An analysis of the implementation of the ISM Code in Mauritius after 1 July 2002 and beyond

Johnny J.M.D.C. Lam Kai Leung

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AN ANALYSIS OF THE IMPLEMENTATION OF 
THE ISM CODE IN MAURITIUS AFTER 
1 JULY 2002 AND BEYOND

By

JOHNNY J.M.D.C LAM KAI LEUNG 
MAURITIUS

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 

MARITIME SAFETY AND ENVIRONMENT PROTECTION 
(Operational specialisation, Engineering) 

2000
DECLARATION

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

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

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ABSTRACT


Degree: MSc

The limited jurisdiction of the Mauritian administration to effectively exercise all its duties under the conventions it has ratified goes against the principles of all international maritime conventions. Article 94 of UNCLOS 1982 reminds the administration of its duties under international law and besides, it is a requirement under Art. 300 that Parties would "fulfil in good faith the obligations and shall exercise the right, jurisdiction..." with regard to this convention.

Jurisdiction is composed of two distinct elements, namely legislative and enforcement jurisdiction for which our legal and administrative infrastructure is still inadequate in Mauritius. Although the code addresses the operator, it is a reminder to the administration to implement convention standards that the ISM Code manages. Being a Party to UNCLOS and the main international maritime conventions, Mauritius has an obligation under art 217 of UNCLOS to exercise its obligations for effective enforcement of all the standards contained therein on its own ships.

Due to limited jurisdiction and control, obligations under port state, coastal state and flag state regimes with respect to requests from other States add to the difficulties already experienced so far in discharging flag states duties. If our administration do not give full effect to the applicable international standards, alternative measures of enforcement will be exercised, on our ships, through Port States jurisdiction. Not only will national ships be constantly targeted until a clean bill of health is proved, but the name of the registry we are trying to promote will also be tarnished.

This paper provides an overview of the importance of the ISM code in the Mauritian context and its implications in terms of administrative, legislative and enforcement powers of an evolving administration.
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<td>Document of compliance</td>
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<td>D.P.</td>
<td>Designated person</td>
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<td>Dwt</td>
<td>Deadweight tonnage</td>
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<td>COLREG</td>
<td>Collision regulations</td>
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<td>EQUASIS</td>
<td>European quality shipping info system</td>
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<td>FSI</td>
<td>Flag state implementation</td>
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<td>IACS</td>
<td>International association of classification societies</td>
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<td>International labour organisation</td>
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<td>IMO</td>
<td>International maritime organisation</td>
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<td>LLMC</td>
<td>Limitation on liability for maritime claims</td>
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<td>MARPOL</td>
<td>International convention for the prevention of pollution from ships</td>
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<td>MOU</td>
<td>Memorandum of understanding</td>
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<td>MSA</td>
<td>Mauritian shipping Act</td>
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<td>OPRC</td>
<td>International convention on oil pollution preparedness, response, and co-operation</td>
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<td>SOLAS</td>
<td>International convention for safety of life at sea</td>
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<td>SMC</td>
<td>Safety management certificate</td>
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<td>SMS</td>
<td>Safety management system</td>
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<td>Transfer of class agreement</td>
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CHAPTER 1

1.0 INTRODUCTION

In 1836, following 3 years of ship casualties, 1702 British ships were lost, 1714 people drowned and property valued at £ 8,510,000 was destroyed. A select committee was set up in 1836. The conclusions are not different from what we see to-day. Imperfections in design and construction, improper repair, incompetence of masters and officers or faulty and defective equipment still rank high as reasons behind casualties.

Notable shipping casualties like the Herald of Free Enterprise, Zebrugge (1987); Dona Paz, Philippines (1987); Exxon Valdez, Alaska (1989) are still fresh in our minds due to the lives lost and the impact on the environment. Recently, between 25 November 1999 and 12 December 1999 there has been 3 serious casualties namely the State-owned Chinese passenger/truck ferry "Dashun" which sank with the loss of 280 lives. The brand new Norwegian twin hull HSC passenger ferry "Sleipner" sank claiming 16 lives and the Maltese-flag tanker Erika which sank without any loss of life but which spilled 8000 tons of thick fuel oil.

The high casualty rates, over the years, have revealed flaws in administrative performance. For many, the issuance of certificates has become more of a formality. This prompted the industry to react to the way management companies were being run. To reduce unfair competition in the industry and make each one responsible for his functions, it was imperative to regulate the operation of ships.

New management companies have put additional stress on management fees. Existing and well-established companies had to cut down costs while on the other hand salaries and insurance have increased. According to Couper, A. (1998), the 1980’s onwards, were depressed years for shipping and it became difficult for small owners to operate. In the name of profitability, ships were handed over to

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1 King.J.,pp469-475, 1995
2 Fairplay 2 December 1999
3 Lloyds list, 26 Feb.2000,p.4
management companies in order to keep costs low and the whole concept of follow-up in training and belonging to an enterprise were eroded.

Crewmembers were recruited and renewed as often as necessary. Training was geared to satisfy company’s requirements and to balance costs, companies flagged out. Recruitment from the developing countries where quality was not always the highest priority was on the rise.

In many countries, company’s survival was increasingly dependent on low operating costs of which 63% represents salaries of personnel. Crew employment on ships became more a matter of cost rather than qualification and experience. As freight rates plunged, less crew was being employed on board to reduce daily operating costs in order to remain competitive in the market. Consequently ship deterioration was experienced and qualified seafarers moved to alternative employment exacerbating the issue of safe ships further.

Weak administrations lack the expertise of some developed nations. They were contended with their level of safety and this created different standards among different nations. This could be, on one hand, due to pure ignorance where the interpretation of the rules reflected the level of competency of the administration instead of the latter adjusting itself to International standards.

Things had to change at international level to match new shipboard technology with increased standard of seamanship. The changes came through the amendments of STCW ’78 and the introduction of the ISM code. For the first time, the administration had to provide for means to audit its administrative structure under regulation I/8 of STCW ’78 as amended in 1995. The philosophy is to get the administration more involved and this has been the first step towards self-assessment. The ISM Code went even further by requiring the managing companies to have a mission statement to which its activities have to be audited.

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Although the ISM Code primarily addresses ship-owners and operators, the work of administrations is more and more coming under scrutiny. The role of administrations towards contributing to eliminate or reduce sub-standard ships is so important that IMO has even gone further in circumventing the claims of sovereignty to expose activities of Flag States through its Flag Assessment Form.

Failure of class societies to ensure safety on board ships has on numerous occasions been clearly demonstrated from Port State inspection reports. The competition and the different standards that exist among them have mainly caused a variation of standards for customers. Weak administrations, devolving their responsibilities upon them has compounded the sub-standard effect. Ship insurers and bankers have highly criticised the performance of classification societies.

Owners, ship operators, charterers, crew and administrations have all contributed to lower standards. Other bodies like insurance and charterers have not always given enough priority to safety issues. Many insurance policies were being issued through operating subsidiaries that would come under a different regulatory regime from that of traditional insurance companies. Some of the subsidiaries very often do not have the necessary expertise and provided cover to anyone ready to pay the high premiums.

In light of the above, it became a high priority to look at the responsibility of the whole spectrum of the shipping industry including inter alia owners, the non-regulatory bodies of class, underwriters and charterers. Administrations as regulatory bodies were not exempted.

To improve on the overall standard of safety, while being aware that not two ships are similar and do not operate under the same conditions due to external environment, it became pertinent to address operators and introduce through the ISM Code procedures to evaluate new risks as they arise.
1.1 Background and purpose of the ISM Code

Pressure was exerted by public and politicians following casualties like Herald of Free Enterprise in 1987, the Agean Sea in 1982, the Exxon Valdez in 1989 and the Braer in 1993. All these events had huge impacts in the world press. The problem of competency of crew and organisational problems at management level were criticised and needed to be addressed urgently. The answer to unsafe ships and delinquent operators does not reside in more regulations. First and foremost, it is essential to enforce rules that already exist.

Additional regulations have drawbacks not only in terms of costs but also for operators who are already operating below accepted standards. New rules will not make them comply better than the way they are behaving with existing ones. The responsible operators and IMO. will simply have to watch the gap of operating costs between the good and undisciplined operators widen. In this case regulations will have the negative effect of driving responsible operators out of business instead of reducing sub-standard ships.

Instead of contending our-selves to comply with prescriptive rules the shipping industry required more emphasis on overall ship’s performance and hazards that a vessel may encounter. Hence a change of attitude in the industry. The whole concept of compliance had to shift to one of attitude.

The initiatives really took shape following investigations into the casualty resulting form the flooding of the Ro-Ro- passenger vessel “The Herald of free Enterprise” in 1987 when the IMO. Assembly adopted a resolution in the same year.

In November 1987, the Maritime safety Committee was asked through Resolution A596(15) to develop guidelines concerning shipboard and shore based

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1 It was pointed out “that the great majority of maritime accidents are due to human error and fallibility and that the safety of ships will be greatly enhanced by the establishment of improved operating practices” (IMO. News N° 3).

2 Res A596 (15) - Safety of Passenger Ro-Ro Ferries. MSC was requested by the Assembly to take all possible measures to facilitate early consideration of amendments to SOLAS’74 relating to Ro-Ro Passenger Safety and facilitate a rapid entry into force of the amendments.
management to ensure safe operation of passenger Ro-Ro ferries. In 1989 a set of guidelines on management for safe operation of ships and for pollution prevention was adopted by the IMO. Assembly as Resolution A 647(16). The guidelines were amended in 1991 by resolution A 680(17) and further amended and adopted in 1993 through resolution A741(18) to become what we know as the International management Code for safe operation of ships and for pollution prevention.

Following the Estonia tragedy (1994) which claimed 853 lives, the European Union speeded the entry into force of the ISM code and decided to make the code mandatory for Ro-Ro passenger ships not later than 1 July 1996.

Due to the importance and the nature of the ISM Code, it had to be made mandatory. This idea was reinforced when the Code was adopted unanimously by the Assembly in 1993, which was regarded as equivalent to full support of all IMO Member States. But waiting for individual Governments to make the code mandatory was over realistic as past experience has shown that this is the attitude that can reasonably be expected from some countries.

The Code cannot be made mandatory for all members of IMO unless brought as an amendment in the SOLAS Convention. The machinery was therefore set in motion to get an amendment to SOLAS to incorporate a new chapter on Management of Safe Operation of Ships. The whole thing is to get acceptance as quickly as possible through the tacit acceptance. This was not a straight forward case and pressed by other casualties, there was consideration by the Secretary General to reduce the circulation process to three months. But this would have been against the amendment procedure and was therefore not acceptable.

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1 IMO Guidelines on Management For Safe Operation of Ships and for Pollution Prevention. Assembly invited all Governments to encourage all ship operators to implement a management system along these guidelines.
2 Guidelines on management for the Safe Operation of Ships and for Pollution Prevention adopted in Nov. 1991
3 International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code. Governments were strongly urged to implement the Code pending the mandatory application of same.
Under normal procedures of tacit acceptance, an amendment can be adopted by an expanded Maritime Safety Committee. Under tacit acceptance procedure, article VIII (vi) of SOLAS allows fast entry into force of an amendment but the period cannot be less than 12 months after acceptance by a $\frac{2}{3}$ majority in an expanded Maritime safety Committee. Furthermore Article VIII (i) of SOLAS '74 as amended in 1978 stipulates that an amendment shall be circulated at least 6 months prior to its consideration and article VIII (e) prescribes a period of 6 months before it can enter in force after being accepted. The earliest possible period was therefore 24 months and it was considered too long for the entry into force of the requirements of the Code.

A Conference had to be convened due to the fact that a Conference, by virtue of Article VIII (c) (iii) of SOLAS '74 as amended in 1978, can decide on a period of acceptance of less than a year. To accelerate the adoption procedure for the ISM Code, the period of acceptance was brought to 6 months while keeping the period of circulation and the period between acceptance and entry into force to 6 months too. The time frame for the entry into force was therefore reduced to 18 months.

The amendment adopted by a diplomatic conference in May 1994 was introduced in Solas'74 as amended in 1978 as a new chapter IX under the name “Management For the Safe Operation of Ships”. The ISM Code gained mandatory status by making reference to it explicitly in Chapter IX of the SOLAS '74 Convention as amended.

The ISM Code is about management of ship-board and shore-based operations. It brings into the regulatory framework of ship activities, a system of processes and procedures against which non-conformities are evaluated. The purpose of the ISM code is to provide an International standard for safe management and operation of ships and for pollution control.

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1 Resolution 4, adopted by the Conference of Contracting Governments. MSC 64/2/5 (June 1994)
2 Preamble of ISM Code
The Code is a proactive approach that is meant to provide for a structured system of performance monitoring against a set of rules and regulations. Such a system, if properly managed can prevent incidents from turning into disastrous casualties. Looking at the ISM Code from a broader perspective, there are definitely more than the main purpose of its mandatory operation to improve on the safety management of ships by administrations.

In fact the short and medium term objective of the code is to uncover the substandard owner, management and administration and probably reduce their number. In the longer term, based on casualty analysis and experience gained, the code can be expected to improve the safety management system at all levels and also the responsibility from Flag States. The end result might be a decrease in the prevailing fierce competition, which is at the root of reduced standards and eventually push the rogue owner closer to the breaking yard.

1.2 A synopsis
Chapter 2 makes an in-depth study of the legal aspect of the code. At national level, the development of maritime law and its enforcement have not really been effective. The ISM code brings in additional legal implications with a central theme of seaworthiness associated with due diligence. Shortcomings in ship's procedures and non-compliance with the ISM requirements make a ship unseaworthy. The different facets and ways to ensure compliance will be examined.

Chapter 3 looks at the administration and the way it addresses its obligatory functions. The need to review the way it addresses International Safety Conventions will be assessed. The importance of redefining its role faced with multiple challenges like the development of its register and the issue of delegation in order to ensure the highest standards are applied and improve its image will be looked at. The ISM

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1 Lord Donalson- The Road to discovery. Lloyds Maritime & Commercial Law Quarterly
Code covers all major International Conventions and standards. By extension, it addresses improvement on performance and efficiency of present administrative procedures. Means to strengthen the administrative and technical capabilities will be explored.

Chapter 4 deals with enforcement. Flag states have an obligation to successfully enforce international agreed standards. Presently there are drawbacks in our system. Most of the major IMO and ILO Conventions are not properly addressed and the ISM Code cannot be implemented in isolation. The degree of success in achieving a safety culture depends primarily on proper regulatory, administrative and enforcement framework. The best regulations are of no use if proper inspections and enforcement measures are not practised.

Finally, conclusions and recommendations are given on how to improve the implementation of the ISM Code to fulfil our obligations as a State Party to IMO Conventions.
CHAPTER 2
LEGAL ASPECT

2.1 Mandatory nature of the ISM Code
Unlike art.16 (5) of MARPOL 73/78, SOLAS ‘74 as amended do not contain similar stringent requirements as to the adoption and entry into force of new technical provisions. Art. VIII of SOLAS requires explicit acceptance to the Articles and chapter 1 only, implicitly allowing the tacit acceptance to be applicable to new technical standards. The ISM Code benefited from the arrangement under SOLAS and entered into force as a new chapter IX.

Amendments and Protocols fall within the ambit of International agreement between States and are governed by International law. Any international agreement between States governed by international law is subject to the Pacta Sunt Servanda principle of art. 26 of the Vienna Convention on law of Treaties. Technical amendments to SOLAS, which made the ISM code mandatory, is binding on all parties and must be performed in good faith. It is, therefore, not only a matter of incorporating the provisions into national legislation but rather facilitating early incorporation through adequate legislative and regulatory mechanisms to ensure enforcement is adequate and in conformity with other State practices.

2.2 Responsibilities of companies
To ensure the effectiveness of the ISM code in its daily operation and reduce risks of liability stemming from casualties, a company should lay down the foundation work for a safety management policy encompassing the basic and primary function of:

1. Establishing a policy around which all actions to promote safety and prevent pollution can be built.
2. Developing instructions and procedures for day-to-day running activities, for the preparation and response of emergency operations identified by

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1 An undertaking must be observed and implemented - Walker, D. (1980). Oxford Companion of Law
risk analysis, reporting, communication within ship and shore-based structures and exchange of any information between ship and shore.

3. Developing procedures for internal audits and review of management system.

In designing the policy of the company it is important that the policy successfully meets the objectives of the ISM code. It is the responsibility of the ship operator or company to exercise its duty and obligation to provide a safe environment on board with a minimum risk to people and to the environment. Both shore-based and shipboard personnel have their roles in the policy formulation and should be active players in the development and practice of the code. No standard format for achieving the objectives of the code can be provided. Each company has an obligation to develop safe practices which do not violate the intent of the code and which take the peculiarity of the trade and type of operation into consideration.

This can be achieved by identifying all the risks likely to be encountered that go against the objectives of the code. Besides, the policy should identify weaknesses in the safety management system, skills of personnel and provide for a continuous improvement based on non-conformity reports and regular internal audits. While doing so, special care should be paid to the ability of personnel to promptly and effectively respond to emergencies likely to be encountered during the operation of the vessel.

The tools at the disposal of the company to meet the objectives are stipulated at sec 1.2.3 of the ISM code. Companies also have obligations to provide an organisational relationship of all those involved with the management and verification of matters relating to safety and environmental protection. The establishment of clear lines of communications enables ease of reporting of non-

1 “The safety management system should ensure compliance with mandatory rules, regulations, codes, guidelines and standards developed by IMO, classification societies, administrations and relevant organisations within the shipping industry”.

2 Sec.3.2 of ISM Code
conformities, accidents and near-misses to the highest level of management, so that rectification can be promptly addressed. The way the code is implemented affects the relationship of the owner with respect to insurance including P&I. Insurance and underwriters will withhold payment if at the time of the casualty it can be proved through the paper trail that the vessel was not ISM-compliant. It should be remembered that neither contractual obligation, made in the name of the owner under contract of carriage of goods, nor his liability for oil pollution damage can be delegated to managing companies.

