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World Maritime University

Malmö, Sweden

THE IMPACT OF ISM CODE IN MARITIME FIELD

By

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The People Republic of China

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

MASTER OF SCIENCE

in

MARITIME ADMINISTRATION AND ENVIRONMENTAL PROTECTION

2000

DECLARATION

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

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



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ABSTRACT

Title of Dissertation: **The Impact of the ISM Code in Maritime field**

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The entry into force of the ISM Code will be one of the most important events in shipping. The implementation of the ISM Code will bring extensively impact in the shipping industry. This dissertation tried to analysis the impact of the ISM Code in the maritime field. It has focused on three main areas, namely the implementation of the ISM Code, the impact on limitation of liability and the impact on marine insurance.

The ISM Code only can make functions after it has been implemented properly and effectively. In order to achieve this objective, Flag States, Port States, Classification Society and Shipowners shall work together and carry out fully implementation of the ISM Code. It could not be function well enough if they worked isolation. Any shipping company who does not implemented the ISM Code sufficiently will face serious outcome. Ships which do not carry ISM certificates will face negative consequences, not only they will be detained by Port State Control, but also it is impossible to find a cargo because most ship-brokers will inevitably make ISM certification a conditon of charter.

The ISM Code will bring impacts on the shipowners limitation of liability. Obviously, due to the character of the ISM Code, it is convenient for the claimant to find some evidences to proof whether the shipowner has actual fault or with the intent to cause such a loss or with the knowledge that such a loss would probably result. With the success of such proof, the shipowner will be deprived of the limitation of liability. With the establishment of the Designated Person(s) with the ISM system, it is difficult for the shipowner to take a black eye for the deficiency found on board its ships, if he continue doing so, his limitation of liability will possibly be challenged.

The ISM Code brings some changes in marine insurance. P&I Clubs changed the rule of its insurance in the light of the coming into force of the ISM Code. The insured probably is not entitled to get his cover as a result of the breach of the ISM Code.

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LIST OF ABBREVIATIONS

BIMCO	The Baltic and International Maritime Council
CLC	The International Convention on Civil Liability of Oil Pollution Damage
CCS	China Classification Society
DOC	Document of Compliance
DPA	Designated Person Ashore
GRT	Gross Tonnage
IMO	International Maritime Organisation
ISM Code	International Safety Management Code
IACS	International Association of Classification Society
JCC	The Joint Cargo Committee
SMC	Safety Management Certificate
SMS	Safety Management System
SOLAS	The International Convention for Safety of life at Sea

Chapter 1 Introduction

When reading reports on investigations into maritime casualties over the decades it becomes clear that most casualties have come about as a result of human failures. The statistical analyses suggest that around 80 per cent of all shipping accidents are caused by human error. The underlying truth is that the act or omission of a human being plays some part in virtually every accident, including those where structural or equipment failure may be the immediate cause.

For a long time, special emphasis has been laid on utilising high technology in ship's construction and equipment. A great deal of regulations on technical aspects of shipping have been developed by IMO and national authorities, nevertheless, such regulations can only achieve part of the objective of safe and pollution-free ship operations. The task facing us now is to prevent and minimise the scope for human error which contributes, directly or indirectly to a casualty, as well as we insist on high standards in ship's construction and equipment.

In the last few years there have been a significant decline in the number of casualties due to structure failures. In comparison the human error related casualty ratio has increased. The often quoted figure of 80 per cent of accidents and casualties being caused by human error may be on an upward trend. Fragmentation of the industry and commercial pressures have led to a reduction in operational expertise afloat and ashore and there is a need to compensate this with a more structured system.

Losses, both of ships and seafarers, on the level of previous years are no longer acceptable. Nor is damage to the environment through accidental, or indeed deliberate, pollution. And the ship and the shore must take responsibility. The master can no longer be left to bear sole responsibility for the operation and safety of his ship without someone being actively and visibly responsible ashore.

During the late 1980s and early 1990s, there are several serious maritime disasters that occurred, which resulted in loss of life of large number of people and as well as damaged to the environment especially to the marine environment. In March 1989 the *Exxon Valdez* ran aground on Bligh Reef, Prince William Sound near Valdez in Alaska. The probable cause of this was, in the words of the US National Transportation Safety Board(NTSB), "... the failure of the third mate to properly manoeuvre the vessel because of fatigue and excessive workload; the failure of Exxon Shipping Company to provide a fit master and a rested and sufficient crew for the Exxon Valdez..." (Jorgen Rasmussen, 1999). Another example is the Ro/Ro ferry *Herald of Free Enterprise*, which capsized off Zeebrugge and caused 188 passengers loss of their life. According to the Sheen-Commission report, the main reasons are as follows:

- Board of Directors did not appreciate their responsibility;
- Management, from top down to the junior superintendent shared the responsibility of the accident.
- Top to bottom infected with the disease of sloppiness;
- Failure to give clear orders contributed greatly.

Considering the above facts and the political pressure coming from the international community, the Assembly of the International Maritime Organisation adopted the International Management Code for the Safe Operation of Ships and for Pollution Prevention, namely the international Safety Management Code(ISM Code) as a recommendation in 1993 and made it mandatory by means of the 1994 SOLAS amendments. The Code is unique among IMO Conventions in that it addresses the management of ships. It is not prescriptive, but defines its objectives and provides a framework within which shipowners are required to develop a safety management system appropriate to their operation, thereby imposing a degree of self-regulation. The entry into force of the ISM Code is the one of the most important events in

shipping industry this decade. Just as Mr. O'Neil, Secretary-General of IMO, stated in the foreword to a book on the ISM Code on December 1998:

“ The adoption of the ISM Code is one of the most important development in maritime safety of the last decade. Previously, IMO's attempts to improve shipping safety and to prevent pollution from ships had been largely directed at improving the hardware of shipping-for example, the construction of ships and their equipment. The ISM Code, by comparison, concentrates on the way shipping companies are run. This is important, because we know that human factors account for most accidents at sea and that many of them can ultimately be traced to management. The Code will undoubtedly help to raise management standards and practices and thereby reduce accidents and save lives.”

The ISM Code is the international standard for the safe management and operation of ships and for pollution prevention. It is obvious that the ISM Code in its entirety deals with the human element, after all it is a code on management. In the preamble it is stated that” The cornerstone of good safety management is commitment from the top. In matters of safety and pollution prevention it is the commitment, competence, attitudes and motivation of individuals at all levels that determine the end result.”

In order to create a safety culture it is necessary to be aware of safety implications. Then there must be the commitment to do what awareness shows to be necessary. The next requirement is for people to have competence to do what is necessary in the right way. It must be realised that competence does not depend only on the capability of an individual, but also on the appropriateness of that capability to the particular task at hand. People are not born with an attitude. Attitudes are shaped and developed by both the individuals and the circumstances surrounding them. If changes are made to the behaviour or the circumstances which shaped the original attitudes, then the new circumstances will shape new attitudes. As for the

motivation, it is a quite important element to encourage people to fulfil their task as well as possible. It is linked from the top management to the bottom.

