Ship Management and SHIPMAN 98

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The role of the ship manager has become more complex through the years. It started in the eighties when there was a profound change in the market as many shipping companies became bankrupt and mortgage banks had to turn to ship managers for help. It continued in the nineties with a new type of investor in shipping with little knowledge of ships and more recently with the implementation of the ISM Code in 1998.

The result was an uncertain situation with proliferation of in-house contracts without any uniformity, particularly in the apportionment of liabilities between the parties.

BIMCO first published in 1998 SHIPMAN, a Ship Management Contract that provided the market with a standard document striking a fair balance between the rights and obligations of the owners and the managers. The contract was very well received.

After the implementation in 1998 of the ISM Code, BIMCO decided to review the contract in order to take into consideration the effect of the Code on the SHIPMAN agreement as well as revising the whole contract to bring it up to date with contemporary ship-management practice. A subcommittee consisting of ship-owners, ship-managers represented by the International Ship Managers Association (ISMA – now InterManager) and insurance representatives (from professional indemnity underwriters of the International Transport Intermediaries Club (ITIC) developed SHIPMAN 98.

1. What is the scope of SHIPMAN 98?

SHIPMAN 98 provides the following optional management services: crewing, technical management, insurance, freight management, accounting chartering, sale or purchase, provision ing, bunkering and operations. SHIPMAN 98 is suitable for managers supplying crew on a limited agency basis. For a more comprehensive and extensive crew management agreement, BIMCO has created CREWMAN A, which is also on an agency or cost plus basis. When the manager supplies crew as principal or on a lump sum basis, BIMCO has created CREWMAN B.

2. What are the main features of SHIPMAN 98?

Under SHIPMAN 98, the manager is the agent of the owner and therefore his position is in principle protected by the owner. Under SHIPMAN 98, the liability of the manager is in principle limited. There are however some exceptions. These exceptions together with demands of a higher level of responsibility, and/or direct involvement and therefore responsibility, require the ship manager to have full insurance cover. SHIPMAN 98 provides for the manager to get full insurance cover as a co-assured under the owner’s insurance policies (see 4 below). The insurance terms of SHIPMAN 98 provide for different options reflecting the actual conditions of the market, mainly because the P&I Clubs within the International Group require the manager (the co-assured) to be responsible for unpaid calls if he is to get full cover. Finally, SHIPMAN 98 makes a clear apportionment of liabilities between the owners and the managers.

3. In SHIPMAN 98 the Manager is the Agent of the Owner

The law of the agency is the basis for the contractual position of a ship manager. However, the fact that a ship manager is known as an agent is insufficient to create an agency relationship. That was the view of the court in a well-known case (Maritime Stores Limited v H.P. Marshall &Co). The Court considered that Marshall although known as the agent had not contracted as such and therefore was found personally liable. It is therefore very important when signing the contract to make clear that the manager acts as the agent for the owners.

In 2003, the Chinese Court (in PICC Shanghai Branch v Grand Fleet Navigation Ltd. and Others) regarded the managers as the actual carrier, and liable for cargo because they were not able to provide evidence of the specific management responsibilities they undertook and the division of labour in managing the vessel between themselves and the owners.

Clause 3 of SHIPMAN 98 is clear in this respect “the managers shall carry out management services in respect of the vessel as agents for and on behalf of the owners”. This provision affords the managers some protection from claims made by third parties. A claim made against the managers by a third party can then normally be defended on the basis that they were only acting as agents to the owners, who would then be able to rely upon their insurances. However, as we explained earlier it is important for the manager be fully covered as co-assured under owner’s insurance policies, particularly if he is providing technical management services.

The managers provide the services on an agency basis. Competition and new regulations have elevated the required standards of those services. SHIPMAN 98 provides that the managers be obliged to use their best endeavours to provide management services in accordance with sound ship management practice. The phrase “best endeavours” is an onerous duty; however, the provisions in Clause 9.5 soften it in that in no circumstances are the managers required to use their own funds to finance the provisions of the management services.

