

# **BIMCO**

## **SUPERMAN**

### **Explanatory Notes for the Standard Contract for the Supervision of Vessel Construction**

SUPERMAN further extends the range of ship management-related standard contracts produced by BIMCO. It is a contract between ship managers or consultants and their clients to provide supervision services during the construction of a ship. It can, however, also be adapted for use for ship conversion and ship repair work. The contract has been written so that it can dovetail with BIMCO's NEWBUILDCON and REPAIRCON contracts, although it is by no means restricted to these agreements. It is designed as a one ship supervision contract.

SUPERMAN is modelled on SHIPMAN 2009 and has the same structure of liability provisions from that contract. Like SHIPMAN, it is a "cost plus fee" agreement with the supervisors acting as agents for and on behalf of their clients. The contract requires the supervisors to have in place professional indemnity insurance, and stipulates a time-bar for claims, providing certainty to both parties.

BIMCO is grateful to the following people who contributed to the development of the SUPERMAN Contract:

Capt. Ajay Hazari, Anglo-Eastern Ship Management (Chairperson)  
Mr Maurizio A. Bergamaschi, d'Amico  
Mr Steven Davies, Graig Shipping  
Mr Krzysztof Kozdron, Schulte Marine Concept  
Mrs Charlotte Kirk, ITIC  
Mr Justin Turner, CDG Law Firm

\*\*\*\*\*

### **Explanatory Notes**

These notes are intended to provide some of the reasoning behind the provisions of SUPERMAN. The contract follows the usual BIMCO pattern of a Part I box layout where the parties will enter the variable information of the agreement and a Part II consisting of the standard terms and conditions. The contract incorporates five annexes covering matters such as details of the ship, fees, budgeting and the site team.

#### **Part I**

This part contain boxes where the parties should fill in the variable information of the contract such as the name and contact details of the parties and a summary of the services agreed. Part I provides a useful summary of the key elements of the agreement.

## Part II

This part contains the standard terms and conditions of the agreement subject to which the contract should be performed.

### Section 1 – Basis of the Agreement

#### Clause 1 (Definitions)

SUPERMAN starts with a Definitions Section setting out the contractual meaning of important terms that appear in several places throughout the document. Below follows an explanation of some of the definitions.

**“Affiliate”** – This is an important definition in relation to the “buyer” under the “Shipyard contract” which may not be the same as the “Company” under the SUPERMAN Contract.

**“Company”** – SUPERMAN uses the term “Company” for the definition of the party who is contracting with the “Supervisors”. Although some shipbuilding contracts use the term “Buyers”, it was not felt appropriate in this context since the party that the Supervisors are contracting with can be one of a number of different entities, for example a parent company or affiliate. Neither is the term “Owner” appropriate since in many cases it will not be the future owner of the ship that is a party to the supervision contract, but instead a company specifically set up for the purpose of the newbuilding.

**“Contractual Date of Delivery”** – This date should be taken from the underlying shipbuilding contract. For the purpose of establishing this date, it is useful if the shipbuilding contract is annexed or otherwise made available to the Supervisors. This date is distinguished from the actual **“Date of Delivery”** which may be adjusted due to permissible delays under the terms of the shipbuilding contract. It should be noted that if SUPERMAN is used for conversion or repair work, these terms may need to be amended. For example, in REPAIRCON the term “Delivery” refers to when the ship is delivered by the Company to the Shipyard where the repairs will be done. The word “redelivery” in REPAIRCON is used for delivery by the Shipyard to the Company when the works have been completed. We recommend that if you plan to use SUPERMAN for repair or conversion work, these terms should be amended in line with the above repair contract terminology.

**“Flag State”** – It is the Supervisors' responsibility to ensure compliance with the Flag State regulations as provided for under the Shipyard Contract. However, since it is not unusual to change flag concurrent with delivery, the Flag State in SUPERMAN refers to the State under whose laws the ship will be constructed and not the Flag State of the ship after delivery.

**“Shipyard contract”** – There is no obligation to attach the shipbuilding contract to SUPERMAN, but if attached then further reference to it will be by this definition. As explained above, it may be useful to annex or make available the shipbuilding contract to the Supervisors for the purpose of establishing the Contractual Date of Delivery.