The ISM code will be implemented in two stages depending on the types of ships. The first stage applied for all passenger ships, including high-speed passenger craft; oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed craft of 500 grt and above not later than 1st July, 1998, which counts for a total of around 12,000 ships. The second stage will apply for all other cargo ships and mobile offshore drilling units of 500 grt and above.

Shipping companies have the obligation to establish a safety management system(SMS) to meet the requirements of the ISM Code. There is no excuse for not complying. Owners have been given ample warning and those who think the Code will not happen are deluding themselves. These shipping companies that do not carry ISM certification could face the following consequences:

- They will be banned from ports in Europe, North American, the Far East and many others parts of the biggest trading nations.
- They could find their insurance cover has been withdraw: many insurance companies and P&I Clubs have announced that compliance with the ISM Code will be regarded as an essential condition of insurance.
- They could find it impossible to find a cargo. Most ship- brokers will inevitably make ISM certification a condition of charter.
- They will be forced to try and make a living in the handful of countries where the Code is not strictly enforced. Even if they are able to find some cargoes to carry, they will be forced to accept very low rates because the vast majority of shippers will opt for shipping companies that have ISM accreditation. (Fairplay, 1998)

The entry into force ISM Code has widely potential impacts in the maritime field. The impacts are not only related to the safety aspects of the ships but also related to

the commercial and legal aspects of shipowners, insurers and charters. In this dissertation, the author will discuss the following issues:

In chapter 2, the author will analyse the relationship between maritime casualty and the human error as well as the objectives of the ISM Code. With the development of the high technology in ship building and equipment, the maritime casualties due to structure failures have declined and the human error related casualties ratio has increased. One solution to the problem is to emphasis the human element through the ISM Code and try to reduce maritime casualties due to the human error. Moreover, the objectives of the ISM Code will be examined and discuss the way to achieve the goals.

In Chapter 3, the author will describe the responsibilities of Flag States, Port State Control, Classification Society and Shipowners in the implementation of the ISM Code. These parties should work together efficiently for the purpose of the ISM Code implementation to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment and to property.

In Chapter 4, the most important Chapter in the dissertation, the author will focus on the impact of the ISM Code on the shipowner's limitation of liability. The related international conventions with the limitation of liability will be examined. The potential impact of the ISM Code on the limitation of shipowner's liability will be deeply analysed. The shipowner-ship link, made visible by the ISM requirements for reporting structures and documentary evidence, will make it very hard for an owner to limit liability. "Actual fault or privity" have been in the past the only way in which liability limitation could be lost. These have been defences in the past but under the ISM Code it will be too easy for it to be shown that the highest levels of management in a shipping company were aware of a situation(deferred repairs, for example) which could lead to an accident. Faced with this prospect, the options are to do nothing since you are confident in your safety system, do everything possible to

conform with ISM and then more. Cargo owners under the Hague and Hague-Visby rules may also be able to sue shipowners more easily under ISM, since the same requirements for reporting and records will strip away the defence of demonstrating the exercise of due diligence in making the ship seaworthy. Cargo owners will simply have to show the actual negligence was that of the “directing mind and will” of the company.

In Chapter 5, the author will discuss the impact of the ISM Code on insurers . P&I Club had advised its members that compliance with the Code will be made a condition of cover under the Club’s rules. Members who fail to comply with statutory requirements related to the safe management and operation of ships will be unable to recover claims, whether or not they result from non-compliance. The Club will also decline to accept as new members any shipowner who do not have valid ISM certificates.(AR Hill, 1998.).

Conclusion will be addressed in the last Chapter. With the implementation of the ISM Code around the maritime industry, the potential impacts of the ISM Code will emerge more and more. We must face the golden opportunity as well as the challenge resulting from the ISM Code and reduce the cost to the minimum and achieve the maximum profits during the safe operation of ships and the safe management of companies.

Chapter 2 The role of the ISM Code

2.1 Human element and marine casualty

2.1.1 General

The human element in shipping is something that has been talked about for many years but somehow things have always carried on much as before. Crews continued to be cut, mainly for economic and competitive reasons. Investment in maritime education and training was also scaled down, in many cases to levels where the numbers being trained became insufficient to maintain the required numbers of qualified seafarers. Warnings of skills shortages and concerns over safety and social impact largely went unheeded.

For many years solutions to identified safety concerns and the response to incidents have concentrated on engineering and design aspects. Add a double hull here, install a watertight bulkhead there, put in an alarm system, improve firefighting and evacuation systems and so on. All these measures are fine and necessary. But despite a growing realisation that in themselves these measures are necessary but not sufficient to improve safety and that the human element in various forms plays a major role, the industry had not acted on this fact.

So what has changed ? there seems to have been a marked change in attitude in the industry generally. A recognition has emerged that purely technical and design solutions to problems have virtually reached saturation point. Harmut Hormann, director of ship safety at Germanischer Lloyd, recently commented to ISM: " in ship safety we are at a turning point in regulatory matters, moving away from hardware towards a focus on the human element. Regulation of hardware aspects is now

comprehensive. It is difficult to see further major advance in hardware safety. Now the marine community is starting to address the vast void space called the human element.”

2.1.2 Results of investigation

UK P&I Club seeks real reasons behind costly mistakes

A major investigation into the underlying reasons for shipping insurance claims that are blamed on human error carried out by the UK P&I Club.

“three of five claims are effectively still caused by human error,” according to Mr Herry Lawford, director of loss prevention services. “ why do otherwise well-trained people make mistakes? What goes wrong?” he asked. It was time to get behind the label of human error, he said, and discover the real reasons. He was speaking at the public presentation of the club’s 10-year survey of major claims-that is above \$100000-between 1987 and 1997. Such claims account for a tiny percentage of the total, only 2 per cent by value. Over the period of the survey, human error accounted for 58 per cent of them.

In certain circumstances, the survey points out properly trained personnel can become careless and even reckless.

Specific risk areas it identified are:

- Language problems in the mixed nationality ships, and between ship and shore-side personnel, particularly when engaged in critical activities such as berthing and bunkering.
- Confusion due to poor communication between master and pilot.
- Fatigue resulting from smaller crews and shorter turnaround times in port.
- Minor miscalculations leading to ship instability and as a consequence cargo loss.

- Pride including crew to carry out tasks single-handedly which should be excluded with assistance.
- Calculated risks by masters and officers responding to commercial pressures.(The Sea, 2000)

2.1.3 Categories of human error

There are a number of reasons why human error contributed so high percentage regarding the causes of marine casualties. The major reasons are as follows:

2.1.3.1 Lack of knowledge and/or experience

Some older seafarers do not have sufficient knowledge regarding operating the ship safely and effectively. There are number of reasons. Some of them had no chance to attend the maritime academy and accordingly failed to be well-trained, who came to the ship for service relying on their experience of serving on navy. They feel certain difficulties to keep abreast of the technological developments not only due to their poor educational background but also lack of chance to leave the ship to be trained with the fear of unemployment pressure.