From an operating company’s perspective, the DOC and SMC are vital documents for its commercial activities. In order to ensure that the management system can guarantee the validity of the ISM certificates, the company has a duty to:

1. Ensure the workability of the code and compliance through documentation and authority of all those involved (Sec.3.2)
2. Verify that non-conformities are brought promptly to the attention of the proper person. Delay in reporting may give rise to a non-conformity
3. Ensure the competence of the designated person is adequate to deal with the deficiencies. Short term solutions or temporary repairs conflict with the philosophy of the code.

The company is responsible for the selection of the proper designated person ashore as a link between the ship and top management. The choice should not be limited to experience, qualification, motivation, independence and integrity only. The ability to properly monitor the operation of the ship as well as being conversant with the S.M.S. are as important. The position of the D.P. in the hierarchy should be clearly defined to avoid management conflicts when adequate resources and sufficient shore-based support are sought.

A company is commercially responsible to operate as profitably as possible. There may be a tendency to favour the technical side only. The ISM code has, as far as

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1 Sec.9 of ISM Code
2 Sec. 4. of ISM Code
companies are concerned, introduced responsibility with accountability and probably more vulnerability in court. It is, therefore, of great importance to attribute equal attention to the human and operational management instead of concentrating on the technical side only.

Under the ISM code, a company or an organisation or a manager or a bareboat charterer who has assumed responsibility from the owner to operate the ship is the owner of a ship. The responsibility carries an obligation to fulfil all duties and responsibilities imposed by the Code. Any entity operating the ship is obliged to be registered with the Flag State as the entity responsible for ensuring that the shore and ship management functions as expected. For companies who operate a vessel and sub-contract crew management, there is no allowance under the code for shared responsibility. The company is still responsible for demonstrating, through audits, that services dispensed by the sub-contractors fully comply with the company's S.M.S.

The owner or carrier will still be responsible for exercising the non-delegable obligation to make the ship seaworthy under the contract of carriage of goods. An owner who has delegated the management to a company may be liable for large sums based on fault of managing company. Consequently, the operating company will probably be responsible, to the owner through a contract, to hold a valid D.O.C. and operate the vessel in accordance with the approved S.M.S. Additional responsibilities imposed on the company by the owner, to fight any claim brought against him, will invariably include availability of any relevant material used for the implementation of the ISM code.

There is also a fundamental obligation to establish a safety and environmental policy and ensure that the policy is properly implemented. Writing down detailed management procedures with too many things that are not directly relevant can result in putting a company in a disastrous situation by exposing more evidence for claimants, insurers and lawyers to prove non-compliance with the code. Companies

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1 Sec.1.1.2 of the ISM Code
2 Art III of Hague and Visby Rules
have, therefore, a moral responsibility to ensure that owners are not unnecessarily exposed to unlimited liability due to privity by way the shipping activity is conducted.

2.2.1 Personnel

On the operation side, the ISM code imposes specific duties and responsibilities on the master of a ship. The master’s responsibility is laid down in section 5.1 of the code and requires the company to clearly define and document his responsibility pertaining to

1. Implementation of safety and the environment protection policy of the company.
2. Motivation of the crew to observe the policy laid down.
3. Issuance of clear orders and instructions.
4. Verification that any specified requirements are observed.
5. Review of S.M.S. and reporting of non-conformities.

The master, however, may exercise his right under sec. 5.2 to use his overriding authority and his actions may deviate from the procedures laid down in the S.M.S. According to Anderson, P. (1998), Courts will most probably adopt “the principle of agony of the moment” when accidents and casualties result from such actions. To be exonerated the master should prove that he did not have any time to make a proper judgement for an alternative action. The paper trail behind overriding decisions will be fully investigated to confirm that despite such action, the S.M.S. was fully functional.

Whenever a casualty occurs, courts will try to look at the different facets of the ISM code to find any correlation between the event and any deficiency in the S.M.S. In the process, the aptitudes of the personnel will be closely scrutinised. Four-Fifths of maritime casualties are due to human error. A Company is obliged by Sec.6.0 to ensure that the ship is sufficiently manned by a properly qualified and medically fit

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1 Master’s responsibility and authority
2 ISM Code: A practical guide to the legal and insurance implications, p 109
3 Based on “The Bywell Castle 1879 Case
5 Resources and Personnel
master and crew. It may be sufficient to only prove defective procedures for recruitment or absence of a policy to ensure recruitment activities in order to incriminate a company as not fulfilling the requirements imposed by sec.6.2 of the code.

The safe manning level will be determined according to the flag state requirements and STCW but whether the complement is adequate to actually run the ship safely, will in practice be something the company will need to review if the internal audit of the S.M.S. proves the contrary. The safe manning level will also depend on considerations of accidents, non-conformities or hazardous situations that are directly influenced by fatigue of crew. The company is required to establish procedures, meaning a review of the S.M.S. for bringing in corrective actions.

If an accident occurs and the cause can be traced back to insufficient personnel, important questions can be raised about the seaworthiness of the vessel. Seaworthiness is intimately linked to liability and insurance statutes. It might be difficult to prevent loss of the right to limit and insurance cover if there are no proper procedures for familiarisation of new personnel on the ship and the training programme in force do not cater for any lack of knowledge.

2.2.2 Safety and pollution

Art. 94(1) of UNCLOS addresses the fundamental functions namely jurisdiction and control over administrative, technical and social matters on registered ships. The administrative duty relates to the grant of nationality, which in essence requires compliance with technical and social requirements enacted in national legislation. The element of control is reinforced by art. 94(3) of UNCLOS. Without satisfactory measures to enforce mandatory standards, a State would be in violation of art 1 of SOLAS and similar provisions in international conventions.

1 The company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and International requirements
2 Sec.9.2 of ISM Code.
3 Sec.6.5 of ISM Code
4 Every state shall take such measures through national laws for ships flying its flag as are necessary to ensure safety at sea.
5 The contracting Government undertakes to promulgate all laws decrees, ..and regulations and to take all steps necessary to give full effect to the Convention
There is nothing in the ISM code that can be taken as imposing sanctions upon owners/operators who fail to comply with provisions of the code. This is left to the State to see that appropriate measures are available in the municipal legislation. Through national legislation, an owner/operator may face civil or criminal liability.

Non-judicial sanctions like administrative fines or compounding of offences, which are fines settled out of courts might not be the best deterrents for serious offences as they can easily be absorbed in costs and passed to the customer. However they are valuable as they are inevitable and can be applied promptly.

The route to fines and liability in national law may present many advantages. The fines imposed can be extremely high to act as a powerful deterrent and serve as an example to others. However, civil liability in maritime law has a drawback. Except for oil pollution where liability is mostly strict, owners will in many instances be able to limit liability. Unless it is expressly provided in national legislation that the sanction for particular violations is strict liability, judges will invariably look at the "mens rea" or motive behind the state of mind of the directing will of the company through his alter ego.

Under the 1957 limitation Convention which is still in force in many jurisdictions, the owner/operator may limit his liability unless the casualty resulted from his actual fault or privity. A wrong plot on the navigational chart, leading to a casualty can hardly be considered as the actual fault of the owner if there are proper procedures in place to recruit competent crews. The owner/operator will most likely lose his right to limit due to privity, through reports of non-conformities, rather than actual fault. To reduce risks of being privy to too many things happening on board, companies are distancing themselves from the responsibilities of the master by giving him sufficient autonomy and responsibility to act on his own. Furthermore, a responsible company

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1 One example is Reg. 19(1) of the UK statutory instrument SI 1998 N° 1561 related to the U.K Merchant Shipping (ISM Code). "Any contravention to Regs. 4, 5 or 8 by a company shall be an offence punishable on summary conviction by a fine not exceeding the statutory maximum or on convition on indictment by imprisonment for a term not exceeding two years, or a fine, or both."

2 Art. 1 of the LLMC Convention 1976
able to prove that a serious casualty was the result of a mistake of the crew and has nothing to do with any deficiency in management will be able to limit his liability.

The 1976 LLMC provides a better regime of limitation to the owner. An operating company may even choose a forum where the 1976 convention is in force for a better chance of limiting its liability. Besides, unless it comes to light that management has deliberately ignored reports of non-conformities brought to its attention, it is not usually easy to prove that a loss resulted from the personal acts or omissions of a company, acting recklessly with knowledge. Coupled with above, the fault of the D.P might not always be the "Personal fault" of the owner or directing mind of the company.

Enforcement categorisation under national law strictly depends on the administration. Offences vary in complexity and end results. The administration may wish to attribute criminal procedures as a more forceful deterrent for specific offences. A state may choose to make a breach of safety and pollution a criminal offence or may choose to prosecute under the civil liability regime. However, the degree of success under criminal provisions is more difficult as the threshold of proof is higher than under the civil liability regime.

Although compensation or monetary fines are considered as deterrents, their usefulness can be questioned when the damages can be covered by a P&I cover. For a recurrent offender higher premiums can act as a deterrent and cause an improvement in operating standards.

To give a well deserved weight to the different elements of the safety management network the jurisdictional control to be adopted by the administration need to emphasise on both the responsibility on board and ashore. Although the master's authority within the safety management system is well defined at sec. 5.2 of the code, this is not enough if there are no safeguards. It goes against the improvement

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1 Art. 4 of the LLMC Convention 1976
of safety and pollution prevention if the management ashore has a strong hold on his duties.

The master and crew may even experience unfair disciplinary measures for their actions. A master should be able to act freely even if actions are in direct opposition with the instructions coming from ashore. Unless there has been a clear and fundamental breach of procedures leading to a casualty a master should be protected from unfair dismissal for actions taken. A company allowed to dispense a master or key members of the crew with too much ease cannot work in the best interest of safety and pollution prevention.

Fines or any other form of prosecution are useful means to ensure compliance. However, these cannot be relied upon as the only means to ensure compliance. Close interaction with ship-operators aiming at voluntary compliance should be encouraged. In addition co-operation with administrations during vessel transfer is also an important element in the safety chain. The Estonia casualty revealed the drawback of lack of co-operation between administrations. Although the Estonian authority has a duty to inspect its own ships, the Finnish Government failed to inform the Estonian authorities of exemptions to SOLAS when the ship was transferred. For a wider field of control, co-operation can be extended to charterers, cargo owners, classification societies, insurers, financiers, and the shipbuilding industry for improvements in the existing relationship.

2.2.3 Conformity with Code

Public Authorities have a duty to ensure that shipping is conducted in a safe manner and assures a comfortable degree of protection of public interests without harm to life, health and the environment. For the operator, conformity with the ISM code provides non-negligible advantages in terms of financial returns.

Ships trading in Europe, regardless of flag, are faced with EU State laws on port state control based on EU Directive 95/21/EC of 19.06.1995, as amended which

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1 Honka.H. p. 374
entered in force on 1 July 1996. The doctrine has introduced a mandatory targeting of black listed flags and to a certain extent categories of ships most likely to result in casualties. EU States are compelled to look beyond convention requirements to evaluate the general condition of the ship, its engine room, habitable, working and hygienic conditions on board.

The essential objective of administrations should, therefore, ensure effective conformity with mandatory rules, regulations and guidelines developed by the industry through verification of the SMS. The contents of the code provides for the first time guidance to administrations of what should be considered as the best practice in ship management and operation and owners will be judged by these standards.

Being a Party to Solas’74, the Mauritian Administration has an obligation to adhere to the ISM framework. It is, therefore, important to implement and enforce measures contained therein to guarantee an effective standard of compliance. A State cannot expect owners to comply with the requirements of the code if it lacks enforcement powers and deterrents. In this context, one area of law that puts pressure on owners' liability and affects their vulnerability will be examined.

Hague and Visby Rules

Art III
1. "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

   (a) Make the ship seaworthy
   (b) Properly man, equip and supply the vessel…"

Art IV
1. "Neither the carrier nor the ship shall be liable for loss ensuing or resulting from unseaworthiness unless caused by want of due diligence on part of carrier to
make his ship seaworthy, and to secure that the ship is properly manned, equipped and supplied…"

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
   (a) Act, neglect or default of the master, mariners, pilots or servants of the carrier in the navigation or in the management of the ship…"

With the advent of the ISM code, the defences enjoyed so far by the carrier, usually the ship-owner, under Art.IV(a) above, regarding crew negligence/competence and privity have been strongly eroded. More care has to be exercised by the owner or charterer in abiding with the requirements of the ISM code to avoid exposure to claims from cargo-owners. If it is established that the vessel was not seaworthy, the ship-owner has to prove that he exercised due diligence at the commencement of the voyage. Otherwise he may be liable for actions of the managing company in not ensuring a proper selection of the crew (Sec 6.2). The obligation to exercise due diligence is on the operator and cannot be delegated to management companies.

A ship-owner not having in place a system to prevent or reduce crew's negligence, which may directly contribute to a loss, would fall short of exercising due diligence. The chances of showing that management procedures do not conform with parts of the code and proving that the management was privy to certain defects leading to a casualty will be greater than before. A common deficiency of not maintaining a competent crew will deprive an owner of the possibility to rely on the defences provided under Art.IV above as he would not be able to prove that he complied with
Art. III (a) above

Considering the financial implications of the ISM code, where documentation has opened the flood-gates of recovery demands from claimants, Mauritius may wish to have a Marine Insurance Act in the national legislation to give some protection to the ship-owner. The Act can be based on the British Marine Insurance Act 1906 which states that "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 privy of the assured, the ship is sent to sea in an unseaworthy condition the insurer is not liable for any loss attributable to unseaworthiness". This may act as a forceful deterrent compelling a ship-owner to comply with the ISM code.

Mauritius is a Party to the 1957 Limitation of Liability Convention. Compared to the 1976 Limitation convention, the 1957 regime allows an owner to limit his liability if the resulting casualty is without his actual fault or privy, as explained earlier. The greater degree of transparency, introduced by documentation and audits, will diminish any difficulty experienced so far to prove that an irresponsible owner had actual knowledge and turned a blind eye or acted recklessly with knowledge.

Although the Hague and Visby rules and insurance law are private laws it would be wise to implement them in the national legislation together with the 1976 LLMC. The 1976 LLMC provides a better mean to limit liability and better insurance cover is available to the owner. Actually the level of premium will most probably be calculated on how easy it is easy to break limit. By all means, with the 1976 Limitation of Liability Convention 1976 in place, an owner/operator will be less

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1 In the Maxine Footwear Co.Ltd v. Canadian Government Merchant Marine Ltd, it was held that the "principle of reliance may not be placed on the Hague-Visby Rules exeption where the operative cause of loss is a failure on the part of the carrier to exercise due diligence to provide a seaworthy ship under Art III 1. (a)". Girvin D. S. 1997) IJSIL, p.205.
2 The convention entered in force for Mauritius in 1968.
3 It would not be difficult to prove fault under the 1957 Convention due to the transparency of the documentation. According to Vlasto, T (1998), the outcome of the Star Sea (1997) could have been different had it been tried under the 1957 Convention instead of the Marine Insurance Act 1906. Actually under the 1957 liability convention, management would have been at fault for turning a blind eye in sending a ship to sea with poor fire-fighting equipment and defective dampers especially when ships of the same management have suffered similar serious fires.
inclined to turn a blind eye to non-conformities reported to him for fear of being charged as having acted recklessly with knowledge. Not only the owner/operator will lose the right to limit but will be exposed to claims in full.

As a powerful deterrent to ensure conformity with the ISM code the Mauritian Administration may think in terms of:

- Having a provision of corporate manslaughter in the national legislation for sending an unseaworthy ship to sea.
- Making an insurer not liable under law for any loss attributable to unseaworthiness if during the course of the voyage the ship becomes unseaworthy due to the fault of the insured.

Sections 98 and 100 of the 1993 U.K. Merchant Shipping Act may serve as a model in the preparation of the legislation.

### 2.2.4 Documentation

Documents have been introduced to fulfil the intention of the ISM code i.e. to learn from mistakes and apply the lessons learnt to improve safety and protection of the environment.

The question that has been debated over the years is whether such documentation may be misused by flag states, Port states, claimants, insurers and courts against companies.

A proper and functional SMS generates enormous documentation and may incriminate an owner or senior officials of management and also the D.P. Losing the right to limit the financial liability, due to a paper trail, in the event of an involvement of the ship in a major incident is a legitimate fear of owners.

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1 Documentation will be proof of exercising due diligence in meeting the objectives of the ISM code
The question that arises is whether all documents should be public and allowed for scrutiny by claimants. Exposing a management to all sorts of claims may jeopardise the existence and the good intentions of the company having the commitment to improve its management system. Furthermore, it might even be a deterrent if more time is spent in courts rather than spearheading efforts to enhance safe procedures on board.

However, the documentation generated may become a source of interest during court proceedings on what really happened and with hindsight, serve to highlight incidents which have been the precursor of the actual accident. It may even be possible to establish grounds for a proper analysis of what went wrong, why things went wrong, what owners have done and what they should have done. Provided that reports on corrective actions can be promptly produced, the owner may be incriminated by his own documents. He may be charged on grounds of fault and privity, by having knowledge, and recklessness with intent by being aware of the risks but disregarded them.

According to Connaughton, S. (1998), charterers, shippers, insurers may misuse the ISM documentation to secure a commercial advantage or exert pressure to improve their negotiating powers or even break valid contracts and charter parties. One of the well-known cases of documentation misuse is the Coors Brewing Company of Colorado. The company, which was not violating any terms of the permit of operation conducted an internal audit of its systems and found that the plant was emitting more air pollutants than the Federal requirement because the Government’s approved method of determining emissions were inaccurate. The company brought modifications to its systems to reduce the level of air pollution and wanted to share the information with the Government.

To plaintiffs, the ISM is an ideal tool for increased exposure of owners/operators to criminal culpability and criminal negligence. The owner/operator may be tempted not

1 “State officials of the environment backed by the US Government used the results of the audit to impose a heavy fine on the company”. (Connaughton, S.T.. Shielding your ISM documents. In the International journal of shipping law. P 264).
to document the reports of non-conformities or writing the bare minimum. Such a move may, in fact, result in a deficiency of the ISM Code and constitutes a major non-conformity.

In case of strict liability arising from a pollution incident, documents play a secondary role. The ship-owner will automatically be liable for clean-up costs and damages caused. However the documentary evidence of actions taken prior to the spill ranging from emergency preparedness procedures, training, corrective measures and audits can be very helpful to prove that due diligence was exercised to mitigate the results of any probable spill. Thus, punitive actions can be limited.