**“Supervision Services”** – This is the definition of the services that the Supervisors undertake to perform under SUPERMAN. Box 10 contains a list of commonly agreed services to which the parties must indicate either “yes” or “no” for them to apply. If the parties agree additional services, for example, shipbuilding contract

negotiations; shipyard audits; and guarantee claims handling, they should add them to the list in Box 10, and further details can be included in Section 2 (Scope of Services) and Annex B (Schedule of Fees).

**“Supervisors”** – for the purposes of SUPERMAN, the managers or consultants are referred to as the “Supervisors”.

**“Site Team”** – The definition for “Site Team” refers to the persons listed in Annex “E”. If the listed Site Team should change significantly during the period of the agreement then a new agreement may be required to reflect the change of costs.

### **Clause 2 (Commencement and Appointment)**

This Clause contains the basis of the agreement whereby the parties agree that the Supervisors should be appointed by the Company to perform the Supervision Services. The contract will start on the agreed date as stated in Box 2 and continue until the Supervision Services have been completed, which is defined in Sub-clause 17(a) as when the ship is delivered by the Shipyard to the Buyer.

### **Clause 3 (Authority of the Supervisors)**

SUPERMAN is an agency based agreement where the Supervisors act as agents for and on behalf of the principal “Company” and are given the necessary authorities to perform under the contract.

## **Section 2 – Scope of Services**

### **Clause 4 (Specification Review)**

This is a brief description of the Specification Review that may be one of the chosen services that the Supervisors should perform under this contract. The Supervisors will be expected to examine the specifications to ensure that the ship will be able to do what the Company intends to use it for.

### **Clause 5 (Makers List Review)**

Generally included in the Supervision Services is the review of the Makers List since it is the Supervisors who have the competence and knowledge to advise on the suppliers and manufacturers that should be included in the shortlist eventually handed over to the Shipyard.

### **Clause 6 (Plan Approval)**

Always bearing in mind the Company’s intended use of the ship, at the stage of Plan Approval the Supervisors need to make sure that the plans and drawings submitted by the Shipyard are in compliance with the Shipyard Contract (see **Sub-clause (a)**). Furthermore, the Supervisors should review, comment and approve the Shipyard’s choice from the Makers List (see **Sub-clause (b)**).

## Clause 7 (Site Supervision)

One of the key elements of the Supervision Services is the Site Supervision which is described in this Clause.

**Sub-clause (a)** – This Sub-clause describes what is included in the Site Supervision, for example, putting the Site Team in place and setting up a Site Office at the Shipyard, attending meetings with the yard and carrying out inspections of the ship and attending tests and trials.

The inspections referred to in **Sub-clause (a)(iv)** are the official inspections that are often carried out by personnel other than the Supervisors, but which the Supervisors have the right to attend (compare, for example, with Sub-clause 23(b) of NEWBUILDCON).

**Sub-clause (b)** – It is important that if the Supervisors identify or become aware of any problems, or non-conformities with the Shipyard Contract, they are required to report these to both the Shipyard and the Company. They must inform the latter of how the Shipyard intends to deal with the non-conformities so that they can either be rectified or otherwise closed.

**Sub-clause (c)** – This Sub-clause contains some practical details in relation to the Supervision Services. For example, that the Supervisors should provide the Site Team with the necessary equipment; that they should cooperate with the classification society and flag administration; and notify the Company if they become aware of any changes in laws, rules and regulations.

## Section 3 – Obligations

### Clause 8 (Supervisors' Obligations)

The provisions of this Clause define the Supervisors' obligations in carrying out the Supervision Services.

**Sub-clause (a)** – The Supervisors are obliged to perform the Supervision Services in accordance with "sound industry practice". The term "sound industry practice" is a commonly used term indicating the standard to which the supervision services should be performed. It is an objective standard and does not refer to the Supervisors' opinion of what is sound, but what is considered "sound" by the industry as a whole.

**Sub-clause (b)** – It is important that the Supervisors maintain records of the work carried out by them in connection with the performance of the services under the contract, in particular, if a dispute arises such records will provide a good source of evidence.

**Sub-clause (c)** – In order for the Company to keep track of the construction work and other activities that are under the supervision of the Supervisors, written reports should be submitted to the Company.

**Sub-clause (d)** – Since it is the Company that is the principal of the Supervisors and will eventually will take delivery of the ship, the Supervisors cannot accept any changes to the Shipyard contract without prior written approval from the Company.

