Explanatory Notes to LAYUPMAN

Standard Contract for the Laying up of Vessels

In view of the current increasing frequency of vessels being laid up awaiting more favourable market conditions and in the absence of an existing standard agreement, BIMCO working together with third-party layup management specialists has developed a new purpose-designed contract for the laying up of vessels. The new agreement is designed primarily for vessels which will be placed in "cold" layup with main engines and auxiliaries de-activated and with minimal or no owners' personnel on board. The users of LAYUPMAN will be third-party layup managers who provide dedicated layup services including the leasing of moorings from a port authority and vessel monitoring and maintenance programmes during the layup. The contract provides for the de-activation process on arrival at the layup site, which will involve the ship's personnel as well as the managers, and also the re-activation process at the end of the layup period. The contract is modelled on BIMCO's widely used SHIPMAN 2009 ship management agreement.

A specialist Sub-committee was formed during summer 2010 and the contract was formally adopted by the Documentary Committee in June 2011. BIMCO is grateful to the following Sub-committee members and observers for their valuable contributions to the project:

Mr. Chris Hilton, Eversheds LLP & Graig Shipping, UK (Chairman)
Dr. Fehmi Ülgener, Kiran Shipping Group, Turkey
Mr. Shaun Michael Long, Maersk Line Vessel Management, Denmark
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Mr. Eivind Killengreen, Wilhelmsen Ship Management, Norway
Mr. Andrew Lockie, International Shipcare, Singapore

The following explanatory notes are intended to provide users an overview of the thinking behind the contract:

LAYUPMAN is an agency based contract whereby the layup managers act as agents for and on behalf of the owners and are remunerated for their services with an agreed monthly management fee. The owners are able to keep insurance costs down during the layup by permitting the managers, as agents, to be named as co-assured on the owners' P&I cover. This avoids the managers having to take out expensive separate liability insurance cover, the cost of which would be passed back to the owner.

BIMCO's aim has been to produce a comprehensive contract that will be applicable to all ship types and in most jurisdictions. The benefit of using LAYUPMAN is that it is an entirely new contract drafted by experts from the industry with specific expertise in and experience of laying up ships. This means that the obligations, responsibilities and liabilities are fairly apportioned and that the overall structure of the contract clearly guides the user through the chronological sequence of events using language that is easy to understand. The clarity that LAYUPMAN provides should help to reduce the risk of disputes arising related to the interpretation of the contract terms and conditions.

LAYUPMAN is concluded on 'evergreen' terms (without an agreed end date) combined with a minimum period to ensure that the layup managers are able to recover their initial costs of arranging the layup. To give the agreement the widest appeal to a broad range of vessels without the need for major amendments, the main body of LAYUPMAN focuses primarily on the legal issues relating to the layup – namely

obligations, responsibilities and liabilities – while additional annexes deal with technical issues and the allocation of operational tasks between the parties.

The contract consists of Part I (box layout), Part II (terms and conditions) and a list of annexes (Annex A-E), including a vessel description; a detailed scope of work which sets out the tasks to be undertaken by the layup managers and the owners during layup; a list of additional fees, expenses and optional services; an annex for the parties to append the layup protocols; and a list of associated vessels, if needed.

Users should be aware that LAYUPMAN, like all BIMCO contracts, is a carefully crafted package of terms and conditions and amendments to the standard text may upset the balance of provisions. Therefore care should be taking in amending the standard text or adding additional clauses to the agreement

PART I Box Layout

Part I of LAYUPMAN is set out in the familiar BIMCO box-layout style. The boxes are used to enter details that are intended to cover the main commercial terms that the parties need to agree at the time the contract is concluded. It should be noted that for convenience the boxes, where appropriate, contain cross-references to the relevant clauses found in Part II.

The boxes are designed to include the key information that underlines the contract, for instance the place and date of the agreement and detailed information concerning the owners'/managers' name, place of registered office and law of registry, and the name and contact addresses for the technical managers of the vessel. Because the contract is agreed on 'evergreen' terms there is no reference to the contract period but Box 2 sets out a minimum contract period. In most layup agreements it is important to have a minimum contract period in order for the managers to be able to cover the costs of preparing the layup site and allocating administrative resources. The length of the minimum period will vary from layup to layup and the parties are free to agree to the number of months that best suit their purposes. Should the parties fail to agree or state a minimum contract period, the default position is that the contract will continue to run for a further 30 days after notice of termination has been given.

Details of the layup site, either place or area confirmed by latitude and longitude, are set out in Box 7. The parties also have to agree to a notice of arrival of the vessel off the layup site.

Boxes are also provided for the parties to state the management fee to be paid on a monthly basis (Box 9) to the manager's nominated account (Box 10); the rate of interest to apply to outstanding sums (Box 11); and the number of months' management fee to be paid on termination (Box 13 – only applicable if termination is not due to default by the managers). Of particular note is Box 12, which refers to the managers' maximum liability (amount). The intention here is to place a cap on the managers' maximum liability, so that it can be reasonably insured. If no cap is stated the managers' liability will not exceed a total of ten times the annual equivalent of the management fee.

It should be noted that although it is the intention that the parties complete all applicable boxes, the contract will not invalidated should they leave a box blank, intentionally or otherwise.

Part II Terms and Conditions
Part II of LAYUPMAN is divided into six sections each covering a specific aspect of the layup/management scenario. This has been done to make the contract easier to follow and cross-reference.

