

# Drafting And Managing Refit Contracts

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Eric

J.

Goldring,

Esquire

Owners ask me why I want to have a contract for refit work completed before their yacht arrives at a shipyard and, even more so, why I want to be on the dock when the yacht arrives. I ask them if they remember the Fram oil filter commercials ("You can pay me now, or you can pay me later") or Mad Comic's Alfred E. Newman ("What? Me worry?")

In other words, spending time and money to prevent delays and shipyard conflicts is a much better investment than engaging in litigation after the fact when things are delayed or go wrong.

The first consideration is, of course, the economic value of having an attorney involved in the drafting of a refit agreement when the amount of work to be performed may not be that significant; pausing to note that a US\$250,000+ bill is now commonplace and multi-million dollar expenditures a regular event. If one was to invest those sorts of amounts in a business venture there would be no question that a lawyer would be involved. Same holds true if it was a real estate purchase or sale. A commercial lease? Absolutely. So why the resistance, or rather absent of thought, to use the same services for significant work on a yacht?

I think one problem is the tendency to associate lawyers with lawsuits. The other problem is that many attorneys are not actually sufficiently knowledgeable in yacht construction and shipyard management. The first problem is merely one of correcting a misperception. The second problem is one which requires education by, and interface with, crew and other yacht professionals. In other words: Experience.

Without a lawyer, what are we faced with. While there are some rare exceptions, a captain probably does not have the training to read, understand and negotiate contract language. Many managers are former engineers that may have practical knowledge in certain areas, but contract law and the litigation that can follow? Dispute avoidance and resolution techniques? Probably not.

I pause: That is no more an affront to captains and engineers abilities as it is to say that an attorney is incompetent if he can't drive the yacht or rebuild the top end of a generator. As Clint Eastwood once said, "A man must know his limitations."

Let's take a few examples of how this interplays:

I. The shipyard provides the yacht with what appears to be fairly standard language regarding the hauling of the yacht (leaving aside pricing and insurance issues):

"Shipyard will prepare the graving dock or marine railway, drydock the yacht and perform the services as described herein, and launch upon completion for the prices established in accordance with the enclosed proposal. Hauling will occur on or about X."

That sounds pretty standard. Now, take that same provision and add the following:

and shall be in full cooperation with the local American Bureau of Shipping Surveyor.

The Shipyard shall provided the CLIENT with reasonable notice as to the unavailability of the drydock sufficiently far in advance so that the CLIENT is not prevented from having the yacht hauled, any work performed, the ABS Survey completed, and then re-launched no later than Y.

These two sentences make sure both sides appreciate:

The coordination with ABS is required;

That the shipyard cannot without consequence claim that lift is not going to be available because work on another yacht is taking longer;

That there are time constraints which must consider there will be an extended period for work to be done once hauled (avoiding, we have to put you back in because another yacht is arriving); and,

The yacht being blocked in by other yachts subsequently hauled. Now, is my work done? No. All that has been done is a predicate has been laid. In other words, a very basic structure to coordinate and how to anticipate possible conflicts is in place and must now be actively utilized; not put in a drawer until a fight begins and fingers start pointing.

The issues of what work is going to be done, what additional work may be discovered to be necessary or required by ABS, or the "While she is hauled why don't we...".

If the shipyard is defining the "any work" as being limited to that which it (not the yacht) anticipated or the unanticipated by everyone has arisen, then what?

Who addresses the issues of delay, consequence, if there is an obligation to perform the work, etc. (I pause: While having a contract which anticipates everything would be ideal, the fact is that most shipyards won't commit to that level for obvious reason.)

## **II. Another example:**

The shipyard provides the following "stock" language:

Man-hours, materials, and/or services utilized will be agreed to, in writing, by both parties on a daily basis or work item completion, as applicable

How many have actually sat down every day and signed off on the work performed each and every day? Honestly, probably nobody. So how do you manage time and materials? A start is to add language such as:

The shipyard will provide time sheets for all jobs which are not charged on an agreed-to price basis, which if agreed to shall be signed off on by solely either the Captain or Owner's Representative.

What needs to still be managed is not only the number of hours charged by "Frank", but was Frank actually working on the billed item and was he working with some efficiency or smoking in your smoke-free engine room? Obviously a team approach (engineers, captain and owner's representative) need to coordinate literally every day to document such items and there must be a point person to address the situation... promptly and not when the yacht is about to depart or time critical work is held up because a payment is due. It is not merely "It's T&M. Pay X".

## **III. A third area: Change Orders.**

This is an area where, as is said, "The best laid plans..." Many disputes do not arise out of the original contract, but the Change Orders. For reason I cannot understand these "contracts" are regularly treated as scrapes of paper rather than as actual contracts or contract amendments. Many times the Change Orders are cryptic, created after the fact and/or are written with no pricing. It is, in my opinion, critical that Change

Orders are treated as much as a legally binding document as the underlying contract. The extra time used to better define Change Orders save time, avoids disputes and controls costs.

#### **IV. A fourth area: Outside Suppliers.**

Who is responsible for the supply of equipment, machinery, generators? How do the warranties of the yard interface or conflict with the warranties of the suppliers.

#### **CONCLUSION**

By not only having the drafting but the management of the refit contracts coordinated and integrated the potential for conflicts is reduced and the efficiencies of the yard and the yacht are increased... while providing the shipyard with greater profits and the yacht owner significant cost savings.