

World Maritime University

The Maritime Commons: Digital Repository of the World Maritime University

World Maritime University Dissertations

Dissertations

1999

The potential impact of the ISM Code on ship owner's liability for maritime claims

Zhou Shen

World Maritime University

Follow this and additional works at: https://commons.wmu.se/all_dissertations



Part of the [Admiralty Commons](#)

This Dissertation is brought to you courtesy of Maritime Commons. Open Access items may be downloaded for non-commercial, fair use academic purposes. No items may be hosted on another server or web site without express written permission from the World Maritime University. For more information, please contact library@wmu.se.



WORLD MARITIME UNIVERSITY
Malmö, Sweden

**THE POTENTIAL IMPACT OF THE ISM
CODE ON SHIP OWNER'S LIABILITY
FOR MARITIME CLAIMS**

By

SHEN ZHOU

The People's Republic of China

A dissertation submitted to the World Maritime University in partial
fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

in

SHIPPING MANAGEMENT

1999

To my mother

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

.....

.....

supervised by:

Patrick Donner
Associate Professor, Shipping Management
World Maritime University

Assessor:

Rajendra Prasad
Lecturer, Shipping Management
World Maritime University

Co-assessor:

David Mottram
Former Course Professor, Shipping Management
World Maritime University

ACKNOWLEDGEMENTS

First of all, my special thanks and gratitude to Canadian International Development Agency (CIDA) for sponsoring my study in World Maritime University, Malmö, Sweden.

I would like to express my appreciation to Dr. Karl Laubstein, Professor Gunthen Zade, Professor Ma shuo and Ms. Sue Jackson. Without their kind assistance, I would not have had this opportunity to study in this university.

Heartfelt thanks go to Professor Patrick Donner, who supervised my dissertation with dedication and diligence, and Mr. Clive Cole, who did a special favour for me in proof-reading this work in his very busy time of the year.

I am also indebted to Ms. Susan Wangeci-Eklow and Ms. Cecilia Denne for their enthusiastic and ever-ready co-operation, concern and support in getting material and information for the study.

My gratitude is particularly due to my father, Professor Shen zhaoqi, and all my family members for their help and support during these two years.

Throughout the dissertation, considerable reference is made to various commentators, authors and organisations, whose details are set out in the bibliography. I am indebted to these people and organisations for their thought-provoking ideas which have been instrumental in developing this dissertation.

Finally, I want to thanks all WMU staffs, my colleagues and friends for their disinterested assistance and support.

Shen zhou
August 1999
Malmö, Sweden

ABSTRACT

Title of Dissertation: The Potential Impact of the ISM Code on Shipowner's Liability for Maritime Claims.

Degree: MSc

This dissertation is concerned primarily with the legal and insurance implications of the International Management Code for the Safe Operation of Ships and for Pollution Prevention -- International Safety Management Code (ISM Code). It focuses on the potential impact on the shipowner's liability for maritime claims, i.e. the civil liability and criminal liability of shipowners and their liability in marine insurance.

The ISM Code, as a mandatory regulation, lays down an internationally accepted standard on shipowner's responsibility for safe management of ships and pollution prevention. The shipowner has to establish, maintain and implement a Safety Management System (SMS) which meets the requirements of the ISM Code.

The impact on civil liability aspects will be more focused on the impact on shipowner's liability for cargo loss or damage and shipowner's legal right to limit his liability for claims. Questions such as seaworthiness, crew's negligence, actual fault and privity, recklessness with knowledge and the role of the designated person(s) will be discussed.

A breach of the ISM Code and non-conformities of the SMS will be regarded as management failure, which may lead to criminal prosecution for "manslaughter" and "corporate killing".

Hull and Machinery (H & M) underwriters and Protection and Indemnity (P & I) Clubs have already changed the conditions in policies to meet the requirements of the ISM Code. Shipowners' liability for keeping their ships in seaworthy condition and their duty of disclosure will be tested by the ISM Code.

The ISM Code can be used by the shipowner as proof of best practice compliance. But in this dissertation, the greater emphasis will be placed upon the potential consequences of non-compliance with the requirements of the ISM Code, as this is the main area of concern.

CONTENTS

| | |
|---|----------|
| Declaration | iii |
| Acknowledgement | iv |
| Abstract | v |
| Table of Contents | vi |
| List of Abbreviations | ix |
| 1 Introduction | 1 |
| 2 The ship owner's statutory responsibility under the ISM Code | 7 |
| 2.1 Safety and environment protection policy | 8 |
| 2.2 Responsibilities and authorities | 8 |
| 2.3 Resources and personnel | 10 |
| 2.4 The designated person(s) and the master | 11 |
| 2.4.1 The designated person(s) | 11 |
| 2.4.2 The master | 13 |
| 2.5 Maintenance of the ship and equipment | 14 |
| 2.6 Reports and analysis of non-conformities, accidents and hazardous occurrences | 15 |
| 2.7 Internal audits, external verification and certification | 16 |

| | | |
|----------|--|-----------|
| 3 | The impact of the ISM Code on ship owner's civil liability | 18 |
| 3.1 | The impact on shipowner's liability for loss or damage to cargoes | 18 |
| 3.1.1 | The Hague and Hague-Visby Rules | 18 |
| 3.1.2 | The impact of the ISM Code | 19 |
| 3.1.2.1 | Due diligence | 19 |
| 3.1.2.2 | Seaworthiness and proper manning | 21 |
| 3.1.2.3 | Exemption from liability by crew negligence | 24 |
| 3.1.2.4 | Questions of evidence | 25 |
| 3.1.3 | Conclusion | 26 |
| 3.2 | The impact on limitation of shipowner's liability | 27 |
| 3.2.1 | The legal framework of limitation of liability | 27 |
| 3.2.1.1 | Related International conventions | 27 |
| 3.2.1.2 | National legislation | 31 |
| 3.2.2 | The impact of the ISM Code | 32 |
| 3.2.2.1 | Actual fault or privity | 32 |
| 3.2.2.2 | Recklessness with knowledge | 35 |
| 3.2.2.3 | The status of the designated person(s) | 37 |
| 3.2.3 | Conclusion | 39 |
| 3.3 | The impact on other aspects of civil liability | 41 |
| 3.3.1 | Limitation of liability for oil pollution | 41 |
| 3.3.2 | Death of or personal injury to passengers | 43 |
| 3.3.3 | Collision liability | 43 |
| 3.3.4 | Charterparty claims | 44 |
| 4 | The impact of the ISM Code on ship owner's criminal liability | 46 |
| 4.1 | The Merchant Shipping Act 1995 | 46 |
| 4.2 | The Herald of Free Enterprise disaster | 48 |
| 4.3 | The Law Commission Recommendation | 49 |

| | | |
|------------|---|-----------|
| 4.4 | The impact of the ISM Code | 50 |
| 5 | The impact of the ISM Code on marine insurance | 54 |
| 5.1 | Change of policy | 54 |
| 5.2 | Unseaworthiness | 57 |
| 5.3 | Duty of disclosure | 59 |
| 6 | Conclusions | 61 |
| | Bibliography | 64 |
| | Appendices | |
| Appendix 1 | Resolution A. 741 (18) The International Safety Management (ISM) Code | 70 |
| Appendix 2 | Chapter IX of SOLAS Convention | 79 |

LIST OF ABBREVIATIONS

| | |
|------------|--|
| BIMCO | The Baltic and International Maritime Council |
| CLC | The International Convention on Civil Liability of Oil Pollution Damage |
| COSCO | China Ocean Shipping (Group) Company |
| DOC | Document of Compliance |
| ETA | Estimated Time of Arrival |
| GMT | Greenwich Mean Time |
| ICS | International Chamber of Shipping |
| INTERTANKO | International Association of Independent Tanker Owners |
| IMO | International Maritime Organization |
| ISF | International Shipping Federation |
| ISM | International Safety Management Code |
| ISMA | International Ship Manager's Association |
| JCC | The Joint Cargo Committee of the Lloyd's |
| JHC | The London market's Joint Hull Committee |
| LLMC | The Convention on Limitation of Liability for Maritime Claims |
| SMC | Safety Management Certificate |
| SMS | Safety management System |
| SOLAS | The International Convention for Safety of Life at Sea |

Chapter 1

Introduction

The International Management Code for the Safe Operation of Ships and for Pollution Prevention, i.e. the International Safety Management Code (ISM Code) was adopted in November 1993 by the Assembly of the International Maritime Organisation (IMO) as Resolution A. 741 (18). It was the culmination of a series of resolutions adopted by IMO, such as Resolution A. 680 (17), Resolution A. 596 (15), Resolution A. 411 (XI) and Resolution A. 443 (XI), which are dealing with guidelines on management procedures to ensure the safest possible operation of ships and maximum attainable prevention of marine pollution.

There had been a series of maritime disasters, which exploded in the late 1980s and early 1990s. The following are some of them:

- 1987 Ro/Ro ferry *Herald of Free Enterprise* capsized off Zeebrugge. About 188 passengers and crew died.
- 1987 Ferry *Dona Paz* collided with a tanker in the Philippines. Estimated 4,386 people killed.
- 1989 Tanker *Exxon Valdez* ran aground off the coast of Alaska. 37,000 tonnes of oil spilled and extensive environmental damage caused. Final claims level possibly exceeding USD 10 billion.

- 1990 Ferry *Scandinavian Star* fire. 158 people died.
- 1991 Tanker *Agip Abruzzo* collided with Ro/Ro ferry *Moby Prince* off Livorno, Italy. Fire, pollution and 143 people died.
- 1991 *Haven* fire and explosion off Genoa. Claims in excess of USD 700 million.
- 1991 Ferry *Salem Express* struck reef and sunk. 470 people killed.
- 1992 *Aegean Sea* broke in two off La Coruna, Spain. Extensive pollution. Claims approaching USD 200 million.
- 1993 *Braer* driven onto Shetland Islands. Pollution claims in region of USD 200 million.
- 1994 Ro/Ro passenger ferry *Estonia* sank after bow door fell off during heavy weather at sea. More than 800 people died.
- 1996 *Sea Empress* major oil pollution off Milford Haven, UK.

These maritime disasters caused extensive loss of life and serious damage to the marine environment. They also caused serious economic losses to the shipping industry. During the period 1987 to 1990, P & I insurance claims, and consequently the cost of P & I insurance, rose on average by more than 200 per cent. There were similar development to the Hull and Machinery claims and premium (Anderson, 1998, 14). The public, the industry, government agencies and international organisations have paid more attention to these accidents. Researches have been done by the government agencies and by industry to try to find out what might be behind this problem.

A common factor which appeared in almost all the reports of investigations is that basically these accidents and incidents primarily arose as a result of human failings. In the “Human Element in Shipping Casualties”, the report of the research funded by the UK Department of Transport in 1988, it was stated that the human element was found to be causative in over 90 per cent of collisions and groundings and over 75 per cent of contacts and fires/explosions. The UK P & I Club reported that human

error accounted for 58 per cent of all claims. In 1992 the UK House of Lords Select Committee on Science and Technology issued its report on the “Safety Aspects of Ship Design and Technology”. The report concluded that four out of five (80%) ship casualties are due to human error (Anderson, 1998, 15).

The ISM Code was produced following these high profile incidents and in response to political pressure. It is a relatively short document which is only 13 articles long. However, it is the first step taken by IMO to minimise human error and management deficiencies as causative factors in maritime casualties.

Considering the fact that human error has been proved to be the greatest contributor to marine accidents and many of them can ultimately be traced to management, the ISM Code is concentrated on improving the software of shipping, i.e. to raise management standards and practices for safe management ships and pollution prevention, rather than laying down specific rules as to the technical condition of the ship. It specifically targets the human element and the philosophy behind regulating that element. It demands that companies formalise structures and management systems for safety and implement these through specific routines, defined roles and crew training.

The ISM Code establishes safety management objectives, which are:

- to provide for safe practices in ship operation and a safe working environment;
- to establish safeguards against all identified risks;
- to continuously improve safety management skills of personnel, including preparing for emergencies.

It requires the Company, which is defined as the owner of the ship, or any other organisation or person such as the manager, or the bare boat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the ISM code, to establish a safety management system (SMS). This

system should be designed to ensure compliance with all mandatory regulations and codes, guidelines and standards recommended by IMO and other organisations.

The ISM Code was prepared as a self-contained document. However, it has been incorporated into the International Convention for Safety of Life at Sea (SOLAS) 1974 as chapter IX entitled Management for the Safe Operation of Ships in 1994.

The incorporation of the ISM Code into SOLAS 74 made it mandatory in states that are parties to the SOLAS Convention. Under the Convention's tacit acceptance procedures, it will apply by default and is not dependant upon any active adoption measure. As a consequence, those states which gave effect to the amended SOLAS Convention will now have to ensure that appropriate rules giving effect to the ISM Code are introduced into their own domestic legislation and implemented at the following date:

- Not later than 1st July, 1998 for all passenger ships, including high-speed passenger craft; oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed craft of 500 grt and above.
- Not later than 1st July, 2002 for all other cargo ships and mobile offshore drilling units of 500 grt and above.

The ISM Code establishes an internationally recognised standard for the organisation of a shipping company's management in relation to safety and pollution prevention. It is not directly concerned with the civil and criminal liability of the shipowner for maritime claims and the shipowner's insurance cover. However, considering that most of the casualties in shipping and marine pollution incidents are the result of crew negligence, ineffective management and lack of communications between the vessel and the shore based managers, the ISM Code will impact upon all shipowners because the court is likely to treat it as the yardstick of liability in every situation where managerial standards and faults have to be examined. The contents of the

ISM Code will constitute guidance to the judges as to what constitutes “best practice” in ship management and operation.

In this dissertation, shipowner’s responsibility under the ISM Code will be described in Chapter 2. These responsibilities include establishing safety and environment protection policy, defining levels of authority and lines of communication between and amongst shore and shipboard personnel, setting procedures for reports and analysis of non-conformities, accidents and hazardous occurrences, setting procedures for responding to emergencies and setting procedures for internal audits and management review.