Section 1 – Basis of the Agreement

The first section covers the basic elements of the contract: definitions; commencement of agreement and appointment of managers; and the authority of the managers to carry out the management services.

Clause 1 (Definitions)
The contract contains a number of defined terms which appear in various clauses throughout the contract and which are listed in Clause 1 for easy reference. It should be noted that these definitions are used to define words and phrases for the purposes of the contract and are not "legal" definitions. The definitions are important to the understanding of the agreement and the key definitions are described below.

'De-activation' is the period from arrival off the layup facility until the vessel has been down-manned and is physically ready for layup, during which an agreed set of activities will take place. The owners and the managers will have agreed on the activities to be undertaken during 'De-activation' and which party is responsible for which tasks. For convenience, a list of standard tasks has been set out in section 3 of Annex B (Scope of Work), but it is recommended that the parties always consider the tasks in view of the particular vessel and add or amend tasks and/or responsibilities on a case by case basis.

The **'Layup Period'** is the period during which the managers are responsible for the vessel and during which the owners will pay the management fee. A list of suggested activities to be carried out during this period is set out in Section 4 of Annex B (Scope of Work).

The **'Management Services'** means the services specified in Annex B (Scope of Work) for which the managers are to be responsible for as well as all other functions to be performed by the managers, including any additional and optional services set out in Annex C (Additional Fees, Expenses and Optional Services). It is important to note that 'Management Services' is a broad definition which has not been limited to services carried out during the 'Layup Period', but will include any agreed services carried out or to be carried out as long as such services come under the terms of the agreement.

'Re-activation' is the process to be undertaken when the agreement has been terminated and the vessel is to be removed from the layup site and brought back into service or taken for recycling. The re-activation work begins as soon as notice of termination of the agreement has been given to either party (or the agreement has been terminated for other reasons, for full description see Clause 17 (Termination)). This is also the period of time during which the activities set out in Section 5 of Annex B (Scope of Work) is to be carried out.

Clause 2 (Commencement and Appointment)
This Clause establishes the appointment of the managers as of the date of commencement of the agreement and the agreement of the managers to act in that capacity until the contract comes to an end.

It is important to note that when concluding a LAYUPMAN agreement the parties should take care to ensure that the layup agreement is properly terminated within the duration of any time charter party or bareboat charter party. The contract does not deal with the scenario where a managing owner, for instance a bareboat or time charterer, enters into a layup agreement which may exceed their obligations under another contract.

Clause 3 (Authority of the Managers)
This Clause establishes the fundamental principle of LAYUPMAN that it is an agency agreement with the managers carrying out the services specified in the agreement as agents for and on behalf of the owners. It should be noted that if the managers act in their own interest in providing services under the agreement, this will be an exception to their agency role and may have insurance implications (for further information on this, see Clause 10). An example of such an exception could be the optional services offered in Annex C (Additional Fees, Expenses and Optional Services) or additional repair work undertaken by the managers.

The purpose of the second sentence of Clause 3 is to ensure that the managers have sufficient freedom to operate and carry out the management services without being unduly delayed by having to seek owners' approval for every decision, regardless of its importance. The managers are free to take action, provided that such actions are, in their opinion, necessary to enable them to fulfil their obligations under the contract and provided that the actions do not compromise anything else that has been agreed in the contract. It should be noted that the managers' obligations under the LAYUPMAN agreement are not limited to the layup period itself, but would include all services undertaken by the managers under the agreement.

Section 2 – Obligations

This section covers the obligations of the parties.

Clause 4 (Managers' Obligations)
The provisions of this Clause define the managers' obligations in carrying out the management services.

The managers are obliged to use their "best endeavours" to provide management services to the owners in accordance with "sound layup industry practice" and to perform such services in compliance with "all relevant rules and regulations".

The managers' general obligation to use "their best endeavours" is not an undertaking to be taken lightly. Courts often take a fairly strict view as to what constitutes "best endeavours".

"Sound layup industry practice" does not depend on what a particular layup manager may regard as sound. In the event of a dispute, acceptable standards of best layup management practice may well be heard by the testimony of each party's industry expert. Practice from SHIPMAN has shown that courts do not have a problem in establishing what such phrase should cover. The phrase is not defined in the contract because industry practices tend to evolve over time, especially in a relatively new sector such as third-party layup management. A contractual definition would most likely become outdated quickly and so the phrase has been left to the industry and the courts to define on a case-by-case basis.

The managers are also obliged to protect the vessel and surrounding environment in the case of emergency. The fact that this obligation is limited to emergencies does not mean that the managers should not react if they notice an issue which could potentially result in a serious occurrence. The managers are still obliged to use their best endeavours to perform the management services, which includes advising the owners of the discovery of any potential risk of loss or damage. If the owners refuse to act on the managers' notice this would override the managers' right to take further action at this point in time. Only if the issue later develops into an emergency are the managers obliged to take action and protect the vessel and surrounding environment.

Clause 4(a) places an obligation on the Managers to have in place and maintain an emergency response plan. Most port authorities will require the managers to have such a plan in place. Section 1 of Annex B

(Scope of Work) provides for general safety measures to be implemented in connection with the layup and it is recommended that further details are discussed and agreed on a case-by-case basis between the port authorities and the layup managers. The owners may want to check the adequacy of the managers' emergency response plan before the layup period begins as well as follow up on whether this plan is regularly revised and updated as appropriate. It is important to note that, depending on how the tasks in Annex B (Scope of Work) have been allocated, the owners may be responsible for certain safety measures during the de-activation and re-activation of the vessel, for instance keeping a fire watch.