2.1.3.2 Lack of communication

The lack of a common language, mainly during an emergency situation, has proved to be a contributing factor to the human element affecting maritime safety. Today multi-national crews are very commonly employed for the purpose of cheaper labour costs. Clear and understandable communications among multi-national crews is necessary to ensure the operation of the ship safely. Communication is a key element in the control of ship operations, and its absence makes marine casualties inevitable.

The lack of communication among multi-national crew members does not only invite an adverse social environment, but more seriously has negative influences on the safety, harmony and smoothness of the ship's routine operations. It is obviously

important that in a crisis situation they must be able to communicate with each other more accurately and rapidly rather than just try to utilise a language one is not familiar with.

2.1.3.3 Fatigue

There are a number of factors which contribute to fatigue on board ships. A number of accidents or casualties on ships have occurred where the cause of such accidents could be the fatigue on the ship's crew members.

Fatigue is defined as a state or condition of exhaustion, weariness or extreme depletion of physical or mental reserves or capabilities. Fatigue results in the degradation of human performance, the slowing down of physical and mental reflexes and/or the impairment of the ability to make rational judgements. Fatigue may be induced by factors such as prolonged periods of mental or physical activity, inadequate rest, adverse environment factors, physiological factors and /or stress or other psychological factors. (Annex of Resolution A.772-18).

Fatigue is always accompanied by the result of reduced crews, less experienced or well-trained seafarers. The most common factor of fatigue are due to:

- unplanned maintenance programme which put pressure on crew members.
- The quick loading and unloading of cargoes
- Not properly laid down routine on board
- Lack of rest on the job
- Excessive workloads
- Interpersonal relations
- Cultural changes

Some of the environment conditions that create fatigue situation on board are:

- vibration
- noise
- ship's motion
- bad weather condition
- unsafe or hazardous vessel conditions

- type of trading

the group on the ship which is mostly exposed to fatigue is the masters and senior deck officers, chief engineer and senior engineer officers as they are all loaded with responsibilities of safe running of the vessel.

Some of the contributing factors could be:

- longer pilotage distance in heavy traffic areas
- longer stand-by period
- short sea passages on some trades
- fast tank cleaning due to loading and unloading
- constant engine breakdown
- blackout situation on board.

2.1.3.4 Stress

Stress on crew members is a very important issue that shipping companies or shore-based organisation should take into consideration. The trends within the shipping industry may lead to serious stress and lower morales which in turn are affecting the ships safety.

The nature of seafaring which involves long periods of isolation from home, families and the shore community at large, is creating great stressful atmosphere. Some of the causes which contribute to the problem, a combination of factors such as less time in port, smaller crew member(reduced manning), workload and condition of the ship can be much to bear.

The behaviour of some shipping companies adds to low morale and serious stress conditions onboard. It could be the non-payment of wages or very low paid wages and poor communication problems on mixed-nationality crew ships. Inadequate food and the slow delivery of mail to seafarers increase the stressful conditions onboard.

Religious background and differences in culture contribute to an increase in stress on the crew. Also there are perceived fears which prevent many seafarers from reporting many of the deficiencies or safety infringement on board ship. They close their eyes and mouths when it comes to matters of safety and they endanger their lives. The fear because of which they refrain from complaining could be for many reasons such as being replaced by another seafarer who can be paid less. They may also be the breadwinners of their entire families or relatives and can not afford to lose their work even though conditions on the ship are unbearable.

If the crew are given more responsibility in doing or running things themselves with the support from the shore-based organisations, then they would feel that they are being valued and would be far less stressed which will increase their ability in performing their duties. It would definitely increase the level of safety onboard ship and all the crew members would live onboard in peace and harmony.

2.1.4 Suggestions for reducing human errors

In order to prevent or eliminate the human error in the safe operation of ships, the following aspects must be taken into consideration and highlighted.

2.1.4.1 Emphasise training of seafarers in accordance with STCW78/95

Attempting to improve the human element, the STCW78 Convention was principally revised so as to produce new STCW95 Convention which entered into force in February 1997. An important feature of the STCW95 is the mandatory Part A of the STCW Code which outlines in detail not only the compliance on which syllabus of courses should be based but also assessment methods and even requiring assessment by demonstrated skill where applicable.

Continuous training is necessary to keep abreast of the rapid technological developments in the shipping industry. Most of the accidents on board ships are caused by operational errors despite the fact that the international community is trying hard in the training of seafarers.

It is always possible to produce better trained crews to do their job, the training effort should concentrate not only on producing better, well-trained and motivated management and crew for the future, but also on upgrading and better motivating existing personnel.

There should be review training for older seafarers who left maritime academies many years ago for upgrading due to the technological developments in the maritime sector. Most accidents or incidents on ships are also caused due to lack of knowledge of sophistication of the systems and the equipment on the ship. Therefore, complete understanding of the system is required by the operators to achieve correct running of the ships.

It is important that these older seafarers keep abreast with the present day developments in shipping industry. Older seafarers who are used to the old fashion ways of navigation or engine room complexities would be able to cope with the present day ship operations as the result of the training.

In China, at the current stage, the Chinese seafarers usually are convened on the maritime universities for training for the purpose of the eligibility and passing the certificate examination. If a seafarer can pass the written examinations carried out by China Maritime Safety Administration, obviously he can obtain the related qualification certificate regardless whether he is competent for his specific post on board the ship. It is hardly to assess the real ability of the seafarer regarding his service on board the ship. Particularly, it is very difficult to assess the English skills

of the seafarer such as speaking ability and listening ability on the basis of the fact of passing the written English test.

With the complete implementation of the STCW78/95, the seafarers have to be trained not only for the eligibility certificates but also for the assessment of the practical skills. In other words, a seafarer can not obtain his certificates until both his written examinations and assessment meet the minimum requirements of the Convention. Moreover, the senior officers are required to be trained on related simulators for the improvement of the safety at sea and prevention of pollution as well.

2.1.4.2 Stringent implementation of the ISM Code

As mentioned in the Chapter I, one of the objectives of the ISM Code is to minimise the scope of poor human decisions which contribute directly or indirectly to a casualty or pollution accident. It is important that shipping companies adopt a human element perspective or attitude so as to make positive and effective changes to maritime safety and protection of the marine environment. In identified risks, as required by the ISM Code, the company should consider “fatigue” as a primary contributing factor for many foreseeable risks. Companies are encouraged to review their laid down policies and operational procedures and give due consideration for aspects such as on board work schedules regarding fatigue. Each company should develop individual strategies to manage the fatigue issue to arrive at an optimum operating safety standard.

