

Ship Management Agreements



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I. Introduction

Under a ship management agreement...

the **ship manager**

undertakes *vis-à-vis*

the **owner**

to perform, on behalf of the latter, the legal and material acts that are deemed to be necessary to adequately administer all or some of the aspects involved in the operation of the ship

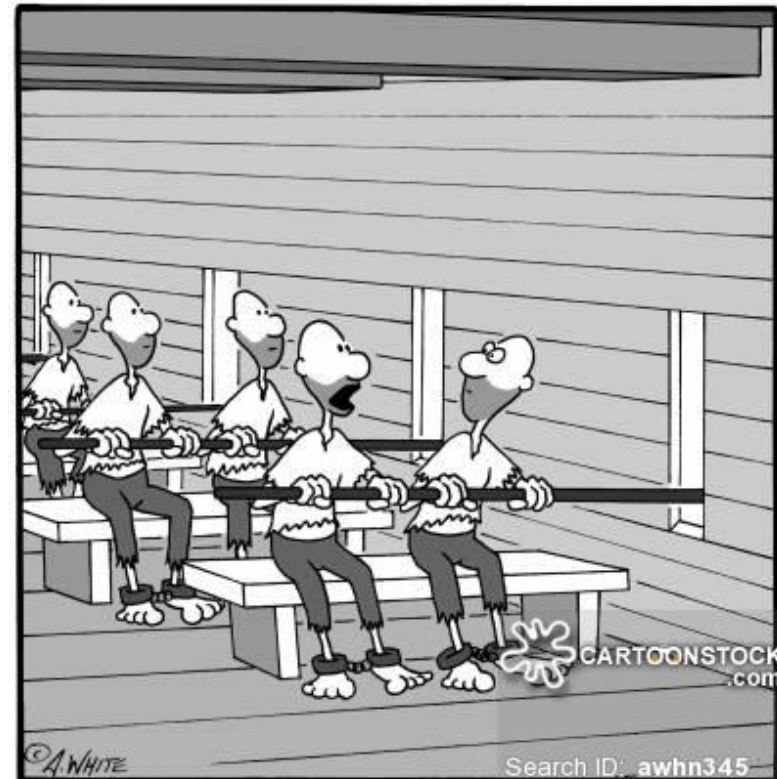


I. Introduction

- the law of ship management has traditionally been **form-based**: those that are mostly used in practice are BIMCO's *Shipman* and *Crewman* forms → no legal regulation
- in Spain, the ship management contract was not regulated until the 2014 Maritime Navigation Act (MNA)
- **today**: Arts. 314 to 318 MNA, which
 - include a short definition
 - define the standard of care for the ship manager (due diligence)
 - envisage two specific questions as regards liability
 - determine the rules to apply in case the parties do not decide on a specific issue



the **importance of forms** is still undisputed



"Actually, this is my vacation.
I'm a substitute teacher."



SHIPMAN 2009

STANDARD SHIP MANAGEMENT AGREEMENT

PART I

1. Place and date of Agreement	2. Date of commencement of Agreement (Cl. 2, 12, 21 and 25)
3. Owners (name, place of registered office and law of registry) (Cl. 1) (i) Name: (ii) Place of registered office: (iii) Law of registry:	4. Managers (name, place of registered office and law of registry) (Cl. 1) (i) Name: (ii) Place of registered office: (iii) Law of registry:
5. The Company (with reference to the ISM/ISPS Codes) (state name and IMO Unique Company Identification number. If the Company is a third party then also state registered office and principal place of business) (Cl. 1 and 9(c)(i)) (i) Name: (ii) IMO Unique Company Identification number: (iii) Place of registered office: (iv) Principal place of business:	6. Technical Management (state "yes" or "no" as agreed) (Cl. 4)
	7. Crew Management (state "yes" or "no" as agreed) (Cl. 5(a))
	8. Commercial Management (state "yes" or "no" as agreed) (Cl. 6)

II. Circumstances that favour the recourse to ship management

there are several **reasons** that may lead to outsourcing the management of ships

- ❖ lack of skills on the part of the owner
oil companies acquiring ships, foreclosure by a financing bank that holds a security interest in the ship, K/S companies
- ❖ complexity of the fleet owner's corporate structure
it is common that all ships owned by "one ship companies" that belong to the same group of companies are managed by a single ship manager (which may itself belong to the group)
- ❖ flags of convenience
when the ships owned by one ship companies fly a flag of convenience, it is common for the management of the whole fleet to be entrusted to a manager established in a country with a long maritime tradition
- ❖ economies of scale and experience in management
young or small shipping companies, compliance with increasingly complex regulations, benchmarking, etc.



III. Ship managers today: an attempt of classification

classification criteria

- relationship (corporate or not) between owner and manager
in-house ship management (\approx leadership of the group to which several one-ship companies belong) vs. third-party ship management
- scope of the services entrusted to the manager: “all or some of the aspects involved in the operation of the vessel” (opt-in provisions)
 - ❖ technical or nautical management
involves, *inter alia*: ensure that the vessel complies with the legislation of the flag state and international codes (ISM and ISPS); guarantee supply of provisions, spare parts and lubricants
 - ❖ crew management
the manager (also called manning agent) has to ensure the management of the crew, either in exchange for reimbursement of expenses plus a commission (*Shipman, Crewman A*), or in exchange for a lump sum (*Crewman B*)
 - ❖ commercial management
by assuming this task, the manager undertakes to seek employment for the ship
 - ❖ insurance management
the manager can also undertake to provide for insurance, e.g., for the hull and liability *vis-à-vis* third parties



opt-in provisions under Shipman 2009

<p>5. The Company (with reference to the ISM/ISPS Codes) (state name and IMO Unique Company Identification number. If the Company is a third party then also state registered office and principal place of business) (Cl. 1 and 9(c)(i))</p> <p>(i) Name:</p> <p>(ii) IMO Unique Company Identification number:</p> <p>(iii) Place of registered office:</p> <p>(iv) Principal place of business:</p>	<p>6. Technical Management (state “yes” or “no” as agreed) (Cl. 4)</p>
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<p>9. Chartering Services period (only to be filled in if “yes” stated in Box 8) (Cl.6(a))</p>	<p>8. Commercial Management (state “yes” or “no” as agreed) (Cl. 6)</p> <p>10. Crew Insurance arrangements (state “yes” or “no” as agreed)</p> <p>(i) Crew Insurances* (Cl. 5(b)):</p> <p>(ii) Insurance for persons proceeding to sea onboard (Cl. 5(b)(i)):</p> <p>*only to apply if Crew Management (Cl. 5(a)) agreed (see Box 7)</p>
<p>11. Insurance arrangements (state “yes” or “no” as agreed) (Cl. 7)</p>	<p>12. Optional insurances (state optional insurance(s) as agreed, such as piracy, kidnap and ransom, loss of hire and FD&D) (Cl. 10(a)(iv))</p>

III. Ship managers today: an attempt of classification

Section 2 – Services

4. Technical Management

(only applicable if agreed according to Box 6).

