perform for as long as they lasted. The ships weren't being built, it was a complete stalemate. And the real problem was that the shipyard had arranged refund guarantees which expired because of this long delay and there was nothing you could do about that because banks will always insist on a fixed termination date on a refund guarantee and if you don't factor it in, and really because you can't ever predict how long force majeure may possibly last, the only way to deal with it is to say that after a certain period, if it's 180 days or 300 days you say well, if there's been force majeure for that long, then we accept that the contract is effectively at an end, or at least we give one party or sometimes both parties the right to terminate. Then you can fix the duration of your refund guarantees by reference to that date, which you know is the last possible date on which your right to cancel for delay is going to arise.

[Panel]

So our specific case for 2006—2007 dates back to 1992? That's the best we can do?

OK, we've had the time, we've had the nod from Martin, who's tired of standing up.

Martin

We can discuss it over a drink. Thank you very much indeed.

End of day 1