Documents may be helpful to limit liability but will most likely be self-incriminating in many instances. There are risks that the documentation produced may be misused against a good operator. Documentary evidence of procedures has been introduced to identify problems, rectify shortcomings and improve on existing procedures in order to avoid accidents occurring.

While risks of misuse of the documentation are evident, claimants should not be deprived of a fair deal. It would also be against the objective of the ISM Code to expose a good owner to unnecessary claims arising from his non-conformity reports. Good operators are more likely to strive for a safety culture and they should be encouraged to record non-conformities and correct deficiencies without fear.

Connaughton, S. (1998) suggests that administrations may enact legislation to provide some protection to self-incriminating ISM documentation. In that connection, reports, policies, plans, instructions, audits and other materials prepared for compliance with the ISM Code should be excepted from admission as evidence in any civil, criminal or administrative proceedings other than those proceedings to ensure compliance with the ISM code.

According to Anderson, P. (1998), it is further suggested that primary documents used in the implementation of the code should be distinguished from other subsequent documents produced during operation of the vessel. The former
documents may be considered as private and confidential. They will be attributed a privileged status and be classified as documents whose exposure is to be disclosed to judges while the latter may be classified under documents to be produced and available for inspection to litigants. Contrary to production, disclosure would mean that they are exempted from being opened to scrutiny while there is an obligation to make these documents known.

Other legal options suggested comprise consideration by the administration to protect the attorney and client privilege over any legal advice of non-conformities following a casualty.

To encourage conformity with the code and protect documents generated by the ISM code from being wrongly used, administrations may encourage companies to:

1. Audit own system in parallel with the audit performed by outside company to evaluate deficiencies with the ISM requirements. Such audits are steered by the company and are not mandatory and might not be asked for.

2. Keep the ISM documentation as simple as it can possibly be. Take care not to fall into the trap of over documentation.

3. Clearly identify documents related to trade secrets.

4. Keep documents as long as is necessary as there is no mandatory requirement to keep the documents for any length of time.

2.3 Liability - civil

2.31 Negligence

From Reg. IX/1 (2) of SOLAS it can be inferred that ship-owners, management companies or operators who have agreed to run ships have a personal responsibility for the management systems at all levels. There is an obligation by
above entities to put in place a safety policy and practice it as well as complying with mandatory regulations and guidelines developed by the industry. It is not in the interest of owners to turn a blind eye to best available and well-proven practices.

The origin of something going wrong can be traced back from two definite sources. Firstly, from a negligent act by servants of owners and secondly from a defect of the management system for which the owner/operator has personal responsibility. The mandatory requirements that should be complied with are clearly laid down in the code. An owner or operating company falling short of these requirements will be exercising less than due diligence and seaworthiness and would be categorised as negligent. The owner/operator can try to escape liability by showing that there was no negligence on his part and the incident was not foreseeable. With the documentation system in place, as positive evidence, it will not be easy to use such defence to avoid civil liability and probably criminal sanctions if negligent acts are uncovered.

Management functions broadly fall into four main branches namely planning, organising, supervising and control. Supervision and control are non-delegable functions under law. A company which does not exercise proper supervision and control of ship board operations would therefore fail the test of due diligence and be termed as negligent.

Section 2 of the code provides the framework of responsibilities that a diligent owner/operator would have in place to "ensure that the policy is implemented and maintained at all levels of the organisation both, ship-based and shore based". This is reinforced by the judgement in the Marion Case where the company did not have procedures to control the master. Although the latter was competent, according to the owners, the owners were made privy of the accident and lost their right to limit liability. Actually they should have known that lack of procedures to control sensitive operations, like chart corrections, could lead to accidents. To reduce the likelihood

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1 Sec 2 of the ISM Code
2 Sec.1.2.3 of the ISM Code
3 See Muncaster castle Lloyds rep.57 1961, Lady Gwendolen 1965 Lloyds rep 335 and The Marion 1984 Lloyds rep 1
of casualties due to human error, Section 4 of the ISM code goes even further than Sec. 2 above, to require a designated person "to ensure the safe operation of each ship and to provide a link between the company and those on board".

In case of a serious ship casualty, a court may use the ISM code as a yard stick of conduct and lead to closer scrutiny of whose act or state of mind may be associated with the company. Unless it can be proved that the D.P. is the directing mind, his chances of conviction are remote. Instead it may be assumed that the company is privy to any non-conformity which has been brought to the attention of the designated person. Negligence shifts to top management and the company director may, through the negligence of the D.P., be accused of reckless behaviour leading to liability and loss of insurance cover.

The actions or inaction of the D.P. may be a determinant factor when the actual fault or privy of the owner or operating management is questioned. There will be times when his position, relationship and access to top management will come under scrutiny as he is the one monitoring the rectification of deficiencies arising from non-conformities and reporting back to top management.

Although the designated person might be proved guilty of gross negligence in the exercise of his duties, he is not, in many instances, the person responsible for the operation of the ship. According to the ISM code the designated person responsibilities are limited to monitoring safety 1.

However, in deciding whose negligent act it is, the court will examine whether the act leading to liability is part of an obligation under law, or is part of the company's obligations or was specifically authorised by a board resolution or an agreement of shareholders. Whether the D.P or the managing director is held guilty of negligence and criminal wrongdoings will depend on the extent the D.P. is entrusted with powers of the board. Without such powers the role of the D.P. is limited to monitoring the safety and pollution prevention aspects of the ship and giving advice

1 Sec. 4 of the Code - The responsibility and authority of the designated person should include monitoring the safety and pollution aspects of the operation of each ship…
to senior management of the company. In such a case, he cannot be categorised as the one responsible for the operation of the ship.

Even in the absence of proper lines of communication between the D.P. and top management, the latter may be liable for the negligent acts of the designated person. Failing to receive reports from the designated person requires the top management to enquire what could have gone wrong. It would be naïve to assume that the absence of reports means that everything is under control. By not attempting to find out what could be wrong, especially if other ships in the same management have suffered important damages, may be considered as an inappropriate behaviour below what should be expected of normal and prudent management. A Ship-operator, may, therefore be unable to exercise the right of limitation as there is an element of constructive knowledge meaning that he ought to have known that damages would probably result from such situations.

It is therefore a requirement for top management to enquire what the designated person knows or ought to know at any specific time. Furthermore ignoring mandatory rules, regulations, guidelines developed by the industry will amount to turning a blind eye to best operating practices and will constitute a violation of a mandatory obligations. In the Eurysthenes court of appeal case, Lord Denning stated "if a man, suspicious of the truth, turns a blind eye and refrains from enquiring so that it should not know it for certain, then he is regarded as knowing the truth. The turning a blind eye is far more blameworthy than mere negligence. Negligence is not knowing the truth and is not knowledge of it".  

Easy access to management by way of modern communication and information technology will prevent top management from denying positive knowledge or privity. The need for communication cannot be denied as section 8.3 of the code stipulates
that the SMS should provide for measures ensuring that the company's organisation can respond at any time to hazards, accidents and emergency situations involving the vessel" 

By tradition, a tort of negligence is assessed against a prescribed duty of care. For a case of negligence to succeed, it must be proved that a mandatory legal duty that existed has been breached. During the normal course of one's obligations, a duty of care is owed to someone who might be affected by one's acts or omissions. As casualties caused by human errors are amply documented, the way the ISM code is drafted implies that a deficiency in the management system will probably lead to a casualty. Ignoring the importance of the SMS in reducing casualties due to human error would mean more than negligence for not giving enough consideration to damages that could occur to third parties.

2.3.2 Seaworthiness and due diligence

Seaworthiness is about safe standards "which a prudent and careful operator will require on his ship having regard to all probable circumstances" that may arise during the voyage. Failure to observe the requirements of the ISM code is not necessarily unseaworthiness. Surely, it will lead to that direction as ISM is about mandatory acceptable minimum standards for safe operation within a safety management system based on safe practices, safeguards against all identified risks and preparation for emergencies.

In the Elder Dempster v. Paterson Zochonis case (1924), the English court held that stowage of cargo may or may not affect seaworthiness of a ship. Bad stowage as opposed to improper stowage, only affects the cargo but does not affect the ship. If bad stowage results in endangering the ship, it amounts to unseaworthiness of the ship. In the same vein a culmination of unsafe practices central to the theme of the ISM code will make a vessel less than seaworthy. Incompetence of a master or

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2. MacFadden v. Blue Star Line (1905). The judge pointed out "Would a prudent owner have required the defect to be remedied before sending his ship to sea if he had known it? If he would, the ship would be unseaworthy. (Anderson, P. p. 102)
3. Functional requirements - See Sec. 1.4 of ISM Code
4. Anderson, P. p.125
crew attributed to defects in the quality of manning and bad stowage amplify the risk and endanger the seaworthiness of the ship.

Under Rule 1, Art.III of the Hague-Visby rules the obligation on the carrier is to exercise due diligence to make the ship seaworthy, to properly man the ship and to make the ship cargo-worthy. Here a distinction has to be between incompetence and negligence. A seafarer is considered as incompetent when he does not have the required ability to perform his job. However negligence arises when the seafarer does not exercise his ability and his performance is below what is reasonably accepted of him. In cases of negligence of the crew, the carrier may be able to use the defence under Art IV of Hague-Visby Rules but the same defence will not be available if the crew is incompetent. In the event of the crew being found incompetent, a carrier would have to prove that he exercised due diligence in having adequate procedures in place to recruit a competent crew in order to escape liability.

Some other factors that may affect the seaworthiness of a ship due to the incompetence of the crew to properly discharge their duties are include drunkenness, incapacity of crew to communicate among themselves, fatigue and ignoring established ship operation techniques.

The SMS and mandatory procedures to be complied with under the ISM code will be documentary evidence of due diligence exercised. The degree of fitness of a ship will be also be judged against failure to provide the ship with the necessary information for safe operation and by not ensuring that the personnel can operate the ship safely will also constitute unseaworthiness. This was apparent in the Standard Oil Corp v. Clan Line(1924) where the master neither had any special knowledge of the vessel nor knowledge of the design on her stability.

1 In the Makedonia case (Lloyd’s Report 316, it was held that “a ship may be rendered unseaworthy by the inefficient master who commands her.” (Anderson, P. p. 124)
3 Anderson, P. p. 121
Of similar character, section 1.2.2.2 of the ISM code requires the establishment of safeguards against all identified risks. Therefore to ensure seaworthiness, a ship-owner must ensure that the vessel is properly manned, the crew is adequately trained for their tasks and have received adequate instructions to familiarise themselves with the ship and the company ISM policy and the ship is properly equipped before the commencement of the voyage. Not only does the ISM code require policies to be in place for recruiting personnel, but the policy, for monitoring the performance of the master and the crew, must be properly documented. Otherwise the owner may find it difficult to prove that he exercised due diligence to make the ship seaworthy and will be exposed to liability.

It will be up to the company to prove that it exercised due diligence in employing the right crew, and training it to keep the ship in a seaworthy condition. It was made clear in the Makedonia that there is an obligation on the ship-owner to have a policy to recruit personnel and verify the documents of those being employed, to interview and require information from previous employers that the seaman is fit to occupy the post he is offered.

An administration condoning sub-standard operations and not having adequate control over an authorised organisation will create unseaworthiness of ships. Besides improper manning, lack of familiarisation procedures and poor equipment, other factors pertinent to ship’s operation may also affect the seaworthiness of a ship. Defective procedures for navigation and protection of the environment may also be causative of an accident. The list is not limited to the above mentioned elements only. Other factors include design, common language, bunkers, mental state and medical fitness of crew, drugs and alcohol abuse, up-to-date charts, maintenance procedures and emergency routines.

To verify ISM compliance and ensure seaworthiness two types of control are exercised. One is preventive and the other reactive. Preventive control ensures conformity with the requirements of the code and prevents violation of the applicable

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standards. An unseaworthy ship can lead to detention and serious offences can give rise to withdrawal of the Safety Management certificate. Reactive control is triggered by investigations into casualties to determine if there has been any violation against rules and regulations affecting seaworthiness. In such a case, depending on the severity of the violation, civil or criminal prosecution could result if provided for in national legislation. Both types of control are complementary and being an integral part of our obligations, should be exercised fully by the administration to reduce conditions that will lead to sub-standard and unseaworthy ships.

2.4 Liability - criminal/regulatory

2.4.1 Conviction and corporate manslaughter
There have recently been a few notable disasters that hit the media. Public disgust has been expressed about the way companies are running business giving more attention to economic returns. The same is felt by the law Commission established in the UK to review the criminal code. It is stated in the report that the commission "sees no reason why companies should continue to be effectively exempt from the law of man slaughter, and that they should be liable to prosecution for a homicide offence if they cause death through conduct that is sufficiently blameworthy" 1.

As big corporations walk away easily, free from prosecution, the feeling was that the public was being cheated and justice was not done. Some of the notorious cases, which involved some wrongdoings for which there has been no successful prosecution so far, are 2:

1. The loss of 187 lives following the capsizing of Herald of Free Enterprise in 1987
2. The loss of 4386 lives following the collision of Dona Paz in 1987

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2 As 2 above
3. The loss of 167 lives following the Piper Alpha oil platform disaster in 1988
4. The loss of 853 lives following the sinking of Estonia in 1994

The burning question that was on the lips of many was why blame is always placed on junior employees and not on employers who steer the operation and reap the benefits. It was actually said that a corporation cannot be guilty of man-slaughter.

It is already standard practice in the US, following a pollution incident, to institute criminal investigation that can lead to criminal charges levied upon the master, crew, corporations and corporate officers (OPA 90).

At least in the Herald of Free Enterprise it was mentioned at paragraph 14.1 of the accident investigation report that the management was at fault but they were not prosecuted for criminal manslaughter. The reason for this was that under English law it has to be proved that one person, acting as the directing mind of the corporation has acted in such a way as to create an obvious and serious risk of injury responsible for actions causing death. The case was not successful because the single person criterion was not fulfilled.

Trying to convict a corporation under a duty of care owed to victims might not be easy as there might not exist any clear personal responsibility undertaken by a corporation to the victims. For a corporation to be liable, it has to be shown that the corporation itself failed in its duty to ensure that the ship was operated in a safe manner. However, identification of the directing mind might not be as easy as in a one-man company.

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1. Ang Fong, B (1997). In January 1983, the drilling tower ENIWETOK collided with the cableway in Singapore killing 7 people. The Commission of Inquiry concluded that it was too much a burden and onerous on individuals to conclude that their actions were causative of the accident.
2. Such a principle stems from a decision by Judge Finlay in 1927 in the Cory Bros Ltd. Case. Law Commission report 237, p 79. “An indictment will not lie against a corporation on the ground that mens rea could not be present in case of an artificial entity like a corporation”
Of interest under the ISM code in the event of deficiencies leading to death or serious injury is involuntary or unintentional manslaughter. Surely, in most cases, the directing mind will have no intention to cause death or serious injury but his actions or omissions can directly lead to such a result. This act would fit the category of gross negligence which is an incompetent unlawful act and a very serious disregard of life and safety of others or reckless manslaughter which stems from not giving enough thought to the risk or recognising the risk but nevertheless ignoring it.

According to the Law Commission Report N° 237, proposals for the offence of gross negligence manslaughter seems to obey three criteria namely

1. A conduct which carries an obvious risk of causing death or serious injury to a person or substantial damage to property even if the risk is not fully appreciated.
2. There are reasons to believe that the risk was capable of being appreciated had the person directed his mind to it.
3. A conduct falling short of what would normally be expected of a person in preventing a risk occurring or preventing a risk from developing once the risk is present.

Considering the mandatory nature of the ISM code, the failure to promptly rectify non-conformities or ignoring a number of minor non-conformity reports would fulfil all three criteria above. The ISM Code spells out the reasonable steps to be taken to ensure that the ship is operated in a safe manner. The duty thus imposed on the operator to safely operate its ship makes it possible for faults occurring lower in the hierarchy of command to be imputable to corporations. Based on the criteria developed by the commission, it is not required to prove a duty of care as in tort on owners/operators but only a standard of behaviour falling short of what can normally be expected of a reasonable operator. With the ISM code standard around and the introduction of the D.P, it is no longer possible for the owner/operator to dilute the powers and responsibilities of the company through various levels of management and, therefore, will be more exposed to criminal liability than before.
It has also been a long-standing practice for companies to put blame on the master and crew following an accident. The recent Erica disaster is no exception. Both companies and P&I insurance would like to exonerate the owner and prove that the casualty resulted from an act of navigation to benefit from the exclusion clause under the contract of carriage. The creation of corporate manslaughter will bring more attention to management activities.

With regard to pollution, it is an established principle in criminal law that a corporation can be vicariously liable for actions of its employees during their course of employment. In many instances where statutes place an obligation on owners to “take all reasonable steps to secure that the ship is operated in a safe manner”, that duty cannot be delegated. Hence criminal liability of owners, apart from strict liability cannot arise vicariously under these circumstances. However, the situation is different when Corporations are made liable under National laws for acts or omissions of the alter ego.

When a ship is run by a corporation, which has no mind of itself, courts will look at whose mind it is which can be regarded as the directing mind of the corporation. The status of the designated person is significant when addressing who is the alter ego and who is the directing mind of the corporation. The corporation may be directly liable for actions or polices directly contributing to a serious accident if the alter ego committing the wrongdoing is the directing mind. A designated person having full discretion and who acts independently without effective supervision from someone above, fulfils the criteria of the directing mind. In such a case the alter ego, apart from being himself exposed to liability, will be regarded as the mental state of the company and by extension courts will succeed in establishing corporate liability.

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1 Lloyds list April 2000
2 Para. 1.10 of Law commission report on Involuntary manslaughter explains that “a number of recent cases have evoked demands for use of law of man slaughter following public disasters and it would be wrong if criminal law placed all blame on junior employees” (Hamblen.N & Edley.P.,p.11,1999)

3 See 51 of UK MSA act 1988
The ISM code was not in force when the Herald of Free Enterprise case was heard. The outcome might have been different now that the ISM code is mandatory and which requires an ordained structure and more clarity on the interaction between the ship and top management. A fault by a crew member causative of an accident can nowadays be more easily be attributed to top management for not ensuring that the ship is operated in a safe manner. Judge Turner, in his analysis of the Herald of Free Enterprise case and concluded that an indictment for manslaughter would lie today against a corporation.