One of the important topics discussed in the dissertation is the impact of the ISM Code on the shipowner’s civil liability. First, the question of seaworthiness, or rather unseaworthiness, of the ship will be discussed: how the court traditionally considered unseaworthiness, the way the ISM Code affects the shipowner’s liability on exercising due diligence to make the ship seaworthy and the effect of the non-compliance with the requirements of the ISM Code on shipowner’s liability. Secondly, I will discuss the effect of the ISM Code on shipowners’ legal right to limit their financial liability, which include how the implementation of the ISM Code will affect the judgement of the shipowner’s conduct under the “fault and privity” and “recklessness with intent” regimes, the role of the designated person(s) and what the possible implication of the status of the designated person(s) will have on the assumed state of knowledge of the shipowner or the *alter ego* of the company. Thirdly, some other aspects of the civil liability of the shipowner will also be discussed in Chapter 3.

Also in the dissertation, the impact of the ISM Code on a shipowner’s criminal liability will be discussed in Chapter 4. Because the criminal law approaches are quite different in different countries, the United Kingdom has been used as an example to see how the ISM Code affects the shipowner’s criminal liability under the

current English Law (Sections 98 and 100 of the Merchant Shipping Act 1995) as well as the future law, i.e., Clause 4 of the Draft Involuntary Homicide Bill.

The impact of the ISM Code on a shipowner's insurance cover will be examined in Chapter 5. Hull and Machinery (H & M) underwriters and Protection and Indemnity (P & I) Clubs have already changed the conditions in policies to meet the requirement of the ISM Code. Does the ISM Code put more liability on the shoulder of shipowners for their insurance cover?

There have been many articles talking about the potential impact of the ISM Code on shipowner's liability. The years ahead of us will certainly see many legal and insurance cases being argued before the courts and arbitrators, exploring the finer details and applying an interpretation on the ISM Code. However, up to now, there is no court decision on this subject. The influence of the ISM Code is still unclear.

Chapter 2

The Ship Owner's Statutory Responsibility Under the ISM Code

The basic requirement of the International Safety management (ISM) Code is that the shipowner or any other organisation or person who has assumed the responsibility for operation of the ship, i.e. the “Company” which is defined in the ISM Code, should develop, implement and maintain a Safety Management System (SMS).

The system should comply with mandatory rules and regulations and take into account the applicable code, guidelines and standards recommended by the IMO, flag state administrations, classification societies and maritime industry organisations to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment and to property.

With the implementation of the SMS, the Company can provide for safe practices in ship operation and a safe working environment, establish safeguards against all identified risks and continuously improve safety-management skills of personnel ashore and aboard ships, including preparing for emergencies related to safety and environmental protection.

The SMS is a structured and documented system enabling the Company's personnel to effectively implement the Company's safety and environment protection policy (IMO, 1995). As a system, it must be concerned with all safety and environment protection activities and tasks, both ashore and on board. All the activities and tasks

are planned, organised, executed and checked by the system in accordance with the legislative and the Company's requirements.

It is important to understand that the SMS is not just a documented system, it is concerned with the organisational structure of the Company, the responsibilities and authority of the different departments and persons involved in the system, the lines of communication between these departments and persons and the management processes and procedures. It is also concerned with the necessary resources to manage the tasks and activities related to safety and environment protection, such as people, financial support, equipment, materials, technology and software. The system must "enable the company to measure its performance, allowing areas for improvement to be identified and implemented" (ICS and ISF, 1996, 6).

2.1 Safety and environment protection policy

The establishment of the safety and environment protection policy is the first step for establishing the SMS. The Company should ensure the policy is implemented and maintained at all levels of the organisation, both ship based as well as shore based. "The policy should be a concise and clear statement. It should describe the aim of the SMS and outline a strategy and plan of action to achieve and maintain the aim" (ICS and ISF, 1996, 15).

2.2 Responsibilities and authorities

The development of a safety culture is not merely the matter of having a safety and environment protection policy, but also the systematic practice within the organisation from top management ashore down to the officers and crew at sea. Everybody involved in the management of safety and environment protection has his/her responsibilities in the safety and environment protection task.

The ISM Code describes the Company's responsibilities and authorities in Article 3. First, it is the question of which organisation will be responsible for the safety and environment protection. Generally, the entity which is responsible for the operation of the ship is also responsible for safety and environment protection. But "if the entity who is responsible for the operation of the ship is other than the owner, the owner must report the full name and details of such entity to the Administration" (Art. 3.1, the ISM Code).

Secondly, the Company should clearly define the responsibility and authority of personnel concerned with safety and pollution prevention. The documenting of the responsibility and authority of personnel is to ensure those who are involved in the management of safety and environmental protection know what is expected of them to make the system function effectively. In the meantime, it can assist in motivating them to understand the vital importance of their performance in the success of the Safety Management System.

Thirdly, a person or persons should be designated to provide a link between ship and shore to monitor the operation of each ship. Adequate resources and support should be provided to the designated person(s).

Besides Article 3, the requirements of the ISM Code for the company's responsibilities can be seen in every part of the ISM Code. Throughout the ISM Code, we can find repetitious phraseology talking about the responsibilities of the Company, such as "The Company should establish procedures for the preparation of plans and instructions for key shipboard operations concerning the safety of the ship and protection of pollution. The various tasks involved should be defined and assigned qualified personnel" (Article 7, the ISM Code) and "The Company should establish procedures to identify, describe and respond to potential emergency shipboard situation" (Article 8, the ISM Code) and "The Company should establish

and maintain procedures to control all documents and data which are relevant to SMS (Article 11, the ISM Code).

2.3 Resources and personnel

Nowadays, the maritime industry has become particularly concerned with the subject of the “human element”. The introduction of the ISM Code seeks to set operational procedures to improve safety and environment protection, but it is important to ensure the people involved in carrying out the procedures are adequate (Mottram, 1998).

The whole content of Article 6 of the ISM Code is concerned with the qualification and training requirement of the people involved in safety and environment protection, both on shore and at sea. In the meantime, a Company should ensure that staff and crew are properly informed and equipped to fulfil their operational responsibilities safely.

The master is a very important person within the SMS. Holding an appropriate international recognised certificate is not enough for the master. To be fully conversant with the Company’s Safety Management System, he must also have some ability and special skill in command and control.

The crew members working on board the ship must be qualified, certificated and medically fit seafarers. All personnel concerned with safety and pollution prevention should be familiar with their SMS related duties and adequately understand the relevant rules, regulations, codes and guidelines. This is very important for maintaining the continuity and effective performance level of the SMS.

Considering the fact that more and more ships are manned by crews from different countries with different home languages, the effective communication between crew

members in the execution of their duties related to the SMS is very important. The Company should ensure the ship's personnel have received relevant information on the SMS in a working language or language understood by them. However, it is necessary to carry out training which may be required in support of the SMS for all personnel concerned.

2.4 The designated person(s) and the master

The master and the designated person(s) have special status within the Safety Management System. They have very important responsibilities in the Company's safety and environment protection.

2.4.1 The designated person(s)

As stated in the ISM Code, a person or persons ashore having direct access to the highest level of management should be designated by every appropriate Company to ensure the safe operation of each ship and to provide a link between the Company and those on board (Article 4, ISM Code).

The designated person(s) is a new concept in the maritime field although it is similar to the Management Representative, a person responsible for the quality system, that is required by the ISO 9002 element 4.1.2.3. In most shipping companies which have also opted for ISO Certification, these two requirements may be merged into the appointment of the same person (Paranjpe, 1996).

The role of the designated person(s) is to monitor safety and pollution prevention aspects of the operation of each ship and to ensure adequate resources and shore-based support are applied. He must also put in place a system of verification, review and evaluation (Expert views, 1998).

Apart from the responsibilities clearly stated in Article 4 of the ISM Code, the designated person(s) should generally:

- Be suitably qualified and experienced in safety and pollution control aspects of ship operation (meaning a master or chief engineer);
- Be fully conversant with the Company's safety and environment policy;
- Have the independence and authority to report deficiencies to the highest level of management;
- Be responsible for safety audits;
- Ensure corrective action is taken (Paranjpe, 1996).

As is clearly mentioned in Article 4 of the ISM Code, the designated person(s) ashore should have direct access to the highest level of management. That means the designated person(s) may not be a person in the highest level of management. According to the article "ISM Truths, Myths and Grey Areas: A synthesis of the ISMA panel of experts" (1998), "the designated person(s) should not be someone directly involved in the management of the vessel". So the designated person(s) may not be a ship owner or a person who can represent the ship owner. However because of the special status of the designated person(s), he should provide a link between the Company and the ship. He has the independence and authority to report deficiencies to the highest level of management. As the ICS/ISF in their Guidelines suggested, the designated person(s) also has the responsibility to ensure corrective action is taken. The introduction of the designated person(s) may become a very sensitive area in the implementation of the ISM Code and maritime law field.

The knowledge, experience and records of the designated person(s) are very important to the Company. It is clear that activities and records of the designated person(s) and the performance of the SMS may be crucial for the shipowner in establishing or refuting maritime claims. These matters will be discussed in the following chapters.

2.4.2 The master

The master is the highest level commander on board the ship. He takes full responsibility for the safe operation of the ship and pollution prevention on board. According to the ISM Code, the Company must “clearly define and document” the master’s responsibility, as specified in Article 5.1, including reporting deficiencies in the SMS to the shore based management (Rudd, 1996).

There are general responsibilities and authorities for all personnel, which includes the master of the ship, in Article 3 of the ISM Code. It states that the Company should define and document the responsibility, authority and interrelation of all personnel who manage, perform and verify work relating to and affecting safety and pollution prevention. In Article 5, the responsibility and authority of the master are particularly focused on the operation of the SMS.

The ship is seen as a special independent unit in the SMS. The implementation of the SMS on board can not be fully monitored by the designated person(s) on shore. The master is the person responsible for the implementation of the SMS on board. At the same time, he is also the person to monitor the performance of the SMS on board, which is similar to the designated person(s) on shore (COSCO Shanghai, 1997, 66). That is why a company has to ensure the master is “fully conversant with the Company’s SMS” (Article 6.1.2, the ISM Code).

Considering the uncertainty of the sea’s condition, the ISM Code gives the master “overriding authority and responsibility to make decisions with respect to safety and pollution prevention” (Article 5.2, the ISM Code). The ship’s master has complete authority and responsibility for taking all necessary actions for safety, pollution prevention and the efficient operation of his ship. “In certain situations this may mean deviation from documented procedures” (Lloyd’s Register, 1996). This means the master can take whatever action he considers to be in the best interests of

passengers, crew, the ship and the marine environment. It gives the master full authority to take action according to the actual conditions and his experience, even if these actions deviate from the Company's documented procedures.

2.5 Maintenance of the ship and equipment

Article 10 of the ISM Code contains the requirement for safe, efficient and effective maintenance of the ship and equipment.

First, the company should establish procedures to ensure the ship is maintained, repaired and surveyed in conformity with the provisions of the relevant rules, regulations and additional requirements established by the Company.

Second, in order to meet these requirements, it is necessary to establish and implement procedures, including the requirement for inspections, reporting non-conformities, analysis, corrective actions and records. The procedures should be implemented in the daily maintenance operations.

Third, the company should establish procedures in the SMS to identify equipment and technical systems which may result in hazardous situations in case of sudden operational failure. The SMS should provide for specific measures in order to promote the reliability of the equipment or system. All these procedures and measures should be implemented in the daily maintenance operation.

Article 10.2 requires the person who is responsible for operation of the vessel and safety and environment protection to report any non-conformity and its possible cause. Non-conformity here refers to the non-conformity of ship and equipment which is discovered during the daily maintenance operation. These non-conformities will affect the seaworthiness of the ship and equipment (COSCO Shanghai, 1997,

77-78). The company should ensure that appropriate corrective action is taken and records of these activities are maintained.

2.6 Reports and analysis of non-conformities, accidents and hazardous occurrences

According to Article 9 of the ISM Code, the SMS should include procedures ensuring that the master should report the following to the designated person(s):

- Accidents,
- Hazardous occurrences,
- Non-conformities within the SMS and
- Suggested modifications and improvements to the SMS (ICS and ISF, 1996, 24).

The report will be reviewed and evaluated by the appropriate level of management to determine corrective action and ensure that recurrences are avoided.

The reports of accidents and hazardous occurrences should include the probable causes, details of the consequences with respect to harm to people, damage to the environment or property, or the loss of operational safety, and any suggestions for improvement (ICS and ISF, 1996, 24).

The non-conformity here refers to any deviation from the SMS procedures and instructions. It is a non-conformity in management aspect which focuses on safety and environment protection conditions of the Company and the ship as a whole. This is different from the non-conformity of the technical condition of the ship and equipment which is described in Article 10.2.2. Not only should the master report the non-conformities within the daily management but also the designated person(s), who is in charge of the safety and environment protection of the company, should report all the non-conformities within the SMS to the highest level of management.

The Company should introduce a system for recording, investigating, evaluating, reviewing and analysing the reports. As a result, corrective actions should be taken, experiences should be distributed throughout the Company and the existing SMS procedures and instructions should be amended if necessary.

2.7 Internal audits, external verification and certification

The ISM Code also requires the Company to carry out internal audits for verifying whether safety and pollution prevention activities comply with the SMS. This internal audit should be carried out by independent personnel and follow documented procedures. If deficiencies are found, possible corrective action should be carried out by the management personnel responsible for the area involved. These deficiencies also include those related to the Company's SMS itself, e.g. organisation structure, personnel, responsibilities and authorities and the Company's safety management regulations (COSCO, Shanghai, 1997, 92-93).

The external verification should be carried out by the Administration (the Government of the flag state) or an organisation recognised by the Administration or by the Government of the country, acting on behalf of the Administration in which the Company has chosen to conduct its business. If the Company has been proved by the verification that it has complied with the requirements of the ISM Code, a Document of Compliance (DOC) should be issued.