Supervisors may simultaneously act as supervisors for other ships on behalf of other companies. The purpose of the last paragraph of this Clause is to ensure that the Supervisors can in such cases allocate their resources effectively and appropriately without any bias.

## **Clause 9 (Company's Obligations)**

In addition to the obligation to pay the Supervisors under **Sub-clause (a)**, and the ensuing interest if payment is late, the Company's obligations towards the Supervisors also include the provision of a copy of the Shipyard Contract, or sufficient information about it (**Sub-clause (b)**); a full set of plans, drawings and other technical information (**Sub-clause (c)**); and access to the shipyard, ship, workshops etc. (**Sub-clause (d)**). The degree of such access will be determined by what is required for the Supervisors to perform the agreed services. In general, the parties should aim to align the level of access, both physical and in terms of documentation, under SUPERMAN with that of the Buyer's Representative in the underlying shipbuilding contract.

Furthermore, it is also important that the Supervisors are kept informed of changes and modifications to the Shipyard contract so that they can continue to carry out their duties (**Sub-clause (e)**). For example, there may be changes that affect the Supervisors' schedule, the scope of their work or the costs of the project. Based on such information, the Supervisors will be able to make informed decisions about the continuance of the supervision work and if the terms of the agreement need re-negotiation.

## **Section 4 – Fees, Expenses and Budgets**

### **Clause 10 (Supervisors' Fee and Expenses)**

**Sub-clause (a)** – This Sub-clause sets out the Company's obligation to pay the Supervision Fee to the Supervisors based on the amounts stated in Annex B (Schedule of Fees), and requires the parties to state in Box 11 which bank account it should be paid into.

**Sub-clause (b)** – It is for the Supervisors to provide their own office accommodation, staff, office equipment and stationery. However, the Company should reimburse the Supervisors for out of pocket expenses such as postage and travelling. If the Supervisors use additional days in performing the Supervision Services to those already agreed in the budget, those extra days should be charged for at the daily rate as per Annex B (Schedule of Fees).

### **Clause 11 (Budgets and Management of Funds)**

**Sub-clause (a)** – An Annex C has been created for the Supervisors' Budget.

**Sub-clause (b)** – The Supervisors should make a budget for their estimated working capital requirement and present it to the Company, which should pay, monthly in advance, to the Supervisors the funds they need to perform the Supervision Services. Payment should be made within 10 days from receipt of the written request for payment. The monies should be kept in a separate bank account to the credit of the Company.

**Sub-clause (c)** – This is the auditing provision which sets out the standard of accounting to which the Supervisors must keep their accounts, which is by reference to the International Financial Reporting Standards. However, the parties may agree alternative standards. The second paragraph provides the Company with access, upon reasonable notice, to the Supervisors' accounts electronically as well as being available for physical inspection in the Supervisors' offices.

**Sub-clause (d)** – This is to clarify that the Supervisors should not have to use their own funds in order to perform the Supervision Services.

## Section 5 – Legal, General and Duration of Agreement

### Clause 12 (Replacement)

A member of the Site Team who is unsuitable for the work can be replaced at the request of the Company.

### Clause 13 (Supervisors' Right to Sub-Contract)

It is important for the Company to know who is carrying out the Supervision Services as contracted for and it has therefore been made a requirement that the Supervisors must get the Company's written approval if they wish to sub-contract any of their obligations.

### Clause 14 (Responsibilities)

**Sub-clause (a)** – This Clause is modeled on the ICC (International Chamber of Commerce) model Force Majeure Clause 2003 which BIMCO has used to create a "standard" force majeure provision for its contracts. The Clause excuses the performance without liability of the party invoking force majeure if it can show that the alleged force majeure event falls within any of the listed event in the Clause; that its performance is prevented by that event; and that it has taken reasonable steps to avoid or minimise the consequences of the event. Courts tend to interpret force majeure clauses narrowly so that only the events listed or similar events will be considered to be force majeure events. In order for force majeure to operate, the event has to be completely beyond the parties' control such that they could not have avoided its consequences, nor could they have reasonably known it was going to happen. Parties cannot invoke force majeure if they are relying on their own acts or omissions. This Clause, combined with Sub-clause 17(d)(iii), can give rise to a right of termination if the delay to the delivery of the ship exceeds the number of days as stated in Box 13.