2.1.4.3 Motivation

People are not motivated when they do not know how well they are doing in their working places. They need to know what is expected of them and they need to know how well or poorly they have performed. People do not want to have their

personalities treated as company property, but they are eager to learn how well they have done in accomplishing the objectives of their job.

When morale and motivation are low due to any cause such as severe boredom, fatigue, depression, lack of job satisfaction, anxiety etc, then functional performance is diminished accordingly. It is said that “any circumstance significantly diminishing or degrading human performance or functional potentials could be due to low morale or motivation.”

The most vital item in safe manning of a vessel is motivated crew members . If a seafarer only works for his daily bread or wages, he will never do a good job. But by getting a sense of great importance with his employer, partners and teamwork within the ship’s staff would give great access to job satisfaction which is essential in our day-to-day activities.

With regard to motivation, it will be even more important when one is talking about reduced crews since the workload increases. Seafarers can be motivated to practice safe behaviour if incentives are given which correspond to their social and physical needs. If the safety aspects are a high priority goals for a shipping company, then the seafarers will be motivated to pay attention to safety.

2.2 Objectives of the ISM Code

A key feature of the ISM Code is that it does not introduce any new technical standards, but that its operation should ensure that all relevant existing rules and regulations are complied with. As defined in the ISM Code, the objectives of the ISM Code covers the following aspects:

- Ensuring safety at sea

- Prevention of human injury or loss of life
- Avoidance of damage to the environment, in particular to the marine environment and to property.

During the past years the international maritime community has concentrated more attention on ships and their equipment and also adapted adequate relevant conventions and codes in respect of the safety at sea and pollution prevention. The Code together with existing conventions and codes represents an adequate set of requirements to guarantee a good safety level. However, the rules on their own are of little value unless they are effectively implemented. The problem is not lack of standards or regulations but rather their inadequate implementation and enforcement. So the ISM Code moved towards human issues both of training of seafarers and the exercise of responsibility by those operating shipping companies.

The safe and efficient operation of ships depends on the Holy Trinity of management:

- Well designed, constructed and maintained ships
- Capable, committed management personnel
- Competent, qualified and experienced seafarers.

If either of the foregoing is deficient, the whole operation will be jeopardised and problems and accidents will occur. This is why the ISM Code has come into being to ensure that all three of these requirements are equally addressed by an Owner or Manager.(Jhc, 1996)

The Code sets down certain requirements and guidelines. How the company achieve compliance with these requirements is the company's responsibility. Actually, a company does not need to replace its existing systems and procedures, what a company need to do is to modify if required and to re-organise the documentation and ensure it fully meet the requirements of the ISM Code. It is necessary for a company to document its policies, procedures and operating instructions to ensure

that every one in the company, both ashore and afloat, understands how the company wishes to operate. Also without procedures being documented, it would not be possible to show objective evidence to a third party(the Flag State Administration) that the company conduct its affairs in a planned and effective manner.

Each company should establish a Safety Management System(SMS) to ensure compliance with mandatory rules and regulations, and applicable codes, guidelines and standards recommended by the IMO, Administrations, classification societies and maritime industry organisations are taken into account. The objectives of the SMS should:

- Provide for safe practices in ship operation and a safe working environment
- Establish safeguards against all identified risks and
- Continuously improve safe management skills for personnel ashore and aboard ships, including preparing for emergencies related both to safety and environment protection.(Section 1.2.2, ISM Code)

Chapter 3 Implementation of the ISM Code

3.1 Flag States responsibility

The UN Convention on the Law of the Sea(UNCLOS) establishes the fundamental principles and thereby makes it clear that having a shipping register is not an unfettered right of a sovereign state but one which is qualified as a result of the obligations imposed on the state, especially with regard to ensuring compliance with international minimum safety, pollution prevention and social standards.

The duties and responsibilities of flag states are firmly established in international law and provisions are binding all states. All flag states should abide by their international obligations and take the necessary enforcement measures so as to secure the implementation of the ISM Code by vessels flying their flag.

The efforts of Flag States are of primary importance in ensuring that ships conform to international safety standards such as the ISM Code. That is why the Maritime Safety Committee of IMO is currently looking into improving Flag State implementation of the main IMO safety conventions through its FSI Sub-Committee, as well as focusing on streamlining the rights and obligations of port States.

The Flag State must be responsible for the following aspects in respect of the implementation of the ISM Code efficiently and sufficiently.

3.1.1 Establishing the necessary national legislation to guide proper implementation of the ISM Code

Every administration must have in place the necessary national legislation covering:

- Scope of application

- Verification and certification
- Entry into force and
- The code itself.

With regard to verification and certification the legislation must cover audits(initial, periodical and renewal) and the certificates(DOC and SMC), including conditions for their validity.

Moreover, it is necessary to develop the national guidelines to companies on the following:

- How to apply for certification?
- The documentation need when applying
- How audits will be organised and carried out
- The structure of the cooperation between the company and the Administration.
- Such guidelines should be developed in close cooperation with the maritime industry in the country, i.e. shipowners and trade unions.

3.1.2 Establishing control mechanism to ensure the ISM Code being properly implemented

A large number of Administrations have delegated fully or in part their statutory work to Classification Societies. It is also the case with regard to the implementation, verification and certification of the ISM Code.

Even if an Administration decided to delegate in full all work concerning the ISM Code, the necessary national legislation must be developed and adopted and some guidance must be given by the Administration to the Societies and to the companies. The Administration which delegates its audits and certification work to the Classification Society must establish some control mechanism to be able to monitor the work being carried out on their behalf and ensure the related certificates have been issued in accordance with the requirements of the ISM Code. Each Administration must be aware that the responsibility can never be delegated to other

parties such as the Classification Societies. It is always the first responsibility of the Flag State to ensure ships flying its flag to implement the ISM Code properly.

3.1.3 Providing qualified personnel involving the ISM Code.

All Administrations should also have properly qualified personnel to be used for verification and certification purposes. This applies in both cases, when Administration carries out the actual work itself or if it decides to delegate the work. The auditor must possess adequate experience of the operation of ships and knowledge of a company's shore-based operations, he or she must also have solid knowledge of relevant rules and regulations. Even if the audits and certification work have been delegated to other parties, an Administration still must monitor the work done on its behalf, and in order to be able to do that the qualified personnel is needed. In addition, these Administrations who decide to carry out auditing and certification themselves must also consider the need for internal procedures and instructions for their auditors.

3.1.4 Taking measures for enforcement of the implementation of the ISM Code

Flag states should also consider taking additional measures such as bringing proceedings against vessels flying their flag which are operating without the required ISM certification, and imposing penalties of adequate severity to discourage such violations of international minimum rules and standards. The Flag State must be aware that Port State Control can never substitute the Flag State though sometimes the Port State can find the sub-standard vessel and force it to take appropriate corrective measures to meet the requirements of the relevant conventions.