After the Administration or organisations recognised by the Administration verified that the Company and its shipboard management are operating in accordance with the approved SMS, a Safety Management Certificate (SMC) should be issued to a ship.

The SMC and a copy of DOC should be carried on board the ship in order that the master may produce it for the verification the Administration or organisation recognised by the Administration.

Chapter 3

The Impact of the ISM Code on Ship Owner's Civil Liability

3.1 The impact on shipowner's liability for loss of or damage to cargoes

The carrier's liability in respect of cargo is very often determined according to the Hague or Hague-Visby Rules. Although the International Safety Management (ISM) Code is not directly concerned with issues of carriage of goods by sea, it will affect the way in which a carrier's liability is assessed in the event of loss of or damage to cargo. "Safety and seaworthiness go hand in hand" (Intertanko, 1996, 33).

3.1.1 The Hague and Hague-Visby Rules

The International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules) was adopted in 1924 and was amended by the 1968 Brussels Protocol of amendments and the Protocol of 1979 . The amended Convention is known as the Hague-Visby Rules. The Hague-Visby Rules have been ratified by most of the important maritime countries. This has resulted in virtual uniformity in the regulation of the most important legal disputes involving Bills of Lading, including what a Bill of Lading should contain and what liability is associated with the description of the cargo (IMO, 1993, 77).

Most of maritime countries have ratified or accessed the Hague Rules or Hague-Visby Rules. The principles of the Hague Rules or Hague-Visby Rules have been incorporated into the national legislation by various ways in these countries.

Although some countries have not ratified the Hague Rules or Hague-Visby Rules, their legislation are largely based on them.

The Hague Rules are given effect in the U.S. by the Carriage of Goods by Sea Act 46 U.S.C. The Hague-Visby Rules are given effect under English law by the Carriage of Goods by Sea Act 1971 (Intertanko, 1996, 33), and the Maritime Code of the People's Republic of China, 1992 also contains similar provisions to the ones shown above.

According to the Hague-Visby Rules, the carrier is the party “who enters into a contract of carriage with the shipper” (Richardson, 1998, 15), including the owner or the charterer. But in most cases, the carrier for the purposes of the Hague-Visby Rules is the shipowning company, although it is possible for the carrier to be a demise charterer or time charterer (Heward, 1996). This definition is similar to the “Company” as defined by the ISM Code. But the “carrier” does not include the manager.

3.1.2 The impact of the ISM Code

The impact of the ISM Code on the shipowner's liability under the Hague-Visby Rules lies in the effect that the Code will have upon the interplay between the “overriding obligation” in Article III (1) and the “crew negligence” exception in Article IV (2) (Heward, 1996).

3.1.2.1 Due diligence

The fundamental obligation of the carrier (shipowner or charterer) under the Hague-Visby Rules is to exercise due diligence to keep the ship seaworthy and properly manned, equipped and supplied the ship. This responsibility comes into sharp focus with the implementation of the ISM Code.

Due diligence can be defined as “a genuine, competent and reasonable effort of the shipowner to fulfil the obligation to provide a seaworthy vessel” (Ogg, 1996). Scrutton on Charterparties and Bills of Lading (19th Edition) comments that “the due diligence required is due diligence in the work itself by the carrier, all persons, whether servants or agents or independent contractors whom he employs or engages in the task of making the ship seaworthy; the carrier does not, therefore, discharge the burden of proving that due diligence has been exercised by proof that he engaged competent persons to perform and supervise the task of making the ship seaworthy” (Mocatta, et al, 1984, 434).

Due diligence can also be defined as “not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so (seaworthy) as far as diligence can serve” (Richardson, 1998, 20). So just saying “I did my best” is not enough. The carrier’s actions in exercising due diligence will be judged against the standard at the highest level. This standard will change with the change of knowledge, technology, method of operation and other factors (Richardson, 1998, 20). For example, a shipowner may successfully defend himself for the unexpected failure of a component which may not be reasonably expected to fail. But next time when a similar situation happens to the same shipowner, the standard of care will have risen. The shipowner can not defend himself by saying that he did not know the situation might happen.

The introduction of the ISM Code sets a new standard for “due diligence”. The shipowner’s Safety Management System (SMS) will be tested. Generally, the due diligence of a shipowner will be judged with a two stage test: first, the content of his SMS will be evaluated to ascertain whether it was a system capable of ensuring safety and marine environment protection; second, the application of the SMS will be judged as well as actions of the shipowner to ensure its application (Pamborides, 1996). The failure to implement the Code or failure in any one of the particular

requirements, e.g. failure to take action to correct a defect which was identified by the internal audit, will be used as evidence for the claimant to claim the lack of due diligence of the shipowner.

3.1.2.2 Seaworthiness and proper manning

As we discussed before, under the Hague-Visby Rules, the shipowner's liability is to exercise due diligence to make the ship seaworthy. To be seaworthy, a vessel "must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it" (Gaskell, et al, 1997, 187). The shipowner must keep his vessel fit in design, structure, condition and equipment (the physical condition of the ship and the condition of the cargo holds/tanks) to encounter the ordinary perils of the voyage and have a competent master and competent and efficient crew to meet the requirements of the Hague-Visby Rules.

The question will be asked when a cargo claim arises that whether the ship was seaworthy and whether the carrier failed to take care of the goods. The ISM Code will have an impact on these issues. Firstly, the objective standard of seaworthiness will now be tested against requirements of the Code and Chapter IX of SOLAS. Secondly, if there is a satisfactory SMS existing, but the shipowner or operator has failed to implement it, then either the ship is unseaworthy because the SMS is not in fact being implemented properly (in breach Article III-1) or the shipowner has failed to properly care for the cargo (in breach of Article III-2) (International Safety Management Code, part II, 1998).

The ISM Code, as stated in the preamble of the Code, is an "international standard for the safe management and operation of ships and for pollution prevention". It is a prevailing standard for safe management which has been widely accepted by the shipping industry.

Non-conformity, which is a deviation from the requirement specified in the shipowner's SMS, will be regarded as unseaworthiness in many cases. For example, Article 10 of the ISM Code deals with the maintenance of the ship and its equipment. A planned preventative maintenance system is acceptable under the ISM Code. The maintenance work should be organised and carried out with forethought, control and records. If the maintenance routines and schedules are not set ahead after proper consideration of what might happen, this will be regarded as unseaworthiness. Furthermore, if the shipowner has established a planned maintenance system which complies with the ISM Code only for getting the ship to pass the assessment, but the system has not been implemented properly, the ship may also be regarded as unseaworthy (Ogg, 1995).

Unseaworthiness is not only limited to the ship being unfit to face the perils of the voyage on account of physical deficiency but also includes an undermanned or poorly manned ship, i.e. simply a badly managed ship (Grime, 1995).

Historically, when people talked about "properly manning" the ship, they were talking about whether the crew member was properly certified, whether his employment record tended to show that he was competent and whether the shipowner had exercised reasonable care in selecting the crew member. The phrase "properly manned ship" has been summarised in *Scrutton on Charterparties and Bills of Lading* (19th Edition) (Mocatta, et al, 1984, 435) as follows:

"The shipowner must satisfy himself by inspection of the seaman's documents, interviews and inquiries from previous employers that he is reasonably fit to occupy the post to which he is appointed. It will not necessarily be enough to rely on certificates of competence held by the seaman."

With the introduction of the ISM Code, it is not enough for the shipowner to select certified and well recorded crew members and put them on board the ship. “To ensure each ship is manned with qualified, certified and medically fit seafarers” is just a part of the shipowner’s obligations, which are set out in Article 6 of the ISM Code. The ISM Code goes on to lay down further requirements. The shipowner has to ensure that each member of a ship’s crew is competent to carry out his duties and the whole crew must perform as a team. Competence now includes the training of each crew member in the provisions of the SMS of the Company as well as his familiarisation with the instructions, which must be provided prior to sailing, by the Company to each crew member. This information must be provided in a language which can be understood by the crew member. The crew members must be able to effectively communicate with each other.

The shipowner also has the responsibility to provide the crew members with all of the necessary information and instructions about how to handle hazardous situations as well as the steps and measures that must be taken in order to prevent problems arising. In the case of an emergency situation, the crew must follow the related procedures which are described in the SMS. However there remains a problem. If the crew members do as the procedures say but the efforts fail, it may be shown that the Company failed to establish the right procedure for the particular emergency. On the other hand, if the crew members do not follow the established procedure of the Company and there are damages or loss of cargo as a result of this, then there might be liability for the carrier either because it failed to train the crew members according to the SMS or because it failed to motivate them in following the policy (Pamborides, 1996).

Article 5.2 of the ISM Code says that the master has the “overriding authority and responsibility to make decisions with respect to safety and pollution prevention”. It gives the master full authority to take action according to the actual condition and his experience, even if these actions deviate from the Company’s documented

procedures. But if his action has failed, the shipowner has to prove the loss or damage was caused by crew negligence in order to seek exemption from liability.

3.1.2.3 Exemption from liability by crew negligence

Under the Hague-Visby Rules, the shipowner can exempt himself from liability for loss or damage arising or resulting from the act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship. When a loss appears to have been caused by crew negligence, if the shipowner can prove that crew members were properly certified, their employment records suggest they were competent (at least not incompetent) and that the shipowner has exercised reasonable care in select the crew members, there was previously little incentive to challenge the “crew negligence” defence because there was no evidence to show that the vessel was not “properly manned” for the propose of Article III (b) of the Hague-Visby Rules. But with the introduction of the ISM Code, the shipowner may find it is not so easy to defend himself under “crew negligence”.

The ISM Code is likely to have the effect of reducing the proportion of cases in which crew negligence will be regarded as the sole cause of a loss (Potential legal implication of ISM Code, 1996). Under the Hague-Visby Rules, the shipowner has the obligation to exercise due diligence to make the ship seaworthy and properly manned, equipped and supplied. The ISM Code, as a new safety management standard, gives an explanation of the “proper manning” in Article 6.1—“ to ensure that each ship is manned with qualified, certificated and medically fit seafarers...”. It also gives further requirements in the following Articles 6.2 to 6.7. So if there is a cargo claim involving a crew error, the shipowner may have to show that he has exercised due diligence to comply with all the duties required by the ISM Code in the selection and training of the crew. “An error by a crew member will be regarded as having been brought about, wholly or in part, by a lack of an adequate system and/or

training aboard the ship.” (Heward, 1996). If the shipowner has not exercised due diligence to man the ship properly according to the ISM Code and this fault is the reason for the loss or damage to the cargo, the “crew negligence” defence will be irrelevant.

3.1.2.4 Questions of evidence

The other effect of the ISM Code is that it will be easy for the claimant to get enough documented evidence to establish whether or not the owner is in breach of his duty of care.

According to the Hague-Visby Rules, the carrier or other person who is claiming exemption, has the responsibility for the burden of proving “due diligence” whenever loss or damage has resulted from unseaworthiness.

The ISM Code requires the shipowner to produce a lot of written materials such as documents, procedures, reports within the SMS. From these materials, the claimant may find what system was in place and whether the system was properly operated. This applies not only to pre-existing documents relating to the state of the vessel and the internal audit reports but also potentially to subsequent investigation reports relating to the incident itself. If the investigation shows non-conformance, which was documented in the audit report but no corrective action was taken, the claimant may easily prove that due diligence was not exercised by the shipowner to make the ship seaworthy (Paranjpe, 1997). On the other hand, if the SMS documents are asked for and not provided, this may also prejudice the shipowner.

Sometimes the document of SMS itself will become evidence against the shipowner. As the example given by Captain Ogg (1995) in his article:

“A very large state-of-the-art container vessel operated by a rated, professional carrier lost or damaged 50 boxes off the fore deck in bad weather in the Mediterranean. In defence to a claim brought by cargo interests, the carrier invoked perils of the sea, alleging not one but two successive freak waves.

Cargo counter-alleged that the cause or a cause of the damage was the failure of the vessel’s master to slow down in admittedly bad weather conditions in order to protect the deck cargo which was vulnerable to loss and damage. Cargo said this was evidenced by among other things, the master’s note of protest which started off by referring to the need to average over 22 knots on the voyage in order to make his scheduled ETA. The carrier denied cargo’s allegation, referring to a policy statement contained in its deck officer’s manual: ‘We stress that the safety of the crew and the ship is the first and most important requirement, while quick dispatch is secondary’.

The carrier gave quick dispatch a higher priority than care of the cargo, which is not even mentioned in the statement. Of course this evidence can do nothing to support the defendant. On the other hand, it may be used as evidence by the plaintiff against the carrier.

3.1.3 Conclusion

The ISM Code lays down standards for assessing the due diligence, seaworthiness and safe operation of the ship. The shipowner will have to bear the consequent liability if he fails to live up to these standards and fails to comply with his SMS at the time of the incident. In the meantime, a great deal of paper circulating within the owner’s office and on board will give the claimant greater scope for establishing precisely what has gone wrong.

Nevertheless, if the ship has a well designed and approved SMS, holds all the required documents and certificates and can establish that the master and crew members were properly trained etc., it will be easy for the shipowner to argue that a claim against him did not arise as a result of unseaworthiness and/or that it occurred as a result of an individual act of neglect by the master in the navigation or management of the ship, for which he would not be responsible under the Hague-Visby Rules (International Safety Management Code, Part II, 1998).

3.2 The impact on limitation of shipowner's liability

Legal limitation of the liability of shipowners for loss or damage resulting from negligent navigation or management of the ship has long traditions in international maritime law. Although legal regimes are different in different countries, there are two commonly accepted principles. Firstly, the legal limit of liability varies with the size of the ship. Secondly, the shipowner will not be entitled to limit his liability if the loss or damage resulted from his personal fault or neglect (Selvig, 1984).

3.2.1 The legal framework of limitation of liability

3.2.1.1 Related international conventions

There are two types of limitation provisions: the global limitation and the specific or contractual limitation.

The specific or contractual limitation applies to special claims. It includes provisions in various international conventions covering carriage of goods and passengers by sea, e.g. the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Athens Convention. Other individual regimes established by international

conventions with respect to oil pollution, nuclear liability and hazardous and noxious substances accidents are also under this special heading (Vlasto, 1998).

