

MARITIME

SHIP MANAGEMENT: CONTRACTUAL  
LIABILITY OF VESSEL MANAGERS  
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- FINANCIAL INVESTORS IN SHIPPING SHOULD BE PARTICULARLY CONCERNED WITH ENSURING THAT THE RELEVANT VESSEL MANAGEMENT ARRANGEMENTS ADEQUATELY PROTECT THEIR INTERESTS
- A CLEAR UNDERSTANDING OF THE DEFAULT STARTING POSITION ASSOCIATED WITH THE BIMCO SHIPMAN SHIP MANAGEMENT FORM IS ESSENTIAL BEFORE STARTING ANY NEGOTIATION



Owners of vessels often delegate the technical, commercial and/or crewing management of a vessel either to a separate entity within their owning or chartering group, or to a third party professional manager. Financial investors in shipping should be particularly concerned with ensuring that the relevant vessel management arrangements adequately protect their interests. These, amongst other things, manage their operational and financial risk and facilitate the independent benchmarking of costs and overall performance of the manager and vessels.

The contract between the owner and manager in this scenario is generally based on the "BIMCO SHIPMAN 2009" ("SHIPMAN"), the most recent iteration in a series of standardised ship management forms published by the Baltic and International Maritime Council. Although the terms of this standard form will always require amendment to reflect the specific commercial agreement between owners and managers, some of the general provisions in the standard form are regarded by many as "market standard". Any owner wishing to deviate from the default position may encounter resistance from the manager.

One such set of provisions are those governing the liability of the manager under the management agreement, primarily found in Clause 17 of the standard form. While such terms are always subject to negotiation and amendment, a clear understanding of the default starting position is essential.

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### Scope of manager’s liability

The contractual liability of the manager towards the owner under the standard SHIPMAN is limited in scope. With only a few exceptions, the manager will not be liable to the owner for any loss, howsoever arising, in the course of performance of the management services, unless the owner’s loss is a result of the negligence, gross negligence or wilful default of the manager in connection with the vessel.

The negligent, grossly negligent or wilful defaulting acts or omissions of the manager’s employees, agents or sub-contractors are treated as if they were the acts or omissions of the manager. The exception to this is the crew of the vessel (in the event that the crew is employed by the manager), where the manager will only be liable to the extent that the crew’s negligent, grossly negligent or wilfully defaulting acts or omissions arise from the manager’s failure to perform its obligations under the management agreement.

Notably, the manager’s employees, agents or sub-contractors enjoy the same contractual protections as those provided to the manager, and the owner will not be able to claim against such employees, agents or sub-contractors directly.

The standard SHIPMAN also contains a force majeure clause that exempts both the manager and the owner from liability towards each other to the extent that the liability arises from certain force majeure events. This is provided that the party seeking to rely on the force majeure clause has made all reasonable attempts to avoid, minimise or prevent such events or conditions.

Through negotiation, it is often possible to improve an owner’s position from the default under the standard SHIPMAN, provided the owner is aware of the potential issues and, importantly, what is market standard (or at least reasonable in a shipping context) for a manager to be asked to accept.

### Cap on liability

In any event, under the wording in the standard SHIPMAN, the manager’s liability for any incident or series of incidents is capped at a total of ten times the annual management fee paid by the owner to the manager. The exception to this cap is where the loss resulted from the manager’s personal act or omission, committed either with the intent to cause the loss or recklessly and with knowledge that the loss incurred would probably result. It should be noted that this exception is extremely difficult to establish.

### Summary

The liability of the manager to the owner under the standard SHIPMAN wording is limited to an extent that may be surprising to those more used to management arrangements in other business sectors.

The explanatory notes to SHIPMAN state that Queen’s Counsel has previously advised that the liability provisions in an earlier version of the SHIPMAN standard form, which remain substantially unchanged in the current form, are in compliance with the UK’s Unfair Contract Terms Act 1977. However, it is possible that a legal challenge could be mounted to the default provisions, particularly if they have not been the subject of express negotiation and/or amendment. This is perhaps riskier in circumstances where the courts of a country other than England & Wales have jurisdiction over a dispute between an owner and manager.

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“THE LIABILITY OF THE MANAGER TO THE OWNER UNDER THE STANDARD SHIPMAN WORDING IS LIMITED TO AN EXTENT THAT MAY BE SURPRISING...”

Nonetheless, from the perspective of an owner or investor engaging a manager, the default position under the standard SHIPMAN should always be reviewed to form a view as to whether it is acceptable: it is, in theory at least, subject to negotiation between the parties.

It is possible, through amendment of the standard form wording, to either widen or narrow the scope of the manager’s liability, depending on the relative negotiating strength of the owner and manager and ability of the manager to secure insurance cover for any increase in risk. In particular, if the ship management arrangements are part of an investment project structure where one of the parties is experienced in shipping and is providing the ongoing commercial and/or technical management services to the joint venture (perhaps after contributing or selling the vessel to the JV) it is vital that the non-shipping parties engage suitably qualified advisors to assist them with the management arrangements, including assessing whether what is proposed is “market standard”.

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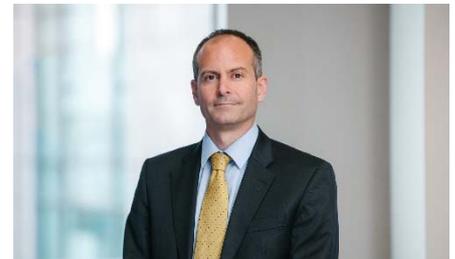
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