The Managers shall provide technical management which includes, but is not limited to, the following services:

- (a) ensuring that the Vessel complies with the requirements of the law of the Flag State;
- (b) ensuring compliance with the ISM Code;
- (c) ensuring compliance with the ISPS Code;
- (d) providing competent personnel to supervise the maintenance and general efficiency of the Vessel;
- (e) arranging and supervising dry dockings, repairs, alterations and the maintenance of the Vessel to the standards agreed with the Owners provided that the Managers shall be entitled to incur the necessary expenditure to ensure that the Vessel will comply with all requirements and recommendations of the classification society, and with the law of the Flag State and of the places where the Vessel is required to trade;
- (f) arranging the supply of necessary stores, spares and lubricating oil;
- (g) appointing surveyors and technical consultants as the Managers may consider from time to time to be necessary;
- (h) in accordance with the Owners' instructions, supervising the sale and physical delivery of the Vessel under the sale agreement. However services under this Sub-clause 4(h) shall not include negotiation of the sale agreement or transfer of ownership of the Vessel;
- (i) arranging for the supply of provisions unless provided by the Owners; and
- (j) arranging for the sampling and testing of bunkers.

see also cl. 8(b) Shipman
appointment as "the Company"

opt-in provisions under Shipman 2009

<p>5. The Company (with reference to the ISM/ISPS Codes) (state name and IMO Unique Company Identification number. If the Company is a third party then also state registered office and principal place of business) (Cl. 1 and 9(c)(i))</p> <p>(i) Name:</p> <p>(ii) IMO Unique Company Identification number:</p> <p>(iii) Place of registered office:</p> <p>(iv) Principal place of business:</p>	<p>6. Technical Management (state “yes” or “no” as agreed) (Cl. 4)</p> <p>7. Crew Management (state “yes” or “no” as agreed) (Cl. 5(a))</p> <p>8. Commercial Management (state “yes” or “no” as agreed) (Cl. 6)</p>
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III. Ship managers today: an attempt of classification

Section 2 – Services

5. Crew Management and Crew Insurances

(a) Crew Management

(only applicable if agreed according to Box 7)

The Managers shall provide suitably qualified Crew who shall comply with the requirements of STCW 95. The provision of such crew management services includes, but is not limited to, the following services:

- (i) selecting, engaging and providing for the administration of the Crew [...];
- (ii) ensuring that the applicable requirements of the law of the Flag State [...] are satisfied;
- (iii) ensuring that all Crew have passed a medical examination [...];
- (iv) ensuring that the Crew shall have a common working language and a command of the English language of a sufficient standard to enable them to perform their duties safely;
- (v) arranging transportation of the Crew, including repatriation;
- (vi) training of the Crew;
- (vii) conducting union negotiations; and
- (viii) *if the Managers are the Company*, ensuring that the Crew, on joining the Vessel, are given proper familiarisation with their duties in relation to the Vessel's S[hip]M[anagement]S[ystem] and that instructions which are essential to the SMS are identified, documented and given to the Crew prior to sailing. [...]



opt-in provisions under Shipman 2009

<p>5. The Company (with reference to the ISM/ISPS Codes) (state name and IMO Unique Company Identification number. If the Company is a third party then also state registered office and principal place of business) (Cl. 1 and 9(c)(i))</p> <p>(i) Name:</p> <p>(ii) IMO Unique Company Identification number:</p> <p>(iii) Place of registered office:</p> <p>(iv) Principal place of business:</p>	<p>6. Technical Management (state “yes” or “no” as agreed) (Cl. 4)</p> <p>7. Crew Management (state “yes” or “no” as agreed) (Cl. 5(a))</p> <p>8. Commercial Management (state “yes” or “no” as agreed) (Cl. 6)</p>
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III. Ship managers today: an attempt of classification

Section 2 – Services

6. Commercial Management

(only applicable if agreed according to Box 8).

The Managers shall provide the following services for the Vessel in accordance with the Owners' instructions, which shall include but not be limited to:

- (a) seeking and negotiating employment for the Vessel and the conclusion (including the execution thereof) of charter parties or other contracts relating to the employment of the Vessel. If such a contract exceeds the period stated in Box 9, consent thereto in writing shall first be obtained from the Owners;
- (b) arranging for the provision of bunker fuels of the quality specified by the Owners as required for the Vessel's trade;
- (c) voyage estimating and accounting and calculation of hire, freights, demurrage and/or despatch monies due from or due to the charterers of the Vessel; assisting in the collection of any sums due to the Owners related to the commercial operation of the Vessel in accordance with Clause 11 (Income Collected and Expenses Paid on Behalf of Owners) [...].
- (d) issuing voyage instructions;
- (e) appointing agents;
- (f) appointing stevedores; and
- (g) arranging surveys associated with the commercial operation of the Vessel.

opt-in provisions under Shipman 2009

<p>5. The Company (with reference to the ISM/ISPS Codes) (state name and IMO Unique Company Identification number. If the Company is a third party then also state registered office and principal place of business) (Cl. 1 and 9(c)(i))</p> <p>(i) Name:</p> <p>(ii) IMO Unique Company Identification number:</p> <p>(iii) Place of registered office:</p> <p>(iv) Principal place of business:</p>	<p>6. Technical Management (state “yes” or “no” as agreed) (Cl. 4)</p> <p>7. Crew Management (state “yes” or “no” as agreed) (Cl. 5(a))</p> <p>8. Commercial Management (state “yes” or “no” as agreed) (Cl. 6)</p>
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III. Ship managers today: an attempt of classification

Section 2 – Services

[...]