The global limitation relates to claims from all and any accidents. Generally it is applied after any applicable specific limitation provision.

3.2.1.1.1 The global limitation

There are two international conventions dealing with the global limitation. They are the International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships 1957 (the 1957 Convention) and the Convention on Limitation of Liability for Maritime Claims, 1976 (the LLMC 1976 Convention).

The 1957 Convention was adopted in Brussels in 1957. This convention has been ratified or acceded to by a considerable number of states.

According to Article 1 (1) of the 1957 Convention, the person entitled to limit his liability is the owner of a seagoing ship. This right has been widened by Article 1 (3) to include ownership, possession, custody or control of the ship in order to protect charterers, shipbuilders and repair yards. The master and members of crew are entitled to limit their liability even if the damage was caused by their own negligent acts. Furthermore, the mortgagee is also able to limit his liability for damage caused after taking possession of the ship (Donner, 1996).

The shipowner is not always entitled to limit his liability. He will lose the right to limit if the loss or damage resulted from “the actual fault or privity of the owner” (Article 1 (1), the 1957 Convention).

Although the 1957 Convention has gradually been superseded by the LLMC 1976 Convention, it is still in force in over 40 jurisdictions (Grime, 1996).

The LLMC 1976 Convention was adopted in London and came into force in 1986. It provides a quite modern and satisfactory general system of limitation of liability which covers about 43.12 % of the world tonnage (IMO, 1999).

In the LLMC 1976 Convention, it is declared that “shipowners and salvors, as hereinafter defined, may limit their liability, in accordance with the rules of this Convention for claims set out in Article 2” (Article 1 (1), the LLMC 1976 Convention). The shipowner here means “the owner, charterer, manager and operator of a seagoing ship” (Article 1 (2), the LLMC 1976 Convention). Persons for whom the shipowner is vicariously liable, i.e. crew, pilot, tug and other persons involved in the operation of the ship, such as those working at the shipowner’s offices, are also allowed to invoke the limitation rules. Insurers of liability for claims that are subject to limitation have been given a right of limitation through a provision in Article 1 (6) of the LLMC 1976 Convention (IMO, 1993, 197).

Under Article 4 of the LLMC 1976 Convention, “if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result”, the person liable shall not be entitled to limit his liability.

The provisions relating to the loss of the right to limit in the LLMC 1976 Convention are very similar to the terms used in the Hague-Visby Rules, the Hamburg Rules and the Athens Convention.

3.2.1.1.2 The specific or contractual limitation

In the Hague-Visby Rules, Article 4, sub paragraph 5 (e), it is stated that “neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or

omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.” The carrier includes “the owner or the charterer who enters into a contract of carriage with a shipper.” There is a similar provision covering the servant or agent of the carrier.

Under the Hamburg Rules, “the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.” This limitation also applies to the servant or agent of the carrier.

In the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 and its 1976 & 1990 Protocols, “the carrier shall not be entitled to the benefit of the limits of liability prescribed in Article 7 and 8 and paragraph 1 of Article 10, if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause such damage, or recklessly and with knowledge that such damage would probably result.” The limitation is also applied to the servant or agent of the carrier just like in the Hamburg Rules.

The provisions in these Conventions, the Hague-Visby Rules, the Hamburg Rules, the Athens Conventions and LLMC 1976 Conventions are quite similar. However, there still remains some differences among them.

Under the Hamburg Rules, the Athens Convention and the LLMC 1976 Convention, the knowledge has to be of the particular “loss, damage or delay in delivery”, “damage” and “loss” that has in fact occurred. Whereas under the Hague-Visby Rules, the knowledge that any damage would probably result is sufficient, coupled with recklessness to deprive the carrier of limitation. So it looks as if the Hague-Visby Rules are much stricter than the other three Conventions.

3.2.1.2 National Legislation

International Conventions have no independent life of their own. They require adoption as part of the national law of participating countries before they become effective.

The 1957 Convention was originally given domestic effect in the United Kingdom by the Merchant Shipping (Liability of shipowner and others) Act 1958. The LLMC 1976 Convention applies in the United Kingdom by virtue of section 185 of the Merchant Shipping Act 1995 (Griggs and Williams, 1998, 3).

The United States has not adopted either the 1957 Convention or the updated LLMC 1976 Convention. The shipowner's right to limitation of liability is provided by the Limitation of Vessel Owner's Liability Act. The Act gives the right to all shipowners, American or foreign, to limit their liability for maritime claims resulting from maritime casualties occasioned in navigable waters, whether American or foreign. In this Act, shipowners include any person or entity which may be held liable because of an ownership interest in the vessel, part owners and demise charterers (Griggs and Williams, 1998, 331-332). According to the Act, the shipowner may limit his liability only upon showing proof that the fault causing the loss occurred without his "privity or knowledge".

Although China has not ratified or accessed to the 1957 Convention or the LLMC 1976 Convention, some principles of the LLMC 1976 Convention has been adopted in the provisions related to limitation of liability in the Maritime Code of People's Republic of China. This provides in Article 204 that shipowners and salvors may limit their liability in accordance with the provisions of Chapter XI of the Maritime Code for claims set out in Article 207. In article 209, it states that "A person liable shall not be entitled to limit his liability in accordance with the provisions of this

Chapter, if it is proved that the loss resulted from his personal act or omission done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.” The degree of “recklessly and with knowledge” is less than “intention” but greater than “negligence”, and similar to “culpable negligence” in Chinese law. With respect to Articles 204, 205 and 206, the “person liable” could be the shipowner, manager, salvor or their servants or an insurer (Li, 1996).

3.2.2 The impact of the ISM Code

Generally, the ISM Code is not directly concerned with the shipowner’s ability to limit his liability to a particular figure under any limitation convention. However, the implementation of the ISM Code may affect many limitation issues. The most alarming legal implication the ISM Code will have is an inevitable effect on barring limitation of liability under the 1957 Convention and possibly the LLMC 1976 Convention. The standard of supervision and management required by the ISM Code will have an effect on assessing concepts such as “actual fault or privity”, “personal act or omission”, or “recklessly and with knowledge that such loss would probably result” in limitation cases.

3.2.2.1 Actual fault or privity

Under the 1957 Convention, the shipowner will lose his right to limitation if he fails to prove that the relevant damage was not caused by his “actual fault or privity”. Here the ISM Code is likely to have a great direct effect.

First of all, it is necessary to make clear within the organisation whose “actual fault or privity” can be regarded as the shipowner’s. There have been many court decisions in the United Kingdom about this issue. It is clear that it should be the “actual fault or privity” of someone who is not merely a servant or agent of the company but rather of someone whose action is of the company itself (Vlasto, 1998).

In his article “The loss of the right to limit”, Professor Robert Grime (1986, 107) summarised some cases from English courts, such as *the Lennards Carrying Co. v Asiatic Petroleum Co. Ltd*, *the Lady Gwendolen* case, *the Garden City* case and *the Marion* case and came to the conclusion that:

“the actual fault of a shipowning company included: a fault brought home to the Board of Directors; the fault of a proven *alter ego* who need not be a Board member; and the fault of a person, partnership or company which is either a registered ship’s manager or to whom management has been wholly delegated.”

The person whose “fault or privity” can be regarded as the shipowner must be the person who represents “the directing minds and will” of the company. What circumstance the knowledge or negligence of a person acting with the authority of a company could be attributed to the company for the purpose of establishing liability is different in each case.

Generally, the phrase “actual fault or privity” does not raise any question with regard to malice or reprehensible conduct. Fault does not necessarily imply bad behaviour, i.e. in legal terms, the purposive breach of some generally binding obligation. It can also encompass carelessness, lapse of attention or simply inefficiency (Grime, 1986, 104).

A shipowner’s “actual fault” is seldom in question because of the physical separation between ship and shore. However if the fault causing the accident can be traced back to managerial shortcomings in the maintenance, manning, training or supply of the vessel, the ISM Code will certainly help claimants. The ISM Code as a mandatory law lays down requirements for establishment and maintenance of a Safety Management System (SMS) within the organisation. So a defect in the SMS may be sufficient to establish the actual fault on the part of the shipowner. A failure to

implement the SMS may give rise to allegations that the company's senior management is at fault (International Safety Management Code, Part III, 1998). The ISM Code will enable the claimant to obtain good disclosure of the company's SMS, which should have been expressly designed to guard the shipowner against such failures (Intertanko, 1996, 21).

The "privity" means "with knowledge and consent". It will be the knowledge and consent of someone in the organisation, whose consent is properly to be regarded as the consent of the organisation itself (Vlasto, 1998). To be privy to another's action means to have private knowledge of it. Thus "privity" in the phrase "actual fault or privity" needs to mean no more than that the shipowner was aware of the fault. A shipowner who knew of, or who wilfully shut his eyes to a fault must take the risk of being held actually at fault himself as well as privy to the fault of others (Grime, 1986, 109).

In practice, the privity can be proved by showing that someone in a high position within the organisation knew of the circumstances likely to give rise to the risk and failed to do what was necessary to remove that risk. The concept of privity can be extended from the actual knowledge to catch those who turn a blind eye to the circumstance.

The ISM Code may be relevant to the concept of privity . Article 9 of the ISM Code requires that the SMS should ensure non-conformities, accidents and hazardous situations to be reported to the Company. The reporting system will make it more likely that the shipowner's management become aware of a safety problem.

The knowledge of a particular problem, for example something affecting seaworthiness, has been reported by a low level staff member within the organisation. This knowledge should be passed to the designated person(s) under the SMS procedures. The designated person(s) should report it to the shipowner's senior

management. If the “non-conformities, accidents and hazardous situations” have been reported to the highest level management, under the properly implemented SMS, the shipowner will have actual knowledge of the problem. The shipowner will be easily proved to have privity. Then if the company did nothing to settle the problem and damage occurred as a result of these non-conformities, the shipowner is turning a blind eye to the situation. In these cases, he may lose his right to limitation.

3.2.2.2 Recklessness with knowledge

Under the LLMC 1976 Convention, a person liable will lose his right to limit liability if it is proved that “the loss resulted from his personal act or omission committed with intent to cause such loss or recklessly with knowledge that such loss would probably result” (Article 4, the LLMC 1976 Convention).

The LLMC 1976 Convention presents a different standard of challenge to the right of limitation of the person liable, i.e. intentionally causing the loss or doing so recklessly with knowledge that the loss was a probability. This new standard is clearly narrower than “actual fault or privity” which is described in the 1957 Convention. First, it specifies in precise terms the mental element which must be proved in the person entitled to limit. Second, it applies the mental element, intention or recklessness, not to the negligent act but to the consequences (Grime, 1986, 110).

In the case of corporations, it is still necessary to consider whose act or omission will be treated as the “personal” act or omission which may defeat the right to limit. It seems that the “alter ego” concept will have to be applied in order to ascertain whose “action is the very action of the company itself” (Griggs and Williams, 1998, 28). For the claimant to break limitation, he has to prove that the loss or damage claimed resulted from a personal act or omission of the legal persona of the shipowning

company. This legal persona of the company has anticipated the likelihood of the loss or damage but acted or failed to act regardless of that probability.

The word “recklessly” or “recklessness” connotes either carelessness or utter heedlessness of the consequence with the result that the perpetrator is deemed to have considered neither the probability nor even the possibility of a like result (Griggs and Williams, 1998, 30).

According to Heward (1996), the LLMC 1976 Convention is more favourable to shipowners. It becomes much easier for a shipowner to limit liability than it was previously. The burden of proof, the recklessness and knowledge has been shifted to the claimants.

It is doubtful that the ISM Code will have a significant effect upon a shipowner's right to limit under the LLMC 1976 Convention (Potential legal implication of ISM Code, 1996). However the requirement for reporting defects, which affect the safety of the ship, upwards within the company's chain of command will increase the risk to the shipowner's right of limitation.

Article 4 of the ISM Code requires establishing a link between “the safety operation of each ship” and “the highest level of management” in the shipowning or operating company. So if the wrongful act in question consists of or arises out of a breach of the ISM Code, it will be easier to prove a “personal act or omission” on the part of the shipowner (Heward, 1996).

If the highest level of management turns a blind eye to a serious safety problem or fails to correct the shortcoming aboard the ship which has been apparent from the documents required by Article 9 of the ISM Code, the owner will probably be regarded as reckless.

Furthermore, there will be a significantly greater amount of paper in existence documenting the owner's safety record. This may provide more evidence to the claimant to run a limitation argument.

In deciding whether the shipowner's behaviour was such that it should deprive him of the right to limit, the court will have to decide whether the standard of behaviour exhibited fell below the industry norm. The ISM Code provides a standard, which is accepted by the industry for testing if the shipowner has acted as a reasonable and prudent shipowner. A two stage test will apply in the case: was there an appropriate SMS provided by the company and has the company properly implemented the SMS?

3.2.2.3 The status of the designated person(s)

With the introduction of the designated person(s), an interesting question has been raised that whether or not the "actual fault or privity" or "personal act or omission, recklessly with knowledge that the loss will probably result" by the designated person(s) would constitute an act of the shipowner and result in the loss of right of limitation.

According to Article 4 of the ISM Code, a person or persons ashore should be designated to have direct access to the highest level of management in order to ensure the safe operation of each ship and to provide a link between the Company and those on board. The designated person(s) has the responsibility and authority for monitoring the safety and pollution prevention aspects of the operation of each ship.

There are two opposite opinions to this question. Grime (1995) in his article "Legal Framework of the Code: Responsibilities and Liabilities" states:

“Under English law, and in many other jurisdictions, a company is fixed with the knowledge of any person within the organisation to whom responsibilities have been properly delegated. A designated person(s) under the ISM Code must be such a person with regard to the matters contained in Article 4, the ‘privity’ of the designated person(s) must be the privity of the Company”.

According to Paranjpe (1997), given the broad scope of the duties of the designated person(s) under Article 4 of the ISM Code, it is almost certain that the court will regard the knowledge of the designated person(s) as the knowledge of the shipowner.