3.2 Port State Responsibility

3.2.1 General

Port State Control(PSC) which means the inspection of foreign flag vessels visiting national ports has been defined as the last safety net in maritime safety. PSC is recognised as being a step in the right direction towards the eradication of substandard ships, when it is carried out in accordance with IMO Assembly resolutions and recommendations.

Port State Control is described as a secondary tier of enforcement, the first responsibility for compliance with international convention standards remains with the Flag State. Port states are not obligated to inspect foreign ships, but do so in the interests of safety and pollution prevention. While Flag States are responsible for the enforcement of IMO Conventions, PSC is seen as fulfilling a caretaker role in terms of supervising the application of Conventions. Port State Control aims at eliminating the operation of substandard ships but it is not a substitute for the Flag State's responsibilities. The increasing failure on the part of some Flag States to effectively implement and enforce international standards for safety and pollution prevention has led to the increased strengthening of the role of the Port State as a policing mechanism for the shipping industry and a "safety net" for the Flag State.

In recent years, Port State Control has become a key element in singling out unscrupulous operators and eventually eliminating substandard vessels. It is now commonly acknowledged that Port State Control will play an important role in determining whether the implementation of the ISM Code on board ship is as effective as desired. The role of the Port State comes into view in Regulation 6 of Chapter IX ^{of SOLAS} which stipulates that a ship shall be subject to control in accordance with Regulation XI/4. Certificates shall be treated as those issued under Regulation I/12 or I/13 and therefore the control provisions of Regulation I/19 should also be considered relevant in this context. In practical terms this means that Port State Control Officers(PSCO) will also verify the Document of Compliance(DOC) and the Safety Management Certificate(SMC) on board the ships which have to comply.

3.2.2 Control Procedures on ISM Code by Port States

The Port State Control Committee of the Paris MOU, recognising the importance of the control procedures contained in the ISM Code, has adopted Provisional Guidelines for the Control on the ISM Code, and decided that the implementation dates regarding certification will be strictly enforced.

The provisional guidelines include the following procedures.

- during the initial inspection, the DOC and the SMC will be verified. An SMC is not valid unless the operating company holds a valid DOC for that ship type.
- When ISM certification is absent or inaccurate or detainable deficiencies in other areas are found, the ship shall be subject to a more detailed inspection.
- If no SMC can be produced on board, the ship shall be detained until such certificates have been provided.

When the flag state or the company do not or can not provide valid ISM certification, the detention may be raised, the ship shall be refused access to all Paris MOU ports until valid ISM certificates can be provided.

The Safety Management Certificate represents the flag state's verification that the vessel has an adequate safety management system in place that complies with the ISM Code. Under the Port State Control program, this certificate, required by chapter IX of SOLAS, will be examined along with the vessel's other required international certificates. In addition, a copy of the company's Document of Compliance, issued to the owner, manager or bareboat charterer, will be examined during the boarding. Of course, a company must hold a valid Document of Compliance endorsed for specific vessel types before a Safety Management Certificate can be issued to its vessels.

Upon completion of the document check, the boarding officers will conduct a general walk-through of the vessel as part of the port state control examination. If, during the general examination, the boarding team establishes "clear grounds" to believe that the condition of the vessel, its equipment or crew does not correspond substantially

with the particulars of the vessel's certificates, the validity of the safety management system will be questioned and the examination will be expanded into the area of the ISM Code compliance.

The expanded examination will generally be limited to the area of concern. Serious structural deficiencies or significant problems in life-saving, fire-fighting, machinery or pollution prevention, along with poorly maintained equipment and structures as well as inadequate training, will give the boarding team cause to question the validity of the ship's safety management system. The first part of the expanded ISM Code's examination will involve a review of the vessel's safety management manual. The following items will be checked for inclusion in the manual:

- the company's safety and environment protection policy;
- procedures for preparation and response to emergency situations, including steering failures, loss of bridge control, fire, abandoning ship, grounding, flooding, collision, medical emergencies, oil spills and emergency drills;
- the company's designated person for the safety management system;
- procedures for reporting accidents and non-conformities with the provisions of the code to the designated person and finally
- written operational procedures and maintenance manuals required by the safety management manual to be on board and understood by the responsible crew members.

3.2.3 Operational requirements *

During an expanded examination, the following operational requirements of the ISM Code will also be verified:

- the officers and crew are familiar with the safety management system and procedures related to their duties;
- The company training programme is in place for all personnel, including new and transferred persons, and all personnel to be familiar with their duties.

- The ship's officers are familiar with the schedule of internal audits specified in the safety manual and able to verify that internal audits have taken place. The port state control officer(PSCO) will not examine the results of internal audits, he/she will only verify that they are being conducted.
- The PSCO will, however, examine the results of the last external audit performed by the organisation issuing the ISM certificates, including the status of any open non-conformities.
- The PSCO will verify that the procedures relating to the deficient system are documented as required by the safety manual and that the appropriate individuals are familiar with the procedures.
- If routine maintenance is required, the PSCO will verify that maintenance was performed and recorded as required.
- The expanded examination will then be conducted by verifying that the appropriate non-conformities are documented and the safety management system is in fact put to use for the continuous improvement of vessel operations.

Regulation 6 of Chapter IX of SOLAS authorises control of a vessel for non-compliance with the vessel's Safety Management Certificate in accordance with Chapters I and XI.

Vessels will be detained under this authority only if the required certificates are not on board or an expanded ISM Code examination reveals serious non-conformities with the ISM Code include:

- a lack of the required certificates attesting to the validity of the safety management system.
- Lack of a safety management manual or
- Major safety system deficiencies where, for instance, critical systems procedures required by the safety manual are not on board and the systems in question are so severely deteriorated as to make the vessel unseaworthy or constitute a threat to the crew or the marine environment.

In 1998 the Paris MOU Port State Control Committee agreed to mount a Concentrated Inspection Campaign aimed at ships entering its region to which the International Safety Management Code applied. The campaign, which was held in conjunction with Tokyo MOU, ran from 1 July to 30 September 1998. First results showed that a total of 1575 eligible ships were inspected during the campaign. A uniform questionnaire was used by Port State Control Officers to test key elements of the ship's safety management system. A total of 81 ships were detained in port for major non-conformities in their systems, resulting in an average detention percentage of 5.1%. Three ships have been banned from the Paris MOU region for not having ISM certificates on board and a safety management system in place. These ships will not be allowed to enter any of the Paris MOU ports until evidence has been provided that a certified management system is in place. (BIMCO, 1999)

Taking the implementation dates into account, ships shall be subject to control in accordance with regulation XI/4. This implies that when the PSCO has clear grounds for believing that the master and crew are not familiar with essential shipboard safety procedures, operational drills and demonstrations may be required.