7. Insurance Arrangements

(only applicable if agreed according to Box 11).

The Managers shall arrange insurances in accordance with Clause 10 (Insurance Policies), on such terms as the Owners shall have instructed or agreed, in particular regarding conditions, insured values, deductibles, franchises and limits of liability.

IV. Ship managers in the BIMCO forms

duties of the parties: the manager

the scope of the manager's obligations depends essentially on the functions he has assumed (technical, crew, commercial and / or insurance management)

✿ act on behalf of *and in the name of the owner*

the manager is bound to act in the name of the owner (*cl. 3 Shipman/Crewman*)

Except crew management under Crewman B (cl. 6)

3. Authority of the Managers

Subject to the terms and conditions herein provided, during the period of this Agreement the Managers shall carry out the Management Services in respect of the Vessel as agents for and on behalf of the Owners. The Managers shall have authority to take such actions as they may from time to time in their absolute discretion consider to be necessary to enable them to perform the Management Services in accordance with sound ship management practice, including but not limited to compliance with all relevant rules and regulations.

✿ duties of diligence and loyalty

promises to employ his “best endeavours” to carry out the tasks he has assumed and to protect the interests of the owner (cl. 8(a) *Shipman*) (“best effort” obligation:)

✿ ancillary obligations of the manager

these are mostly related to the justification of income and expenses, as well as certain incidences related to the exploitation of the vessel



IV. Ship managers in the BIMCO forms

duties of the parties: the owner

the owner's primary obligation is to pay the agreed remuneration and to reimburse the expenses incurred by the manager

✳ remuneration of the manager

the management fee is fixed on an annual basis, although it is payable monthly and in advance; it usually does not include expenses (*cost plus fee* in the *Shipman* and *Crewman A* forms), unless otherwise agreed

✳ reimbursement of the expenses incurred by the manager

the ship owner must advance or reimburse the necessary funds for the administration of the ship (usually, in advance and on a monthly basis); in the *Crewman B* form, the (lump sum) fee includes most of the expenses the manager may incur (cl. 9)

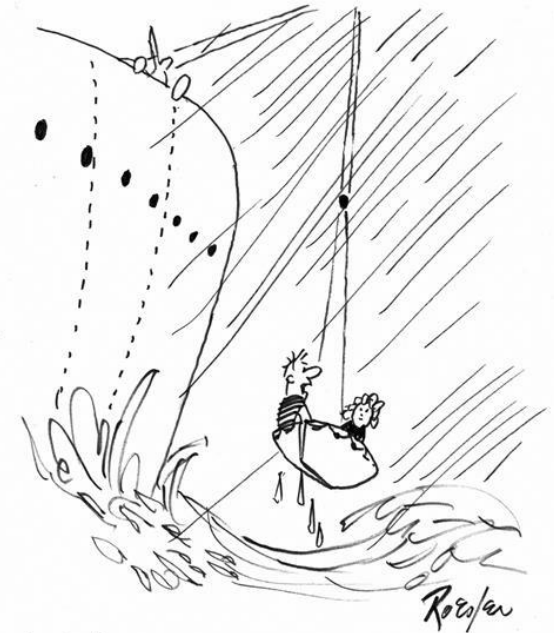
✳ ancillary obligations of the ship owner

such duties vary according to the tasks assumed by the manager (see cl. 9)

IV. Ship managers in the BIMCO forms

legal nature of the contract: contract for services or collaboration between businessmen?

- ❖ as a general rule, the manager assumes one or more *best effort* obligations (however, a few of them can probably be classified as results obligations)
- ❖ 1) the manager's activity sometimes exceeds the mere accomplishment of acts with legal significance for the ship owner and 2) his remuneration is not subject to the achievement of a result, but the contract does not seem to be a contract for services
 - the fact that the manager always acts *on behalf of the owner* (even if exceptionally he does so in his own name) places us in the field of the **contracts of collaboration between businessmen**
- ❖ as a consequence, the Spanish legislator has subjected the contract of ship management to the rules that apply to commission and commercial agents (Art. 317 MNA), *although* the –normally imperative– Commercial Agency Act is not of a mandatory nature here



"NO! THEY WON'T THROW US BACK IF WE'RE UNDERSIZE!"

IV. Ship managers in the BIMCO forms

Codice Civile

**Libro Quarto
Delle obbligazioni**

**Titolo III
Dei singoli contratti**

**Capo IX
Del mandato**

**Sezione I
Disposizioni generali**

**Art. 1703.
Nozione.**

Il mandato è il contratto col quale una parte si obbliga a compiere uno o più atti giuridici per conto dell'altra.

**Capo X
Del contratto di agenzia**

**Art. 1742.
Nozione.**

Col contratto di agenzia una parte assume stabilmente l'incarico di promuovere, per conto dell'altra, verso retribuzione, la conclusione di contratti in una zona determinata.



V. Liability of manager and owner

liability between
the parties (I)

–liability of the manager–

- ✳ the basic rule as regards liability of the manager is cl. 17 *Shipman*, which
 - excludes the liability of the manager in case of *force majeure* (see also Art. 252 Spanish Commercial Code: “[t]he agent [*i.e.*, the manager] who, **without legal cause**, does not comply with the commission he accepted or has begun to evacuate will be liable for all damages incurred by the principal [*i.e.*, the owner]” / [Art. 1.710 Cod.civ.](#))
 - limits the maximum amount of the compensation due by the manager
 - provides a “Himalaya clause” in favour of the manager’s agents and servants (cl. 17(d))
- ✳ with respect to the “best effort” obligations, there is a breach when the debtor does not observe due diligence (sound management practice / that of an orderly businessman, Art. 315 MNA)



17. Responsibilities

- (a) Force Majeure [...]]
- (b) Liability to Owners

(i) Without prejudice to Sub-clause 17(a), the Managers shall be under no liability whatsoever to the Owners for any loss, damage, delay or expense of whatsoever nature, whether direct or indirect, (including but not limited to loss of profit arising out of or in connection with detention of or delay to the Vessel) and howsoever arising in the course of performance of the Management Services UNLESS same is proved to have resulted solely from the negligence, gross negligence or wilful default of the Managers or their employees or agents, or sub-contractors employed by them in connection with the Vessel, in which case (save where loss, damage, delay or expense has resulted from the Managers' personal act or omission committed with the intent to cause same or recklessly and with knowledge that such loss, damage, delay or expense would probably result) the Managers' liability for each incident or series of incidents giving rise to a claim or claims shall never exceed a total of ten (10) times the annual management fee payable hereunder.