On the contrary, some people have argued that because the designated person(s) may not be the senior manager, his knowledge would not necessarily constitute the knowledge of the shipowner.

Vlasto (1998) disagrees with the notion that the designated person(s)’s knowledge and conduct is that of the shipowner. He regards that the designated person(s) as being lower down the authority chain with the specific task of monitoring the safety and pollution prevention aspects of the ship operation. The designated person’s function is a filter. He will have a vast amount of information, much of which will stay with him. So there may have been knowledge that the designated person(s) had but did not pass onto the highest level of management.

The latter idea seems correct. The structure and provisions of the ISM Code do not seem to suggest that the designated person(s) is, or has, to be the directing mind of the owners on the question of safety. The Code requires the designated person(s) to have direct access to the highest level of management, so it must presumably indicate that the designated person(s) need not to be a senior manager himself. In some companies, he does not even have to be the company’s safety officer.

The designated person(s) is not the person who is responsible for safety matters in the Company. His responsibility and authority include only monitoring safety and ensuring that adequate resources are applied. There is no suggestion in the ISM Code that the knowledge of the designated person(s) should be deemed to be in the possession of top management—even in respect of that information which the designated person(s) ought properly to have passed onto the top management. So the knowledge of the designated person(s) would not necessarily constitute the knowledge of the shipowner. His action or omission will not be that of the legal persona of the company unless it has been stated by the company's constitution.

In many cases the knowledge of facts possessed by the designated person(s) will probably not be reported upwards to the highest level of management but sideways to the responsible member of the technical staff (Intertanko, 1996, 26). But if the designated person(s) has reported the safety problem to the highest level of management and included the probable consequence of the problem, the highest level of management has been made aware of this safety problem, and thus knowledge will become the knowledge of the shipowner. The shipowner can not then turn a blind eye. Blind eye knowledge is as good as actual knowledge. If the top manager consciously decides not to follow up on a report from the designated person(s) about lack of resources in a particular area which subsequently has a causative effect on a casualty, the shipowner will be regarded to have privity or show recklessness to the problem. This will threaten his right to limitation.

3.2.3 Conclusion

The introduction of the ISM Code will make it more difficult to limit under the 1957 Convention, the “actual fault or privity” regime, because of the negative burden of proof on the shipowner and the information available to the claimant as the shipowner's compliance with his ISM Code obligations will be much more extensive than before.

The limitation under the LLMC 1976 Convention and other specific/contractual regimes will still be difficult to challenge. However the liable person's right to limit will face more challenges than previously.

There is no doubt that if limitation becomes relevant, the shipowner's systems and procedures will be put under the microscope and only the healthiest of specimens are assured to pass the rigorous test of limitation (Intertanko, 1996, 27). It will be tested by the courts that whether or not the fault, the knowledge and act or omission of the designated person(s) should be taken to be those of top management, or of the legal persona of the company.

The smaller shipowner may suffer more risk than the larger one on limitation issues. The smaller the organisation, the greater the likelihood will be that most of the information known to the designated person(s) will equally be known by top management or the shipowner, especially for that small shipowner who is personally responsible for the operation of his ship. He will be, in many respects, more susceptible to having his limit broken.

On the positive side, if the shipowner or the operator has established, implemented and maintained an effective SMS, and he "says what he does and does what he says", it will be difficult for claimants to prove "recklessness and with the knowledge that the loss would probably result" (the LLMC 1976 Convention) and "actual fault or privity" (the 1957 Convention). In the meantime, as complete documenting of the ship safety operation, the shipowner's burden of proof under the 1957 Convention will be easy to satisfy.

3.3 The other aspects of the civil liability of shipowners

There are some other aspects about shipowners' civil liability which will be affected by the introduction of the ISM Code.

3.3.1 Limitation of liability for oil pollution

Oil pollution from ships has been at the focus of attention in international law in the past 30 years. With the increase in the size of oil tankers, the risk of great oil pollution damage has also increased. The public has become more and more sensitive to the environmental problem. Even a minor oil spill will become an emotive subject and attract the media. International organisations and governmental maritime safety agencies are under pressure to intervene actively following a pollution incident.

The International Convention on Civil Liability of Oil Pollution Damage 1969 (CLC 69) and its revised versions contain regulations governing the shipowners' liability for oil pollution damage. Under the Convention, the shipowner has strict liability for oil pollution damage, i.e. the shipowner is liable without having committed any error in the accident. However, the shipowner has also been given the right to limit his liability to a certain amount.

CLC 69 has been incorporated into national laws and regulations by many oil importing/exporting countries. However some countries have set their own legal frameworks for oil pollution. One of the most notable examples is the United States, which enacted its own oil pollution legislation in 1990, i.e. the Oil Pollution Act 1990 (OPA 90). OPA 90 establishes limits of liability for parties responsible for oil spills in the waters of the United States. These limits of liability do not apply to those incidents that were proximately caused by the gross negligence or wilful

misconduct of or in “violation of an applicable federal safety, construction, or operating regulation” by the responsible party (Intertanko, 1996, 32).

The ISM Code may have little relevance to pollution claims which are governed by international conventions. Since the shipowner has strict liability for oil pollution damage, all claims are channelled to the carrier. However in practice, the ISM Code may be relevant to issues of breaking limitation.

Under CLC 69, the shipowner “shall not be entitled to avail himself of the limitation”, “if the incident occurred as a result of the actual fault or privity of the owner” (Article V-2, CLC 69). In the 1984 revised version of CLC, “the owner shall not be entitled to limit his liability under this convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with the knowledge that such damage would probably result”. Obviously, the condition in CLC 69 is similar to the 1957 Limitation Convention and conditions in the 1984 revised version (not in force) and the 1992 Protocols are similar to the LLMC 1976 Convention as discussed in section 3.2 of this chapter.

Generally, the extensive records that shipowners are required to keep under the ISM Code will be used as evidence against the shipowner in the court. Under the ISM Code, the shipowner will be required to examine his own operations and document any non-conformities with international safety and pollution prevention standards. These documents will provide an opportunity to place the shipowner in a bad position in the claim. Any inconsistencies or omissions in the shipowner’s records could be used in court to call the shipowner’s credibility into question (Maritime lawyer warns that ISM Code requirements could hurt shipowner in court, 1997).

On the other hand, the entity identified on the DOC as a vessel's manager would very likely be considered as the "operator" under OPA 90. So the ISM Code may help to identify who is the responsible party in the claim under OPA 90.

3.3.2 Death of or personal injury to passengers

Passenger death or personal injury claims are generally based upon fault and may well be affected by the ISM Code.

The Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, governs such kinds of claims. Shipowner's liability under this convention is based on "fault or neglect". It is stated in Article 3 that "the carrier shall be liable for the damage suffered as a result of the death of or personal injury to a passenger ... if the incident which caused the damage so suffered ... was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment".

The shipowner has the right to limit his liability, but this limitation will be broken "if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result" (Article 13, the Athens Convention).

The impact of the ISM Code on the fault or neglect of the carrier and on the shipowner's right to limit his liability are similar to conditions which have already been discussed in sections 3.1 and 3.2 of this chapter.

3.3.3 Collision liability

Most collision accidents are caused by human error, i.e. mistakes in navigational procedures. Collision liability will be around issues of fault which are usually

established by references to agreed standards of navigation, such as the International Rules for Preventing Collisions at Sea and good seamanship in practice (Grime, 1995).

The ISM Code may have some relevance to these issues. The qualification and training of the crew on board, the adequacy of the charts and the watch-keeping system, familiarity with the collision rules and other safety regulations and so on, must all be regulated by the ship's SMS.

3.3.4 Charterparty claims

Charterparty claims may also find room for the ISM Code.

Both time and voyage charterparties contain provisions clearly stating or incorporating the Hague-Visby Rules into the charterparty to ensure that providing a seaworthy ship is a central obligation of the shipowner.

It seems that in further charterparty claims, the shipowner's seaworthiness obligations will also extend to exercising due diligence to comply with the provisions of the ISM Code (Intertanko, 1996, 35-36). Not only are a valid DOC and SMC required to exist, but the vessel should also have a properly implemented and maintained SMS which complies with the ISM Code.

The Baltic and International Maritime Council (BIMCO), after consulting the International Group of P & I Clubs, drafted a Standard ISM Clause in March 1998 to be incorporated into both time and voyage charterparties in the future. The BIMCO Standard ISM Clause requires that shipowners "shall procure that both the vessel and the Company (as defined by the ISM Code) shall comply with the requirements of the ISM Code" and "except as otherwise provided in this charterparty, loss, damage, expense or delay caused by failure on the part of the owners or the Company to

comply with the ISM Code shall be for the owners' account" (Brokers and the ISM Code, 1998). If this clause has been incorporated into the charterparty concluded, the shipowner will be in an unfavourable position in the charterparty claim in case of any breach of requirement of the ISM Code.

Chapter 4

The Impact of the ISM Code on Ship Owner's Criminal Liability

Neither the International Safety management (ISM) Code nor the International Convention for Safety of Life at Sea (SOLAS) Chapter IX have imposed any specific criminal liability on shipowners for failing to comply with their provisions. This is because parties of the international conventions are states rather than individual shipowners. However, the implementation of the ISM Code will have an impact on a shipowner's criminal liability. The failure to comply with the ISM Code may result in liability being established under an independent criminal statute. On the other hand, in some jurisdictions it may give rise to criminal sanctions under the legislation implementing the ISM Code itself (International Safety Management Code, Part III, 1998).

Criminal law approaches vary greatly from one country to another. This Chapter will focus on the English law system to see how the ISM Code will affect the shipowner's criminal liability under the United Kingdom Merchant Shipping Act 1995 and the Draft Involuntary Homicide Bill which was recommended by the Law Commission in 1995.

4.1 The Merchant Shipping Act 1995

Manslaughter or criminal negligence charges are often brought against senior crew members following incidents involving loss of life. In some cases, technical superintendents or other shore based personnel will also be at risk. Under the

Merchant Shipping Act 1995, sections 98 and 100, which revised the Merchant Shipping Act 1988 sections 30 and 32, running a dangerously unsafe ship or the unsafe operation of a ship are statutory criminal offences for which the master and the shipowner may be convicted (Intertanko, 1996, 50). This will also apply to the charterer or manager who has concluded a charter party or management agreement with the shipowner.

A large majority of ships are owned or managed by companies. So whether the owning or managing company would be guilty of involuntary corporate manslaughter under common law in the event of loss of life resulting from breach of duty of care through unsafe operation of a ship will depend on the application of the gross negligence test, which was adopted by the House of Lords in the *R v Adomako* case. The test includes the following steps: firstly, whether the individual defendant was negligent; secondly, did the breach of duty of care cause death? thirdly, should the breach of duty be characterised as gross negligence and, therefore a crime? The company will be convicted of manslaughter if the independent defendant, who is a key individual in the corporate structure, has been proved guilty of manslaughter himself (Macdonald, 1998).

Just as Bingham L. J. said in *R v HM Coroner for East Kent* case:

“A company may be vicariously liable for the negligent acts and omissions of its servants and agents, but for a company to be criminally liable for manslaughter...it is required that manslaughter should be established not against those who acted for or in the name of the company but against who were to be identified as the embodiment of the company itself” (Macdonald, 1998).

Those who control the corporation will be treated as embodying the corporation. The *alter ego* or “directing mind and will” of the company is established by reference to

the conduct of key officers. Generally speaking, the managing director and/or directors of a UK registered company (or their equivalent in foreign corporations) can represent the company's "directing mind and will" (Macdonald, 1998). This can also be called the Principle of Identification.

4.2 The Herald of Free Enterprise disaster

The Ro/Ro passenger and freight ferry Herald of Free Enterprise was owned by Townsend Car Ferries Limited, which was a subsidiary of the Peninsular & Oriental Steam Navigation Company at the time of the casualty. On the 6th March 1987, the ferry Herald of Free Enterprise sailed from the inner harbour of Zeebrugge at 1805 GMT. She was manned by 80 crew members and laden with 81 cars, 47 freight vehicles and three other vehicles. Approximately 459 passengers were onboard the ship. The Herald of Free Enterprise passed the outer mole at 1824 and capsizes about four minutes later. No less than 150 passengers and 38 crew members lost their lives and many others were injured (UK Department of Transport, 1987, 1).

The Herald of Free Enterprise capsized because she went to sea with her inner and outer bow doors open. The assistant bosun, who had the duty to close the bow doors at the time of departure from Zeebrugge, failed to carry out his duty. The chief officer also failed to check and ensure that the bow doors were secure when leaving port. According to the General Instruction issued by the company in July 1984, as the officer for loading the main vehicle deck, it was the chief officer's duty to check and ensure the bow doors to be secured. It is clearly that the negligence of the assistant bosun and the chief officer were the immediate cause of the disaster.

This was not the first occasion on which such a failure had occurred. In October 1983, the assistant bosun of the Pride of Free Enterprise, the sister ship of Herald of Free Enterprise, had fallen asleep and as a result he neglected to close both the bow and stern doors on the sailing of the vessel from Dover.

The Court finally found that the capsizing of the Herald of Free Enterprise was partly caused or contributed to by serious negligence in the discharge of their duties by the master, the chief officer and the assistant bosun, and partly caused or contributed to by the fault of the shipowner. As a consequence, the certificates of the master and the chief officer were suspended by the Court (UK Department of Transport, 1987).

During the prosecution of the shipowner, the Judge recognised that the identification principle allowed *mens rea* to be imputed to the corporation, thus permitting criminal convictions including manslaughter. But the trial against the shipowner and most senior individual defendants failed. As discussed before, to convict the company of manslaughter, individual defendants who can be identified as the company should have to be guilty of manslaughter themselves. But in this case, there was not sufficient evidence of such culpability (Macdonald, 1998).