The layup managers do not have a right under the contract to claim any award for salvage performed on the vessel and/or a reward for protection of the environment by minimising pollution. In practice, it is not likely that the owners will be met with such a request because the managers have a duty of care for the vessel and thus, in most circumstances, would not be eligible to claim a salvage reward anyway. However, in order to emphasise that the managers don't have the right to claim such awards, a waiver has been insert in sub-clause 4(a). During the development of LAYUPMAN it was considered whether companies associated with the managers should also be excluded from claiming salvage rewards. However, if there were an emergency and the associated company was the only salvage company in the area, it would be necessary and appropriate for the manager to sign a salvage agreement with this company on behalf of the owner.

In sub-clause 4 (a), the managers are under an obligation to perform the management services in a manner consistent with "appropriate social responsibility". This concept is new, and the intention is to cover both the environmental and social concerns of the local area, for instance when a vessel is laid up near to a populated area and the managers need to minimise noise from machinery during the night time.

Sub-clauses 4(c) and 4(d) deal with the managers' reporting and notice obligations to the owners. Sub-clause 4(c) sets out that the managers are obliged to provide the owners with periodic written reports of the observed condition of the vessel and its equipment and machinery. As the owners may not have any personnel on board the vessel it is important that the managers act as their "eyes and ears" in bringing to their attention any items which need maintenance or repair even though those items might not be specifically covered in the layup agreement. The frequency and format of the reports may vary from layup to layup, so it has been left to the parties to agree to what best suits their purposes.

It is important to note that sub-clause 4(d) only requires the managers to notify the owners of their' observations of any malfunctions or other discrepancies. It is left to the owners to decide on whether the vessel and/or equipment or machinery is in need of repair. However, if anything discovered by the managers is, in their opinion, critical for the safety of the vessel and/or the surrounding environment and time does not permit consultation with the owners, the managers have the right to take whatever necessary and prudent steps to ensure the safety of the vessel and the environment, as set out in Clause 3 (Authority of the Managers).

Third-party layup managers will most likely be acting on behalf of a number of owners and their vessels at any one time. The last paragraph of Clause 4 defines the overall responsibility of the managers in relation to all vessels entrusted to their management. This provision permits managers who are acting on behalf of a number of different owners to allocate manpower and services in a fair and reasonable manner. In the absence of this clause the managers might be faced with the impracticability of trying to give priority to all owners.

Clause 5 (Owners' Obligations)
The primary obligation placed on the owners is to pay all sums due to the managers.

The nature of Annex B (Scope of Work) is that certain tasks during de-activation and re-activation will be the responsibility of the owners. The owners are under a similar obligation to that of the managers to maintain records of work carried out in performance of their tasks under the Scope of Work. Sub-clauses 5(b) and 5(c) reflect these obligations.

Sub-clause 5(d) concerns notification to the managers of any change of flag or classification society during the layup period. The outcome of such a change may be that an adjustment of the management fee is required to meet changed costs.

Finally, the owners are under a strict obligation to ensure that, throughout the layup period, the vessel is in possession of valid certificates to ensure compliance with the port authority, flag state and classification society requirements. This includes an obligation for the owners to ensure that the minimum crew required by the flag state is maintained until the executive control of the vessel is handed over to the layup managers

Section 3 – Operation

This section covers the operational aspects of the agreement, including arrival of the vessel at the layup site, inspection of the vessel, de-activation, re-activation and removal of the vessel from layup.

Clause 6 (Arrival and De-activation)
This Clause requires the owners to give 72 hours' notice to the layup managers before the vessel arrives off the layup site. However, the parties are free to decide an alternative number of hours' notice to suit their particular situation by inserting the relevant number of hours in Box 8. The reference to "off the Layup Site" means in the vicinity of the layup site at a place agreed by the parties, very often the local pilot station.

Once the vessel has arrived, the managers and the owners will carry out a joint inspection to ensure that the vessel is in the condition stated in Annex B (Scope of Work) when the contract was entered into. If the vessel passes the inspection, de-activation will start and the owners and the managers will be responsible for the various tasks allocated to them in Annex B (Scope of Work). On completion, the vessel will be moved to the layup site. It is important to note that the owners will remain responsible for the navigation and management of the vessel until de-activation has been completed and the managers have accepted the vessel as laid up.

At the layup site the owners and the managers have to agree to a down-manning plan, keeping in mind the requirements of the flag state as well as the general safety of the vessel during de-activation. It is important that the vessel has been properly down-manned when the managers take delivery of the vessel, as the managers will need to be in full control of the vessel in order to be co-assured under the owners' P&I Policy (see comments on Clause 10).

As set out in sub-clause 6 (d) a protocol is to be signed on commencement of de-activation and again on completion. The format of the protocol is for the parties to agree and appended to Annex D (Protocols). The protocol is an important 'tool' to ensure agreement between the parties regarding the different 'stages' of the layup process. In particular the signature and date of completion of de-activation is important. Once the owners have signed the protocol and the managers have taken delivery of the vessel and confirmed same by counter-signing the protocol, the owners' obligation to pay management fee starts.