(ii) Acts or omissions of the Crew - Notwithstanding anything that may appear to the contrary in this Agreement, the Managers shall not be liable for any acts or omissions of the Crew, even if such acts or omissions are negligent, grossly negligent or wilful, except only to the extent that they are shown to have resulted from a failure by the Managers to discharge their obligations under Clause 5(a) (Crew Management), in which case their liability shall be limited in accordance with the terms of this Clause 17 (Responsibilities).

V. Liability of manager and owner

liability between the parties (and II)

–liability of the owner–

- ✦ the limit of the shipowner's liability is also *force majeure*
- ✦ delay in the payment of the fee or expenses:
- ✦ the BIMCO forms include an “indemnity” clause:



V. Liability of manager and owner

(c) Indemnity

Except to the extent and solely for the amount therein set out that the Managers would be liable under Sub-clause 17(b), the Owners hereby undertake to keep the Managers and their employees, agents and subcontractors indemnified and to hold them harmless against all actions, proceedings, claims, demands or liabilities whatsoever or howsoever arising which may be brought against them or incurred or suffered by them arising out of or in connection with the performance of this Agreement, and against and in respect of all costs, loss, damages and expenses (including legal costs and expenses on a full indemnity basis) which the Managers may suffer or incur (either directly or indirectly) in the course of the performance of this Agreement.

V. Liability of manager and owner

liability *vis-à-vis* third parties (I)

–liability in contract–

- ❖ cl. 3 *Shipman* (and Art. 316.1 MNA) obliges the manager to act as an agent and on behalf (*i.e. in the name*) of the shipowner (although it does not seem to be an obligation in a technical legal sense, but rather a burden), but it does not specify the consequences in case the manager acts in this way
 - if the manager acts in the name of the shipowner,
- ❖ if the manager makes it clear that he acts *alieno nomine* (as agent only) but does not indicate the person in whose name he does so, he will be liable *vis-à-vis* the third party (*ex* Art. 316.2 MNA)
- ❖ when the manager acts in his own name: he will be held joint and severally liable with the shipowner for the obligations assumed on behalf of the latter (Art. 316.2 MNA,

¿which would be solution under general agency law?



V. Liability of manager and owner

liability *vis-à-vis* third parties (II)

–liability in tort–

- ❖ Art. 318 MNA declares the joint and several liability of the manager and the owner for damages caused «extracontractually» (in tort) to third parties
 - it is a specific legal regulation of the liability for another person's acts (Art. 1.903 of the Spanish Civil Code / Arts. 2.049 and 2.055 Cod.civ.), i.e., the liability of the manager is «attributed» to the owner
 - the owner should not be held liable when the harmful event is not attributable to the ship manager in the first place
 - this solution is shared, e.g., by Art. 3(2) in conjunction with Art. 1(3) of the 2001 BUNKER Convention; and Sec. 1002(a) U.S. Oil Pollution Act (any person who “owns” or “operates” the vessel) ←
 - although Art. 318 MNA does not say so, it seems that the shipowner shall not be liable when the manager acts completely outside the functions assigned to him (teleological reduction of Art. 318 MNA)

or “manages”:
*U.S. v. Nature's
Way Marine*,
904 F.3d 416
(5th Circuit,
2018)

at least,
technical
management



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V. Liability of manager and owner

- ❖ *however* the rule in Art. 318 MNA admits a second reading: the manager is jointly liable with the shipowner when the rule invoked holds the owner liable in the first place (*e.g.*, collision or pollution of the marine environment)
 - but for this to happen, the liability of the shipowner would have to be based on an act or omission of the manager or his agents and servants, *e.g.*, where liability is focussed on the owner, regardless of who caused the damage
 - even so, it is difficult to declare the liability of the *manager* towards third parties in case of pollution: Art. III(4)(c) CLC excludes this possibility, *except for fraud or wilful misconduct* (in this case, the action would have to be based on national law, because the CLC Convention does not envisage liability actions different from those against the shipowner)
- ❖ the rights of both the owner and the manager to limit their liability according to Title VII MNA (which refers to the 1976 London Convention) are not affected (Art. 318 *i.f.* MNA)