4. In SHIPMAN 98 the Name is a joint assured with full cover under the Owner’s Insurances

There have been many incidents where the owner’s insurers considered the managers liable and the managers found themselves unprotected because they did not have proper insurance cover. There have also been cases where the owner’s insurers have refused to pay because they considered the negligence of the manager and that of the owner the cause of the loss.

For a manager, it is very important to be named as co-assured under the owner’s insurance. This is so because the manager undertakes many of the tasks and liabilities of the owners. As a signing the manager also avoids the insurer claiming in subrogation.

The extent of the term co-assurance can be confusing because insurance companies use different terminologies to describe the term. In addition, there is no general practice by insurers as to whether third parties are responsible for unpaid premiums from the owners. P&I Clubs within the International Group (IG) require the managers to be responsible for unpaid premiums when they are entered as full co-assureds under the owner’s
P&I Clubs distinguish between three different types of cover. Full co-assured, ordinary co-assured and misdirected arrow. The P&I Clubs of the IG require the managers to be responsible for unpaid premiums in the case of full co-assurance.

Ordinary co-assured and misdirected arrows are not autonomous covers. This means that the P&I Club will pay only if the owner was liable and only to that extent. If the owner was not liable, the manager will have no cover from the P&I insurance. If the owner was able to limit his liability and the manager was not, the manager will have to pay for the excess. Therefore, if the manager wants to be covered not only for owner’s acts but also for his own acts he needs full co-assurance cover.

Clause 6 of SHIPMAN 98 provides a solution to the potential problems. First, the clause provides that owner’s insurances should name the managers as joint-assureds (co-assureds), with full cover whether in terms that will make the manager liable for unpaid premiums or on terms which do not give rise to such liability. The Clause therefore takes into consideration the insurance market practice of the P&I Clubs belonging to the IG but also allows the practice of other insurers who may not require the manager to take upon his shoulders such a burden.

Finally, if the managers are themselves not arranging the insurances under Sub-clause 3.4, it is important for the managers to make sure that the owners undertake adequate insurance policies.

5. Under SHIPMAN 98, the liability of the Manager is limited unless he has acted with intent to cause the loss.

One of the problems that existed before the creation of the original SHIPMAN was the different approaches taken in respect of liability by the in-house contracts used at the time.

Under SHIPMAN 98, the manager is not liable unless the loss is caused by his or his agent’s negligence. Even if the loss is caused by his or his agent’s negligence, he is able to limit his liability to ten times the annual management fee. This limitation will not apply where the loss has resulted from the manager’s personal act or omission committed with the intent to cause such loss and with knowledge that such loss would occur. The owner should indemnify the manager in cases where he is not negligent or for the amounts in excess of his actual limit of liability. This indemnity will not apply if the manager has lost his right to limit. The clause also includes a Himalaya provision granting the manager’s employees the same contractual protection from liability as provided to the manager.

6. ISM Code and SHIPMAN 98

In 1996, the International Safety Management Code (ISM) became mandatory.

The Code establishes safety-management objectives and requires a safety management system (SMS) to be established by ‘the Company’, which is defined as the ship-owner or any person, such as the manager or bareboat charterer, who has assumed responsibility for operating the ship.

If a ship manager undertakes technical management under ‘SHIPMAN’ 98 clearly, he will be considered the Company for the purpose of the ISM Code.

The procedures required by the Code should be documented and compiled in a Safety Management Manual, a copy of which should be kept on board.

When SHIPMAN 98 was drafted, thorough consideration was given to the degree to which the ship manager assumes additional liability as a consequence of responsibility for compliance with the Code. One of the consequences of the manager being the person who has agreed to take over the duties imposed by the Code, is that any breaches of the Code may be the responsibility of the manager.

The impact of the ISM Code on managers is reflected in Clauses 12 and 13 of SHIPMAN 98. Under clause 12, the managers, upon request, are to make available to the owners all records and documentation necessary to demonstrate compliance with the ISM Code. Under Clause 14, the managers have discretionary powers to obtain expert advice.

SHIPMAN 98 has been, since its publication, a complete success and has been fully accepted by ship owners and ship managers.

Sample copies of the contract along with full Explanatory Notes can be obtained free of charge from BIMCO’s website: www.bimco.org

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