The date for the monthly payment of management fee is based on this protocol (see Clause 11 for a more detailed explanation).

Clause 7 (Layup Period)
The layup period is the period during which the managers will be paid the management fee by the owners in return for the managers providing layup services as set out in Section 4 of Annex B (Scope of Work).

Because of insurance considerations the vessel is not under layup management until the executive control of the vessel passes from the owners' personnel to the managers. The executive control of the vessel is of more significance than the physical state of the vessel's machinery. See Clause 10 (Insurance Policies) for a detailed explanation of the relevant insurance considerations.

Clause 8 (Inspection of Vessel)
This Clause establishes the owners' right to be able to inspect their vessel for any reason. Out of courtesy and for practical reasons the owners should always notify the managers of their intention to visit the vessel.

Clause 9 (Re-activation and Removal of the Vessel from Layup)
This Clause deals with the process of re-activation of the vessel; the consequences if re-activation cannot be completed prior to the end of the agreement; and the removal of the vessel from the layup site.

The basic rule, as set out in sub-clause 9 (a), is that re-activation should be commenced in such a way and at such a point in time as to enable re-activation to be completed by the intended expiry date of the agreement. In practice, re-activation is a lengthy process so it will commonly be commenced as soon as the expiry date becomes known so that there is sufficient time for the engine and electronic equipment to be re-activated and tested before the vessel is removed from the layup site. (See Clause 17 for a more detailed description of termination and expiry date).

BIMCO considered whether there should be an inspection of the vessel before the start of re-activation, as with the de-activation process. However, due to the tight schedule of re-activation and the fact that some parts of the vessel cannot easily be inspected before they have been re-activated, (for instance electronic equipment), the idea of requiring a pre-inspection was abandoned.

Prior to re-activation of the vessel the parties will agree to an "up-manning" plan to bring on board the owners' crew as and when required during the re-activation process.

If re-activation can be achieved prior to the expiry date of the agreement the owners are obliged to take possession of the vessel and remove it from the layup site as soon as possible but no later than the expiry date. However, if re-activation cannot be completed by the expiry date in time then the terms of the agreement will continue to apply, including the payment of the management fee, until the re-activation process has been completed. Re-activation is a process that will involve the layup managers and the owners working together with responsibility for various tasks allocated as per Section 5 of Annex B (Scope of Work).

Sub-clause 9(e) provides for situations where an owner may decide to send the vessel for recycling straight from layup and therefore re-activation is not required. Under such circumstances the parties must agree to a process for the removal of the vessel from the layup site.

If the owners fail to carry out their obligations in respect of re-activation or fail to remove the vessel from the layup site, the managers will have a lien on the vessel and a right to recover their losses. The managers may also move the vessel away from the layup mooring to a safe place.

Similar to de-activation, a protocol is to be signed by both parties on commencement and again on completion of re-activation (see Annex D (Protocols)). If the vessel is to be sent for recycling directly from layup, a protocol will be signed on completion of the process of removing the vessel from the layup site.

Section 4 – Insurance, Income, Expenses and Extension

This section covers insurance and the provision of fees and expenses.

Clause 10 (Insurance Policies)

The insurance provisions are central to the operation of LAYUPMAN and great care has been taken in researching current practice and clarifying potential insurance implications. The Clause incorporates the relevant insurance provisions from SHIPMAN 2009.

One of the key issues involved in providing third party layup services is whether the layup managers can be co-assured under the owners' insurance policies. As far as the International Group of P&I Clubs' Pooling Agreement is concerned, provided the layup managers are acting as agents on behalf of the owners and are exercising effective control over the vessel, they can be considered "managers" under the Pooling Agreement Rules and can be named as co-assured on the owners' insurance policies.

The practical concern for the managers is that they are only co-assured when exercising effective control over the vessel, and it is difficult to determine exactly when the control of the vessel passes from the owners to the managers. Since the control of the vessel is of more significance to the Pooling Agreement than the physical state of the vessel's machinery, it is difficult to set out stringent rules in the agreement as to when the managers may need to take out additional insurance to cover their potential liabilities. This would vary depending on the actual layup scenario. As guidance, the mangers will be co-assured during the actual layup period but will have to consider carefully their position before and after the layup period, i.e. during de-activation and re-activation of the vessel. In particular, the managers should consider their position when agreeing to carry out any of the additional work or optional services set out in Annex C (Additional Fees, Expenses and Optional Services).

When the managers are not acting as agents on behalf of the owners they should ensure that their existing liability insurance provides sufficient cover for such additional work or, alternatively, they may have to take out additional insurance. It is important to note that such insurance can be costly and is likely to affect the size of the management fee or other fees charged to the owners as such costs cannot normally be absorbed by the managers. For this reason owners and managers should consider their options carefully before agreeing to additional services, in particular repair work. Should the managers agree to undertake repair work (on a larger scale than standard maintenance tasks), such work will not be covered by the owners' insurances and the managers will need to obtain their own liability cover. Due to the possible implications of local laws which might entitle the managers to a repairer's lien, it is recommended that repair work is agreed on separate terms in a standard repair agreement, for instance BIMCO's REPAIRCON.

Another issue to consider carefully is the down-manning of the vessel. In order for the managers to be co-assured it is important that the vessel has been properly down-manned when the managers take delivery of the vessel after de-activation – otherwise it can be questioned whether the managers have full control over the vessel. If the vessel still has executive officers on board then it does not seem likely that the managers will be able to exercise full control over the vessel.