V. Ship management and insurance

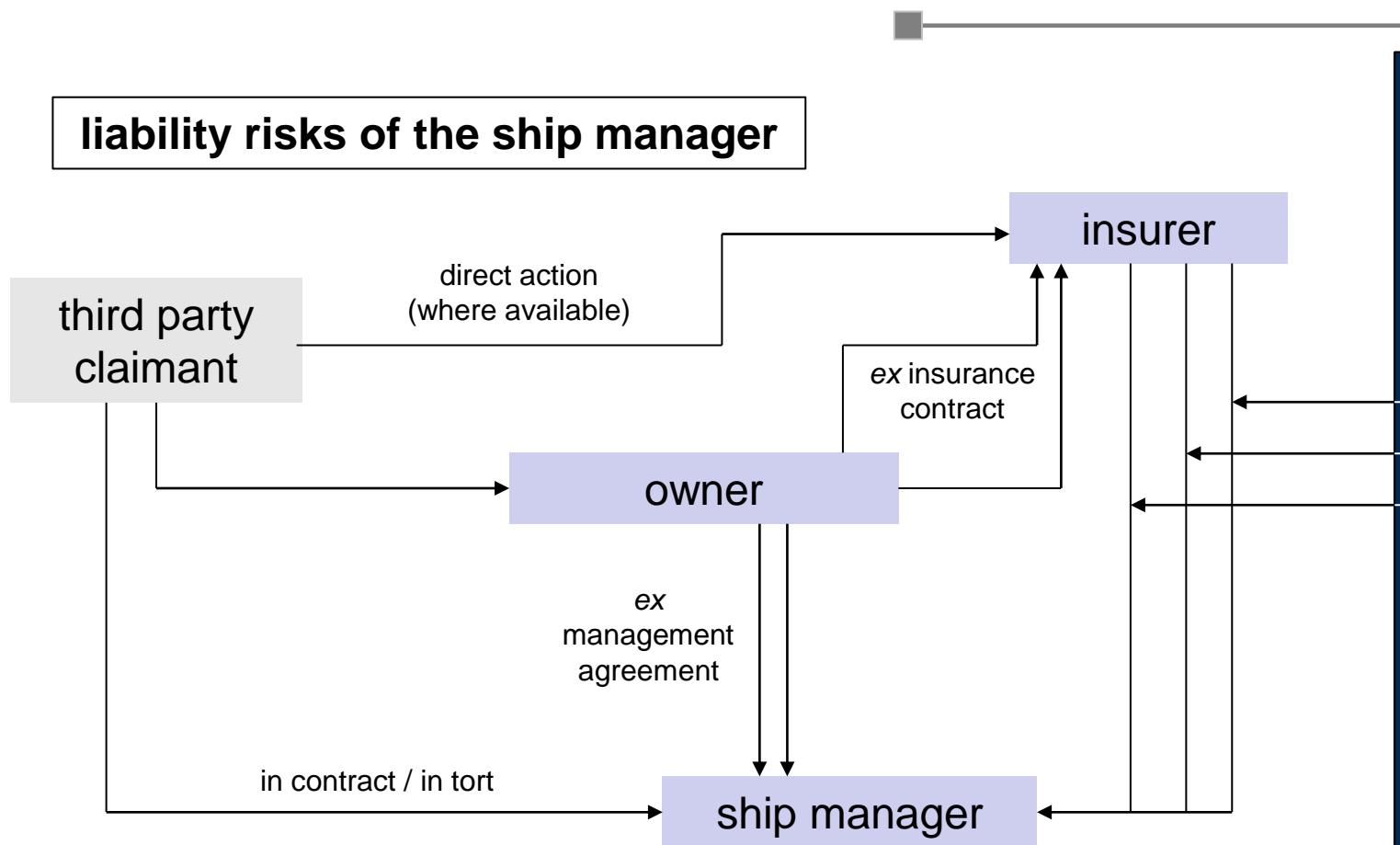
ship managers are thus subject to a **liability risk**, especially –but not only– for breach against the owner

SOME of the liability risks are covered by the owner's H&M and P&I insurances, but **OTHERS** are not

✦ *example:*

- ✦ the ship manager failed to ensure the use of up-to-date sea charts by the Master, who had a propensity to navigate with obsolete charts
- ✦ the ship's anchor fouled a seabed pipeline, that was not marked on the older charts
- ✦ the manager was found to be at fault for not adequately supervising the Master, which was considered to constitute actual fault of the owners (the claim was eventually settled by the owners' P&I Club)

V. Ship management and insurance



via subrogation into the owner's claims against the manager (s. 79 Marine Insurance Act 1906, Art. 437 (5) MNA)

V. Ship management and insurance

- ✦ insurance provisions under Shipman 2009 (I)

Section 4 – Insurance, Budgets, Income, Expenses and Fees

[...]

10. Insurance Policies

The **Owners shall procure**, whether by instructing the Managers under Clause 7 [...] or otherwise, that throughout the period of this Agreement:

- (a) **at the Owners' expense**, the Vessel is **insured** for not less than its sound market value or entered for its full gross tonnage, as the case may be for:
 - (i) **hull and machinery** marine risks (including but not limited to crew negligence) and excess liabilities;
 - (ii) **protection and indemnity** risks (including but not limited to pollution risks, diversion expenses and [...] Crew Insurances);

V. Ship management and insurance

✦ insurance provisions under Shipman 2009 (II)

(iii) **war** risks (including but not limited to blocking and trapping, protection and indemnity, terrorism and crew risks); and

(iv) such **optional insurances** as may be agreed (such as piracy, kidnap and ransom, loss of hire and FD & D) [...]

Sub-clauses 10(a)(i) through 10(a)(iv) all in accordance with the best practice of prudent owners of vessels of a similar type to the Vessel, with sound and reputable insurance companies, underwriters or associations (“the Owners’ Insurances”);

V. Ship management and insurance

✦ insurance provisions under Shipman 2009 (III)

(c) the Owners' Insurances **name the Managers** and, subject to underwriters' agreement, any third party designated by the Managers **as a joint assured, with full cover**. It is understood that in some cases, such as protection and indemnity, the normal terms for such cover may impose on the Managers and any such third party a liability in respect of premiums or calls arising in connection with the Owners' Insurances.

If obtainable at no additional cost, however, the Owners shall procure such insurances on terms such that neither the Managers nor any such third party shall be under any liability in respect of premiums or calls arising in connection with the Owners' Insurances.

V. Ship management and insurance

✦ insurance provisions under Shipman 2009 (IV)

