

Discussion Forum No. 3: Legal Policy and Contract Issues

Reported by: Donald V. Gale

Panelists:

John J. Broders – Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.

Robb R. Maass – Alley, Maass, Rogers & Lindsay, P.A

Being primarily versed in design, naval architecture and engineering, I attended part of this forum yet gained significant insight through the second half of the session. Several points discussed clearly relate to the other Project USA sessions. Legal issues related to contracting design and construction as well as registration and operation were addressed.

Many large yachts are chartered through at least a portion of each year of ownership. A significant number of new builds are commissioned specifically for commercial charter operations. Questions can arise whether a particular use of a yacht is considered a charter. “Grey” areas include an Owner permitting his friends’ use of the vessel, which typically constitutes a commercial operation to Coast Guard and other authorities when the Owner is not aboard. Legal provisions exist whereby a “one-off” single voyage authorization can be obtained for such use. Also, yacht classification, once a rarity, has been driven by charter activity. Lack of market interest for yacht classification and fear of the unknowns among shipyards resulted in premiums for Class construction in past decades. When asked during the forum about the cost premium today, the panel agreed that the premium may more likely exist when Class is, in fact, not sought. Ubiquity of classification in the current market has revised expectations, and its absence would likely depress resale value as well as impede or preclude charter opportunity.

Given recent natural disasters of national and world significance, the definition of a “force majeure” is of enduring interest related to extraordinary circumstances preventing contract parties from meeting obligations. Common understanding exists in cases of fires, labor actions, failure on the part of a third party outside one’s control, storms and earthquakes. In Trinity’s case, the yard did not have information on schedules and supplies needed by its subcontractors, as discussed above in the Subcontractors’ forum, during an expedited relocation from New Orleans to Gulfport, MS following Hurricane Katrina. David Ross related an unconventional force majeure ramification after Katrina whereby a timely ABS Class survey was impossible because ruined infrastructure prevented surveyors from leaving their Gulf Coast offices. Mr. Ross also added that force majeure may not be applicable to a region’s seasonal characteristics. For example, Burger Boats would likely not be able to claim as such for the annual freeze in the northern Midwestern U.S. and Lake Superior, as this is a seasonal event for which businesses are expected to prepare or adjust operations.

Delegates briefly discussed fixed-price contracts, seldom negotiated for yachts given the propensity of change orders and other characteristics of the market. Tying in with the Commercial to Private session subject matter, they are occasionally adopted by commercial yards that are attracted to and wish to enter the yacht market. In such cases a builder may “take a dive” on a “loss-leader” to gain a market foothold or may

receive supplemental funds from a parent company. In some cases, a well-heeled Owner may back a particular yard for personal reasons.

Phil Nuss, Trinity Yachts, raised a question regarding dual registration of a yacht in an open registry when already flying a national flag. Panama actively offers a dual registration option in bareboat charter operation where also permitted by the original flag state. Otherwise, Jack Enright, Marshall Islands Registry, and Mr. Aune of Cayman Islands Shipping Registry said that it can be done. Attorney Rob Maass indicated that dual registry, while common for commercial shipping, is rarely exercised for yachts. Mr. Aune mentioned that a survey requiring one to two days is the prime element involved in re-registering a yacht under a national flag after being registered elsewhere and questioned the need for dual registry. In any case, tax advantages to sales or charter income under the alternate flag are prime motivators for dual registration.