Co-assurance is important because without it the layup managers would face having to obtain expensive professional indemnity insurance – a substantial cost that would invariably be passed on to the owners.

Furthermore, such insurance would be unlikely to offer the same scope of cover and could result in an over- or under-lap in insurance.

Sub-clause 10(a)(iii) deals with naming the managers as a joint assured, with full cover, on the owners' insurance policies. By way of warning, the second sentence of this sub-clause emphasises that by being named as a joint assured on the owners' P&I cover, the managers may be exposed to liability for premiums or calls on the owners' insurances in the event that the owners fail to meet their obligations to pay calls or premiums. Sub-clause 10(a)(iv) attempts to counter the managers' potential liability for such premiums and calls by requiring the owners to arrange insurance cover on terms that exclude the managers' liability, provided this can be done at no additional cost to the owners. The practical reality, certainly as far as P&I clubs within the International Group are concerned, is that they reserve the right to demand premiums or calls from joint assureds and will not take into account any contractual arrangement between owners and managers to the contrary.

Another issue is the potential risk to the managers of having to pay release calls on an owners' insurance after the termination of the agreement, due to the owners' default. It may be the case that a manager named as joint assured on the owners' insurances could face liability for calls even after the management agreement has ended if the owner subsequently leaves the P&I Club but is unable or refuses to pay the release call. As release calls cannot be quantified until the vessel is released from the Club, the managers have a potential open ended exposure until the policy year is closed. While it is possible to insure against the risk of the managers being exposed to liability for premiums or calls, it is recognised that such insurance can be prohibitively expensive. In terms of liability for premiums and calls after the termination of the agreement, sub-clause 10(a)(iv) requires the owners to release the managers from future liability "if reasonably achievable". If this is an area of concern to the managers when concluding a LAYUPMAN agreement with owners then BIMCO recommends that the managers make appropriate arrangements to cover the potential risk.

While the vessel is laid up, the owners are obliged to maintain and provide written evidence of the vessel's standard insurances (namely hull and machinery, P&I and war risks) and, similarly, the managers are obliged to provide written evidence of their professional indemnity insurance (sub-clauses 10(a)(v) and 10(b)(ii)). The layup managers need to know that the vessel is insured in order to comply with local authority regulations. Should the laid up vessel become a wreck then insurance needs to be in place to cover wreck removal. Consistent with the approach taken in SHIPMAN 2009, the owners' insurances are to be taken out with "sound and reputable insurance companies, underwriters or associations". In most countries "sound" means that the company has a good financial standing and "reputable" could be taken to mean that the company appears on broker's approval lists.

Clause 11 (Fees and Expenses)

Layup agreements are generally concluded on the basis of a monthly lump sum - which is the management fee stated in Box 9. This clause provides for a pro rata payment if the last payment covers less than a calendar month. The first instalment of the fee is payable on signing of the protocol of completion of de-activation (see Clause 6(d) and Annex D for further details).

The lump sum monthly fee covers the items listed in sub-clause (b) – notably, travel, communication and office expenses. Any additional charges or expenses that apply on top of the lump sum are to be listed in Annex C.

It should be noted that the management fee does not become due until the vessel has been de-activated and a de-activation protocol has been signed. Thus, the date of the agreement is not decisive in terms of the owners' obligation to pay the management fee.

The Clause also provides for the payment of the booking fee, de-activation work fee, re-activation work fee, payment of optional services and other expenses.

The booking fee and expenses in sub-clauses 11(c) and 11(f) cover sums payable by the owner to the port authorities or sums which have already been paid by the manager to the port authorities while acting as agent for the owners. The booking fee is normally paid once the layup site has been agreed with and confirmed by the relevant port authority. The contract gives the owners two working days to pay the booking fee once the port authorities have confirmed that a layup slot is available. The managers are obliged to give the owners written notice – in practice by sending an invoice, often splitting the due amount in an agency fee (a handling charge for the managers' time and effort) as well as the particular costs involved. It should be noted that the booking fee is normally non-refundable. With regards to expenses, these should be invoiced and paid by the owners within 30 days of receipt of invoice (see sub-clause 11(f)).

The de-activation and re-activation work fee set out in sub-clause 11(d) is linked to Annex C (Additional Fees, Expenses and Optional services) and it is recommended that the parties read through the explanatory notes to Clause 10 as well as Annex C before agreeing to carry out such services. The same applies for the Optional Services mentioned in sub-clause 11(e).

Sub-clauses 11(g) and (h) provide that any payments are to be net of bank charges and that all discounts and commissions obtained by the managers during the contract are to be credited to the owners. Since the managers are merely acting as agents on behalf of the owners, any benefits gained by the managers in providing layup management services rightfully belong to the owners – unless when the managers are no longer acting as agents for the owners, for instance when carrying out additional work or repairs.

With regards to the financial arrangements, the key difference between LAYUPMAN and SHIPMAN is that the layup managers do not prepare an annual budget or require working capital to be provided by the owners. In LAYUPMAN the management fee can only be adjusted in response to specific events affecting the vessel such as a change of flag or classification society - there is no opportunity to review the management fee on an annual basis. Therefore it might be advisable for the parties to think about how the management fee should be adjusted and what the remedy should be if the parties cannot decide on an adjustment of the fee. This is particularly important in a long-term layup where the vessel is laid up for several years or where the parties agree on a long minimum period.