Management systems combine the management of risks and other safety procedures. By addressing the spectrum of risks, both the ship staff and management would identify the risks involved and their degree of seriousness. We shall not lose sight that management are pushing ships hard to keep to tight schedules and disregarding the risks involved with delayed maintenance of ships might be interpreted as gross negligence and satisfy the criteria for corporate manslaughter enunciated previously.

It will be argued that the intention of a director or company is not to cause death. For a Corporation to escape criminal liability, the casualty should, first of all, not be the consequence of an improper management as this is the first thing courts will look for. The defence may argue that the casualty was not the consequence of an irresponsible act or omission or even a choice of reckless behaviour but is part of an environment carrying an inherent risk of causing death. Will that be a successful argument is yet to be proved.

The success of the ISM code is dependent on commitment, values and beliefs, none of which can be subjected to regulation. Procedural requirements from companies and close supervision by shore management are vital to reduce probable events that might encourage States to criminally prosecute corporations.

1 Law commission Report No 237, p.80

2 Sec.1.2.2.2 of ISM Code
Proposals made by the Law Commission that are likely to affect the liability of corporations in future are laid down in a UK proposed bill, the most relevant parts of which are reproduced below.

"A corporation is guilty of corporate killing if

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

2. For the purposes of (1) above
   (a) There is a management failure by a 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."

3. A corporation guilty of an offence under this section is liable on conviction on indictment to a fine.
   (Source: Draft Bill Law Commission Report 1996)

Other methods of punishment can be envisaged by the administration but they must nevertheless guarantee a good or equal degree of success against those who are responsible for the safe operation and management of ships.

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1 Law Commission Report № 237
CHAPTER 3
ADMINISTRATION AND FLAG RESPONSIBILITY

3.1 Brief description of the Mauritian administration
The Mauritian administration was created in 1983 and the merchant Shipping Act was enacted in 1986. The administration is the executive arm of the Ministry of land Transport, Shipping and Port Development and is responsible for exercising its jurisdiction over safety standards on Mauritian ships wherever they may be. It has also the right to verify and implement internationally agreed standards on foreign flagged ships voluntarily in port and in the territorial waters. Other ministries laying down their own standards, as well as enforcing them, carry out policies and regulations derived from coastal state duties.

The administration has been involved in crew engagement, training, investigation, registration of vessels, survey of fishing vessels and, to a limited extent, port and flag state duties.

The Mauritian administration is composed of 3 main but interrelated units. One unit administers the International conventions of ships to which Mauritius is a party. A second unit deals with crew matters and registration of ships while a third unit deals with training of seafarers at support level.

Mauritius has acceded to various important IMO Conventions, including the main conventions and some ILO conventions. A list is found at Annexes 1-A & 1-B. The 1982 LOS convention brought new regulations regarding safe navigation, enforcement of safety standards and seaworthiness under one convention. The administration has not been able to adapt itself fast enough to integrate all the responsibilities within its portfolio. Unlike well-developed nations, we do not cover a wide range of sea and oceans activities limited by the number of trained personnel. The small number of personnel has also limited our scope with regard to many IMO and ILO Convention requirements.
Like most public sectors in Mauritius, the administration is structured in a hierarchical way from top to bottom with little discretion. The minister heading the administration is actively involved in the work of the administration. He is responsible before Parliament and therefore would not wish to encourage discretion at lower levels. More so, as his authority permeates through the whole organisation, he would like to be part of every important decision. This slows decision-making and make it a centralised process. The possibility of decision being withheld or influenced by party politics is real.

Ships registered under the Mauritian flag represent a total GRT of 157,578 and are grouped in four main categories as shown below.

<table>
<thead>
<tr>
<th>Category</th>
<th>Passenger</th>
<th>Cargo</th>
<th>Fishing</th>
<th>Yachts</th>
<th>Dredger</th>
<th>Other</th>
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</thead>
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<td>11</td>
<td>18</td>
<td>16</td>
<td>5</td>
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<tr>
<td>TOTAL GRT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Ministry of Land Transport, Shipping and Port Development

TABLE 1

3.2 ISM Code - Obligations as Flag and Port States

When a State signs a Convention, the State commits itself in the face of the International community that it guarantees the same standard as all other signatories will be implemented and will satisfy itself that its ships can comply. Under the provisions of SOLAS, or MARPOL or LOAD LINE Conventions, a Flag State through the executive arm of the administration is “responsible for promulgating laws, regulations and for taking all other steps that may be necessary
to give full and complete effect to the Convention so that from a point of view of safety of life and environment, a ship is fit for the service it is intended”. Art 1.

The responsibility of being accountable to all the member States and the International community is two fold. First the administration is responsible to ensure that organisations carrying statutory work on their behalf as well as own surveyors can be accountable and that standards agreed are adhered to. Secondly the quality of surveys/audits on own ships must be ensured at all times, which means that technical expertise must be available within the administration to supervise and control the safety standards in force.

The ISM code is part of SOLAS and therefore applies to all signatories. Flag states are faced with an obligation to duly insert the requirements of the ISM Code into their national legislation. The code is applicable to all ships in two stages irrespective of the date of construction. As a matter of fact Mauritius, having mostly cargo ships on the register will need to prepare rules and regulations to be in conformity with the requirements of the code by 1 July 2002.

The justification of flag states responsibilities, including ISM implementation, over own ships on the high seas is derived from the principle of Res Nullis. All states enjoy the freedom of navigation on the High Seas. Ships ply to different zones and may be subjected to different legal systems as laid down in UNCLOS in the form of territorial, coastal and high seas jurisdictions. International law confers legislative monopoly over Flag State to exercise effective control over national ships on the high seas. Therefore the technical and administrative requirements of ISM to which ships have to comply at any time, including navigation on the high seas, are attached to a single legal system. It is a sovereign responsibility to enable adequate

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1 Obligation to ensure completeness of inspection and surveys as per SOLAS Reg.I/6(e), Art 13 of LL 66 and MARPOL Regulations I/4(3) (e), II/10(2) (e), IV/3(3), VI/5(3).
2 Art. 1(b) of SOLAS
4 Art 90 of UNCLOS
5 Art.92(1)
safeguards to prevent violation, which may interfere with the right of other states to free navigation.

Obligations of Flag States under International law are derived from UNCLOS, which require compliance with "generally accepted safety and pollution control standards". Further obligations are to be found in specific Conventions developed by IMO as the latter is regarded as the Competent International Organisation referred to in UNCLOS to develop generally accepted safety and pollution control standards.

The duties and obligations of our administration as a Flag State under UNCLOS and the main IMO. Conventions require a State to apply the generally accepted IMO standards to ships flying its flag and to foreign ships of convention size within its jurisdiction. In that context, regulations developed by IMO. associated to sec. 1.2.3.1 of the ISM Code covering technical aspects like construction, performance standards as well as operational aspects fit squarely within the obligations of the State.

Furthermore the extent to which a convention, including SOLAS and its subsequent amendments, (ISM) is accepted bears a strong influence on the way it should be treated. Even in the absence of formal implementation of convention requirements, as in the case of Mauritius, world-wide implementation of an international convention imposes an obligation on all UNCLOS member states to implement the requirements on own ships and on ships voluntarily in their ports. The non-favourable treatment clause puts another obligation on the State to apply widely accepted rules, it has accepted, to ships flying non-party flags.

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1 Art 21(2) Covers Design, Construction, Manning, Equipment of Ships. Art 94(3) Covers Manning and training. Art 21(4) covers collision. Art 217(2) - Pollution; are all ISM related issues
2 Art. 2 of Annex VIII of UNCLOS explicitly mentions IMO as the competent International Organisation to develop and adopt rules related to navigation and pollution control. Furthermore the world-wide legitimacy of IMO, enshrined by its 158 member states (Focus on IMO, March 2000, p.2) representing more than 95% of the world tonnage, gives added weight to IMO as the Competent Organisation. Convention standards are adopted at IMO by consensus are regarded as generally accepted standards due to the wide acceptance of the major conventions.
3 Art 94 of UNCLOS
For standards not explicitly addressed in the ISM code, in particular risk assessment at Sec.1.2.2.2 of the Code, Flag states are required to take whatever measures necessary. Such measures can be laws and regulations, if they find them necessary to encourage safe practices at sea, which “conform to generally accepted international regulations, procedures and practices”. Art IV (b) of SOLAS further reinforces the above provisions.

The generally accepted standards relevant to the ISM code for which a State should exercise its obligatory functions are:

1. International convention for the safety of life at sea, Solas 74 as amended.
2. Load line convention 1966
3. International regulations for the prevention of collision at sea 1972
4. International convention for the prevention of pollution from ships 1973 as amended
5. ILO 147

More detailed inspections and operational verifications are part of ISM compliance and Mauritius is expected to diligently exercise such powers as Port State when there are reasons to believe that the SMS is not working properly. A PSC officer may require members of the crew to demonstrate a satisfactory operational control according to ISM procedures before allowing the vessel to safely proceed to sea. Any severe defect notified by a foreign port state should be considered in the light of individual IMO Conventions, which prohibit sailing of a vessel until she can proceed safely to sea.

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1 Articles 94(3), 94(4) and 94(5) of UNCLOS.
2 Art IV (b) stipulates that all matters not explicitly provided for in the present Convention remain the subject of the legislation of the contracting country.
3 Resolution A 882 (21) on Amendments to procedures of Port State Control - More detailed inspection to be carried out if clear grounds include absence or inaccurate ISM certification or detainable items.
4 Resolution A 787 (19) on Procedures on Port state Control - Operational verification to be carried out when there are clear grounds for more detailed inspection.
States have an explicit obligation to protect and preserve the marine environment. This can be fulfilled if safe procedures and risk management, as active components of the ISM code, are given proper attention. The ISM code reinforces the importance of safety measures, and although it does not provide a tailor-made solution, it affords useful guidelines in its achievement.

Any violation to the ISM Code, that is likely to lead to criminal proceedings, requires prior investigation. Even casualties of lesser importance warrant an investigation when lessons can be learnt to improve on the safety implementation of standards. Obligations to carry out investigations are found in art. 94(7) of UNCLOS and IMO Conventions. Actually art. 94.7 lays down conditions how and when an investigation is to be carried out.

With regard to pollution control, our obligation as a Flag State shall prevent its ships to proceed to sea until defects are rectified and she is in conformity with generally accepted rules, developed with regard to construction, equipment and manning of the vessel - Art 217(2). This obligation is in effect an extension of Art.94(3), stressing the importance of administrations to ensure safety of ships at sea.

Figures released from Paris MOU for 1998/1999 show that Mauritius has a negative performance running over a 3 year period.

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1 Art.192 of UNCLOS
2 Sec 1.2.2.2 of ISM Code- The safety management objectives should establish safeguards against all identified risks
3 Regulations I/21 of SOLAS, Art 23 of LOAD LINE, Art 12 of MARPOL and ILO 134 on Prevention of Accident to Seafarers
4 Each state must “carry an inquiry into every marine casualty or incident of navigation on the high seas involving a ship flying……and causing loss of life or serious injury to nationals of other state or serious damage to ship or installations of another state or to the marine environment”.
5 States shall take all measures to ensure safety at sea in respect of construction, equipment, seaworthiness, manning conditions, training of crew, prevention of collision, survey at regular intervals.
To the outside world Mauritius is not successfully exercising control over its ships and to the administration, classification societies are not enforcing standards the way they are supposed to. The responsibility of the Mauritian administration to ensure that international standards are adhered to cannot be shared or delegated. Besides an organisation with delegated powers has no legal responsibility vis-à-vis other States.

Furthermore requests to inspect foreign ships from other administrations have to be entertained by virtue of the requirements of IMO. Conventions. Other obligatory functions under the conventions include Port State assessment of other Flag State competence to properly exercise their duties to maintain standards imposed. Added pressure will come from the Indian MOU under which agreement 1, Mauritius will have to fulfil the 10 % inspection rate within 3 years.

3.3 Flag performance

The possibility of states to hide behind sovereignty issues, when confronted with level of implementation and legitimacy to act as a flag state has in many cases prevented proper evaluation of flag performance.

It may be recalled at this stage that IMO, has no legislative powers. Its functions are defined in art. 2 of the 1948 Geneva Convention on the International Maritime

2 Indian Ocean MOU 1998. LLP 11.3.108. LLP
Organisation. It cannot make the adopted regulations mandatory. Only a conference of Parties can. The basis of uniformity in application of international standards, like the ISM Code, rests in the principle that each state, which has accepted the standards, should adopt them and apply them to its fullest standards. Hence, in an ideal world, uniformity would be guaranteed. However the reality is different. There are no mandatory regulations covering the ISM code in Mauritius yet.

Art.1 of SOLAS, MARPOL, LOAD LINE and STCW specify the responsibilities of a State Party in respect of international conventions. The same reasoning is found in the law of interpretation of treaties. Due to technical reasons, the disparity in national enactment of the ISM Code exist among nations although no extension is allowed in the introduction date. In many cases this is due to a lack of expertise in accurately drafting regulations or the cost of implementation involved. Scarcity of human resources and finance to implement all the requirements stipulated in the convention are barriers to good performance.

Guidelines and recommendations developed by international organisations like IMO. and ILO are not normally binding on states unless the State requires them under national law. However some States or Community States have realised the importance of such guidelines and have introduced them in the national legal infrastructure without delay, while others have simply put them aside for the time being. Such a situation has, in effect, over the years created wide unevenness in the performance of the different Flags States.

Many of the new requirements coming into force are of a technical nature and are regularly reviewed with advancement of technology. Coupled with the tacit

1 Art 2(b) …provide for the drafting of Conventions, agreements or other suitable instruments and recommend these to Governments…. (Jackson, D, 1984)
2 A contracting Government “undertakes to give effect to the provisions of the convention” but also “undertake to promulgate all laws, decrees, orders and regulations” to give full and complete effect to the provisions of the convention.
3 Art.26 of the Vienna Convention on treaties stipulate that an effective treaty is binding on parties and must be effectively implemented by them.
4 MSC/Circ 761/MEPC/Circ 311 & Assembly Resolution A 880(21) addressing the early Implementation of the ISM Code
acceptance procedure in force, standards have been produced at a frequency that have introduced complexity in the application of standards and has overtaken the capability of small administrations to promptly enact suitable legislation. One example is, that today there are 3 different interpretations of chapter II-2 of Solas’74 as amended depending on the year of built.

Difficulties to interpret the regulations stemmed from the introduction of the Grand Father clause which was first introduced in Solas ’74 when amendments would only apply to new ships built on or after the date of entry into force of the requirements. Although new standards are nowadays applicable to existing ships after a specified date, it remains a fact that the regulations in force are not easily interpreted.

The obligations under Art III of SOLAS have not been fully adhered to. The sub-committee on flag state implementation established following the FSI committee report FSI 1/21 to MSC and MEPC committees on 18 May 1993 amply demonstrates the poor implementation performance of Flag States. Resolution A 740(18), adopted in November 1993, defined measures to improve on flag state performance and included inter alia measures to help flag states and port states to enhance the working relationship between administrations and recognised organisations.

A set of self-assessment guidelines of Flag States was adopted by Assembly Resolution A 881(21). Through the number of casualties, lives/ships lost, level of implementation and enforcement and ships detention rate under port state control, such a form can be a useful tool to evaluate the performance of flag states.

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1 Different regulations have come into being and apply to:- Ships built before 1980, the year SOLAS ’74 entered into force; ships built before 1996, the year amendments entered into force; and new buildings for which 1998 amendments are applicable.

2 Art VIII(c) of SOLAS and art.16.6 of MARPOL

3 Art III requires submission to IMO laws, decrees, orders and regulations promulgated and specimen certificates, list of persons or organisations authorised to act on behalf of the administration, exemptions and equivalents granted as well as inquiry reports following investigation of casualties occurring at sea.

4 A report by IMO in 1993 noted that of all MARPOL signatories only 30 have sent reports on measures taken for the implementation of the convention (Boisson, P, 1999, p.443).
The new real time EQUASIS (European Quality Shipping Information System), which will provide a wider coverage and expose sub-standard ships might threaten the existence of the Mauritian Flag. The choice is ours, either the Flag State act more responsively or have its influence reduced (Poole, A, 1996).

The ISM code is an important stepping stone for Mauritius. Its implementation is dependent on standards contained elsewhere as explained in other IMO Conventions. It may help to achieve something that has not been possible for decades like giving full effect to the requirements of MARPOL 73/78 which the country has acceded to and acceding to SOLAS Protocols ’78 and ’88, which are marked improvements on SOLAS 74. Regulations in place are mostly outdated and in-depth reforms might deter all good intentions. Improvement on performance and efficiency in administration procedures can only come through a complete overhaul of the existing system.

3.4 What to delegate and how to keep control

The duties of a maritime administration regarding international standards are derived from jurisdiction powers attributed under treaty laws and international customary law. Basically the duties are three fold namely flag state, Port state and coastal state duties. Coastal state duties include pollution prevention and response, search and rescue, safe operation of ships in port, safe navigation within own waters and protection of own resources. Port State duties involve verification of adherence to international standards to which inspecting state is a party.

Of significant importance to this section is flag state duties which involve administration of convention standards to own ships and application of national standards and requirements to domestic vessels and ships below convention. Collision regulations, which are in force in Mauritius, apply to ships of all sizes and to ships in domestic trade while pollution prevention as per Marpol 73/78 applies to

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1 In a statement the EU Transport Commissioner Mr. N Kinnock said that unsafe ships are a menace and are most certainly not welcome in European Union ports and waters.
3 Focus on IMO (1986). June, p. 18. Protocol adopted at the International Conference on Tanker safety & pollution prevention brought important changes to CH 1, introducing unscheduled and/or Mandatory annual surveys and strengthening PSC.
4 Harmonised survey systems
all ships above a certain tonnage and includes ships engaged in domestic trade as well.

