

SUPERMAN strengthens contractual bond in shipbuilding supervision projects

Introduction

Third party project managers are increasingly used to supervise the construction of new ships on behalf of the prospective buyers. The involvement of a project manager and supervision team benefits from a clearly worded contract setting out the scope and authority of the managers and specifying the services they offer. BIMCO recently launched a new standard contract for this precise purpose. Codenamed SUPERMAN, the contract is aimed at filling a gap in the shipbuilding and shipmanagement sectors where until now parties have had to rely on individually drafted agreements.

BIMCO has for more than a century provided the shipping industry with standard contracts to facilitate trade by harmonising the terms and conditions that parties do business on. Grant Hunter, Chief Officer, Legal and Contractual Affairs at BIMCO, explains that “the benefit of using standard forms of contract should not be underestimated as they play an important role in helping to reduce the risk of disputes arising over the interpretation of contractual terms.” As an example, he mentions SHIPMAN and says that “when SHIPMAN was published for the first time in 1988 the sector at that time relied on a wide variety of contracts developed by the major shipmanagement firms. Within a year of its launch, SHIPMAN had become a firm industry standard and remains so to this day.”

The drafting team behind SUPERMAN consisted of experts in the shipmanagement sector and included representatives from Anglo-Eastern Ship Management, Graig Shipping, d’Amico Shipping, Bernard Schulte Shipmanagement, International Transport Intermediaries Club (ITIC), and the law firm Curtis Davis Garrard.

Captain Ajay Hazari of Anglo-Eastern Ship Management, who headed the drafting team says SUPERMAN provides “a balanced, industry-recognised, standard contract form for newbuilding supervision services and completes BIMCO's suite of 'cradle to grave' ship management services and related commercial contracts.”

Agency basis

SUPERMAN is an agency based agreement in which the supervisors act as agents for and on behalf of the principal, who will be the buyer of the newbuilding. The more generic term of “Company” has been used for the party contracting with the supervisors in order to take into account that this party may be one of a number of different entities. This may include the future owner of the ship, or a specific company specifically set up for the purpose of the newbuilding, or a parent company or affiliate. SUPERMAN sets out in detail the services that the supervisors should provide to the Company and the extent of their authority. This should have the effect of greatly reducing disputes between the supervisors and the Company.

Scope of services

To provide flexibility, a list of supervision services from which the parties can choose has been included in the front page of the contract. This list includes specification review; Makers List review; plan approval; and site supervision. Further descriptions of the various services can be found in the body of the contract. Additional services such as a guarantee claims handling can of course be included by adding them to the list of services and the fees schedule in Annex B to the contract.

Cost plus fee basis

Similar to SHIPMAN, the SUPERMAN agreement is on a “cost plus fee” basis where the Company pays the supervision fee and any additional costs on top of that in accordance with the schedule of fees set out in Annex B. It can also be used for lump sum payment with some minor amendments.

Liability, indemnity and insurance

The liability and indemnity provisions of SUPERMAN are based on the same provisions of SHIPMAN 2009 since that regime has been accepted in the ship management industry for a long time and allows the supervisors to obtain an appropriate level of liability insurance. In short, the supervisors are liable to the Company for loss, damage, delay or expenses that may arise during the supervision services if caused by negligence, gross negligence or willful default on part of the supervisors. The supervisors’ liability corresponds with their earnings with a limit set at 10 times the agreed supervisors’ fee. For further flexibility, there is a possibility for the parties to use a fixed limitation amount if that is preferred. If SUPERMAN is used on a lump sum basis, a different, lower limit, should be set.

In line with international conventions on limitation of liability, the supervisors will lose their right to limit if the loss, damage, delay or expense was caused by their personal act or omission with the intent to cause the same or recklessly and with knowledge that the loss would probably result.

There is a time bar of 12 months for the Company’s claims against the supervisors. Time will run from the date of delivery of the ship, or date of termination if the contract was terminated early under the Termination Clause, whichever is earlier. This time bar corresponds with the one year guarantee generally offered by the shipyards.

Because the supervisors are acting as agents for the Company, they should not be liable for more than what is set out in the liability provisions as described above. SUPERMAN therefore contains a clause whereby the Company undertakes to indemnify the supervisors for claims that they may face. The indemnity is not meant to be open ended, rather it is limited to claims that are connected with the performance of the SUPERMAN agreement and as such the indemnity follows the liabilities that the Company would have if not the supervisors had been acting on their behalf.

In terms of insurance, SUPERMAN contains a provision requiring the supervisors to have in place during the contract a professional indemnity insurance to meet their liabilities. This makes sense considering that supervision companies are generally not asset based companies. Requirements regarding the owners’ insurances should be sought for in the shipbuilding contracts where the builders are obliged to take out builders’ risk insurance and the buyers should be co-assured under the builder’s policy. The reason for not including further insurance provisions in the supervision contract is because the Company do not yet own the ship under construction, which generally remains the property of the shipyard until delivery, it is difficult to oblige the Company to insure the ship. Once the ship has been delivered from the shipyard to the owners, they will be responsible for the provision of insurances in relation to hull and P&I cover, and by that time the supervision contract will have ended.

Termination

Unlike conventional ship management agreements, third party supervision contracts are not normally “evergreen” – they will terminate once the supervisors have completed the supervision services, which will usually coincide with the delivery of the ship. For the sake of clarification, this has been expressly stated in SUPERMAN. Also because supervision projects only last for a limited period of time, SUPERMAN can only be terminated early when there has been a breach of contract by either party or some other specific event such as payment default by the Company, termination, transfer or novation of the shipbuilding contract, significant delays to delivery, loss of the vessel or bankruptcy, etc.

Conclusion

Third party project managers provide a valuable service to the industry, bringing a wealth of expertise and experience to shipbuilding and ship conversion projects. Establishing a good working relationship and clear lines of communication between clients and the shipyard is essential. Fundamental to this process is a solid contractual platform that sets out the services the managers will provide and the scope and authority given to them by their clients to act on their behalf. The SUPERMAN contract, provides a good balance between the interests of the supervisors and their clients and comprehensively covers the key issues that managers and their clients will commonly need to address during the project. Using BIMCO’s SUPERMAN will help managers quickly draw up new agreements with clients and better manage the project without having to seek approval for tasks that are often not addressed in existing “home-made” contracts.

Sample copies of SUPERMAN and accompanying Explanatory Notes can be found on BIMCO’s website: www.bimco.org. Secure and authentic Word copies of SUPERMAN for commercial use can be accessed via BIMCO’s online contract editor, IDEA2, also on BIMCO’s website.