Consideration was given to whether there is a need for advance funding of the managers. The conclusion is that since the management fee is paid monthly in advance, a particular provision to deal with working capital should not be necessary (especially as the working capital requirements involved in a layup are substantially smaller than a ship management agreement). However, to offer some protection to the managers it has been emphasised in sub-clause 11(i) that the managers should be under no obligation to use their own funds to finance the management services.

Section 5 – Legal

This section covers the legal provisions, which are of great importance in terms of the parties' responsibilities in the event of disputes arising under the contract. Of particular importance are the liability and indemnity provisions; obligations concerning termination of the agreement; and the provisions concerning governing law and place of arbitration.

Clause 12 (Managers' Right to Sub-Contract)

This clause reflects the position in SHIPMAN that the owners have an expectation that the services they have paid for will be undertaken by the managers, and that any sub-contracting by the managers is subject to the owners' consent. Considering the wide variety of services that the layup managers may be asked to perform under the contract, it seems likely that some of these services will be outside their skill set. Therefore, the consent of the owners to sub-contracting certain tasks should not be unreasonably withheld.

Clause 13 (Responsibilities)

This clause is central to the successful operation of LAYUPMAN and great efforts have been made to provide equitable solutions which strike a fair balance between the owners and the managers. The clause is similar to the Responsibilities Clause of SHIPMAN, which is widely accepted in the industry. Consideration was given to a knock for knock approach, but it was felt that such a regime might not be acceptable in a layup scenario. If a knock for knock regime were to be used, the owners would still have to bear the costs of insuring against the negligence of the layup managers leading to damage to or loss of the vessel.

Sub-clause 13(a) is extensive but is based on the ICC (International Chamber of Commerce) model Force Majeure Clause 2003 that BIMCO has previously used to create a "standard" force majeure provision for other contracts such as SUPPLYTIME 2005 Time Charter Party for Offshore Service Vessels. The clause requires the party affected by a force majeure event to make reasonable efforts to minimise the effect of the event, failing which they cannot rely on the force majeure defence.

In Sub-clause 13(b) the managers' maximum liability has been set at 10 times the annual equivalent of the management fee – although the parties are free to agree another sum if they so choose. The managers are expected to insure themselves against this liability. The fact that they have a cap on their liability is often more important for the managers than the amount itself (because the cost will often be factored into the lump sum management fee). The circumstances in which the managers would face unlimited liability mirror the wording in the 1976 Convention on Limitation of Liability for Maritime Claims, which is an internationally recognised formula. In practical terms the managers will carry unlimited liability in circumstances where they have deliberately or recklessly acted contrary to the owners' interest, although this is restricted to the managers' personal acts or omissions. Acts or omissions of this nature by employees below management level, agents or sub-contractors are still subject to a limitation of ten times the annual equivalent of the management fee.

The drafting committee has considered carefully whether the indemnity provision in sub-clause 13(c) of LAYUPMAN is appropriate for this type of contract and whether the provision could lead to additional exposure to the P&I club or to the managers. It has been concluded that the indemnity provision from SHIPMAN is appropriate because both contracts are agency-based and there should be no additional exposure provided the managers merely perform the management services as agreed in the contract. However, if the managers agree to carry our additional work, for instance repair work, they would not be covered under the owners' P&I policy. Therefore, if the managers agree to carry out additional work, they will have to obtain separate insurance to cover such additional work. (See Clause 10 for further details).

The indemnity provision in sub-clause 13(c) is intended to make the reciprocal provision to sub-clause 13(b)(Liability to Owners). Under Scandinavian and Continental systems of law, sub-clause 13(c) is probably unnecessary because the courts will imply an obligation on the part of the owners to indemnify the managers for anything for which the managers are not liable under 13(b). However, this is not the position taken by the English and US courts and therefore, under these regimes, it is necessary to incorporate a specific indemnity setting out the extent to which owners will have to indemnify the managers. Sub-clause 13(c) sets out the extent of that indemnity by excluding from it any claim for which the managers would themselves be liable under sub-clause 13(b).

In order to protect the interests of employees, agents or sub-contractors of the mangers, Clause 13 incorporates a so-called "Himalaya" Clause. The Clause is designed to afford such employees, agents or sub-contractors at least the same protection as the managers have under the agreement and it removes the necessity to ensure the contractual chain of indemnities from sub-contractors etc., to the managers.

Clause 14 (Lien)
This Clause creates a contractual lien on the vessel for all sums due to the managers on or before redelivery. It protects the managers' interests by giving the managers the right to retain the vessel until unpaid dues have been settled.

The lien covers all costs of recovering the due amounts as well as the legal fees.

Clause 15 (General Administration)
Unlike SHIPMAN, there is little required by way of administration by the layup managers. There will be no claims or dispute handling, but there remains an obligation on the parties to make available any documentation necessary to perform the layup services.

The managers are obliged under Sub-clause (a) to let the owners know about incidents they become aware of that may result or have resulted in claims or disputes involving third parties.

Each party is also under an obligation to the other party in Sub-clauses (b) and (c) to make available on request and without delay all documentation, information and records related to the contract. It should be noted that the parties are not obliged to give their reasons for requesting access to documentation.