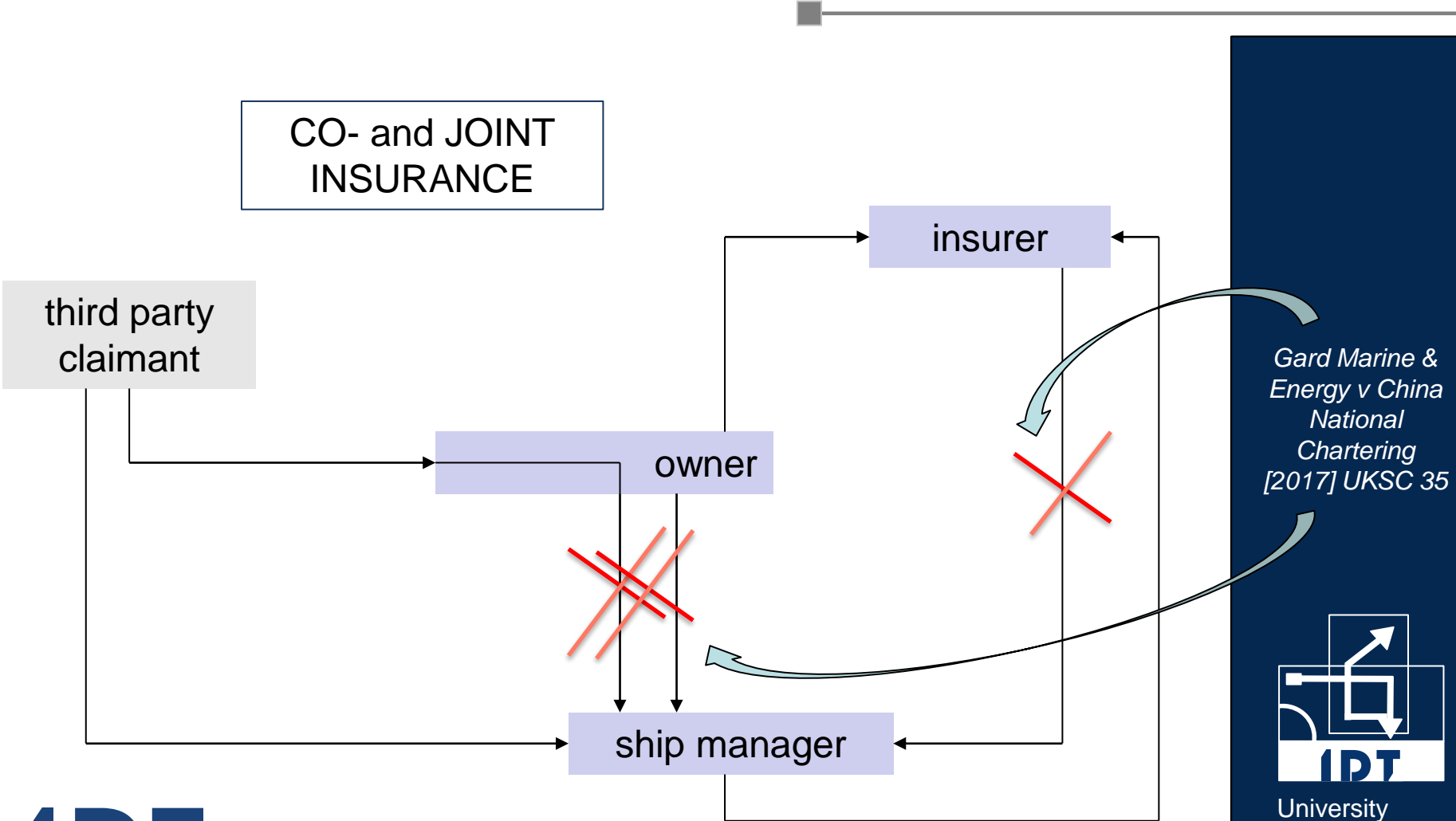
(d) **written evidence** is provided, to the reasonable satisfaction of the Managers, of the Owners' compliance with their obligations under this Clause 10 within a reasonable time of the commencement of the Agreement, and of each renewal date and, if specifically requested, of each payment date of the Owners' Insurances.



failure by any of the parties to comply with clause 10 is a ground for termination of the agreement (i.e. a fundamental breach)

(cl. 22(b)(iii) *Shipman 2009*)

V. Ship management and insurance



Gard Marine & Energy v China National Chartering [2017] UKSC 35



University Institute for Transport Law



V. Ship management and insurance

➤ **but** *can* the manager be named as a joint assured, with full cover?

i.e., does he have an **insurable interest?**

4 Avoidance of wagering or gaming contracts.

- (1) Every contract of marine insurance by way of gaming or wagering is void.
- (2) A contract of marine insurance is deemed to be a gaming or wagering contract—
 - (a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or
 - (b) Where the policy is made “interest or no interest,” or “without further proof of interest than the policy itself,” or “without benefit of salvage to the insurer,” or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

Marine Insurance Act 1906

similar to Art.
408 MNA

5 Insurable interest defined.

- (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.
- (2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.



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V. Ship management and insurance

i.e., the following characteristics have to be met

- (a) the assured may *benefit* by the safety or due arrival of insurable property or *be prejudiced* by its loss or damage or in respect of which he may *incur liability*
- (b) the assured **stands in a legal or equitable relation to the adventure or to any insurable property at risk in such adventure**
- (c) the benefit, prejudice or incurring of liability referred to at (a) must arise in consequence of the legal or equitable relation referred to at (b)

‘The Moonacre’

*Anthony John Sharp and Roarer Investments Ltd v Sphere Drake Insurance plc,
Minister Insurance Co Ltd and EC Parker and Co Ltd*
[1992] 2 Lloyd’s Rep 501

V. Ship management and insurance

➤ **but** can the manager be named as a joint assured, with full cover?

i.e., does he have an **insurable interest?**

1. liability insurance (P&I and liability part of H&M:collisions)



8. 3/4 THS COLLISION LIABILITY

- 8.1 The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for
 - 8.1.1 loss of or damage to any other vessel or property on any other vessel
 - 8.1.2 delay to or loss of use of any such other vessel or property thereon
 - 8.1.3 general average of, salvage of, or salvage under contract of, any such other vessel or property thereon, where such payment by the Assured is in consequence of the Vessel hereby insured coming into collision with any other vessel,

Institute Time Clauses – Hulls

yes

because, under certain circumstances, the manager himself is liable against third parties (or against the owner who faces a third party claim)



V. Ship management and insurance

BUT

to which extent is the ship manager covered by the owner's **P&I insurance**?

ordinary co-insurance / 'misdirected arrow claims'

- the benefit the P&I Club awards to its members is extended to persons affiliated or associated with them
- the beneficiary is not usually liable for the payment of premiums or calls
- cover is limited to the extent to which the owner is entitled to indemnity (e.g. limitation of liability of the owner)