**Sub-clause (b)** – This provision is based on the liability provision in 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. It provides that 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 or their servants. Similar to SHIPMAN 2009, the Supervisors' liability corresponds with their earnings with a limit at 10 times the Supervisors' Fee. In addition, to reflect the practice that parties sometimes use a fixed limitation amount as opposed to a multiple of the Supervisors' Fee, Box 14 has been included where the parties can agree on a maximum amount.

It is the intention that the Supervisors' Fee is the overall aggregate of all fees that the Supervisors earn from the whole contract. It does not matter if the fees have already been earned or not at the time of establishing the limit. For example, if the Supervisors have been negligent in plan approval, before the site supervision has started, the limit will be applied on basis of all fees under the agreement, even if all have not yet been earned. Costs and expenses under the contract should not be included. Moreover, SUPERMAN is a cost plus

fee contract and not lump sum, and if the parties intend to agree a lump sum contract then the limit should be set at a lower level (as, for example, in CREWMAN B).

Similar to international conventions on limitation of liability, the Supervisors' right to limit will be lost if the loss, damage, delay or expense was caused by the Supervisors' personal act or omission with the intent to cause the same or recklessly and with knowledge that the loss would probably result. It should be noted that the relevant conduct must be that of the alter ego of the Supervisors' company, in other words, a person for whom the Supervisors' company is liable since his or her actions are considered to be the very actions of the Supervisors' company itself. Consequently, such a person must normally be a member of the senior management of the Supervisors' company.

In contrast to SHIPMAN 2009, a time bar of 12 months during which the Company must notify the Supervisors of the loss, damage, delay or expense has been added. Time will run from the date of delivery of the ship, or date of termination if the contract was terminated early under Clause 18 (Termination), whichever is earlier. The reason for this is that shipyards generally give a one year guarantee, so a corresponding time bar between the Company and the Supervisors is appropriate as a default position. However, there may be situations that will require different time bars and parties should address such situations on an individual basis.

**Sub-clause (c)** – The contract includes a requirement that the Supervisors have in place adequate professional indemnity insurance to meet their liabilities.

**Sub-clause (d)** – This is standard BIMCO wording providing for full indemnity by the Company to the Supervisors, except when the Supervisors are liable under Sub-clause 14(b).

**Sub-clause (e)** – The aim of the Himalaya Clause is to extend the benefits afforded to the Supervisors under the contract to third parties working on behalf of them, and the agency provision at the end of the Sub-clause is the mechanism whereby this is achieved.

#### **Clause 15 (General Administration)**

**Sub-clause (a)** – The purpose of this Sub-clause is that the Supervisors should inform the Company of any incidents that might give rise to claims or a dispute involving third parties. This should be distinguished from Sub-clause 7(b) regarding non-conformities in relation to the Shipyard Contract.

**Sub-clause (b)-(c)** – The parties may request from one another that the other party make available documentation, information and records that are relevant to the performance of the supervision agreement.

#### **Clause 16 (Compliance with Laws and Regulations)**

This is standard wording found in several BIMCO forms. It is intended to protect the parties to the contract by way of mutual promises to not do or permit any laws or regulations of the Flag State or the place of construction to be broken. In addition, the parties must comply with the laws which the Company and the Supervisors are subject to, for example, where they are registered.

## **Clause 17 (Termination)**

Since supervision projects only last for a limited period of time, it is not appropriate to allow the parties to terminate early just for convenience. This Clause provides for early termination only when there has been a breach by either party or due to other specific causes which are set out in the Clause.

For the sake of completeness, a definition of when the agreement will terminate in the normal course of events has been included in **Sub-clause (a)** whereby the agreement terminates upon completion of performance of the Supervision Services, which will be deemed to occur upon delivery of the ship. This may be useful in determining from which point in time the time bar in Sub-clause 14(b) (Responsibilities – Liability to the Company) will run.

**Sub-clause (b)** – This Sub-clause provides for termination in the event of default by either party. To give the defaulting party a chance to rectify, the other party must give notice and ask for rectification of the failure.