Clause 16 (Compliance with Laws and Regulations)
This Clause requires the compliance of each party with the laws and regulations of the flag state and the place where the vessel is laid up. It is a strict obligation but is primarily aimed at the managers to ensure that they don't do or allow anything to be done that might infringe the relevant laws and regulations while the vessel is laid up.

Clause 17 (Termination)
This Clause is an amended version of the Termination Clause found in SHIPMAN 2009.

The main rule is that the contract may be terminated by either party by giving 30 days' notice to the other party, at the end of which the contract will come to an end. There are a number of exceptions to this rule, including termination before the end of the minimum contract period; termination due to owners' or managers' default; sale or loss of the vessel; adjustment of the management fee following a change of flag or classification society; and termination due to the winding up, dissolution, liquidation or bankruptcy of either party.

If the contract is terminated before the end of the minimum contract period set out in Box 2, it will only terminate upon the expiry of such minimum contract period, unless the agreement has been terminated earlier for one of the reasons listed below.

Sub-clause 17(b) sets out the parties' right to terminate the agreement should the other party fail to meet their obligations under the agreement. When one party discovers a default by the other party, the first step is to give them notice and require them to remedy the default within a reasonable time and to the reasonable satisfaction of the party that has suffered the breach. If the party in default does not rectify the breach then the other party is entitled to terminate the agreement with immediate effect, provided that proper notice of termination is given. It is important to note that the procedure for giving notices must be followed in order to correctly terminate the contract. If the correct procedure is not observed, then the party terminating the agreement may find itself in breach of the contract.

Sub-clause 17(c) lists exceptions to sub-clause 17(b). The first exception is if any monies payable by the owners, including the owners of any associated vessel listed in Annex E (Associated Vessels), are not received by the managers in their nominated account within 10 days of the owners receiving the managers invoice for payment. The second exception is when the vessel has been repossessed by the mortgagee(s). Under such circumstances the managers only need to give notice to the owners that the agreement has terminated with immediate effect.

The third exception to sub-clause 17(b) is when the owners fail to meet their obligations under Clause 10 (Insurance Policies). Again, the managers must give notice to the owners and request them to rectify within 10 days, failing which the managers are entitled to terminate the agreement with immediate effect by giving notice to the owners. The insurance obligation is very important for the managers as they are co-assured under the owners' P&I policy and therefore have not taken out separate insurance. If the managers were to continue their services without co-assurance this would place a heavy financial burden on them to either take out separate insurance or to risk having to cover potentially large losses out of their own funds (see Clause 10 for a more details explanation).

Sub-clause 17(d) deals with circumstances where there is no point in continuing the contract, for instance due to the sale of the vessel; if the vessel becomes a total loss or declared a constructive, or compromised or arranged total loss; if the vessel is requisitioned; or, finally, if the vessel is bareboat chartered and the bareboat charter comes to an end (unless special arrangements have been made to continue the laying up of the vessel). In such circumstances the agreement is deemed to be terminated and the parties do not have to give notice of termination.

The phrase "if the continued operation of the Agreement becomes unlawful" has been added specifically with sanctions in mind, recognising that sanctions could be a circumstance for which extraordinary termination should be possible. However, it would also cover the event where the licence to layup has been revoked or cancelled by the authority having jurisdiction over the layup site. It should be noted that the contract can only be terminated once it has become unlawful. The drafting group has considered carefully whether the parties should be able to terminate the contract in circumstances where the contract had not yet become illegal or unlawful due to sanctions, but was likely to become illegal or unlawful. However, since the parties are always entitled to terminate the agreement with 30 days' notice, except if the minimum contract period has not ended yet and more than 30 days remains, it was concluded that further protection was unnecessary.

In order to avoid disputes, a definition of the date for sale of the vessel or the time when the vessel is deemed to be lost has been set out in sub-clause 17(e).

If the vessel changes flag or classification society during the layup and the parties fail to agree an adjustment of the management fee, then the agreement will be terminated upon the expiry of either one month's notice period or at the end of the minimum contract period stated in Box 2, whichever is the later. It should be noted that an adjustment of the management fee is not required by the contract, but according to sub-clause 5(b) the parties are entitled to request an adjustment of the management fee, if felt to be appropriate.

Sub-clause 17(g) deals with the insolvency of either party. The wording encompasses the various ways in which a liquidated company may be handled in different jurisdictions and it is similar to the insolvency provision in the termination clause of SHIPMAN 2009. If either party becomes insolvent, the agreement will terminate immediately, reconstruction and amalgamation exempted.

It should be noted that the owners are obliged to continue to pay the management fee for a further period of three months, or the number of months stated in Box 13, unless termination is due to the managers' default. The period, during which the management fee continues to be payable is calculated from the effective date of termination. This additional payment is intended to cover the managers' cost of resolving any outstanding matters after the agreement has been concluded.

Sub-clause 17(i) emphasises that the termination of the contract does not relieve the parties from their obligations under the contract prior to the date of termination, for instance payments due will remain due even though the contract has been terminated.

Clause 18 (BIMCO Dispute Resolution Clause)
LAYUPMAN incorporates the latest edition of the BIMCO Dispute Resolution Clause.

It is important to note that 18(a), 18(b) and 18(c) are alternatives and that the parties should indicate their choice in Box 14. If 18(c) is chosen, the parties must also indicate the agreed place of arbitration. If the parties omit to fill in Box 14 or do not fill it in appropriately, alternative 18(a) (English law and London arbitration) will apply.