If the operational proficiency of the crew is not of an acceptable level, the ship may be detained. This decision will be based on the opinion of the PSCO.

Although the ISM Code is related to a documented and approved safety management system, it is obvious that there has to be a clear link with the officers and crew on board. If the crew only considers the management system as a piece of paper without following the principles in their day to day practice on board, deficiencies and non-conformities are to be expected on board.

The ISM Code represents part of the culmination of an evolving recognition within the maritime shipping community that the human element is a critical factor in preventing casualties or pollution incidents. The scope of the relevant IMO and ILO conventions has now effectively been expanded to address the human element, as

well as engineering, design and operational concerns. However, as with any convention, unless implemented they can not serve the purpose for which they were created. It is the obligation of all responsible parties (ie owners, flag states and classification societies) to properly implement the conventions in order to eliminate substandard shipping effectively.

3.3 Classification Society's Responsibility

The greatest contribution to improve maritime safety can only come from higher conformance by the world fleet to recognised IMO Convention and international safety standards. The ISM Code is therefore a vital instrument to bring the improvements expected by the international community. Improved and consistent compliance through stronger enforcement of international rules and regulations are central objectives of the ISM Code.

To comply with the ISM Code, shipowners are required to develop, implement and maintain a Safety Management System (SMS), with conformance of shore-based management operations to standards validated by a Document of Compliance (DOC). The SMS also requires audited compliance of vessels to retain mandatory Safety Management Certificates (SMCs). What is the International Association of Classification Society (IACS) role in terms of the implementation of the ISM Code? According to the author's generalizations Classification Society must be responsible for the following aspects:

3.3.1 Issuing the related certificates on behalf of Flag Administrations

Through delegation by Flag Administrations, much of the audit workload for Code compliance will be undertaken by the IACS societies, which have a unique technical understanding of the world merchant fleet and the Conventions on which the Code is based. Many Flag Administrations have delegated the IACS societies to issue the Safety Management Certificates (SMC) for ships due to lack of resources, and some Flag Administrations also delegated the IACS societies to issue the Document of

Compliance(DOC) for a shipping company. Therefore, the IACS must control the ISM Code certification delivery and ensure that the ISM Code certification services are under the responsibility and authority of the IACS Member Society and not of any of its subsidiary bodies or sub-contractors.

China Classification Society(CCS), one of the IACS members, has been contributing many tasks regarding the implementation of the ISM Code. China Maritime Safety Administration has delegated the CCS to audit and issue a Safety Management Certificate(SMC) for each of Chinese ships. However, issuing a Document of Compliance(DOC) for a shipping company still has been carried out by the Administration themselves. A total number of 756 ships already carry the SMCs issued by the CCS. Below is the list giving details regarding the SMCs of Chinese ships.

Flag	ship type	number
China	Bulk carrier	134
China	Chemical tanker	13
China	Gas carrier	23
China	Oil tanker	91
China	Other cargo ship	129
China	passenger high speed craft	54
China	Passenger ship	9
Hong Kong, China	Bulk carrier	23
Hong Kong, China	Other cargo ship	1
Liberia	Bulk carrier	29
Liberia	Oil tanker	4
Liberia	Other cargo ship	7
Malta	Bulk carrier	6
Marshall	Bulk carrier	1
Panama	Bulk carrier	98

Panama	Gas carrier	5
Panama	Oil tanker	28
Panama	other cargo ship	41
Panama	Passenger ship	2
Singapore	Bulk carrier	6
Singapore	Oil tanker	5
Singapore	Oil tanker/Chemical tanker	1
St. Vincent and the Grenadines	Bulk carrier	20
St. Vincent and the Grenadines	Oil tanker	1
St. Vincent and the Grenadines	Oil tanker/Chemical tanker	2
St. Vincent and the Grenadines	Other cargo ship	22
Vanuatu	Oil tanker	1

3.3.2 Establishing the procedures to train the certification auditors

ISM Code certification requires profound maritime experience. The certifying organisation must possess sufficient knowledge and expertise in mandatory classification and statutory requirements as well as in the process and procedures to ensure complete and accurate application of mandatory rules and regulations. Qualification for auditors therefore include the need for thorough knowledge of the mandatory rules and regulations governing ship's safety and pollution prevention. ISM Code audits may only be performed by qualified auditors who have experience in ship operations or in relevant statutory and classification requirements.

The IACS expert working group on ISM which first met in 1993 identified the need for complete training programme for its auditors involved in certification. This was developed and implemented. It involves five modules which take a minimum of two weeks in addition to participating in actual audits, both of companies and ships. This IACS training programme is mandatory, the first time such a common training

requirement has been made so for IACS members. The implementation of training is also audited under the IACS Quality System Certification Scheme.

3.3.3 Avoiding the conflict of interest between consultancy and certification

An IACS Member verifying ISM Code compliance must ensure that independence exists between personnel providing consultancy and those providing certification. Some shipping companies sometimes invited the employee of the IACS members to assist them to complete establishing the ISM systems, in that case, if the employee carried out the audits of the same shipping company as an ISM auditor, it means that he audited his own systems, in which case it is hard to ensure that the systems have met with the ISM requirements. Therefore, the activities of consultant and audits must be separated by the IACS Members.

However, it must be remembered that IACS members are acting as delegated agents for flag administrations. The ISM Code was not made by classification societies and it is not a classification rule. It was made by IMO member states as an amendment to the 1974 SOLAS Convention. Each member state, as a flag administration, is therefore responsible for its timely implementation. IACS is committed to supporting the flag states wherever possible and has played a full part in the development of the ISM Code over the past years. (James Bell, Fairplay, 1998)

The objective for IACS members has been to seek consistency and uniformity of implementation. Given the thousands of ships and hundreds of companies that are involved in the certification process, this is not an easy task.

3.4 shipping companies responsibility

When something goes wrong on board a ship, by tradition the master has been held responsible, while those back home in the boardroom usually escaped censure. The ISM Code is changing that by censuring that a shipping company's management is held accountable for incidents involving its ships. It calls for companies to have safety management plans for every ship in their fleet and, because it has been made mandatory through the SOLAS Convention, the Code is also subject to port state control. (William A O'Neil, BIMCO review, 1999)

the ISM Code requires a company, which is defined as the owner of the ship or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility of operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code, to set up their Safety Management System to address and document the following aspects of safety as identified in the ISM Code:

- Safety and Environment Policy
- Company Responsibility and Authorities
- Appointing the "Designated Persons"
- Master's Responsibility and Authority
- Resources including Personnel
- Development of Plans for Shipboard operations
- Emergency preparedness
- Reporting and Analysis of Non-conformance, Accidents, Hazardous Occurrence and Near Misses
- Preventive Maintenance of Ship and Equipment
- Control of Documentation
- Company Safety Verification, Review and Evaluation
- Third party Certification, Verification and Control

3.4.1 Safety and environment policy

The first step is to set out the company's objectives which will start with policies regarding safety and pollution prevention. The policies must be properly thought-out describing in a clear and concise manner how these objectives will be achieved and be understood at all levels within the organisation. It will also underline the company's commitment especially that of senior management. Just to say some nice words and thereafter do something else would be directly counterproductive.