4.3 Law Commission Recommendation

The success of the criminal charges against individuals concerned or the company itself for involuntary manslaughter or similar is, more or less, in order to placate angry relatives and the local press (Intertanko, 1996, 50). There was a widespread feeling in the public that it was wrong that the criminal law placed all the blame on junior employees who may be held individually responsible but did nothing to fix responsibility on their employers who operated and profited from the service.

The Law Commission recommended in 1995 the introduction of a new offence of “corporate killing” for which a company may be liable if the death resulted from management failure and the failure constituted conduct falling below what could reasonably be expected of the corporation in that circumstance (International Safety Management Code, Part III, 1998). There is no process of identifying corporate culpability through the “directing mind and will” of individuals.

Clause 4 of the Draft Involuntary Homicide Bill provides:

“4 (1). A corporation is guilty of corporate killing if—

- (a) a management failure by the corporation is the cause or one of the causes of a person’s death; and
- (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.

(2) For the purposes of subsection (1) above—

- (a) there is a management failure by the corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities; and
- (b) such a failure may be regarded as a cause of a person’s death notwithstanding that the immediate cause is the act or omission of an individual.”

If this new offence or something similar is introduced, it will be the shipowner’s duty to provide a safe system of work. The shipowner’s conduct will be tested by whether there was a failure to ensure safety in the management or organisation of the corporation’s activities.

Corporate killing will be committed only where the company’s conduct fell far below what could reasonably be expected in the circumstances. Practices generally regarded as acceptable within the industry may be considered.

4.4 The impact of the ISM Code

The introduction of the ISM Code may have an effect on both the present and possible future criminal law.

The ISM Code requires a company to collect and maintain a large amount of information about its Safety Management System (SMS). It will give the opportunity to the court to learn much more about the company than in the past. In the meantime, it provides a road map for investigation and judicial proceedings.

Under the Merchant Shipping Act 1995, to convict a corporation of criminal liability, the individual defendant, whose gross negligence leads to a charge of corporate manslaughter against the corporation, must be identified as a key individual in the corporation. The company's SMS and the contents of their manuals will help to identify the key person who can represent the company's directing mind and will. For example, Article 3.2 of the ISM Code requires that the company has to define and document the responsibility and authority of personnel who manage, perform and verify work relating to safety and pollution prevention issues. This will give the necessary information for the identification.

The designated person(s) will still be the point at issue. Would possible gross negligence of the designated person(s) in the exercise of his duties be imputed upon the company? An effective designated person(s) will bring the knowledge about crew, cargo, navigation etc to the company's *alter ego*. Although he may be found guilty himself, he is not by the ISM Code made the person responsible for the operation of a ship but only for monitoring safety matters. He has the duty to give reports and advice to the company's senior management. But he does not automatically represent the directing mind and will of the company, unless it has been clearly mentioned in the company's constitution.

It seems that the ISM Code may have more impact on "corporate killing", the new offence. Factors, which are related to management failure will include inadequate safety procedures, lack of safety training and managers ignoring a known problem (Macdonald, 1998). All these aspects will be affected by the ISM Code.

In article 1.4 of the ISM Code, the Company is required to develop, implement and maintain a SMS which includes instructions and procedures to ensure the safe operation of ships. Procedures for reporting accidents and non-conformities with the provisions of the ISM Code are also required.

The Company should ensure that any training, which may be required in support of the SMS, is provided for all personnel concerned (Article 6.5, the ISM code).

The report and analysis of non-conformities, accidents and hazardous situations and the implementation of the corrective action is another most important requirement of the ISM Code (Article 9, the ISM Code).

The ISM Code provides a guideline for the company to prevent any management failure. In the meantime, it also provides a standard to test whether the company has management failure within the operation of the ship. A breach of the ISM Code and non-conformities of the SMS will be regarded as management failure, which may lead to criminal prosecution.

On the other hand, the offence will be committed only where the company's conduct falls far below what could be expected in the circumstances. The ISM Code, as an international standard for the safe management and operation of ships, will be regarded as an accepted industry standard for measuring and judging the relevant conduct of the shipowner.

Now let us review the Herald of Free Enterprise disaster and see the possible legal consequences if it had happened after the ISM Code had entered into force.

The immediate cause of the deaths was the conduct of the assistant bosun, the chief officer or both. Another cause was the fact that the company failed to establish an

adequate safety system for the operation of the ship (Macdonald, 1998). The assistant bosun should never have been in the position where the safety of the ship and its passengers depended on him without any adequate system of checks or controls. This failure might be found to be far below what could reasonably have been expected.

The Board of Directors did not appreciate their responsibilities for the safe management of their ships. This was not the first occasion on which the company's ship had gone to sea with doors open. Earlier incidents should have been reported by the designated person(s) to the highest level of management, but the management had not acted upon the report and a similar incident happened again.

All this evidences will be used against the shipowner. It shows that the senior management had failures in the safe management of its ships and the company had management failure. It will be thus easy to charge the shipowner with the crime.

However, if the ISM Code had already entered into force and the company had acted correctly according to the requirements of the ISM Code, the Herald of Free Enterprise disaster and similar accidents would, hopefully, not have happened.

On the positive side, if a company can show through its SMS documentation that it is committed to correcting deficiencies and improving its safety and environmental record, the shipowner will be in a better position to deal with the criminal litigation and to plead mitigating circumstance.

Chapter 5

The Impact of the ISM Code on Marine Insurance

Although the marine transport technology has developed very fast and navigation has become safer than before, sea transport is still a high risk business. All persons engaged in shipping constantly incur considerable risks. Shipowners may suffer loss or damage to their ships and become liable to pay damages to other ships or to cargo owners as well as pay for the damage to the marine environment. They may also become liable for the loss of life or personal injury of crew members or passengers onboard. So it has long been a practice to insure against the consequences of marine perils. The International Safety Management (ISM) Code sets an international standard for ensuring safety at sea, prevention of human injury or loss of life and avoidance of damage to the environment in particular to the marine environment and to property. It may have a significant effect on marine insurance.

5.1 Change of policy

The International Group of P & I Clubs, Hull and Machinery underwriters and cargo insurers all have adjusted conditions in policies to meet the introduction of the ISM Code.

The rules of the P & I Clubs contain a provision that the vessel entered shall comply with the statutory requirements. The ISM Code forms a part (Chapter IX) of the International Convention for Safety of Life at Sea (SOLAS) Convention. With the

coming into force of the ISM Code and implementation into the national laws of relevant flag states, the compliance with the ISM Code has become a mandatory requirement. It is also the policy decision of most of the Clubs that they do not accept entry of any vessel which has not complied with the relevant ISM Code requirements. Shipowners who did not get the required ISM certificates, i.e. a Document of Compliance (DOC) for owners/managers and a Safety Management Certificate (SMC) for the ship, were not able to renew their existing P & I cover with an International Group club in 1999(Levy, 1998).

Rule 29.1.4 of the Assuranceforeningen Skuld (Gjensidig) (Skuld), one of the leading P & I clubs in Norway, includes the requirement for compliance with the ISM Code, It reads:

“The member shall comply with all statutory requirements of the state of the vessel’s flag, relating to the construction, adaptation, condition, fitment, equipment, manning, operation and management of the entered vessel (including applicable requirements of the ISM Code) and maintain the validity of the statutory certificates issued by or on behalf of the vessel’s flag state in relation to such requirements” (Skuld, 1999, 53).

Skuld also decided to include necessary information relating to the ISM Code within the Skuld entry form. The form must be completed by the company, which applies to enter a vessel with the club. So the valid ISM certificates are being “conditions precedent” for entry (Levy, 1998).

The lack of necessary ISM certificates will result in the termination or suspension of the P & I cover. If a vessel has been entered when the shipowners or managers have their DOC and the vessel its SMC in place, then the member has a continuing obligation to comply with all the statutory requirements of the flag state of the vessel, including the ISM Code.

The P & I insurance is a liability insurance. It gives the insurance cover to the assured member for errors and omissions made by employees for which the member can be held liable. The introduction of the ISM Code does not change this at all. The P & I clubs will still cover liabilities, losses, expenses and costs caused by non-conformity with the ISM Code. However, according to the rules of Skuld, the member will lose the cover from the club if a non-conformity has been reported to him but he did nothing to rectify it, or the member turned a blind eye by not ensuring that a system is in place where a non-conformity is reported to him, unless the member can prove that liability, loss, expense and cost would have been incurred in any event. This rule is only applicable to losses which have causal relation with the member's non-conformity. Other losses which have no such causal relation will still be covered by the club (Levy, 1998).

A limited exclusion clause was issued by the Joint Cargo Committee (JCC) of Lloyd's in May 1998. Under this clause, cargo owners who are aware of, or should have been aware that the insured cargo is carried by a non-ISM compliant vessel or whose owners/operators do not hold a DOC will lose insurance cover from cargo underwriters. Of course, the innocent cargo assured who may unwittingly find their cargoes shipped on non-certified vessels, will still be covered (London insurers act on ISM: New cargo clause introduced, 1998).

In the meantime, the London market's Joint Hull Committee (JHC) also issued a new set of guidelines on dealing with claims. Shipowners/operators will be required to show the DOC, the SMC and a statement from the designated person(s) that all relevant ISM Code procedures have been complied with before the hull underwriters start considering the claim (Key players express hopes on ISM Code, July 3, 1998).

Marine underwriters also give notice that insuring ships without ISM certificates could be illegal in certain circumstances. There may be allegations of criminal

conspiracy to breach or evade the legal requirement imposed by the flag state, e.g., the Merchant Shipping Act of United Kingdom (International Safety Management Code, Part III, 1998).

5.2 Unseaworthiness

Issues of seaworthiness and privity are directly relevant to a shipowner's ability to recover under a voyage or time policy.

Under the English Marine Insurance Act 1906, "in a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured" and "in a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness" (Section 39 (1) and (5)).

According to the Norwegian Marine Insurance Plan of 1964, section 45, "the insurer is not liable for loss that is a consequence of the ship not being in a seaworthy condition, provided that the assured was or ought to have been aware of the ship's defects at such a time that it would have been possible for him to intervene."

Article 244 of the Maritime Code of the People's Republic of China concerns unseaworthiness. It reads:

"unless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured ship arising from any of the following causes:

- (1) Unseaworthiness of the ship at the time of the commencement of the voyage, unless where under a time policy the insured has the knowledge thereof.”

It is not easy to apply these provisions in practice because insurers have to prove the unseaworthiness as well as the fact that the assured knew or ought to have known the unseaworthiness (Intertanko, 1996, 37).

Generally, unseaworthiness includes human failure, a poorly manned or managed ship may well be an unseaworthy ship. The owner's privity has the same meaning as in limitation cases. The insurance shall not cover liability or loss caused intentionally or by a reckless act or omission by the assured.

The introduction of the ISM Code will directly affect on these issues.

First, the ISM Code, as a safety standard, will be used as a yardstick for ascertaining whether the ship is unseaworthy. Non-compliance with the requirement of the ISM Code and the assured's own SMS will be easily proved as unseaworthiness. So if a ship is poorly managed through being in breach of the ISM Code and the loss or damage was caused by that failure, the assured will lose his insurance cover because of unseaworthiness.

Secondly, it will help to identify whether the assured was privy to the unseaworthiness. The ISM Code requires to establish a chain of command leading up to the highest level of management and fixes every person in that chain with a degree of responsibility for safety matters. The designated person(s) is a very important person in this chain. His duties are supervision and monitoring. He has to know the operation, the actual condition and management of the ship. The ISM Code also requires reporting of non-conformities to the Company. The designated person(s) is the receiver of all reports. If the designated person(s) knew about the

defect, it will be difficult for a person or persons who comprise the alter ego or the top management of an insured company to claim that he/they did not know the defect onboard the ship. If the designated person(s) is privy to any non-conformity or problem in general, the company will be assumed to be privy to these.

5.3 Duty of disclosure

The “utmost good faith” principle is one of the fundamental principles common to all insurance, but law of marine insurance requires an even higher standard of honesty. The English Marine Insurance Act 1906, section 17 states that “a contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.” Marine underwriters seldom inspect the object of insurance, i.e., the ship or cargoes. The decision of the insurer to underwrite the risk is based on the information provided by the assured and that information is accepted in good faith. So it is an absolute obligation on the assured to disclose all material facts which are known to him or which he is deemed to have known. The effect of non-disclosure is that the insurer will avoid the insurance contract (Donner, 1999).

It is very important for the insurer to obtain the best available information about the risk to be undertaken. That is why the assured is required to disclose to the insurer every material circumstance, which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk. But in practice, it is always a question of what kind of circumstance is material and must be disclosed. The English Marine Insurance Act 1906 did not help much on this subject. It only provides some circumstances, which need not to be disclosed. Generally, “only circumstances relating to the subject matter of the insurance, the ship and the perils are material” (Gaskell, and et al, 1998, 529). They are those factors, which as material to the risks considered in their own nature, a prudent and

experienced underwriter would deem it proper to consider” (Gaskell, and et al, 1998, 530).

Failure to give accurate loss record information would be an obvious non-disclosure argument (Intertanko, 1996, 41). The technical conditions, defects onboard the ship should also be disclosed to the insurer.

The ISM Code may have an effect on these issues. First, the ISM Code lays down a requirement for the shipowner/operator/manager to establish and maintain a reporting system. Any non-conformity with the Safety Management System (SMS) and deficiency onboard the ship should be reported from ship to shore. The designated person(s) is the person who provides a link between ships and shore. He also has a direct access to the highest level of management. So all the non-conformities, accidents and hazardous occurrences should be reported to the top management along this link. The shipowner will find it more difficult to turn a blind eye and say he did not know about the incident. If he did not disclose the defect which should have been disclosed to the insurer, he may breach the duty of disclosure and lose the insurance cover.

Secondly, the ISM Code also requires the company to document all ISM related activities. It will be easier for insurers to find, from a review of the ship’s ISM record following a casualty and a claim on the policy, whether or not the assured failed to disclose defects either in the SMS or in the implementation of the SMS.