**Sub-clause (c)** – In addition to the Supervisors being entitled to terminate the contract if they have not been paid by the Company for services rendered to the ship, provision has also been made for termination in case of failure to pay in respect of any Associated Vessels, which are listed in Annex D. Even though SUPERMAN is a contract for one ship the Company may have several ships under construction at the same time contracted for supervision with the same supervisors. It is therefore important that Supervisors are able to terminate if the Company has not honored its obligation to pay in respect of the Supervision Services for any other ships under construction.

**Sub-clause (d)** provides for termination due to either termination, transfer or novation of the Shipyard Contract (**Sub-clause (d)(i)**); or, an actual or constructive total loss of the ship before delivery (**Sub-clause (d)(ii)**); or a force majeure event, or any other delaying event, exceeding an agreed amount of days as stated in Box 13, or 180 days if no choice is made (**Sub-clause (d)(iii)**). The words “and any other delaying event” means that termination under Sub-clause (d)(ii) can take place if the delay exceeds the agreed number of days, or the default number of 180 days, irrespective of the cause of delay.

Sub-clause(e) - If either party goes into liquidation or bankruptcy, ceases to carry on its business, etc., the supervision agreement is terminated.

**Sub-clause (f)** – If the contract is terminated early under Sub-clauses (b) to (e), except default by the Supervisors, then the Supervisors’ Fee should continue to be payable during the agreed number of months as stated in Box 15, or, during three months if no choice has been made. In both cases, time will run from the effective date of termination. Provision has also been made for severance costs and any other costs that have been reasonably incurred by the Supervisors because of the early termination. A maximum amount for such costs should be agreed and stated in Box 15.

**Sub-clause (g)** – If the contract is terminated, the Supervisors should upon request release documents relating to the Supervision Services to the Company.

Sub-clause (h) - The parties retain any rights that may have accrued before the time of termination.

## **Clause 18 (BIMCO Dispute Resolution Clause 2016)**

The dispute resolution clause offers four options on arbitration: London (which applies by default if no other venue is agreed); New York; Singapore; and, finally, a free choice of venue as may be agreed between the



parties. The mediation provision applies in all circumstances. If the parties do not indicate their choice of law and arbitration venue in Box 16, then English law and London arbitration will apply by default.

#### **Clause 19 (Notices)**

This is a general notice provision dealing with how contractual notices should be given and when they will be treated as received.

#### **Clause 20 (Entire Agreement)**

The purpose of this provision is to limit the rights of the parties to the written terms of the contract. It is intended to exclude representations, written and oral, not intended to be part of the final concluded contract. It does not, however, mean that this contract overrides all other contracts that might exist between the parties, for instance SUPERMAN contracts concerning other ships.

#### **Clause 21 (Third Party Rights)**

This Clause clarifies that only third parties who are expressly identified in the contract can benefit from any of its provisions, except to the extent as provided for in Sub-clauses 14 (d) (Indemnity) and 14(e) (Himalaya).

#### **Clause 22 (Partial Validity)**

This Clause seeks to avoid a situation where the entire agreement is held to be invalid because a particular provision is deemed by an arbitrator or other competent authority to be illegal, invalid or unenforceable.

#### **Clause 23 (Interpretation)**

The final Clause clarifies that the headings of individual clauses are just labels and should not be used to interpret the content of the clause. It also defines “day” for the purposes of the contract and explains how singular and plural words are to be interpreted in context.

## **Annexes A –E**

The following annexes form part of SUPERMAN:

**Annex A (Vessel Details)**

**Annex B (Schedule of Fees)**

**Annex C (Supervisors' Budget)**

**Annex D (Associated Vessels)**

**Annex E (Site Team)**

## **Copyright and availability**

Copyright © 2016 BIMCO

All rights reserved. No part of this publication may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of BIMCO. For permission requests, write to BIMCO at [documentary@bimco.org](mailto:documentary@bimco.org).

Sample copies of SUPERMAN may be downloaded free of charge from the BIMCO website at [bimco.org](http://bimco.org).

To use SUPERMAN we recommend BIMCO's web-based contract editing system, **IDEA2**, which provides access to a secure Microsoft Word version of the contract that can be filled in and edited online and then exchanged by e-mail. For details of how to sign up to use **IDEA2** please click on the [Products](#) tab on the BIMCO homepage [bimco.org](http://bimco.org) or contact [idea@bimco.org](mailto:idea@bimco.org).