For a fuller description of the BIMCO Dispute Resolution Clause, see Special Circular No. 1, 16 January 2002 available to download from the Documentary section of www.bimco.org.

Clause 19 (Notices)
This Clause anticipates that the parties will wish to send notices and documents between them, either by traditional mail/paper or by electronic means. It sets out that the address for giving notices should be the address set out in Boxes 15 and 16, as applicable, and that the parties should always designate another address in writing.

From the point of view of evidence it would be necessary to prove that the notice has been given in a proper way and to the right address and for this reason any notice should be given in writing and to the address chosen by the parties. This is also the reason why any subsequent change of address should be given in writing as well.

Section 6 – General

This section covers standard contract clauses that relates to the entire agreement and concerns issues of, for instance, interpretation of the agreement, validity and third party rights.

Clause 20 (Entire Agreement)

This is a normal provision in English Law contracts to avoid disputes arising as to whether any other terms (for instance in accompanying correspondence or verbal discussions) form part of the Agreement.

Clause 21 (Third Party Rights)
This Clause clarifies that only third parties who are expressly identified in the contract can benefit from it.

Clause 22 (Partial Validity)
The purpose of the Partial Validity Clause is an attempt to avoid a potential situation where the entire agreement is adjudged to be invalid simply because a particular provision in the agreement is deemed by an arbitrator or other competent authority to be illegal, unenforceable or invalid.

Clause 23 (Interpretation)
This Clause has been included to make the interpretation of the text easier and to avoid having to include plurals and singulars throughout the text.

ANNEXES

LAYUPMAN contains five annexes covering a detailed vessel description; a scope of work with a list of suggested tasks to be undertaken during the layup; a list of additional fees, expenses and optional services; an annex to enclose the standard format of protocols agreed between the parties; and, finally, a list of associated vessels.

Annex A (Vessel Description)
This annex contains a detailed description of the vessel and complements the short description of the vessel in Box 6.

Annex B (Scope of Work)
The Scope of Work is a standard form to be used at all layup sites. For this reason some parts of the Scope of Work may not be relevant for layup in cold water while other parts would be relevant for tropical waters only. The parties are free to amend the Scope of Work as appropriate by selecting the responsible party or choosing “not applicable” from the drop down list in *idea*. It should be noted that the Annex provides for a default position should the parties should forget to make a selection.

Section 1 of the Scope of Work sets out the safe working practices and layup procedures to be in place before re-activation of the vessel is started. Section 2 require the owners and the managers to agree to a down-manning plan during de-activation and sets out that the managers are obliged to set out a manning plan with regards to safety and maintenance for the day to day operation during the layup, in particular watchmen and maintenance staff. Similarly an up-manning plan should be agreed upon re-activation of the vessel, if re-activation is required. The manning plans are always subject to manning requirements by the vessel’s flag stage.

Section 3 -5 sets out the various tasks to be undertaken during re-activation of the vessel, during the layup period and, finally, during re-activation of the vessel.

Annex C (Additional Fees, Expenses and Optional Services)
This annex sets out further details in relation to the fees and expenses mentioned in Clause 11. Prices of the booking fee, de-activation work fee and re-activation work fee will be set out and it will also be clear which parts of the booking fee are refundable and non-refundable. Furthermore the managers can list other expenses that have not been mentioned in the agreement, should such expenses occur.

Furthermore, the annex provides for optional ancillary services which can be undertaken by the Managers.

It is very important to note that the managers may need to take out separate insurance if they agree to carry out any of the services listed in Annex C. The services listed under section 1-3 of the annex relates to services offered prior to and after the layup period and the managers may not be co-assured under the owners' P&I policy at this point in time. Furthermore, the services listed in section 4 of the annex are additional services undertaken by the managers as service providers. It may be important for co-assurance whether the agreed sum is based on a cost plus fee amount or whether they sum is a lump sum, so the owners and managers are recommended to liaise with the owners' P&I club before agreeing on such services.

Should the managers agree to carry out repair work (as distinguished from general maintenance work), it is recommended that a separate contract is concluded to deal with such repairs. The reason for this is that, in some jurisdictions, a repairer's lien might arise and, furthermore, the parties' rights and obligations may be clearer when drafting a separate contract.

Annex D (Protocols)
This annex is used to append the various protocol(s) to be signed on commencement and completion of de-activation and commencement and completion of re-activation (or when the process for removal of the vessel has been completed.

The format of the protocol, including whether it should be one or more protocols, has been left for the parties to decide. The annex has simply been included to emphasise the importance of the parties agreeing to such protocol and in order to append the agreed format of protocol as a part of the contract.

Annex E (Associated Vessels)
In this annex the parties can agree to list any associated vessels, meaning vessels laid up by the same owners and to be serviced by the same managers. The managers would want the owners to list associated vessels in order to ensure that they are entitled to terminate all agreements with the owners, should they not pay their dues under one agreement.

Copies of LAYUPMAN are available to download free of charge from the Documentary section of the BIMCO website. If you want to use LAYUPMAN for a layup agreement the contract can be filled in with the details of the parties, etc., and agreed terms and conditions by using BIMCO's online contract editing system, ***idea***. Details of this product can be found by visiting bimco.org/Products/BIMCO's idea.