Limiting ourselves to IMO conventions, an administration has two types of obligations namely with respect to own ships and foreign ships in port. With regard to flag state ships it must ensure that its ships meet convention standards, be properly and adequately manned and carry appropriate certificates. Furthermore under SOLAS and Art 94(7) of UNCLOS, an administration must conduct casualty investigations whenever necessary. The weakness of class imposes additional work load and involves class monitoring and participation in class activities.

Regarding Port State activities, we must ensure that foreign ships visiting our port are safe and are not likely to cause pollution. Inspection and operational control are required under the ISM code (sec. 3.5 of Res 787(19)). There may also be instances where the state must satisfy request from other administrations to issue convention certificates to foreign ships whenever required (SOLAS, MARPOL, LOAD LINE, STCW). Duties of a port state are limited to verification of certificates and include verification of SMC and DOC but when there are clear grounds for believing that the condition of the ship do not correspond to particulars of the certificate, the inspector has the power to carry a full inspection based on his impression.

All the activities mentioned involve cost and people. Our administration is small with only 4 surveyors and we will not be able to cope if statutory functions are not delegated to class\(^1\). The greater the number of ships calling the port means an increase in port state inspections over-stretching the limited resources. Although delegation of statutory work is provided for under international conventions, incl ISM regulations (sec.13.2 of code), delegation cannot be without safeguards. The State should not lose sight of its mandatory responsibility to guarantee the completeness and efficiency of the survey. To prevent abuse from class, the state must have the necessary infrastructure in place to oversee the delegated activities.

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\(^1\) Cowley,J. (1989).p.116 . It is recognised that no Government has a marine administration extensive enough to carry out all statutory work under the Conventions.
As we are faced with limited resources, the pertinent question is what to delegate. Neither were classification societies created to be a substitute to flag state nor flag states were designed to operate through complete delegation to class. Port state inspections are state functions and cannot be delegated. General inspections of own ships may either be performed by Government surveyors, classification societies or private organisations other than classification societies or private individuals appointed by the administration. Statutory surveys are most often delegated to classification societies, which have a global network of experienced surveyors. Besides classification societies have a long and outstanding experience in developing complete and extensive rules regarding structural strength of ships. Consequently it is customary practice to delegate most of Load Line and Safety Construction Surveys to class.

Retaining the safety equipment survey and annual mandatory surveys give an edge over the standard of class and marks a constant presence on board. As national vessels rarely call to Mauritius, such an arrangement would disrupt the work of the administration and would involve additional cost to the ship-owner. It might also not be practical for surveyors to travel all round the world to survey ships which spend limited time in ports.

The best alternative for us, for the moment, would be to delegate all statutory surveys to classification societies while retaining control on the work delegated to them. This can be achieved by retaining the function of certificate delivery based on survey reports of class. In order not to penalise ship-owners, classification societies will under such a scheme be allowed to issue a short-term certificate valid up to 6 months on completion of the survey pending the full term certificate coming from the administration.

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Whether an administration carries part of the survey or delegates everything to classification societies, the whole question of safety and pollution prevention boils down to uniformity of interpretation and application of rules, uniformity of standards and uniformity of enforcement. The amendment to SOLAS by MSC Resolution 47(66) which is already in force since July 1998, requires all vessels to meet the structural standard of classification societies to be eligible for statutory certificates. This will not guarantee uniform standards as the relation between class and owners lends itself to distortion. This should act as an incentive for closer control on the work delegated to external organisations. Although such a situation is not systematic, some relaxation on part of classification societies can happen in such cases when ships do not call home ports.

To effectively fulfil our obligations under International Conventions and to supervise the work of Organisations to which we have granted authority to act on our behalf, the following procedures should be adopted and put in practice:

1. Access to documentation of quality assurance system compiled by class on own ships.
2. Access to class records regarding surveys of national ships and recommendations for follow-up.
3. Access to internal circulars, instructions and guidelines issued by class.
4. Joint inspection and verification by class and administration surveyors during random checks of ships in between surveys.
5. Submission to the administration of information and statistics on damage casualties of the organisation fleet and Port State detentions.
6. Request additional inspections whenever the administration deems it necessary.
7. Evaluation and acceptance of certification of the quality system of authorised organisations by independent auditors or by other administrations. An administration may also opt for system audits by its own surveyors.
8. Established routines for communication and reporting.
9. Monitor any class related matter and keep the agreement under review.

Furthermore, our administration enabling its surveyors to participate in surveys and ISM audits conducted by class on board vessels as well as auditing the inspection and survey procedures of classification societies will consolidate the above system.
The extent of delegation and interaction should be adequately supported by written agreements. Refer to Annex 2 for a sample format.

The above arrangement frees resources to deal with Port State control, implementation and enforcement of national requirements on ships engaged in domestic trade and those not covered by convention standards. More so, it should be encouraged by the administration as it has a strong bearing on the experience build-up of own surveyors.

3.5 Diminishing role of class?
The importance of classification societies have been seriously eroded. They have lost their traditional and unique privilege of verifying compliance of standards and secondly they have become competitive and profit-driven organisations and hence have seriously compromised their independence.

Forced by competition they have sometimes misused the authority given to them by flag states by adopting double standards in the implementation of standards. The Bulk Carrier KIRKI is a relevant example of class failure. Her bow fell off and revealed many defects falling short of a reputable class society requirement. Figures published show that 23% of vessel detention by PSC in US ports were attributable to class deficiencies.

Many, including insurance, would like to see a reduced influence of class in the traditional areas due to increased risks of exposure to liability claims. There has been a few high profile cases involving Classification Societies.

None of these cases were successful and third parties (cargo interests) have not been able to recover because the Hague Rules and limitation of Liability convention

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1 See Reg XI/1 of SOLAS’ 74 as amended
2 The vessel which lost her bow on 21 July 1991, was issued a full term Load Line Cert. On 25 Feb 1991 by G.L. The investigation revealed that the condition of the ship in general, calls into question the thoroughness of the surveys, in particular the hull and spaces abroad the ship. AMSA(1991), Report 33, p. 81.
places a primary responsibility for care of cargo upon the ship-owner and not on
class. In the Nicholas H case (July 1992) it was held by the appeal court that "
classification societies had no duty of care as regards to interest of cargo owner" 1.

Criticisms and low performance have cast serious doubts, in the minds of many,
about the role and importance of classification societies in today's shipping world
and why should they be immune from liability 2.

It may happen that, one day, claims not successful with class may be laid at the
doors of administrations in an attempt by the ship owner to recover losses. Whether
such a claim can be successful is beside the point but it would have created a
precedent. Unless classification societies can put some order in their business other
entities may face court actions based on Class Performance.

Classification societies exist because they are relied upon by administrations to
verify on effective compliance by owners/operators and provide an assurance of
quality in design, construction and maintenance at specific intervals. Classification
societies will still play an important role in developing new services and in fulfilling
delegated duties from both developed and developing countries. They have been a
more important role under IMO. conventions. They have a legal standing by
Regulations XI/1 and II-1/3-1 of SOLAS as amended 3.

Many States, especially developing countries, are delegating most of statutory work
to classification societies due to lack of personnel. States are actively involved in
other areas where delegation is not possible namely mandatory port state
inspections of standards in the domestic trade. This arrangement also allows the
administration to distant themselves from statutory surveys and in doing so can
carry out independent audits on their registered ships.

2 France,W. (1996). However the truth is different. In the Nicholas H the Court of Appeal held that they saw no motive to alter
the relationship between the owner and the cargo-owner already established by Internationally recognised codes and Limitation
of Liability Convention. P.68
3 Ships shall be constructed and maintained according to the requirements of a class society recognised by the administration
Furthermore, the new liability provisions to be included in the agreement between administrations and classification societies at the forthcoming C.M.I. meeting will be an opportunity for more delegation to classification societies. An administration will have a possibility in a near future to recover from classification societies in the event of a claim being laid against the administration following an error on part of a classification surveyor leading to a casualty.

3.6 Strengthening the ship regulating regime
The performance of ships is dictated by the legal regime of Flag State. Unless violations of specific rules are addressed within the legislative infrastructure, the administration might not have the power to investigate any shortcoming of mandatory rules, regulations that the Flag State is required to develop under Section 1.2.3 of the ISM Code.

The number of marine standards and stringency of convention and protocol requirements grow with time and regulations are continuously amended to reflect present standards. But not all administrations can cope due to inexperience or lack of resources. According to Hindell. K. (1996)\(^1\), the failure of uniform standards can be attributed to incompetence, idleness, greed or indifference.

Much too often national security considerations, economic considerations and other national priorities have taken precedence and segmented the implementation of standards of international conventions at national level. This is exacerbated by a stagnant maritime legislation, which has favoured a number of entities taking responsibility on various matters of pertinence to maritime safety in general and pollution prevention. The ISM code, mandatory in nature, is towards strengthening the compliance with safety and pollution requirements under the main conventions. Regarding the above the challenge will be to regroup the disseminating standards and incorporate pending standards under one instrument and to repeal all concurrent legislation.

In this connection, a priority for Mauritius will be the incorporation of MARPOL 73/78 in the national legislation and the accession to SOLAS protocol of 1978 and ILO 147. (Source: status of multilateral conventions. 31 Dec. 1998). Although Mauritius will be limited in exercising PSC duties, introduced by the 1978 Protocol to SOLAS, other states parties to the Protocol will apply the non-favourable treatment clause to its ships.

A hierarchy of responsibility exists among the different players of the industry. Basically, the system has not been able to guarantee the highest standards in shipping because there exists a flaw at the very top. It has been the IMO policy to accept any state as member even when the state does not possess an effective control and jurisdiction over its registered ships. Furthermore, standard setting within IMO is based on consensus, which is a slow process and may give more influence to minorities which lack the best regulatory infrastructure.

Because IMO do not have the power to enforce the standards developed, the onus is on the administrations, being the next in the hierarchy, to ensure full adherence. The lack of accountability with responsibility at lower levels of our administration has a negative influence on the strength of the regulatory regime. Because administrations have failed to achieve uniform standards, efforts were spearheaded through STCW and the ISM code to force compliance at the bottom of the ladder.

It is expected that enforcement of the ISM code requirements by administrations will revert the trend. Provided Flag States can commit themselves to the development of a safety culture, they may in future be able to accept more responsibility. Failure by many Flag States to respond to the expectations of IMO and consolidate their infrastructure for a better jurisdictional control over their ships, will further erode flag state responsibilities.

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Casualty investigation is an important component in strengthening the regulatory regime. It will highlight any discrepancy in the operation of the ship. Establishing deterrents in the form of administrative and penal measures will encourage compliance and pull low performance operators to an acceptable standard of operation. Art. 21 of Solas ‘74 as amended, as well as art.23 of Load Line ‘66, elaborate on the necessity of casualty investigation.

Art. 12 of MARPOL is not different in meaning and extent when a casualty leads to serious harm of the environment. ILO Convention N° 134 on prevention of accidents to seafarers also requires the setting of an investigation. The extent to which casualty investigation is related to the ISM code is shown by the recent amendment contained in Res. A 884(21) to include new guidelines on investigation of human factors in Res. A 849(20).

Unscheduled inspections covering operational standards have been introduced on board of Ro-Ro passenger ships carrying more than 250 passengers and has not clearly been extended to other types of vessels. The validity of the SMC requires "at least one intermediate survey" and unscheduled inspections can be introduced to other types of vessels at the beginning of the introduction phase of a safety management process bearing in mind that a significant number of minor non-conformities can constitute a major non-conformity.

Sections 1.2, 1.4, 5, 6, 7, 8 and 12 regarding the objective of the code, the functional requirements of code, the master's responsibility and authority, resources and personnel, ship board plans for safe operation, emergency preparedness and verification are all important provisions having a direct bearing on the safety and pollution prevention policy of the SMS. Proposed amendments at MSC 72 in May 2000 to make all provisions of the ISM Code mandatory (See Annex 3) will, if adopted, require positive action from the administration to make the proposed

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amendments to the Code mandatory under the National Legislation.

Because a valid ISM certificate is a prerequisite to trade, it may be reasonable to involve other important players like P & I, financiers, classification societies whose services are heavily relied upon. They can be encouraged to impose contractual compliance of the ISM Code to protect themselves.

As a result financiers may attach to their mortgage specific requirements like compliance with ISM as part of other existing requirements of compliance already applicable like compliance with laws and regulations relevant to pollution protection and seaworthiness of the vessel.

Resolution 787(19) has a binding character on flag states. It interacts with other IMO convention requirements, including ISM requirements as part of SOLAS, through cross-reference. A more detailed inspection can be carried out by the PSC officer if there are clear grounds showing conditions substantially different to those depicted on the certificates. The ship operational aspects can also be closely looked at through actual testing of master and crew familiarity with essential shipboard procedures.

Improvements to the existing legislation to enhance and strengthen the regulatory regime in Mauritius has been covered in chapter 2. There are provisions under the Main Act to make regulations but such provisions are not applicable to MARPOL, STCW and the main ILO Conventions as the framework for these particular conventions do not exist under the Main Act yet.

Reviewing the Main Act each time a different international convention is internationally accepted is not practical. The choice of creating a secondary

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1 A submission was tabled at MSC72 to consider amendments to the ISM Code. It was reiterated that Guidelines a 788(19) should be made mandatory for uniform implementation of the ISM Code by administrations. MSC 69 had decided that the draft amendments should be prepared, approved and adopted to enter in force on 1 July 2002. The new provisions include addition of definition of major non-conformities, objective evidence, conditions of withdrawal of SMC & DOC into the Code, making a company financially more vulnerable to actions from the administration and hence companies may be more inclined to adopt self-regulation

2 Reg.I/19 and XI/4 of SOLAS
legislation eg. Safety at sea Act, prevention of pollution Act may be a feasible option but the process may take as much time as amending the Main Act.

A better option seems to lie in transferring the provisions of the Convention, like surveys, power to inspect, penalties and detentions, addressed to administrations into a principal legislation, leaving the technical and substantive requirements, including those of the ISM Code, to be developed through regulations. Any future amendments to the regulations would circumvent Parliament and reduce the time between approval of amendments at international level and implementation in the national legislation.

Other measures to strengthen the regulatory regime can be based on the practice adopted by UK Merchant Shipping Act 1995 which puts, at section 98 and 100 obligations on Owners/operators to abide to safe practices and prevent dangerous ships to be sent to sea. Section 98 covers broad definitions of unfitness and prohibits sending an unfit ship to sea. Both sections, impose a duty enforceable under criminal law to take all reasonable steps to secure that the ship is operated in a safe manner and also make it a punishable offence to endanger a ship.

3.7 Quality control
The objective of the quality control should ensure that implementation and enforcement processes of the ISM code ensures safe operation of ships so that certification can be relied upon and accepted by other administrations. The same can be achieved if the same quality control can be extended to the whole process of jurisdiction and control of administrative duties providing the best tool to evaluate and improve its procedures for control and efficiency.

Governments have a positive role in striving for safe practices among all entities involved, from the operator to the controller. This can be achieved through a quality

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1 Fogarty, A (1996, 3-31 July). Merchant Shipping Act 1995. Merchant Shipping legislation, 3-62. Owner and Master are liable in respect of dangerously unsafe ship. Applicable also to any ship in port. Owner is to be construed as any other person which has an agreement with the owner under the term of a Charter Party or management agreement.

2 As above. Owner is liable for unsafe ship operation of ship. Also applies to any ship in port. A duty is imposed on owner, charterer or management to ensure that the ship is operated in a safe manner.
control system. Being directly involved in training of seafarers issuing certificates of competency, quality control through self-audits and external audits of specific processes of administration duties is mandatory under regulation IX of STCW as amended. The same control procedures can be extended to the implementation of the ISM code to improve on control and enhancement of compliance.

Mandatory requirements are limited to safety and environment protection. Mandatory requirements seem to neglect the control of procedures to ensure that the prescriptive requirements are met. An administration implementing a quality control system, having its system audited regularly against the simplest objective of ensuring safety and environment protection according to internationally agreed standards will reveal, to the benefit of the administration, non-conformities in terms responsibilities and obligations as a Flag State.

The safety culture aimed by the ISM Code not only addresses the management of shipping companies, but also addresses inter alia the administration as well as classification societies. The safety culture cannot be complete and uniform among the registered fleet if the administration, which is the entity responsible as the guardian of safety standards, is not in a position to verify its system is performing well and the standards it is applying are in conformity with established standards.

All measures put in place should be verified according to a quality system based on the ISO model or any appropriate model. To ensure satisfactory control it is required that the administration is scrutinised by an unbiased external independent body to look into its work and procedures to evaluate weaknesses and propose improvements to achieve the set goals. Such audits should be regularly conducted on a 5-year basis and any recommendation should be properly implemented.

The importance of introducing a system of quality control system in the administration is reinforced by the fact that an administration carrying out audits require to have its own system audited by an outside organisation. This is the guarantee that the documented procedures it has audited are according to prescribed rules and standards of quality audits. An administration is not only
responsible for ensuring safe operation of ships but is also responsible to respond to the expectations of those it services. The service delivered should be of acceptable international standard with the least amount of time, money and dissatisfaction among all concerned.

A system of quality control can benefit an administration in other ways. Through documentation generated, an administration can be in a position to learn by itself from past experiences and apply appropriate ways of correcting the system, which yielded the error, and successfully applying lessons learnt to other ships before similar accident occurs. By doing so, the management of risks within the administration becomes possible and some of accidents with disastrous effects can be avoided.

As Port states, we also have an important role to play as a guarantor of quality inspections. Just as it happened in 1996\(^1\) within the Paris MOU, our port state objective should likewise look beyond the certificates when assessing standards of ships. It should be standard practice to access the general condition of the ship, its engine as well as accommodation and hygienic conditions on board.

Control processes should contain procedures for investigating causes of non-conformities and trigger corrective actions to prevent re-occurrence. The effectiveness of such a system will depend on a properly manned, well managed, and equipped administration. There are pre-requisites for sustained improvement in operation performance, which in the long run will be beneficial to operators operating under the national flag to penetrate certain markets which require initial vetting.

