

The Superyacht Owner Report

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A REPORT WORTH READING



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Assessing the risk factor

Reed Smith partner Thor Maalouf and senior associate Romain Farnoux explain the complexities of the contracting stage of constructing a superyacht ... and where the responsibilities lie between builders and owners.

Superyacht construction has always been a laboratory for innovation, pursuing the highest standards of comfort, luxury and safety – from the use of fibreglass hulls to the general use of stabilisation systems.

As we push for more sustainable superyachts, new and experimental technologies are increasingly being used in construction. Examples include hybrid propulsion, alternative fuels, improved propeller design, hull optimisation, heat pumps and the incorporation of contra-rotating thrusters for propulsion.

To temper this excitement, one can always rely on lawyers to approach innovations and new technologies with circumspection. Indeed, untested or less proven technologies carry a risk of failure, and the allocation of this risk between the shipyard, the owner and any relevant third-party providers needs to be considered during the building contract stage.

The starting point within a yacht-building contract is that risk associated with design – going beyond the aesthetic blueprint provided by a design consultant – and built-

in technologies, whether new or established, is borne by the shipyard. It's common to find a specific term to this effect within the contract to make this abundantly clear. After all, it's the shipyard's responsibility to use reasonable skill and care to ensure the yacht meets the agreed specifications.

This position reflects the principle that the shipyard's fundamental commitment to manufacture and sell the yacht usually implies an obligation to ensure the design permits it to operate safely and meet the performance criteria promised in the contract. The yacht is to be built in accordance with the technical specifications detailed in the construction contract, and design and integrated technology are aspects of the workmanship that the yard must fulfil when building the yacht.

The situation differs when a technology developed by the buyer or a third-party supplier is to be incorporated by the shipyard, particularly if it's a new innovation which is often the case with new decarbonising technologies, for example.

In such circumstances, it may not be

implied that the builder assumes the risk of this design and, therefore, the contract needs to clarify who bears the risks in that case. Legal challenges may involve, among other things, addressing the builder's home template contract and the position under the agreed applicable law.

Understandably, the builder may even refuse to provide a warranty or other assurance that a particular technology is adequate to meet the buyer's operational requirements. The builder might limit its obligations to complying with the integration specifications from the technology provider.

Without a separate agreement with the technology provider, the risk would then fall on the owner for incidents (which might include damage to other parts of the yacht caused by batteries, for example) or for failing to meet required performance standards related to such technology. One possible alternative might involve a separate warranty by an ad-hoc engineer (or engineers) for specific technology items.

The drafting of the allocation of risk should be very clear regarding the scope of the respective parties'

responsibilities for any technology, whether in the shipbuilding contract or in a standalone agreement. It may also be sensible to agree on a development and testing/trials programme for specific items to be carried out by the builder in conjunction with the buyer and relevant supplier.

This would identify and resolve any design or performance issues as early

as possible, minimising the prospect of the finished yacht encountering performance issues that lead to downtime and warranty disputes. This way, even for new technology items where the buyer has accepted some risk, it will still be clear where the shipyard bears responsibility.

Ultimately, taking the time during the initial project planning stage to consider

how risks are to be apportioned, whether additional agreements are necessary and carefully drafting provisions relating to the incorporation of new technologies with specialist technical and legal input will help anticipate and circumvent issues that may arise later in the construction stage. Such occurrences could have a detrimental impact on the project and product for all parties involved. **TM & RF**

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