3.4.2 Company responsibility and authority

The administrative structure of the company and the operating structure on board ship should be clearly identified including the inter-relationship of the various positions both ashore and afloat with special regard to the "Designated Persons ashore". The company should ensure that adequate resources are made available and this will include financial, material and human resources. Every person who has responsibility or authority for safety matters must have these clearly defined in order that they can efficiently fulfil their tasks.

3.4.3 Designated Persons

For a Safety Management System to function effectively it is necessary for one person to co-ordinate and monitor all safety and pollution prevention matters both ashore and afloat. In large companies it may be necessary to split the fleet, in which case there can be more than one Designated Person Ashore(DPA). Where the DPA does not have overall authority, it is imperative that there is direct access to the highest level of management to ensure that any required action which is considered necessary will be taken by senior management in a timely manner.

3.4.4 Master's responsibility and authority

The company must clearly define and document the Master's responsibility and authority to ensure there is no misunderstanding especially in times of emergency. It is necessary to clearly establish that the Master has overriding authority and

responsibility to make decisions with respect to safety of the crew, the vessel and pollution prevention and to expect the company's full support and assistance following a major incident. The Master's role in motivating the crew in safety matters must be established in the SMS and he should be given every encouragement and assistance in implementing the company's policies and procedures and ensuring that the crew are well aware of the SMS and their part in its implementation.

3.4.5 Resources including Personnel

The company must ensure that adequate resources are made available to develop and maintain an effective Safety Management System. They will required to ensure that they appoint adequately qualified and experienced personnel both ashore and afloat and with special regard to the appointment of Masters.

3.4.6 Development of shipboard operations

Key shipboard operations involving safety of personnel and ship including pollution prevention should be identified and assigned to qualified and capable personnel with emphasis on preventive actions. Special and critical shipboard operations including contingency plans must be addressed and adequate procedures developed, implemented and recorded.

3.4.7 Emergency preparedness

Procedures and guidance instructions are required to be developed and made available to ensure that potential emergency situations can be dealt with quickly and effectively. Integrated contingency planning between shore and ship must be consistent to ensure the smoothest of operations during times of extreme pressure. Plans and drills for shore and shipboard contingencies should be reviewed at regular intervals and amended as necessary.

3.4.8 Reporting and analysis of non-conformances

As effective SMS will rely on a concise procedure for reporting accidents, hazardous occurrences, near misses and non-conformances. Good feedback from all sections of the company and especially from the ships must be encouraged. Any deviation from the SMS procedures and instructions will require to be documented and reported to the shore-based management and evidence of effective corrective action having been taken must also be shown.

3.4.9 preventive maintenance

It is crucial to the success of the SMS that adequate provisions are made to ensure that as a minimum requirement, ships are maintained in accordance with statutory rules and regulations. Additional requirements to meet company standards should be established and clearly communicated to all personnel. The SMS should provide for specific measures aimed at promoting the reliability of equipment and systems.

3.4.10 Documentation

The company should ensure that all documentation is controlled and that documented procedures and instructions are available for use at the relevant locations. That changes have been approved by authorised personnel and obsolete documents are withdrawn and properly disposed-of. Records must be readily available and retained in a manner that will ensure they do not suffer from deterioration.

3.4.11 Internal auditing and review

Internal audits of the Safety Management System must be carried out to evaluate the effectiveness of the policies, procedures and instructions, and to ensure that the system continues to be effective. The results of audits, non-conformance, analysis, corrective actions, reports and inspections require to be reviewed by senior management to ensure that the safety system is maintained and continually improved.

3.4.12 Certification, verification and control

A Document of Compliance(DOC) should be issued to every company complying with the requirements of the ISM Code by the Administration, by an organisation recognised by the Administration or by the Government of the country, acting on behalf of the Administration in which the company has chosen to conduct its business.

A Certificate, called a Safety Management Certificate, should be issued to a ship by the Administration or organisation recognised by the Administration which should periodically verify the proper functioning of the ship's SMS as approved.

Chapter 4 the Impact of the ISM Code on Limitation of Liability

4.1 General

Those outside the shipping and transportation business find it difficult to understand why shipowners and similar transporters should be in the uniquely privileged position of being able to limit their liability in respect of claims which are made against them. Why do shipowners and transporters enjoy this privilege? This right arises by operation of law and not by contract.

An eminent English judge summed up the position as follows: "limitation of liability is not a matter of justice. It is a matter of public policy which has its origin in history and its justification in convenience." (Richard Williams, 1997)

Legal limitation of the liability of shipowners for loss or damage arising on the connection with the operation of the ship has long traditions in international maritime law. Although the legal regimes have varied with time and place, they have two principles in common:

- (1) the legal limit of liability varies, generally speaking, with the size of the ship, and
- (2) the shipowner is not entitled to limit his liability if the damage is attributable to his personal fault or neglect.

4.2 Two types of limitation

Specific or contractual limitation includes the provisions in the various International Conventions covering carriage of goods and passengers by sea, namely the Hague Rules, the Hague-Visby Rules and the Hamburg Rules in respect of carriage of goods and the Athens Convention in respect of carriage of passengers. Also under the specific heading, there are other regimes established by the International Conventions in respect of oil pollution, nuclear liability and more recently HNS. The

characteristic of this limitation is that it applies to specific types of claim. The specific or contractual limitation provisions broadly apply to “the carrier”, which includes the owner or charterer entering a contract with the shipper(Hague and Hague-Visby Rules), and any person by or in whose name a contract has been concluded with a shipper or who actually performs all or part of the carriage(Hamburg Rules and Athens Convention)

Global limitation relates to claims from all and any source and is generally applied after any applicable specific limitation provisions, although it does not apply at all to claims in respect of liability for oil pollution covered by the Civil Liability Convention(CLC) where the limitation regimes are totally independent and stand alone. There have been two international conventions setting out this type of limitation-the 1957 Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships(the 1957 Convention) which is now of fairly limited application and the Convention on Limitation of Liability for Maritime Claims 1976(the 1976 Convention) which is increasingly becoming the international standard.

The difference between these two conventions is broadly that the 1957 Convention provides for lower limits but it is easier for a claimant to challenge and break the limit whereas the 1976 Convention provides for higher limits(soon to be substantially increased when the 1996 Protocols come into force internationally) but those limits are much more difficult to challenge.