The importance of a quality control within an administration is not to be underestimated. It is a process through which internal activities can be monitored to ensure that the objectives are met, that resources are managed efficiently and the

\(^1\) EU Directive 95/21/EU, issued on 19th June 1995, came into force for all European Member States in 1996. Requires mandatory inspections on all passenger ships calling at ports within the European Union.
whole process is cost effective. Administrations are having an ever-increasing role in the implementation process of international regulations devolving from continuous development in international shipping. Consequently, the administration needs to constantly evaluate whether its aims are attainable and whether new targets can be set to ensure the system continuously improves itself for the benefit of the industry.

3.8 Drawback of the present Act
The Merchant Shipping Act 1986 as amended is made up of 10 different sections ranging from Part I to Part X. The layout is found at Annex 4.

The Merchant Shipping Act is very general. It does not successively address the substantive and technical requirements contained in International Conventions. In terms of safety and environmental protection, which are the two main pillars of the ISM code, the restructuring of the Mauritian Shipping Act takes all its importance in light of art. IV(d) of SOLAS as amended.

The ISM code does not prescribe standards to be conformed with. The main IMO Conventions are all tributaries of the ISM code. The mandatory rules and regulations to be complied with under the ISM Code are applicable standards in the main conventions. Paragraph 1 of the preamble to the ISM code, which outlines the purpose of the code as to "provide an international standard for the safe management and operation of ships and for pollution prevention", gives legitimacy to the rules that already exist under the different conventions. The requirements against which the ISM Code, work cannot be enforced in Mauritius as the internationally agreed standards are not made mandatory under the existing legislation.

1 It is expressly provided that, with regard to safety of life at sea, "all matters which are not expressly provided for in the present convention remain subject to the legislation of the contracting Governments".

2 SOLAS’74 as amended, MARPOL’73/78, STCW’78 as amended, LOAD LINE ‘66 and ILO 147
3 Sec. 1.2.3 of the ISM code
4 O’Connell, D,P.(1984). "It is a fundamental rule of International law that in treaties, the parties make their own law", p. 46
It may be recalled that the major conventions have all been ratified and accepted by a vast majority of countries.

<table>
<thead>
<tr>
<th>CONVENTIONS</th>
<th>PARTIES</th>
<th>% OF WORLD TONNAGE (APPROXIMATE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOLAS '74 AS AMENDED</td>
<td>140</td>
<td>98</td>
</tr>
<tr>
<td>MARPOL 73/78</td>
<td>108</td>
<td>94</td>
</tr>
<tr>
<td>STCW 1978</td>
<td>133</td>
<td>98</td>
</tr>
<tr>
<td>LOAD LINE 1966</td>
<td>143</td>
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<td>TONNAGE 1969</td>
<td>124</td>
<td>98</td>
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<tr>
<td>COLREG 1972</td>
<td>134</td>
<td>96</td>
</tr>
</tbody>
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TABLE 2

Wide acceptance of the standards contained therein has been around long enough to be considered as having gained customary law status and therefore it is quite normal for everyone to abide to them. In fact a state not Party to SOLAS, for example, should expect that a Party to SOLAS, having made the ISM code mandatory, would apply the applicable standards also to foreign ships during Port State Control. With this in mind, ships flying the Flag of Mauritius which has not yet transposed the internationally agreed standards into national standards will be subject to detention and forced to comply with international standards in force.

Another serious difficulty to properly implement the ISM Code is the delay in enactment of MARPOL 73/78 into the national legislative framework. Thus the

1 United Nations(1985). Guidelines for maritime legislation, p.6. A basic rule of International law is that a Convention is binding on state Parties once the Convention enters into force. However a Convention may receive so much wide acceptance that it is considered as Customary International law and is also binding on States not party to the Convention.
environmental standards to prevent pollution damage to the marine environment cannot be enforced on own ships.

On the other hand States, which are Parties to MARPOL, will apply the anti-pollution requirements on Mauritian ships when exercising their duty under the convention during Port State Control. National vessels may be at a disadvantage commercially. Furthermore deficiencies and shortcomings in national legislation will prevent Mauritius to apply same standards being applied to its ships elsewhere, as it cannot apply higher standards than it is actually enforcing on its own vessels. This would prevent enforcement of standards not covered in national legislation even when in presence of a violation to convention standards.

Until the ISM code can be effectively and completely enforced under the MSA Act, the administration operations will depend entirely on rules of classification societies. The difficulty resides in the withdrawal of the DOC and SMC in cases of non-conformities. It would be difficult to revoke a certificate, leading to standards that might not be the highest ones on own flagged ships. Besides, in the absence of adequate provisions in the National Act, any attempt to revoke a certificate preventing a vessel to trade may draw the into a legal battle it might not want.

The company being the legal entity under the ISM code has important obligations to ensure conformity with the functional requirements. The term owner, under the ISM Code, means any owner, organisation or person such as the manager, or bareboat charterer who has assumed responsibility for the operation from the owner. The MSA 1986 do not define a company and the term may be given a restricted meaning in case of conflicts.

For proper enforcement it should be clear to everyone, including the administration and courts, that the company or entity assuming responsibility to operate a ship has agreed to take over all the responsibilities and duties imposed by the ISM code.¹

¹ Sec. 1.1.2 of Res. A788(19).
Furthermore the term seaworthiness which also has great importance under the ISM code, needs to be defined under the act.

Due to the broad terms of the ISM Code, ship operators are required to conform to functional requirements. A cargo ship operator is not bound by the same type of operational regulations, risks, emergency procedures and maintenance as a tanker or bulk operator. Guidelines developed by the industry are very different for different types of ships' operations. As the MSA 1986 is mainly prescriptive, it will be required to be revamped to move to more performance based regulations allowing the different operators to identify the parameters within which they have to operate thereby freeing the burden on the administration.

The ISM Code\(^1\) and SOLAS\(^2\) require that an administration to "periodically verify the proper functioning of the ship's SMS ". It may mean a close safety follow-up of the ship non-conformities until the safety management system is well in place or regular periodic surveys. Enforcement of the ISM code cannot be properly exercised if the type and extent of control is not made mandatory within the domestic legislative framework. Unscheduled inspections covering operational control of National ships may be required at the initial phase of implementation. In the absence of national provisions, authorised organisations do not enjoy the same privilege of access to ships as a Flag State.

Unless included in the national legislation, validity of certificates which are not referred to in the ISM code, cannot be enforced as a mandatory requirement. Furthermore, regulations setting obligations on owners to maintain conditions between surveys\(^3\), as an improvement on the existing control scheme have also not been addressed. Survey periods already clash with the harmonised system in force and our system of inspection, under the MSA 1986, is based on surveys and examinations of hardware as opposed to operational control.

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\(^1\) Section 13.5 of ISM Code
\(^2\) Reg.IX/6
\(^3\) Section 10.1 of ISM Code
Monetary penalties under the Act are ridiculously low and varies between US $ 200 and US $ 1000 at the present rate of exchange. For the owner/operator wishing to cut corners, the gains outweigh such costs and can easily be incorporated into the operating costs and passed to customers. As things stand, the scheme of penalties does not encourage compliance with neither the requirements of the ISM code nor with any other requirements and as such, the legislation cannot be considered as a useful deterrent.

The legislative framework has also to be reviewed in terms of port state control by foreign states. It would not be likely that one day other Port states report major non-conformities to Mauritius being the flag state responsible for the ship incriminated. Port states officers in another country are not sworn officers of the Mauritian administration. Unless the administration facilitates the acceptance of documents by accepting such practices under national law a case against the ship might not be successful. It may be argued that such information is mere here-say from third parties.

Other elements, not specifically specified in the code, need to be clearly spelt out for proper enforcement are:-

1. Duty to hold certificates
2. Authority for the issuance of certificates by another contracting Government and at the request of other Government
3. Extent of annual and intermediate audits of every ship and company and suspension of DOC and SMC gained fraudulently or obtained on fraudulent information as well as a clear interpretation of the D.P.

3.9 Deterrents
The ISM code cannot be viewed in isolation when implementing the requirements of the code, as the ISM code does not duplicate other Conventions. It motors standards contained in other Conventions for which the administration has the responsibility to enact laws, decrees etc, to give full effect to the provisions provided under the Conventions.
Laws adopted in conjunction of ISM Code compliance will partly govern the behaviour of operators. Other areas related to the ISM Code like carriage of goods and passengers at sea, liability and limitation of liability, liens and mortgages have also to be addressed.

Adopting international conventions does not necessarily mean that the standards are binding on operators and that sanctions can be applied in case of violations. Mauritius has a maritime legislation based on the English system, which is of the dualistic type. A convention only becomes part of the national law after it has been fully drafted into the national law.

One of the central aspects of international maritime law is jurisdiction. In public law concerning maritime activities, jurisdiction implies the existence of State power to lay down legislative measures and power to enforce these national regulations. To be effective, the powers to be exercised should naturally be supplemented by deterrents in the form of administrative penalties and/or physical interference by local courts.

When a vessel fails to comply with statutory requirements, sanctions may be imposed and may vary depending on severity of offence. Sanctions may be imposed and may take the form of warnings, prohibition, improvement notes, detention of vessel and ultimately prosecution.

Non-conformity with ISM procedures may entail disciplinary measure leading to detention of foreign ships or withdrawal of DOC and SMC of own ships. Serious violations, categorised as criminal offences by an owner/operator, could expose the violator to court actions.

A state has only its legal system to deter violations of the ISM code. The success of the legal system depends very much on the way an administration addresses the violation within the regulatory framework. Conventions only state that penalties in
case of pollution must be adequate in severity to discourage violation\(^1\) and remain silent on criminal proceedings. This is reflected in Art.4(4) of Marpol 73/78\(^2\). It is therefore necessary for the administration to differentiate between the different levels of non-conformities to define the parameters that may lead to the different levels of penalties and criminal proceedings.

With regard to pollution not only a state is required to "adopt laws and regulations for the prevention, reduction and control of pollution\(^3\), but such laws and regulations must be designed to minimise the risk of accidents……\(^4\). Art 4 of MARPOL goes even further in the control over ships. It requires a Party to prohibit violations from own ships and foreign ships in its jurisdiction and to provide sanctions under national laws to start proceedings against the offenders.

According to art. 217(8) of LOS convention, penalties provided under national laws for ships, flying the national flag "shall be adequate in severity to discourage violations wherever they occur". Except for detention of ships, national or foreign, for which the conditions are clearly specified in conventions, art 4 of Marpol and art 217(8) of LOS leave it to the state to establish the proper sanctions. As MARPOL, SOLAS is also regulatory in nature and requires sanctions under the laws of the State to properly enforce the standards and deter violations.

A violation of existing regulations under the ISM code can range from very serious to less serious. An offence which is very serious in nature, like pollution of the environment, or repeatedly ignoring safety standards which are likely to result in casualties having severe consequences can be referred in the national legislation as a criminal offence leading to imprisonment. Less serious offences are most of the time treated as regulatory offence for which administrative fines can be imposed. Administrative sanctions such as detention, withdrawal of certificates including the DOC and SMC by the flag state are non-judicial sanctions which impacts on

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1 Art.217(8) of UNCLOS
2 " Penalties shall be adequate in severity to discourage violations"
3 Art. 211.5 of UNCLOS
4 Art. 211.2 of UNCLOS
revenue and are very convincing measures to ensure compliance. Unless offences are detailed in national legislation, they cannot be successfully enforced.

To successfully impose restrictions on serious violations, our administration has to consider the option of making owners civilly liable for their actions. The threshold of proof is lower than criminal law and in addition, owners are more worried of being exposed to civil liability than penal liability. Although the remedy under civil liability claims is compensation as opposed to a fine, yet the provision of civil liability claims against owners from third parties is a very strong deterrent and will act in a positive way for us in our future effort to curtail violations. However it should also be clear that in cases of wilful misconduct, the operator shall not be entitled to enjoy limitation.

Acting as a port state, Mauritius has an equal obligation to impose sanctions on vessels voluntarily in port whenever there is a violation to convention requirements of which the ISM code is an integral part. Detention is only allowed in the conventions when there is an unreasonable threat to safety or the marine environment.

Regarding classification societies, which are sometimes criticised for lowering standards, it might be advisable for Mauritius when delegating work to include liability clauses in the written contract to encourage inspections, certification and audits of own ships to be of the highest standards.

Deterrents should also be considered in terms of withdrawing the DOC when there is a major non-conformity. By extension the SMC is also invalidated

On the other hand the SMC may be revoked on 2 conditions, namely:
1. There is no request for an intermediate verification
2. Major non-conformity with the ISM code and absence of Immediate action

Under the ISM code, withdrawal of the document of compliance and the safety management certificate by the Flag State is a very good deterrent to be used
judiciously to enforce compliance. Vessel or vessels belonging to the same company, which had their DOC revoked, might not be in a position to produce evidence of a document of compliance at port state inspections. These will therefore no longer be eligible to the privileges available under international conventions (Reg.I/20 of Solas & Reg.13.2 of ISM Code) to trade world-wide without any restriction.

Striking a vessel from the register will have limited effect as this will encourage flag hopping. Quite probably the vessel will again trade under a new flag with a new DOC. Except for bare-boat chartering, such a move might even benefit the owner as secured mortgages would no longer be subject to national laws.

Mauritius may be guided by the UK merchant shipping (ISM) code regulations 1998 when addressing the issue of deterrents in national law. Attention is given to offences committed on registered vessels by the company, the master, the designated person and any person fraudulently interfering with the SMS. With regard to violations of companies, the nature of violations are defined as:

- Failure to comply with the requirements of the ISM code as it applies to the company and to any ship owned and operated by it.
- Failure of a company to hold a valid DOC and SMC relevant to ships in operation.
- Failure to appoint a D.P. and failure of latter in not performing his work properly.
- Failure to arrange for valid SMC and copy of DOC to be on board.

In addition under the Regulations
- A master is faced with sanctions whenever he fails in his duty to operate his ship according to the safety management system approved.
- A designated person, faces sanctions whenever he fails to take steps to ensure compliance with the company SMS in accordance to the DOC. He also faces sanctions when he fails to ensure that ships are properly manned, equipped and maintained in order to be fit to operate according to the SMS and other statutory instruments.
Deterrents are also extended to other persons who intentionally alter statutory documents, who submit erroneous information in connection with audits, who misuse the DOC and SMS and who fails to surrender the DOC or SMC.

Besides being an incentive to comply with existing regulations, the provision of deterrents in national law can protect an administration from being vulnerable to international liability claims. Improper or inadequate regulatory measures is a shortcoming in the flag's duty to regulate activities of its ships, leading to a breach of international rules. This may in future expose a flag to claims from an owner, which considers that his troubles with port states are due to the incompetence of the administration to properly carry out its obligations.
CHAPTER 4.
MARITIME ENFORCEMENT

4.1 Enforcement of International standards

Enforcement refers to rules of conduct laid down by the State. Enforcement measures by administrations require technical expertise, resources and a safety and an environmental protection culture. To effectively exercise our duties as a flag state under the new regime of safety and environmental protection, there are some basic requirements that need to be focussed on, namely:

1. Adoption of all relevant international conventions
2. An adequate legal framework to implement the convention adhered to
3. Competence and ability to enforce the mandatory requirements through national legislation
4. A quality system to inter alia monitor the performance of registered vessels and classification societies
5. Corrective actions, inclusive of sanctions against ships flying the National Flag.
6. Adoption of measures to encourage classification societies to adhere to international standards.

The principle behind the enforcement of convention standards has been covered in chapters 3. To ensure that a vessel complies with the ISM safety requirements, the administration requires more than mere competence to legislate, enforce its jurisdiction over its vessels and investigate casualties. It also requires expertise to detect shortcomings through an audit in relation to pre-established objectives.

Enforcement of the ISM code is possible through audits. An audit not only identifies non-conformities with the SMS but also highlights non-conformities with the standards and regulations that the SMS manages. Disregard of non-conformities by owners/operators may lead to a withdrawal of the SMC. It is enforcement in a different form, where the owner/operator runs the risk of self-incrimination.
Regulation IX/6 of SOLAS '74 as amended clearly defines the obligations of an administration with regard to verification and control. The obligations have far reaching implications. The capability to develop the proper expertise is important to verify the SMS is functioning properly on own ship and to carry out audits at the request of another state. It is of great importance for our administration to scrutinise the various facets of the auditing system and devise the best auditing framework to be applied to all ships being assessed. Neither the ISM code nor chapter IX of SOLAS detail the form of verification to be followed. Even at sec. 2.2 of Res. A788(19), the objectives to be met to satisfy the effectiveness of the SMS are of a general nature. Therefore we have an initial duty to identify and elaborate sufficient measures to verify that safe practices in place for ships operation are adequate and all risks likely to be encountered will not jeopardise the whole application of the ISM code.

Although classification societies will carry out most of the audits on our behalf, they cannot operate in a vacuum. Interaction with class is essential, otherwise we would put a public duty in private hands. Interaction includes guiding class about the way we would like audits to be performed and sample check on class work according to our own framework. Such a structure must already be in place to fulfil the direct obligations imposed on our administration.

Due to the absence of MARPOL requirements and other Internationally agreed standards in force, in our National regulations, owners will have to follow class rules to be able to trade world-wide. A ship classed with an authorised classification society will have to follow class rules. Non-compliance with the rules will only be a non-conformance with class rules and will not have violated any section of the Shipping Act. Violations cannot be sanctioned as no enforcement measures can be

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1 An administration is required to periodically verify the proper functioning of the ship's Safety Management system

2 Guidelines on Implementation of the ISM Code - The assessment is based on determining the effectiveness of the SMS to meet specified criteria rather than conformity with detailed requirements
effectively applied.

There is a need for the administration not to remain stagnant and be outgrown by organisations it is supposed to control. The administration should be able to develop the capability to implement, monitor and enforce all the standards it has agreed to give full effect. With regard to the ISM code, expertise should be sought to develop the necessary legal infrastructure to ensure that both the ship operator and recognised organisations co-operate closely to continuously improve on the level of safety and environment protection.

As a means of verifying compliance, audits have the advantage of providing a paper trail. Going backwards through an auditing process, enforcement failures along the line can be earmarked and reinforced. As an example, following a common incident occurring on board a vessel, the investigation that follows will allow the administration to analyse the incident in relation with the SMS in place with details from previous audits involving similar incidents. The review may, if necessary, give rise to a broad review of enforcement measures to prevent re-occurrence.