- joint entries are usually jointly and severally liable for (premiums and) calls
- the cover is not necessarily limited to the extent to which the owner is entitled to indemnity, but agreements to the contrary are possible (and usual)

joint insured / members under a joint entry

managers benefit from the LLMC Convention and channelling of liability under CLC

Newcastle Protection & Indemnity Association v. V. Ships (USA) Inc and Shipping Management SAM [1996] 2 Lloyd's Rep 515

Rule 10(c)
Shipman 2009:
"joint assured,
with full cover"



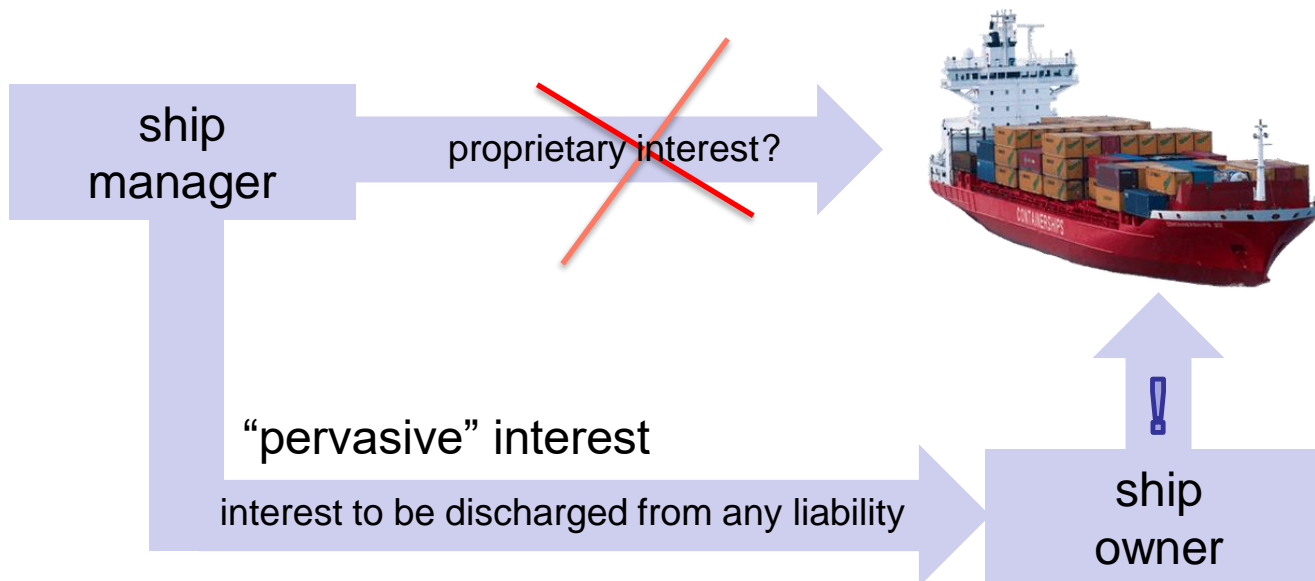
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V. Ship management and insurance

➤ **but** can the manager be named as a joint assured, with full cover?

i.e., does he have an **insurable interest?**

2. H&M insurance [...] any legal or equitable relation [...] to any insurable property at risk?



V. Ship management and insurance

with respect to the managed ship, there is sufficient benefit (and corresponding prejudice) for the **manager to have an insurable interest**

- the management agreement derives into a **legal relationship** to the vessel and
 - the agreement imposes extensive and ongoing *responsibilities* upon the manager
 - the manager is entitled to a *remuneration* for its services it would be deprived of in case of termination of the agreement due to total loss
- as a consequence
 - the manager benefits by the vessel's safety
 - it can be prejudiced by its loss or damage thereto
 - it might incur a liability in respect thereof

V. Ship management and insurance

BUT

the interests of the owner and that of the manager are different

- **composite insurance** (\neq joint insurance)
 - ↳ each co-assured has a different contract with the insurer
- wilful misconduct of one of the co-assured (or any other defence of the insurer against the latter) does not affect the other co-assured's right to recovery, unless he is himself privy thereto
- the insurer's **subrogation** into the owner's claims depends on the construction of the underlying management contract (*Gard Marine & Energy v China National Chartering* [2017] UKSC 35)
 - a contractual limitation of liability or a "benefit-of-insurance"-clause orderly hinders the subrogation of the insurer
 - even in the absence of a contractual limitation, the fact that the owner undertakes to provide insurance coverage *possibly* limits the owner's (and, hence, the insurer's) right to make a claim against the manager

not possible
under standard
P&I Rules:
Court Line v
Canadian
Transport Co Ltd
[1940] AC 934



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V. Ship management and insurance

BUT

the interests of the owner and that of the manager are different

- the **manager** has to be **expressly identified** (but not necessarily named) in the policy

Contracts (Rights of Third Parties) Act 1999

1 Right of third party to enforce contractual term.

- (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

INTERNATIONAL HULL CLAUSES (01/11/03)

36 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

36.1 No benefit of this insurance is intended to be conferred on or enforceable by any party other than the Assured, save as may be expressly provided herein to the contrary.

36.2 This insurance may by agreement between the Assured and the Underwriters be rescinded or varied without the consent of any third party to whom the enforcement of any terms has been expressly provided for.

V. Ship management and insurance

what happens with the risks **not covered** by the owner's *H&M* or *P&I* insurance?

- ✦ *example 1: failure to check the ship prior to taking it under management*
 - ✦ the manager fails to check the ship at the beginning of the contract period
 - ✦ some months later, the owner visits the ship and finds it to be in a deplorable situation
 - ✦ although the ship was probably not in a pristine condition when the manager took it over, there is no proof thereof and a claim is brought by the owner for USD 400,000

- ✦ *example 2: inadequate manning*
 - ✦ a tanker changes from hard copy to electronic sea charts
 - ✦ in such situations, the flag state requires the second officer to possess an ECDIS (Electronic Chart Displays and Information Systems) Certificate, which the second officer assigned by the ship manager does not have
 - ✦ during a routine vetting by an oil major, the failure is detected and the ship is put on technical hold
 - ✦ since a new vetting is needed for the technical hold to be lifted (which can take up to six months), the owner claims the subsequent *lucrum cessans* from the manager

source: www.itic-insure.com



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V. Ship management and insurance