Although the assured has held necessary ISM certificates, but after investigations of a major casualty it is found that the SMS has not been properly implemented, and a deficiency existed but was not reported or dealt with. The insurer might argue that the shipowners’ circumstances had not been disclosed or had been misrepresented. As a consequence, they may avoid the policy.

Chapter 6

Conclusions

Neither the International Safety Management (ISM) Code nor the Chapter IX of the International Convention for Safety of Life at Sea (SOLAS) Convention is directly concerned with issues of civil and criminal liability of the shipowner or his commercial or contractual relations with third parties. However, the ISM Code will affects a shipowner's legal responsibility on issues such as liability for cargo claims or claims following a casualty, his ability to limitation of liability and insurance arrangements.

First, the ISM Code lays down an industry-wide uniform standard for safe management of ships and environment protection. This standard, which will probably be regarded as a minimum standard, will be used for evaluating the shipowner's performance on issues such as seaworthiness, manning and training of personnel by assessing the adequacy and implementation of the shipowner's Safety Management System (SMS). The judge will have a benchmark to evaluate whether due diligence was exercised or the minimum standard of supervision and management was applied. The failure to meet that standard will be construed as lack of due diligence of the shipowner.

Secondly, the ISM Code requires the shipowner to set up a report and analysis system. All the non-conformities, accidents and hazardous occurrences should be

reporting from the ship up to the highest level of management through the report chain. The system should ensure that analysis and corrective action have been done. The shipowner will know everything concerned with safety and pollution prevention within the organisation. It will affect the shipowner's ability to limit his liability for maritime claims and the shipowner's insurance cover.

Thirdly, the safety management and pollution prevention issues of the organisation become much more transparent. The ISM Code requires the company to document all matters relevant to the SMS and maintain these documents. These records and data about the safety and pollution prevention will make it easy for a claimant to get enough documentary evidence concerning with the structure and organisation of the shipowner, the operation of the ship and its condition and seaworthiness. This may affect the shipowner's task in defending marine claims. So it is a strong suggestion that shipowners keep the records and documents simple, direct and not overly subject to interpretation.

Fourthly, the designated person(s) is a quite new concept in maritime law as well as in the international shipping industry. The actual legal status of the designated person(s) is still not quite clear, although it has been the subject of extensive deliberation and speculation amongst many lawyers, journalists and other well-intentioned commentators (Anderson, 1998, 63). It is unlikely to become clear until it has been tested in the courts. However, in fact, the actual interest lies in the legal implication of the relationship between the designated person(s) and the highest level of management of the organisation, the actual knowledge of the designated person(s) and how this new concept affects the shipowner's liability for maritime claims. It will still be interesting for people in the shipping industry to discuss topics relevant to the designated person(s), the qualification requirements for the designated person(s), his level of authority, his budgetary powers, his rank, whether and to what extent he administers or directs and to whom he should report on a daily basis or in special cases to the highest level of management etc.

Fifthly, the objectives of the ISM Code are to ensure safety at sea, prevention of human injury or loss of life and avoidance of damage to the environment and to property. So from the optimistic point of view, if the company has developed an adequate SMS and properly implements and maintains it according to the requirements of the ISM Code, hopefully, it will help the shipowner to improve his safety management and reduce marine accidents and casualties. As a consequence, shipowners may face less marine claims and they will be in a favourable position for defending themselves in the courts. It can assist the diligent shipowner to show that an accident at sea did not occur as a result of poor management.

The ISM Code has been in force for one year. However, up to now, there is no court decision concerning the legal impact of the ISM Code on shipowner's liability. As Professor Robert P. Grime (1995) said in his article: "there is still much that is doubtful and unclear about the legal impact of the ISM Code. No one can, however, doubt its importance." It will be interesting to see how the law develops in this field.

BIBLIOGRAPHY

‘A Question of Liability’, (1998, June). *Lloyd Shipping Management*, p 27.

Anderson, P (1998). *ISM Code: A practical guide to the legal and insurance implications*. London: LLP.

Assuranceforeningen Skuld (Gjensidig) (1999). *Skuld Statutes and Rule*. Oslo: Skuld.

‘Brokers and the ISM Code’, (March, 1998). *Baltic*, p 9.

COSCO Shanghai (1998). *The Training Course for Implementation of ISM Code in COSCO Shanghai*. Shanghai: COSCO Shanghai.

Department of Transport (1987). *The Merchant Shipping Act, 1894, mv. Herald of Free Enterprise, report of court no. 8074, formal investigation*. London: Department of Transport.

Donner, P (1996). ‘The Shipowner and His Liability’. *Maritime and Commercial Law*. Handout. World Maritime University, Malmö, Sweden.

Donner, P (1999). ‘Marine Insurance’. *Maritime and Commercial law*. Handout. World Maritime University, Malmö, Sweden.

‘Expert views’, (1998, June). *ISMA Focus*, pp 3-4.

Gaskell, N J J, Debattista, C and Swatton, R J (1998). *Chorley & Giles’ Shipping Law*. London: Pitman Publishing.

Gold, E (1996). 'Lessons in Corporate Responsibility: Learn From Disaster?' *The ISM Code Implementation in Practice- Corporate Risk: BIMCO Shipping Courses* (15-18 April, 1996: Copenhagen, Denmark). BIMCO. Copenhagen: BIMCO.

Griggs, P and Williams, R (1998). *Limitation Of Liability For Maritime Claims*. London: LLP.

Grime, R P (1986). 'The Loss of Right to Limit'. *Conference on the 1976 Convention on Limitation of Liability for Maritime Claims* (September 1986: Southampton, UK). Institute of Maritime Law, Southampton University. London: Sweet & Maxwell.

Grime, R P (1995). 'Legal Framework of the Code: Responsibilities and Liabilities'. *The ISM Code Implementation in Practice- Corporate Risk: BIMCO Shipping Courses* (18-22 September, 1995: Copenhagen, Denmark). BIMCO. Copenhagen: BIMCO.

Heward, R (1996). 'The Legal Consequences for Owners and Operators of the Introduction of the ISM Code'. *13th International Conference on Marine Transport Using Roll-on/Roll-off and Horizontal Handling Methods* (21-23 May, 1996: Lubeck, Germany). London: BML Business Meetings.

Huang, L J (1999). 'The Influence of ISM Code on Limitation of Liability for Marine Claims'. *China Shipping Gazette*, January 4, p

'In Support of Safety', (1998, September). *Lloyd's Shipping Economist*, pp26-27.

International Association of Independent Tanker Owners (Intertanko) (1996). *Legal implications of the ISM Code*. Oslo: Intertanko.

International Chamber of Shipping (ICS) and International Shipping Federation (ISF) (1996). *Guidelines on the Application of the IMO International Safety Management Code*, (3rd ed.). London: ICS/ISF.

International Maritime Organization (IMO) (1993). *Maritime Law*. London: IMO.

International Maritime Organization (IMO) (1995). *Guidelines on Implementation of the International Safety Management (ISM) Code by Administration*. Resolution A.788(19). London: IMO.

International Maritime Organization (IMO) (1999). *Summary of Status of Conventions*. <http://www.imo.org/imo/convent/summary.htm> (August 4, 1999)

‘International Safety Management Code, Part I’, (1998, February). *P&I International*, pp 38-40.

‘International Safety Management Code, part II’, (1998, March). *P&I International*, pp 62-64.

‘International Safety Management Code, Part III’, (1998, April). *P&I International*, pp 83-85.

‘ISM Truths, Myths and Grey Areas: A synthesis of the ISMA panel of experts’, (1998, June). *ISMA Focus*, p 2.

‘Key Players Express Hopes on ISM Code’, (1998, 3 July). *Lloyd’s List*, p 7.

Levy, H (1996). 'The P & I Club – How do the clubs evaluate the ISM Code'. *The ISM Code Implementation in Practice -Corporate Risk: BIMCO Shipping Courses* (15-18 April, 1996: Copenhagen, Denmark). BIMCO. Copenhagen: BIMCO.

Levy, H (1998). 'The ISM Code-- impact on P & I cover'. *BIMCO Bulletin*. Vol. 93, No. 6, pp36-41.

Li, X G (1996). 'Chinese Maritime Law on Global Limitation of Liability'. *Lloyd's Maritime and Commercial Law Quarterly*, Part 3, August, 1996, pp 337-402.

Lloyd's Register (1996). 'Example Safety Management Manual'. ISM Practical Pack. London: Lloyd's Register.

'London Insurers Act on ISM: New cargo clause introduced', (1998, 21 May). *Fairplay*, p 18.

Lord Donaldson of Lymington (1998). 'The ISM Code: the road to discovery?' *Lloyd's Maritime and Commercial Law Quarterly*, November, 1998, pp 526-534.

Macdonald, C (1998) 'The Criminal Liability of Shipowners: Present and Future Laws and the ISM Code'. *International Maritime Law*, No. 2, 1998, pp 39-45.

Mandaraka-Sheppard, A (1996). 'The International Safety Management Code in Perspective'. *P&I INTERNATIONAL*, June 1996, pp 107-110.

Maritime Code, 1992, Beijing, SCNPC.

'Maritime lawyer warns that ISM Code requirements could hurt shipowners in court', (1997, 20 June). *Global's Oil Pollution Bulletin*, pp 5-6.

Merchant Shipping Act, 1995 (Chapter 21), London, HMSO.

Mills, P (1997). 'ISM the Legal Implications'. *Lloyd's Maritime Asia*, April, p 47.

Mocatta, A A, Mustill, M J and Boyd, S C, Eds. (1984) *Scrutton on Charterparties and Bills of Lading* (19th ed.). London: Sweet & Maxwell.

Mottram, D (1998). 'Management Structure For The Maritime Industry'. *BIMCO Bulletin*, Vol. 93, NO. 2 , pp 8-13.

Ogg, T (1995). 'Some Legal Aspects of the ISM Code'. *Seaways*, December 1995, pp 3-5.

Ogg, T (1996). 'IMO's International Safety Management Code (The ISM Code)'. *International Journal of Shipping Law*, June 1996, pp 143-152.

Pamborides, G P (1996). 'The ISM Code: Potential Legal Implications'. *International Maritime Law*, No.2, 1996, pp 56-62.

Paranjpe, M R (1997). 'Designated Person and The Law'. *Indian Shipping*, Vol. 49, No. 6, pp 21-23.

'Potential Legal Implications of ISM Code'. (1996). *Indian Shipping*, Vol. 48, No. 12, pp 13-14.

Richardson, J (1998). *The Hague and Hague-Visby Rules*. London: LLP.

Rudd, J (1996). 'The international Safety Management Code'. *P & I International*, June, 1996, pp113-115.

Sahatjian, L C (1998). 'The ISM Code: A Brief Overview'. *Journal of Maritime Law and Commerce*, Vol. 29, No 3, pp 405-409.

Selvig, E (1984). 'An Introduction to the 1976 Convention'. *Conference on the 1976 Convention on Limitation of Liability for Maritime Claims*. (September 1984: Southampton, UK). Southampton University. London: Sweet & Maxwell.

Shaw, R (1998). 'The ISM Code and Limitation of Liability'. *The International Journal of Shipping Law*, Part 3, September, 1998, pp 169-172.

Vlasto, T (1998). 'The Impact of ISM Code on Limitation of Liability'. *BIMCO Bulletin*, Vol. 93, No. 6, pp 28-35.

Wilson, J F (1998). *Carriage of Goods by Sea*. London: Financial Times management.

'You ready for this?' (1997, February). *Hazardous Cargo Bulletin*, pp 63-65.

Appendix 1:
Resolution A.741(18) of the International Maritime Organization

Resolution A.741(18)
Adopted on 4 November 1993

**INTERNATIONAL MANAGEMENT CODE FOR THE SAFE OPERATION
OF SHIPS AND FOR POLLUTION PREVENTION**

(International Safety Management (ISM) Code)

THE ASSEMBLY,

RECALLING Article 150) of the Convention on the International Maritime Organization concerning the functions of the Assembly in relation to regulations and guidelines concerning maritime safety and the prevention and control of marine pollution from ships,

RECALLING ALSO resolution A.680(17), by which it invited Member Governments to encourage those responsible for the management and operation of ships to take appropriate steps to develop, implement and assess safety and pollution-prevention management in accordance with the IMO Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention,

RECALLING ALSO resolution A.596(15), by which it requested the Maritime Safety Committee to develop, as a matter of urgency, guidelines, wherever relevant, concerning shipboard and shore-based management, and its decision to include in the work programme of the Maritime Safety Committee and the Marine Environment Protection Committee an item on shipboard and shore-based management for the safe operation of ships and for the prevention of marine pollution, respectively,

RECALLING FURTHER resolution A.441 (XI), by which it invited every State to take the necessary steps to ensure that the owner of a ship which flies the flag of that State provides such State with the current information necessary to enable it to identify and contact the person contracted or otherwise entrusted by the owner to discharge his responsibilities for that ship in regard to matters relating to maritime safety and the protection of the marine environment,

RECALLING FURTHER resolution A.443(XI), by which it invited Governments to take the necessary steps to safeguard the shipmaster in the proper discharge of his responsibilities in regard to maritime safety and the protection of the marine environment,

RECOGNIZING the need for appropriate Organization of management to enable it to respond to the need of those on board ships to achieve and maintain high standards of safety and environmental protection,

RECOGNIZING ALSO that the most important means of preventing maritime casualties and pollution of the sea from ships is to design, construct, equip and maintain ships and to operate them with properly trained crews in compliance with international conventions and standards relating to maritime safety and pollution prevention,

NOTING that the Maritime Safety Committee is developing requirements for adoption by Contracting Governments to the International Convention for the Safety of Life at Sea (SOLAS),- 1974, which will make compliance with the Code referred to in operative paragraph I mandatory,

CONSIDERING that the early implementation of that Code would greatly assist in improving safety at sea and protection of the marine environment,

NOTING FURTHER that the Maritime Safety Committee and the Marine Environment Protection Committee have reviewed resolution A.680(I 7) and the Guidelines annexed thereto in developing the Code,

HAVING CONSIDERED the recommendations made by the Maritime Safety Committee at its sixty-second session and by the Marine Environment Protection Committee at its thirty-fourth session,

1. ADOPTS the International Management Code for the Safe Operation of Ships and for Pollution Prevention (International Safety Management (ISM) Code), set out in the annex to the present resolution;
2. STRONGLY URGES Governments to implement the ISM Code on a national basis, giving priority to passenger ships, tankers, gas carriers, bulk carriers and mobile offshore units which are flying their flags, as soon as possible but not later than 1 June 1998, pending development of the mandatory application of the Code;
3. REQUESTS Governments to inform the Maritime Safety Committee and the Marine Environment Protection Committee of the action they have taken in implementing the ISM Code;
4. REQUESTS the Maritime Safety Committee and the Marine Environment Protection Committee to develop Guidelines for the implementation of the ISM Code;
5. REQUESTS ALSO the Maritime Safety Committee and the Marine Environment Protection Committee to keep the Code and its associated Guidelines under review and to amend them as necessary;

REVOKES Resolution A.680(17).