The basic philosophy of the ISM code is minimum requirements within a wider framework of control. With regard to ships operation, the industry should be encouraged to self-regulate itself on the route to a safety culture. However minimum regulations require better deterrents for the system to work. They should be appropriate and strong enough to discourage violations. The legislative framework needs not be overburdened with regulations and deterrents. Notices and guidance to operators can be as effective as regulations in a proper working environment. As a minimum, our administration should also promulgate laws, comprehensive enough to permit effective jurisdiction and control over its ships.

Effective verification and enforcement by administrations as expressed in Resolution A 788(19) depends on effective assessment of compliance of the SMS with the ISM
code as well as compliance with mandatory rules and regulations in force. The objectives are to safeguard human lives, property and environment from dangers of poor standards. For Mauritius, it means providing lead auditor training to surveyors as well as broadening the functions of surveyors before they can take active part in the auditing process. The administration has also to ensure through its regulatory system that non-mandatory standards are taken into account before carrying audits. All of which requires qualified personnel and maximisation of roles of the Flag state surveyors.

Shortcomings in Flag State duties will attract Port State Control for which provisions are available under the main conventions. Under Res. A 882 (21) adopted in November 1999, a Port State may suspend an inspection if the vessel is "obviously sub-standard". The Flag State cannot be passive anymore and will be forced to take over and cause the deficiencies to be rectified. The ship will be detained and lifting of detention is conditional and based on Port State requirements dictated by the Port State only.

Although it is understood that States should exercise their right of jurisdiction and control over registered ships, it is not clearly spelt out in International law to what extent a State should exercise those obligations. Article 10 of the of the High Seas Convention and Art.94(3) of UNCLOS are not of much help in stating that "every state shall effectively exercise control over ships flying its flag". Different States have interpreted these obligations differently and this has led to inconsistencies in the level of implementation of safety standards among administrations. Although the obligation to have "full authority" over registered ships has been judicially confirmed in the Lauritzen v Larsen case, it appears that there has, so far, not been any marked improvement by many States to give full effect to their obligations.

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1 The introduction of Res A 788 (19) it is stated that the objectives of the mandatory application of the ISM Code should ensure compliance with mandatory rules and regulations related to safe inspection of ships and protection of the environment for effective implementation and enforcement
2 Section 4.6 of Assembly Resolution A 882(21)
3 Boczek, A, p.103. "The state shall take responsibility for the lawful conduct of its ships in the way they serve the maritime community and for acquiring full authority over them wherever they may be"
The inconsistencies have plagued the enforcement mechanism of existing standards and new measures have been included in international conventions to tighten up on the irresponsible and passive attitudes. One such example is the 1995 amendments to STCW 1978.

4.2 Reasons for expanded duties and mechanisms
Mauritius as a Party to the major International Conventions has as part of the ratification process, accepted the obligation under International law to fully exercise its responsibility and discharge its obligations as prescribed by the Conventions.

Mechanisms so far in place are inadequate to fulfil all the obligations. It is therefore the responsibility of the administration to take measures that can effectively guarantee the implementation and enforcement of the Conventions, which it has voluntarily accepted to be a Party to. The standards required by the Code go beyond the frontiers of SOLAS '74 as amended. As the Code is about safety, pollution prevention and risk management, it constitutes an amalgamation of various standards contained in different Conventions.

The convention standards, developed by IMO, that contribute to the foundation and strength of the ISM code reside in

1. The International Convention for the Safety of Life at Sea (SOLAS '74 as amended).
2. The International Convention for the Prevention of Pollution from Ships 1973 as amended by the 1978 Protocol (MARPOL 73/78)
3. The International Convention on Load Lines 1966
5. The Convention on International Regulations for Preventing of Collisions at Sea, 1972 (COLREG 1972), as amended and
It is worth mentioning that preambles outlines the basic philosophy of regulations. In this context para. 1.2 of resolution A 741(18) specifies that the objective of the code should inter alia provide for safe practices in ship operation and a safe working environment which means adopting IMO standards in addition to standards contained in ILO instruments.

Apart from Marpol 73/78 for which the legal infrastructure is so far inexistent, other IMO Conventions have only been superficially covered by the National framework. Besides, a lot of work awaits the administration regarding regulations, guidelines etc, which are referred to in the ISM code. In addition Mauritius, being a Party to the Indian MOU 2, has still to match its regulations with those instruments accepted as the basis for control and verification of ships visiting its ports. Primarily we have to address the amendments to SOLAS ‘74, its Protocol of ‘78 and ILO Convention 147.

ILO Convention 147 has a strong bearing on safety standards contained in the ISM code. The convention requires administrations to incorporate into the National legislative framework minimum requirements, which add to the enforcement of other Convention standards. The relevant minimum requirements covered and which fall within the scope of the ISM code are Safe Manning Standards, Hours of Work, Seafarer’s Competency, Medical Care and Examination, Minimum age and Training.

As explained in chapter 3, the administration will be required to participate more closely in classification work as delegation is inevitable in our case. Statutory work remains the responsibility of administrations and to control classification societies, administration surveyors should participate in surveys and have access to audit reports as well as auditing classification procedures.

4.3 Quality inspections and surveys as a Flag State

In order to bring quality into implementation and enforcement procedures, there is a compelling need to change our views how safety should be handled and

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1 UNCLOS 1982, SOLAS 1974, MARPOL 73/78, COLREG’72, LOAD LINE 1966 and Tonnage 1969
2 Signed on 5 June 1998
considered. Too often administrations believe that once they have delegated to classification societies, the latter will ensure that the ships will be of acceptable standards throughout. They also rightly believe that owners have a duty to operate their ships safely and keep it in a seaworthy condition. Unfortunately this is far from reality but still administrations have been sitting back peacefully and hoping nothing wrong will happen.

Mauritius has for too long lacked a proper implementation and enforcement structure. Like many administrations there is a compelling need to change our views about how safety shall be handled and viewed. The present trend is to introduce quality in every branch of shipping starting from registration to demolition. In parallel, to regulate flag state behaviour, criteria for flag state performance are being considered at the FSI sub-committee 1. Quality in shipping can best be achieved by encouraging self-regulation and Flag State regulation to co-exist in parallel because the present regulatory regime has not achieved everything it is supposed to do.

A prominent member of the Swedish Club once said that behind every sub-standard ship lies a sub-standard cargo-owner. There is a lot of truth in this statement. Without a sub-standard cargo owner a sub-standard operator cannot exist. Eradication of the sub-standard cargo-owner is just next to impossible. They do not have a code of conduct as operators do.

Together with ship operators, administrations have an important role in improving safety and control of pollution. None of IMO. treaties setting the duties and responsibilities of administrations have measures to enforce these responsibilities so that national flagged ships satisfy the standards established in the Conventions. Responsibilities set out in the Conventions are our obligations. The attraction to a particular flag is no longer based on economic gains only but on reputation and quality as well. The choice is ours and it is high time we can guarantee the highest level of quality during inspection and surveys. Flag states have by tradition viewed safety of ships quite narrowly. Checks on ships have before the entry of the ISM

1 IMO (2000). FSI 8/19, para5.15. The correspondence group established by FSI was instructed to update the Annex to Resolution A 881 (21) to include criteria and performance indicators
Code been limited to “structural strength [1] and so constructed and equipped to withstand the perils of the seas”.

Before the ISM code there was no or little emphasis on ship operation and navigation. It was not common practice to check whether the deck officers, engineers and crew understand their duties and functions properly and are able to operate all the sophisticated equipment safely. Addressing the above issues during inspections and surveys as mandatory requirements, for seaworthiness will be a first step towards bringing quality in shipping.

In addition, flag states should fully exercise the right they have to board their ships at any time. By taking that opportunity, whenever required, to inspect their ships, administrations will be in a position to ensure that ships are properly maintained between surveys. Boarding own ships provides the opportunity to listen to complaints from crew members and the attention of the surveyor may be attracted to areas where safety is being compromised. It is a non-negligible aspect of improving quality during inspections.

The involvement of classifications societies have had limited impact on quality on ships. Classification societies can only board ships when invited by owners or when surveys are due. Furthermore crew complaints to a class surveyor may not give any result as it is through the owner that they are paid. Contrary to classification societies, administrations can make unannounced and unscheduled inspections.

Three elements need to be addressed to ensure an acceptable level of safety before ever thinking of introducing quality in our system. These elements are technical expertise to consolidate the existing regulatory infrastructure, economical and personnel resources and a safety and environmental protection culture.

Although we might hopefully one day have the ability, capability and administrative machinery to successfully implement all international conventions, we cannot

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[1] Art 1 of LL convention 1966. Ships built and maintained in conformity with the requirements of a classification society recognised by the administration may be considered to possess adequate strength.
guarantee that all Mauritanian ships will at all times be in their best conditions. The establishment of a quality system to monitor our own performance and performance of classification societies will be a first line of defence against any deterioration of quality standards in the inspection and survey regime.

To guarantee the quality of inspections and surveys we require a control mechanism as part of a quality process for an effective and uniform enforcement of standards on ships. Ensuring that own vessels met international agreed standards is the responsibility of all State Parties and the responsibility comes with accountability. The contradiction is that up to now states have refused to be accountable. Accountability can force quality in many administrations impermeable to improved standards. It is poor surveys and inspections that encourage owners to a policy of sub-standard maintenance that results in unsafe ships. Strict adherence to survey requirements and ISM code requirements by local surveyors and appointed or authorised surveyors can only be beneficial to reverse the negative effect of ageing of structures and equipment aided by an inefficient and poor performance crew.

To achieve quality in ships and compliance with standards, there must be a form of agreement between the administration and authorised organisations based on IMO. resolutions A739(18), A789(19) and model agreement issued as MSC/Cir.710/MEPC/Circ 307 which are made mandatory by regulation XI/I of SOLAS. To prevent dubious standards, the agreement should also encompass supervision, liability and deterrents. The classification society derives its authority to carry out surveys from the administration, granting that authority. As a result an administration should be free to impose its conditions on how surveys and inspections are to be carried out to be in line with its policies.

In an endeavour to introduce quality in classification surveys, the common trend is to recognise that a classification society is liable to administrations for its acts or omission of its employees, agents or others that act on its behalf. Recovery from the classification society found at fault is possible under a contract of agreement. The
The success of quality in inspections and surveys will depend on sound policies, feedback on non-conformities and control. There are some fundamental principles, applicable to any operation, to be adopted and put into practice.

1. Clear policies and standards governing quality of staff and the conduct of their activities  
2. Realistic and properly funded implementation and control measures to give practical effect to objectives set  
3. Procedures to monitor the performance and results of activities shall match the objectives i.e. conformity with convention standards  
4. All entities involved in the process interact positively and are kept informed at all times.

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1 Principle of conduct of classification societies. Adopted by the Assembly of CMI. Antwerp, 16 June 1997
CHAPTER 5
CONCLUSIONS AND RECOMMENDATIONS

5.1 Possible approach
The study provides an overview of our obligations with respect to ISM implementation. The ISM Code in itself will not raise standards on board ships but will undoubtedly help to achieve it through continued effort and commitment of all parties involved in shipping. Our administration cannot act alone and while standard setting is a combination of economic, legal and political issues, it requires the contribution of all parties to shape the implementation and enforcement systems so that the industry eventually develop a safety culture. Different facets of the forthcoming ISM Code implementation in Mauritius have been examined, highlighting our weaknesses and course to steer to prevent too much difficulties when the implementation process is addressed.

The study revealed that the approach needs to be more general than specific. Corrective measures have to address inherent weaknesses likely to affect the performance of the Flag State in its obligations under international conventions before the administration can perform and discharge its responsibilities successfully. The most pertinent measures are addressed below.

1. Consolidation of the training of technical and administrative staff. Appropriate staff is to receive adequate training to perform as lead auditors, to be able to participate more effectively in the work of class and build up their experience.

2. Development of own audit instructions and requirements to be used as a yardstick to measure own performance and performance of authorised organisations. Inform recognised organisations of national requirements with respect to audits and certification and arrange for surveyors from the administration to participate in both audits of class and audit of companies and shipboard safety management system.
3. Develop and consolidate the legal infrastructure in conformity with international agreed standard provisions and provide for appropriate corrective measures and sanctions.

4. Develop ISM guidelines, recommendations and interpretations of convention requirements for the benefit of companies, classification societies and other interested parties like insurance, charterers and financiers.

5. Improve the daily activities of the administration through the incorporation of a quality assurance system, against which our own standards and standards of interacting players can be assessed for improvement. Furthermore it would be possible to cut down on wasted time and efforts thereby contributing to the overall efficiency of the administration.

6. All key personnel to receive training appropriate to their jobs and be part of a quality system. Emphasis is to be placed on planning, and improving the existing structures, procedures, and dissemination of information. The whole process is to be supported by a proactive attitude towards safety and environmental issues.

7. Based on Regulations XI/1 and II-1 Part A-1 /3-1 of SOLAS and by the fact that performance of classification societies can affect the reputation of the administration, MOU with Recognised Organised have to be established according to available guidelines, Res. A789(19) and MSC/Circ710/MEPC/Circ307, developed by IMO.

   Such agreements should include inter alia access to classification survey reports, ship data etc. and realistic compensation to the administration in the event of claims from 3rd parties arising from delegated duties. Classification societies should be required to operate within the parameters of national laws.

8. Shipping is an industry which do not impose entry requirements on seafarers. As resources are rare, there are risks that the industry accepts candidates that are not the best ones available. As the success of the ISM Code also depends on
personnel, the administration has to spearhead its efforts towards improving the
type of course delivered at training institutions, improving the quality of lecturers
and the quality of assessment.

9. Strengths and weakness of all entities, including management, crew, training,
operation and regulators are to be weighed as part of an overall process and
improvements to be brought along the chain of activities through seminars,
guidance, development of an open relationship with all players for a free
interchange of information.

10. Participation of top officials to the relevant IMO. committees, sub-committees
and working groups whenever possible for exposure to new developments and
exchange of experience.

11. Adoption of the 1996 protocol to the convention of limitation of liability of
maritime claims 1976 to make the flag more attractive as owners have a better
protection compared to the 1957 limitation convention.

12. Regulations to accurately reflect and be comparable to international standards to
filter rogue operators and prevent flagging out.

13. Encourage co-operation between the industry and the administration to
encourage interaction and participation in the regulatory process. To simplify
procedures for less bureaucracy and encourage concerted reviews of existing
procedures.

14. Establish procedures to co-operate with other flag states when issuing DOC and
SMC of multi-flagged companies.

15. Promote an understanding of the Code and awareness of its importance. It
should be clear that adherence to it is to be construed as an indication of an
internationally accepted level of safe operation.
16. Together with the Indian Ocean Memorandum of Understanding, harmonise the legislative and control functions.

17. Have in place measures to access records of class. Class may be lenient in interpreting the ISM code requirements as 1 July 2002 comes closer.

5.2 Implementation – Not in isolation
States have specific obligations governed by the international conventions they are Party to. Mauritius is a Party to UNLCOS 1982 and various IMO. instruments (See Appendix A). As part of the ratification process, it has accepted the obligation under international law to meet its responsibilities and discharge its obligations as set out by the conventions and instruments to which it is a Party. Due to the shortfall in implementation of internationally agreed standards, Mauritius cannot enforce them rigorously. The implementation process would require the following initiatives.

1. Update and collect information relating to obligations of the state under international conventions for consolidation of existing system and for improvement.

2. Set application dates for certification well in advance of enforcement date. Assembly resolution 848(20) and MSC Circ.881, remind us of the importance to expedite the process of ISM implementation and to pre-plan schedules for the implementation process to be in place before 1 July 2002.

3. Instruct companies to prepare themselves to avoid delays in auditing and certification. The safety culture of people involved may require dramatic change and cannot be accomplished overnight.

4. Establish an appropriate inspection service with enough discretion and provide the necessary resources to supervise the application of the measures taken under the various conventions.
5. Assign responsibilities within the administration to update, evaluate and revise the goals and policies as necessary as part of a long term strategic plan. The plan should support a control program of all administrative work for early correction of errors.

6. More detailed national legislation to address actions to be taken in the event of unsafe and unseaworthy conditions on ships or when safe conditions cannot be maintained on ships.

7. Establish further inspection procedures to monitor classification society standards when conditions of national ships are doubtful. Institute random ship inspection to monitor classification society standards. Carry out technical audits of class once yearly.

8. Verification of classification societies to ensure they are not too lenient in the control of conformity with the class requirements.

9. Review and redesign courses conducted locally to reflect contemporary training structures and encourage a safety culture among seafarers. Such measures should be supplemented by relevant on information ILO Conventions standards referred in I.L.O. 147 to ensure that healthy living and working conditions contribute to good morale and motivation.

10. The administration should feel free to report on its implementation process to IMO, which can advise on actions necessary.

11. Development of a web site addressing quality while encouraging close electronic interaction and probably collaboration in compilation of casualty data and near-misses.
5.3 Agency or not?

The advantages of operating as an Agency reside in a better integration and coherence of hierarchical administrative and technical duties. Although the agency will still be under the responsibility of a minister, the activities of shipping would be conducted by a separate body assuming responsibility for its actions. The interaction between the different levels in the hierarchical set up would be more relaxed, bringing accountability and responsibility within departmental constituents of the agency and allowing discretionary autonomy in management. A separate Agency would be organised in a more efficient way with each individual or core unit focussing on specific activities thereby enhancing effective delivery of policies and strategies developed by the Agency itself.

However the revenue base of a small administration having a small fleet, puts limitations on the administration to act as an Agency. Cost recovery would be minimal. Besides Port State control does not generate funds and there is a danger of pursuing economics at the detriment of effective management in maritime safety. Moving to an Agency status does not bring benefits to Mauritius and could be more detrimental to the performance of the administration. Keeping the existing administration small but redistributing and re-defining its functions will give a better understanding of the whole system for an overall improvement.

5.4 Steps towards a more responsible administration

The ISM code is a positive contribution in increasing awareness of the importance of safety and at bringing principles of organisation in the everyday running of the ship. Notwithstanding any deterrents, it is only when an administration or classification society assists companies, by providing the necessary support through seminars, explanations and guidance information in the form of interpretations that the awareness can be translated into a safety culture.