- ✦ *example 3: inadequate maintenance of the ship*
 - ✦ among other duties, the manager assumes to change and analyse the main engine lube oil of an experimental hull platform
 - ✦ although the lube oil has to be changed 27 times over a period of only two years and a high debris content and fuel oil is detected by an independent testing company on each occasion, the manager fails to investigate the cause and the ship eventually suffers an engine failure
 - ✦ the owner claims damages of GBP 800,000, which are settled finally for GBP 590,000
- ✦ *example 4: failure to provide for insurance*
 - ✦ albeit under a duty to do so, a ship manager for the time charterer had failed to arrange insurance for a ship which afterwards grounded whilst entering a port in India
 - ✦ although the claim between the owner and the charterer was settled on a drop hands basis, the latter claimed against the ship manager for the costs he had incurred (and which would have been paid under the charterer's liability policy if there had been one)

V. Ship management and insurance

- ✦ it is thus convenient to take out a

Professional indemnity insurance

for ship managers

- ✦ for the ship manager to arrange his own H&M and P&I insurance would probably exceed the management fees, so *joint insurance* with the owner is advisable
- ✦ however, since not all risks incurred by the manager are covered by the owner's insurance, ship managers should take out professional indemnity / negligence insurance
- ✦ the insurance
 - can be made conditional upon the ship manager being a joint insured / co-assured in the owners H&M and P&I insurance: supplementary cover
 - be offered as an additional insurance for members of a club who offer ship management services

Who can be covered

Gard clients with underlying P&I cover when acting as ship managers, performing ship management functions (including but not limited to full management, operational, commercial, technical and crew management functions, on behalf of an owner).

Gard
*Ship manager liability
insurance*

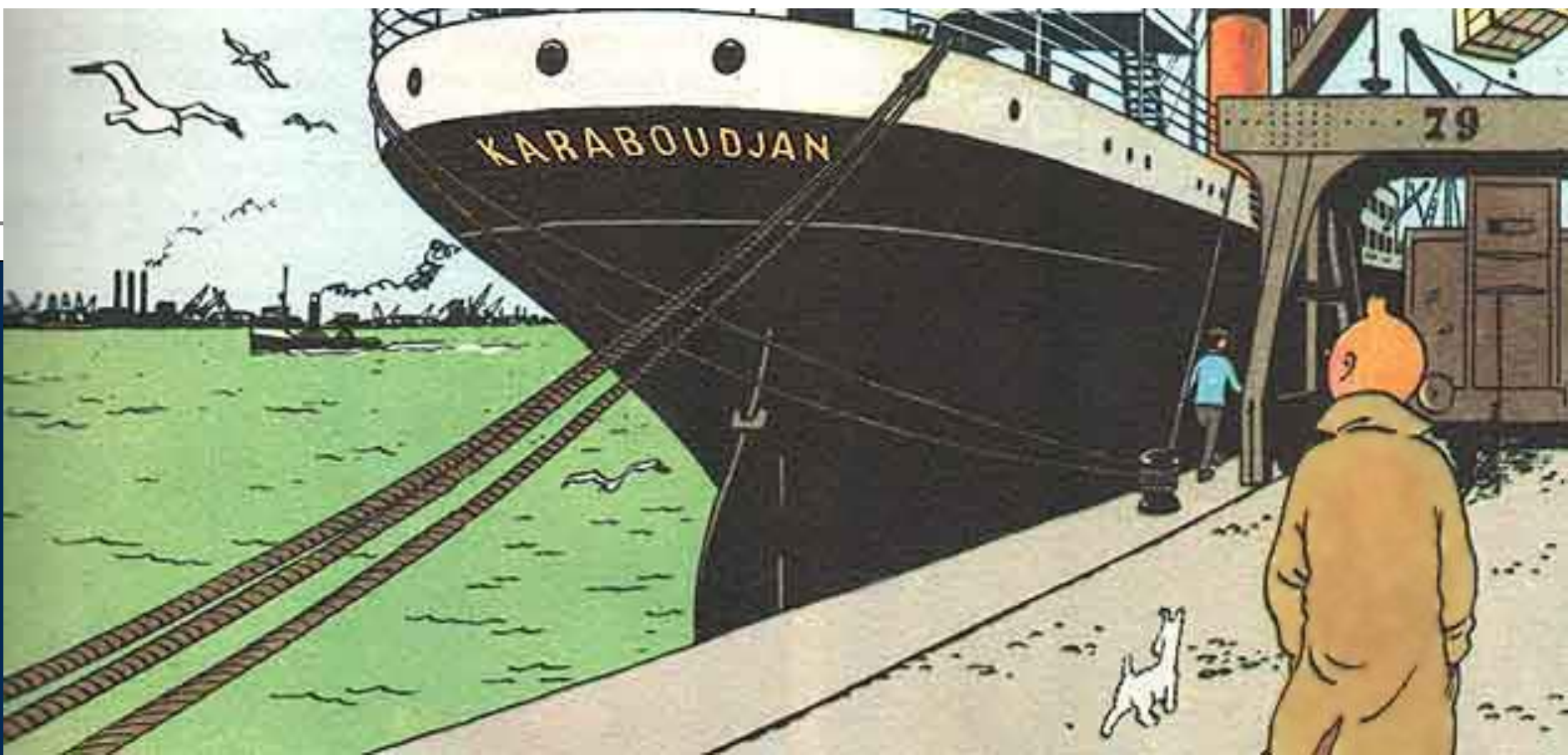


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V. Ship management and insurance

- ✦ coverage
 - ✦ *negligent* performance of the ship management services (both by the manager and by his agents and servants)
 - ✦ *fraud of employees*
 - ✦ *breach of warranty of authority*
 - ✦ *liability under contracts entered into as agent only / unintended principal*
 - ✦ *certain fines and penalties*
 - ✦ *certain costs related to covered claims*
- ✦ but not
 - ✦ *dishonest or reckless behaviour, or with the intention to cause harm*

Art. 419 MNA: coverage is lost in case of wilful misconduct and, unless otherwise agreed, gross negligence (although in this case the assured has to bear, at least, a 10 % of the damage)



**MANY THANKS FOR
YOUR ATTENTION**



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