Annex

INTERNATIONAL MANAGEMENT CODE FOR THE SAFE OPERATION OF SHIPS AND FOR POLLUTION PREVENTION (International Safety Management (ISM) Code)

Contents

PREAMBLE

1 GENERAL

- 1.1 Definitions
- 1.2 Objectives
- 1.3 Application
- 1.4 Functional requirements for a safety-management system (SMS)

2 SAFETY AND ENVIRONMENTAL-PROTECTION POLICY

3 COMPANY RESPONSIBILITIES AND AUTHORITY

4 DESIGNATED PERSON(S)

5 MASTER'S RESPONSIBILITY AND AUTHORITY

6 RESOURCES AND PERSONNEL

7 DEVELOPMENT OF PLANS FOR SHIPBOARD OPERATIONS

8 EMERGENCY PREPAREDNESS

9 REPORTS AND ANALYSIS OF NON-CONFORMITIES, ACCIDENTS AND HAZARDOUS OCCURRENCES

10 MAINTENANCE OF THE SHIP AND EQUIPMENT

11 DOCUMENTATION

12 COMPANY VERIFICATION, REVIEW AND EVALUATION CERTIFICATION, VERIFICATION AND CONTROL

PREAMBLE

1 The purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention.

2 The Assembly adopted resolution A.443(XI), by which it invited all Governments to take the necessary steps to safeguard the shipmaster in the proper discharge of his responsibilities with regard to maritime safety and the protection of the marine environment.

3 The Assembly also adopted resolution A.680(I 7), by which it further recognized the need for appropriate organization of management to enable it to respond to the need of those on board ships to achieve and maintain high standards of safety and environmental protection.

4 Recognizing that no two shipping companies or shipowners are the same, and that ships operate under a wide range of different conditions, the Code is based on general principles and objectives.

5 The Code is expressed in broad terms so that it can have a widespread application. Clearly, different levels of management, whether shore-based or at sea, will require varying levels of knowledge and awareness of the items outlined.

6 The cornerstone of good safety management is commitment from the top. In matters of safety and pollution prevention it is the commitment, competence, attitudes and motivation of individuals at all levels that determines the end result.

1 GENERAL

1.1 Definitions

1.1.1 International Safety Management (ISM) Code means the International Management Code for the Safe Operation of Ships and for Pollution Prevention as adopted by the Assembly, as may be amended by the Organization.

1.1.2 Company means the owner of the ship or any other organization or person such as the manager, or the bare boat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who on assuming such responsibility has agreed to take over all the duties and responsibility imposed by the Code.

1.1.3 Administration means the Government of the State whose flag the ship is entitled to fly.

1.2 Objectives

1.2.1 The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment, and to property.

1.2.2 Safety-management objectives of the Company should, *inter alia*:

- .1 provide for safe practices in ship operation and a safe working environment;
- .2 establish safeguards against all identified risks; and
- .3 continuously improve safety-management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection. t

1.2.3 The safety-management system should ensure:

- .1 compliance with mandatory rules and regulations; and
- .2 that applicable codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken into account.

1.3 Application

The requirements of this Code may be applied to all ships.

1.4 Functional requirements for a safety management system (SMS)

Every Company should develop, implement and maintain a safety management system (SMS) which includes the following functional requirements:

- .1 a safety and environmental-protection policy;
- .2 instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;
- .3 defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel;
- .4 procedures for reporting accidents and non-conformities with the provisions of this Code;
- .5 procedures to prepare for and respond to emergency situations; and

- .6 procedures for internal audits and management reviews.

2 SAFETY AND ENVIRONMENTAL-PROTECTION POLICY

2.1 The Company should establish a safety and environmental-protection policy which describes how the objectives given in paragraph 1.2 will be achieved.

2.2 The Company should ensure that the policy is implemented and maintained at all levels of the organization, both ship-based as well as shore-based.

3 COMPANY RESPONSIBILITIES AND AUTHORITY

3.1 If the entity who is responsible for the operation of the ship is other than the owner, the owner must report the full name and details of such entity to the Administration.

3.2 The Company should define and document the responsibility, authority and interrelation of all personnel who manage, perform and verify work relating to and affecting safety and pollution prevention.

3.3 The Company is responsible for ensuring that adequate resources and shore-based support are provided to enable the designated person or persons to carry out their functions.

4 DESIGNATED PERSON(S)

To ensure the safe operation of each ship and to provide a link between the company and those on board, every company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution-prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required.

5 RESPONSIBILITY AND AUTHORITY

5.1 The Company should clearly define and document the master's responsibility with regard to:

- .1 implementing the safety and environmental-protection policy of the Company;
- .2 motivating the crew in the observation of that policy;
- .3 issuing appropriate orders and instructions in a clear and simple manner;
- .4 verifying that specified requirements are observed; and
- .5 reviewing the SMS and reporting its deficiencies to the shore-based management.

5.2 The Company should ensure that the SMS operating on board the ship contains a clear statement emphasizing the master's authority. The Company should establish in the SMS that the master has the overriding authority and the responsibility to make decisions with respect to safety and pollution prevention and to request the Company's assistance as may be necessary.

6 RESOURCES AND PERSONNEL

The Company should ensure that the master is:

- .1 properly qualified for command;
- .2 fully conversant with the Company's SMS; and

- .3 given the necessary support so that the master's duties can be safely performed.

6.2 The Company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements.

6.3 The Company should establish procedures to ensure that new personnel and personnel transferred to new assignments related to safety and protection of the environment are given proper familiarization with their duties. Instructions which are essential to be provided prior to sailing should be identified, documented and given.

6.4 The Company should ensure that all personnel involved in the Company's SMS have an adequate understanding of relevant rules, regulations, codes and guidelines.

6.5 The Company should establish and maintain procedures for identifying any training which may be required in support of the SMS and ensure that such training is provided for all personnel concerned.

6.6 The Company should establish procedures by which the ship's personnel receive relevant information on the SMS in a working language or languages understood by them.

6.7 The Company should ensure that the ship's personnel are able to communicate effectively in the execution of their duties related to the SMS.

7 DEVELOPMENT OF PLANS FOR SHIPBOARD OPERATIONS

The Company should establish procedures for the preparation of plans and instructions for key shipboard operations concerning the safety of the ship and the prevention of pollution. The various tasks involved should be defined and assigned to qualified personnel.

8 EMERGENCY PREPAREDNESS

The Company should establish procedures to identify, describe and respond to potential emergency shipboard situations.

The Company should establish programmes for drills and exercises to prepare for emergency actions.

The SMS should provide for measures ensuring that the Company's organization can respond at any time to hazards, accidents and emergency situations involving its ships.

9 REPORTS AND ANALYSIS OF NON-CONFORMITIES, ACCIDENTS AND HAZARDOUS OCCURRENCES

The SMS should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the Company, investigated and analysed with the objective of improving safety and pollution prevention.

The Company should establish procedures for the implementation of corrective action.

10 MAINTENANCE OF THE SHIP AND EQUIPMENT

10.1 The Company should establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established by the Company.

10.2 In meeting these requirements the Company should ensure that:

- .1 inspections are held at appropriate intervals;
- .2 any non-conformity is reported, with its possible cause, if known;
- .3 appropriate corrective action is taken; and
- .4 records of these activities are maintained.

10.3 The Company should establish procedures in its SMS to identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The SMS should provide for specific measures aimed at promoting the reliability of such equipment or systems. These measures should include the regular testing of stand-by arrangements and equipment or technical systems that are not in continuous use.

10.4 The inspections mentioned in 10.2 as well as the measures referred to in 10.3 should be integrated into the ship's operational maintenance routine.

11 DOCUMENTATION

11.1 The Company should establish and maintain procedures to control all documents and data which are relevant to the SMS.

11.2 The Company should ensure that:

- .1 valid documents are available at all relevant locations;
- .2 changes to documents are reviewed and approved by authorized personnel;
and
- .3 obsolete documents are promptly removed.

11.3 The documents used to describe and implement the SMS may be referred to as the Safety Management Manual. Documentation should be kept in a form that the Company considers most effective. Each ship should carry on board all documentation relevant to that ship.

12 COMPANY VERIFICATION, REVIEW AND EVALUATION

12.1 The Company should carry out internal safety audits to verify whether safety and pollution- prevention activities comply with the SMS.

12.2 The Company should periodically evaluate the efficiency of and, when needed, review the SMS in accordance with procedures established by the Company.

12.3 The audits and possible corrective actions should be carried out in accordance with documented procedures.

12.4 Personnel carrying out audits should be independent of the areas being audited unless this is impracticable due to the size and the nature of the Company.

12.5 The results of the audits and reviews should be brought to the attention of all personnel having responsibility in the area involved.

12.6 The management personnel responsible for the area involved should take timely corrective action on deficiencies found.

13 CERTIFICATION, VERIFICATION AND CONTROL

13.1 The ship should be operated by a Company which is issued a document of compliance relevant to that ship.

13.2 A document of compliance should be issued for every Company complying with the requirements of the ISM Code by the Administration, by an organization recognized by the Administration or by the Government of the country acting on behalf of the Administration in which the Company has chosen to conduct its business. This document should be accepted as evidence that the Company is capable of complying with the requirements of the Code.

13.3 A copy of such a document should be placed on board in order that the master, if so asked, may produce it for the verification of the Administration or organizations recognized by it.

13.4 A certificate, called a Safety Management Certificate, should be issued to a ship by the Administration or organization recognized by the Administration. The Administration should, when issuing the certificate, verify that the Company and its shipboard management operate in accordance with the approved SMS.

13.5 The Administration or an organization recognized by the Administration should periodically verify the proper functioning of the ship's SMS as approved.

Appendix 2:
Chapter IX of the International Convention for the Safety of Life at Sea, 1974

CHAPTER IX
Management for the safe operation of ship

Regulation 1
Definitions

For the purpose of this chapter, unless expressly provided otherwise:

- 1** *International Safety Management (ISM) Code* means the International Management Code for the Safe Operation of Ships and for Pollution Prevention adopted by the Organization by resolution A.741(18), as may be amended by the Organization, provided that such amendments are adopted, brought into force and take effect in accordance with the provisions of article VIII of the present Convention concerning the amendment procedures applicable to the annex other than chapter 1.
- 2** *Company* means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who on assuming such responsibility has agreed to take over all the duties and responsibilities imposed by the International Safety Management Code.
- 3** *Oil tanker* means an oil tanker as defined in regulation II-1/2.12.
- 4** *Chemical tanker* means a chemical tanker as defined in regulation VII/8.2.
- 5** *Gas carrier* means a gas carrier as defined in regulation VII/11.2.
- 6** *Bulk carrier* means a ship which is constructed generally with single deck, top-side tanks and hopper side tanks in cargo spaces, and is intended primarily to carry dry cargo in bulk, and includes such types as ore carriers and combination carriers.
- 7** *Mobile offshore drilling unit (MODU)* means a vessel capable of engaging in drilling operations for the exploration for or exploitation of resources beneath the sea-bed such as liquid or gaseous hydrocarbons, sulphur or salt.
- 8** *High-speed craft* means a craft as defined in regulation X/1.2.

Regulation 2
Application

- 1** This chapter applies to ships, regardless of the date of construction, as follows:
 - .1** passenger ships including passenger high-speed craft, not later than 1 July 1998;
 - .2** oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high-speed craft of 500 gross tonnage and upwards, not later than 1 July 1998; and

.3 other cargo ships and mobile offshore drilling units of 500 gross tonnage and upwards, not later than 1 July 2002.

2 This chapter does not apply to government-operated ships used for non-commercial purposes.

Regulation 3

Safety management requirements

1 The company and the ship shall comply with the requirements of the International Safety Management Code.

2 The ship shall be operated by a company holding a Document of Compliance referred to in Regulation 4.

Regulation 4

Certification

1 A Document of Compliance shall be issued to every company which complies with the requirements of the International Safety Management Code. This document shall be issued by the Administration, by an organization recognized by the Administration, or at the request of the Administration by another Contracting Government.

2 A copy of the Document of Compliance shall be kept on board the ship in order that the master can produce it on request for verification.

3 A Certificate, called a Safety Management Certificate, shall be issued to every ship by the Administration or an organization recognized by the Administration. The Administration or organization recognized by it shall, before issuing the Safety Management Certificate, verify that the company and its shipboard management operate in accordance with the approved safety-management system.

Regulation 5

Maintenance Of conditions

The safety-management system shall be maintained in accordance with the provisions of the International Safety Management Code.

Regulation 6 Verification and control

1 The Administration, another Contracting Government at the request of the Administration or an organization recognized by the Administration shall periodically verify the proper functioning of the ship's safety-management system.

2 Subject to the provisions of paragraph 3 of this regulation, a ship required to hold a certificate issued pursuant to the provisions of regulation 4.3 shall be subject to control in accordance with the provisions of regulation XI/4. For this purpose such certificate shall be treated as a certificate issued under regulation I/12 or I/13.

3 In cases of change of flag State or company, special transitional arrangements shall be made in accordance with the guidelines developed by the Organization.