Because all the elements, that contribute to a safe record of operational safety, are in different hands, there are risks of an inherent failure anywhere along the line due to external pressure. The process of enhancing safety through a quality system in
the minds of everyone, from top management to support level, takes time and constant effort.

Safety is no longer limited to prescriptive rules and documentation only. It is about continuous improvement on safety performance and procedures, which requires a change of mind and attitude. In the long term the reputation of our register will depend on how well we can guarantee effective enforcement of international standards on our ships. In this context, the following measures can only be most welcome.

5.5 Recommendations

1. The administration should prepare, as a matter of urgency, necessary legislation giving full effect to chapter IX of SOLAS.

2. The administration should review existing regulations for adequacy, relevance and clarity.

3. The administration should publish performance of ships and class in an annual report to encourage good operators and motivate good performance among those trailing behind.

4. It is recommended to have a continuous self-assessment of performance and evaluation of administrative functions through a quality system and Port State deficiency reports.

5. It is recommended that administration follows the work of the FSI sub-committee and implement proposed measures in time.

6. The administration should clearly define the roles and obligations of each party within the regulatory loop.
7. It is recommended that the Staff should to be part of policy process and make proposals to the Government for reforms and appropriate actions.

8. It is recommended to establish a clear hierarchical line of responsibility and communication that will give the same degree of accountability as when run as an agency. A schematic diagram is contained in Annex 5.

9. It is recommended to establish provisions within the regulatory framework for professionals of the administration to participate in International, Regional or National technical committees of authorised organisations when new rules and regulations are developed.

10. The administration should encourage increased discretion among professionals and document administrative procedures for ease of decision questioning.

11. It is recommended to have an orderly administration to reduce risks of legal suits against administration and staff relating to performance of statutory and other functions.

12. The administration should provide support to personnel participating in regional committees (e.g. Indian Ocean MOU), international committees (e.g. IMO) and classification technical committees to influence or contribute positively in rule making.

13. The administration should be guided by the new quality system ISO 9004, which focuses on continuous improvement of performance of an organisation to attain a total quality management system applicable to new management. (Einarsrud. T-ISM code- Status of implementation and a comparison with other certification schemes. Gard News 153, March/May 1999, p 10).

14. The administration should sort out overlapping issues with other ministries and departments as overlapping issues hinders apportionment of blame and curtails professionalism.
15. The administration should establish safety awareness and safety culture through performance regulations rather than trying to impose stringent and rigid interpretations of conventions, codes etc.

16. The administration should request any organisation entrusted with surveys and inspections to continuously report deficiencies and rectification of defects to the administration instead of contending ourselves with renewal survey reports only.

17. It is recommended that acceptance of ships on the register should be conditional on past records, age and the outcome of a stringent initial survey.

18. The administration should establish administrative procedures for prompt exchange of information and reports with port states following deficiencies on national and foreign ships in order not to penalise ships.

19. The administration should consolidate technical know-how and in-house experience to enhance capability to conduct, analyse and learn from casualty investigations and Port State deficiency reports.

20. It is recommended to make use of technical assistance under the Technical Co-operation Committee of IMO. to upgrade administrative and legislative functions.

21. The administration should review ships casualties and accident ratios to detect the percentage of sub-standard ships on register and take whatever action necessary, in a timely manner, irrespective of degree of seriousness.
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### ANNEX 1-A

#### IMO CONVENTIONS ACADEMED BY MAURITIUS

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<th>No.</th>
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<td>International Convention for the Safety of Life at Sea (SOLAS) 1974</td>
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<td>International Convention on Load Lines 1966</td>
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<td>International Convention on Tonnage Measurement of Ships (TONNAGE), 1969</td>
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<td>Convention on International Regulations for the Prevention of Collisions at Sea (COLREG), 1972</td>
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<td>Convention on Facilitation of International Maritime Traffic (FAL), 1965</td>
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<td>International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1976</td>
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<td>The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992</td>
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<td>International Convention on Maritime Search and Rescue (SAR), 1974</td>
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# ILO CONVENTIONS ACCEDED BY MAURITIUS

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<td>N°. 2 Unemployment</td>
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<td>N°.7 Minimum Age (Sea) Convention, 1920</td>
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<td>3</td>
<td>N°. 8 Unemployment Indemnity (shipwreck) Convention, 1920</td>
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<td>N°. 29 Forced Labour Convention, 1930</td>
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ANNEX 2

Agreement between the Danish Maritime Authority, Denmark, and the Recognized Classification Societies concerning surveys and inspections on Danish Cargo and Passenger Ships.

BASIS
This agreement is entered into on the basis of Technical Regulation for Recognition of Classification Societies for Ships, with reference to authorization for statutory surveys etc.) and is applicable to ships registered in Denmark and classed with the CL.

PURPOSE
1.1 The purpose of this agreement is to establish the scope and the procedures for co-operation between the Danish Maritime Authority and the recognized Classification Societies.

DEFINITIONS
2.1 "IMO": The International Maritime Organization
"DMA": Danish Maritime Authority
"CL": Recognized Classification Society
"IACS": International Association of Classification Societies

"Class survey": Survey carried out by a recognized Classification Society in accordance with the Society’s own regulation.

"Statutory survey": Survey carried out by a recognized Classification Society on behalf of and with authorization of the Danish Maritime Authority.

"Exemption": A release from certain requirements of the regulations, provided that in the opinion of the Danish Maritime Authority, adequate safety requirements have been met for the intended voyage.

"SOLAS": The International Convention for the Safety of Life at Sea 1974 together with the protocols and amendments thereto, and related codes of mandatory status in Denmark and currently in force.

"LL 1966": The International Convention on Load Lines, 1966 together with the protocols and amendments thereto, and related codes of mandatory status in Denmark and currently in force.

"MARPOL": The International Convention for the Prevention of Pollution from Ships 1973/78 together with the protocols and amendments thereto, and related codes of mandatory status in Denmark and currently in force.

AUTHORIZATION
3.0 General

1 Reproduced with the kind permission of the Danish Maritime Administration
CL is authorized to carry out inspections and surveys at the request of a shipyard or ship owner, and to issue certificates as stated in this agreement. The statutory certificates issued by CL shall be in a form approved by DMA. International certificates shall be issued on the basis of the relevant international conventions and the interpretations of DMA. National and regional certificates shall be issued by DMA.

3.1 LL 1966
On cargo ships, barges and passenger ships CL is authorized to perform freeboard calculation, undertake initial, periodical and mandatory annual surveys, inspections and marking, and to issue "International Load Line Certificates". The scope of CL's surveys is stated in Annex 1.

3.2 SOLAS
On cargo ships CL is authorized to perform surveys and inspections and to issue certificates as follows:

CL is authorized to perform the initial survey and all subsequent periodical, mandatory annual, and additional surveys and inspections, and to issue and endorse the certificates.
DMA undertakes the initial survey of items as stated in Annex 1, covered by SOLAS, and issues a confirmative statement.
The scope of CL's surveys is stated in Annex 1.

"Cargo Ship Safety Equipment Certificate" and "Supplement to Cargo Ship Safety Equipment Certificate".
DMA performs the initial survey and issues the initial certificate.
CL is authorized to perform all subsequent periodical, mandatory annual and additional surveys and inspections after the initial survey, and to reissue and endorse the certificates.
The scope of CL's surveys is stated in Annex 1.

"Cargo Ship Safety Radio Certificate".
DMA performs the initial survey and issues the initial certificate.
CL is outside Denmark authorized to perform all subsequent periodical, mandatory annual and additional surveys and inspections after the initial survey and to endorse and reissue the certificates.
The scope of CL's surveys is stated in Annex 1.
"Certificate of Fitness for the Carriage of Liquefied Gases in Bulk"
CL is authorized to perform the initial survey, and all subsequent periodical, intermediate, mandatory annual and additional surveys, and to endorse and reissue certificates in accordance with the provisions of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC-Code), and in accordance with the provisions of the Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (GC-Code). The scope of CL’s surveys is stated in Annex 1.

"Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk". CL is authorized to perform the initial surveys, and all subsequent periodical, intermediate, mandatory annual and additional surveys, and to endorse and reissue certificates in accordance with the provisions of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC-Code) and in accordance with the provisions of Code for Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH-Code). The scope of the surveys is stated in Annex 1.

"Exemption Certificates". DMA carries out the initial approval and issues the initial certificate. CL is authorized to carry out all subsequent periodical surveys and inspections after the initial survey, and to reissue and endorse the certificates. The conditions which formed the basis for the issue of the initial exemption certificate shall be known to CL, shall still apply and shall be inspected by CL.

3.3 MARPOL
On cargo ships including oil tankers, CL is authorized to perform surveys and inspections as instructed in the Convention, and to issue the certificates stated in the Convention in accordance with the following guidelines: "International Oil Pollution Prevention Certificate" with Supplement, MARPOL ANNEX I. DMA and CL perform the initial survey. DMA issues the initial certificate. CL performs parts of the initial survey, of items as stated in Annex 1, and issues a confirmative statement on the scope of the survey and inspection performed by the Society. CL is authorized to perform all subsequent periodical, annual and intermediate surveys, and to reissue and endorse the certificates. The scope and division of the surveys is stated in Annex 1.
"Pollution Prevention Certificate for Carriage of Noxious Liquid Substances in Bulk", MARPOL ANNEX II.
CL carries out the initial survey and issues the initial certificate.
CL is authorized to perform all subsequent periodical, annual, and intermediate surveys, and to endorse and reissue the certificates.
The scope of the survey is stated in Annex 1.

4.1 **INCLINING TEST**
CL is authorized to witness inclining tests and to sign the test report. CL’s procedure for the execution of inclining tests may be used, provided this does not deviate essentially from the procedure prescribed by DMA. If CL has not established a procedure for the execution of inclining tests, the procedure prescribed by DMA shall be used.
The procedure is stated in Annex 2.

5.1 **INTERPRETATIONS (Conventions)**
Where class rules and Conventions rules are identical, or where interpretations are provided in the class rules, CL may use these interpretations provided that DMA has not notified CL of other interpretations to be applied. Where no class rules are known, CL shall apply interpretations stated by DMA.
DMA’s interpretations are stated in Annex 3.
In fields where neither class rules nor national interpretations are available, CL may make interpretations and keep DMA informed.

6.1 **EQUIVALENTS**
Under the terms of the International Conventions, equivalents shall be approved by DMA before these equivalents enter into force and if:

- they are considered to be of importance for the safety of the ship,
- they are considered to represent a pollution risk to the maritime environment, or
- they are required to be reported to IMO in accordance with regulations of the Conventions.

7.1 **REPORTING AND OTHER DUTIES**
For each Danish ship which has been entered in the register of CL, the Society shall forward details of the valid class certificates, including the attached notations and annexes issued by the Society.
When changes in the character of class, including class notations are made to a ship’s class certificates, including annexes and notations, DMA shall be informed.
When the class of a ship is cancelled or withdrawn, DMA shall be informed at the same time as such cancellation or withdrawal take place, and the reason for the cancellation or withdrawal shall be stated.

7.2 DMA shall inform CL of the valid statutory certificates and records of initial surveys carried out by DMA.
All statutory certificates, records etc. issued by the DMA shall be in the English language.
7.3 For each Danish ship entered in the register of a recognized Classification Society, the Society shall forward details to DMA of the statutory certificates, including annexes, issued.

7.4 When CL has carried out freeboard calculation and initial load line survey, details of the result of the freeboard calculation and the survey report shall immediately be forwarded to DMA.

7.5 If a class surveyor boards a Danish ship classified by the Society he represents for the purpose of class, statutory or unscheduled inspection, and observes technical conditions which he considers to be of a character such as render the ship unfit to proceed, such as are of importance to the safety of persons on board, or such as constitute a pollution risk to the maritime environment, DMA shall be informed and the surveyor shall withdraw the statutory certificates or notify the master that the certificates have been cancelled and that the ships is not fit to proceed.

The withdrawal or cancellation of certificates for ships which are not fit to proceed or which constitute a pollution threat shall be reported to DMA as soon as possible.

7.6 Upon request by the ship owner, and upon reasonable notice, it is the duty of CL to carry out inspections as initiated by DMA, on ships classified by the Society concerned.

Inspection reports relating to fields covered by the International Conventions shall be forwarded to DMA as soon as reasonable possible after the inspection.

7.7 In so far as the certification services covered by this Agreement is concerned, CL agrees to co-operate with port state control officers to facilitate the rectification of reported deficiencies on behalf of DMA when so requested, and report to DMA.

USE OF SUBCONTRACTORS

7.8 Normally, surveys shall be carried out by surveyors working exclusively for CL. CL may use exclusive surveyors of another organization with which CL has a bilateral agreement provided that the other organization is recognized by DMA.

However, CL may use non-exclusive surveyors provided such surveyors and all services and functions performed by such personnel relevant to this agreement, are subject to the quality assurance system of CL. These provisions apply to subcontractors and to all other suppliers of support services relevant to statutory survey and certification.

SUPERVISION

7.9 CL is to present documentation of its quality assurance system

7.10 CL is to give DMA access to relevant internal instructions, circulars and guidelines, regarding statutory surveys for which CL is authorized.

7.11 CL is to co-operate with the DMA's inspection and verification work.
7.12 Audits to be carried out by DMA or by an impartial external body (e.g. IACS QSCS) recognized by DMA, to satisfy itself that the CL effectively carry out the functions it is undertaking on inspections and surveys on statutory matters as well as on matters related to its own rules concerning hull, machinery and electrical and control installations.

CONSULTATION AND INFORMATION

8.1 Rules and technical regulations.
   1. CL has an obligation to co-operate with DMA in connection with development of rules and/or regulations.
   2. CL shall forward three copies of the valid class rules to DMA, not later than one month after this agreement becomes effective.
   3. When new class rules and regulations are agreed to, or amendments to CL's existing survey regulations take place, the Society shall forward three copies to DMA, not later than the effective date of these regulations.
   4. DMA shall forward three copies of its technical regulations to CL, not later than the effective date of these regulations.
   5. DMA may invite CL to participate in technical studies etc. initiated by DMA.

8.2 All technical regulations and/or interpretations with which CL must comply shall be in English.

MUTUAL EXCHANGE OF INFORMATION

9.1 At least one consultative meeting shall be arranged every year at which subjects and matters of common interest shall be discussed.

9.2 CL shall assist DMA by providing drawings etc. in connection with the examination and the investigation of loss of Danish ships and accidents.

TRANSFER OF KNOW-HOW

10.1 CL will on a case-by-case basis assist DMA in maintaining and developing its technical competence in the field of shipping/ship survey.

FEES

11.1 The settlement of fees payable by shipyards and/or shipping companies for surveys and inspections performed, and for certificates issued by CL as stated in this agreement shall take place between the Society and the party which ordered the service, and shall be of no consequence for DMA.

11.2 When a foreign port state requests CL to board a ship which is classified by the Society due to shortcomings in statutory surveys carried out by CL, settlement of the fee payable shall be of no concern to DMA, but must be resolved between the Society and the party which ordered the service.
FINANCIAL LIABILITY

12.1 Subject to this Agreement, if a liability is finally and definitively imposed on the Danish State for loss or damage which is proved to have been caused by a wilful or grossly negligent act or wilful or grossly negligent omission within the scope of this Agreement by CL, its bodies, officers, employees or others who act on behalf of CL, DMA is entitled, on behalf of the Danish State, to full compensation from CL.

12.2 Subject to this Agreement, if a liability is finally and definitively imposed on the Danish State for loss or damage which is proved to have been caused by any other negligent act or any other negligent omission by CL bodies, officers, employees or others who act on behalf of CL, DMA is entitled, on behalf of the Danish State, to receive from CL compensation up to the amount of financial liability as defined in the standard terms and conditions of CL or 5.000.000 DKK whichever is greater.

12.3 If the Danish State is summoned, or is expected to be summoned to answer for such liability as is mentioned above in this article, CL shall be informed without undue delay. DMA shall, for information purposes, send all claims, documents and other relevant material to CL.

12.4 The Danish State shall not enter into a conciliation, which involves acceptance of such liability as is mentioned in the first or second paragraph of this article without the consent of CL.

12.5 While acting for DMA under this agreement CL shall be free to create contracts directly with its clients and such contracts may contain CL normal contractual conditions for limiting its legal liability.

TERMINATION UPDATING AND ENTRY INTO FORCE

13.1 This agreement may be terminated or renegotiated by the parties subject to three months advance notice.

13.2 The content of the existing Annexes and possible additional annexes shall be updated, as appropriate, taking into account in particular the relevant decisions of the IMO and any changes of the division of activities between DMA and CL.

13.2 This agreement shall enter into force on 1 May 1996.

Date: .....................................

Signed CL: ...................................... Signed DMA: ......................................
ANNEX 3
PROPOSED AMENDMENTS TO THE ISM CODE MSC 72/15/1

1. Add the following text at the end of existing regulation IX/3.1:

"For the purpose of this regulation, the requirements of the Code shall be treated as mandatory"

2. Delete the words "Subject to the provisions of paragraph 3 of this regulation" in existing regulation IX/6.2

3. Delete existing regulation IX/6.3
ANNEX 4
STRUCTURE OF THE MAURITIAN SHIPPING ACT 1986 AS AMENDED

- Part I covers definitions associated with the act.

- Part II refers to management and administration of the act.

- Part III is made up of 8 chapters covering technical aspects of initial surveys and social conditions. The different chapters cover broadly registration requirements, mortgages, maritime liens, nationality and "parallel registration".

- Part IV is divided into 13 chapters covering inter alia certification to some extent, crew agreement, wages, health, discipline on board and ships documents.

- Part V covers 12 chapters and SOLAS '74 requirements, relates to safety conventions and addresses general surveys and inspections of ships with respect to SOLAS '74, COLREG, load Line, carriage of grain as well as dangerous goods, offence of sending an unseaworthy ship to sea and detention of unseaworthy ships.

- Part VI is made up of 4 chapters relating mainly to salvage assistance, priority of claims and wreck removal.

- Part VII deals with inquiries and investigations.

- Part VIII addresses offences committed under the act and penalties.

- Part IX covers legal proceedings, arrest and detention.

- Part X is quite general in nature.