4.3 “The actual fault or privity” standard

the actual fault or privity standard exists in the 1957 Convention. This convention is no longer in force in England, nor in most other English law based jurisdictions, although it still applies in Singapore. The right to limit liability under the 1957 Convention is granted to a shipowner “ unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner”. In England the burden of

proving the absence of fault or privity has lain on the owner(it is always particularly difficult to prove a negative), whereas the civil law system in Europe and elsewhere have placed the burden of proving the existence of fault or privity on the claimant seeking to break limitation.

The meaning of "actual fault or privity of the owner" has been the subject of much litigation before the courts.

The primary problem has been to establish who, in law, constituted the "owner". This was a particularly difficult question where the vessel concerned owned by a company. The problem was solved in most countries that adopted the Convention by the development of the concept of the "alter ego". This concept first saw light of day in the United Kingdom in the *Lennard's Carrying Co.* case where the court was required to consider the problem in the context of the Merchant Shipping Act 1894. The court held that, upon the true construction of section 503 of the MSA 1894, the "fault or privity" must be the fault or privity of somebody who is not merely a servant or agent for whom the company is liable but somebody for whom the company is liable because his action is very action of the company itself.(Patrick Griggs, 1986)

According to Professor Robert Grime's view in his article "The loss of the right to limit", the "actual fault" of a shipowning company included: a fault brought home to the Board of Director; the fault of proven "alter ego", who need not be a Board member; and the fault of a person, partnership or company which is either a registered ship's manager or to whom management has been wholly delegated. Faults of other will not be the actual fault of the company, but if the delegation of responsibility to another was improper, faulty or not sufficient supervised, then the act of delegation might itself be accounted the actual fault of the shipowning company.

What is the exact meaning of privity? Privity means actual positive knowledge or “turning a blind eye” as Lord Denning said in the *Eurysthenes* in 1976. When we talk about privity of the owner, there are many phrases used to describe the individual who represents the corporate body. Phrases such as “the directing mind and well”, “the very ego”, the person “for whom the company is liable because his action is the very action of the company itself”.

The requirement in Article 4 of the ISM Code for the appointment of a designated person with access to the highest levels of management, and with express duties to monitor the safety and pollution prevention aspects of the operation of each ship, will make it impossible for a owner of a vessel claiming limitation of liability under the 1957 Convention to prove the absence of fault or privity if the problems which gave rise to the casualty were already known to the designated person. It seems likely that knowledge and records of that designated person may be available to aid claimants in civil law countries to prove the existence of fault or privity.

On the other hand, the existence of a complete set of ISM Code documentation and certificates may actually make it easier for a shipowner seeking limitation of liability in those common law countries where the 1957 Convention still applies to prove the absence of fault or privity. The ISM Code may therefore bring the application of the 1957 Convention in those civil law and English law countries where it still applies more closely into line.

4.4 Under the 1976 Limitation Convention

The drafting of Article 4 of this Convention was deliberately intended to make the loss of the right to limitation of liability much more difficult to prove in order to counterbalance the substantially increased limits introduced by the Convention . Article 4 reads:

“A person liable shall not be entitled to limit his liability if it proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.”

It is well known that a heavier burden of proof is required under the new system of limitation to break limitation as compared with the old system. For a claimant to break limitation not only does Article 4 require proof that the loss claimed resulted from a personal act or omission of the legal person of the ship owning company but also that it was committed either with intent to cause such loss, or recklessly and with knowledge that such loss would probably result, in other words, the legal person of the company must have anticipated the likelihood of the loss, but nevertheless acted or failed to act regardless of that probability. Therefore, mere negligence or even gross negligence is no longer sufficient to break the right to limitation because the right to be lost there must be intention to cause loss or damage or recklessness.

There has been no decided case on Article 4 since the 1976 Convention came into force in 1986, but the question of whose “personal act or omission” will be relevant in the case of a corporate shipowner has been the subject of academic comment. In a recent case in the Privy Council on another issue, *Meridian Global v. Securities Commission* it was held by their Lordships that the relevant “Rules of Attribution” must be identified from the true construction of the governing statute or convention. (RICHARD SHAW, 1998)

The 1976 Convention expressly provides that it is only the “personal” act or omission of the person liable which will defeat the right to limit. However, it is still necessary to consider in the case of corporations whose act or omission will be treated as the “personal” act or omission which may defeat the right to limit. Thus it seems that the concept of the alter ego co-opted from the law developed from the limitation provisions of the 1894 MSA will have to be applied in order to ascertain whose action is the very action of the company itself.

4.4.1 The “personal liable”

Article 4 of the 1976 Convention speaks of the “personal” act or omission of a “personal liable” which term presumably encompasses all the various parties identified in Article 1 which is headed:” persons entitled to limit liability”. Therefore, a “person liable” could be the shipowner, the charterer, manager, operator, salvor or liability insurer of the vessel or a further class of person defined as “ any person for whose act, neglect or default the shipowner or salvor is responsible”.

Whose “personal” act will defeat the right to limit? The personal act of any one of the different persons identified in Article 1 will prevent him from limiting his own liability in the event of a claim against him but will not necessarily defeat the right to limit any other persons in the same group in the event of a claim against them. Therefore, if losses arose as a result of the personal act of a ship’s manager he would not be able to limit liability in the event of a successful claim against him whereas the shipowner might be able to limit since the act or omission would not be necessarily be “personal” to him. But the close relationship which frequently exists between the management and ownership structures the distinction may not be so clear cut since the alter ego of both “persons” might well be the same.

It is clear from Article 1.1.2 of the ISM Code that the Code identifies within the term of “company” the owner of the ship and any organisation including a professional manager or bareboat charterer who has assumed the responsibility for operation of the ship from the shipowner. The question arises therefore as to whether the “personal fault” of such a manager would be imputed to the owner in the context of a limitation action under the 1976 Convention.

A professional ship manager will probably be the employer of the designated person under the ship’s SMS. If that person is found to be at fault, but the true owner

remains ignorant of the problem despite having acted reasonably in appointing a competent ship manager, then it would be unfair to deprive the owner of limitation of liability. The wording of the 1976 Convention does not help much, but the insertion of the word "personal", which does not appear in other conventions containing clauses worded similarly to Article 4 suggests a rule of Attribution pointing very specially to the owner himself, or to the person in a corporate ownership most closely corresponding to the individual shipowner.

4.4.2 "Intent to cause such loss"

It is clear from these words that in order to deprive the "personal liable" of the right to limit, it must be proved that the "persona liable" had the subjective intent to cause the loss. It is not sufficient to prove that a reasonably competent person could not have not failed to conclude that his act or omission would cause the loss. It must be shown that the "person liable" himself actively intended the loss. It is difficult to imagine how anybody could prove this because to do so it would almost seem to be necessary to explore the mind of the party who had committed the act or expose that person to truth drugs or some equally infallible method of exposing the true intentions of the person concerned.

4.4.3 "Recklessly and with knowledge that such loss would probably result"

The meaning of the word "recklessly" or "recklessness" has been construed by the courts in the United Kingdom in a number of cases such as *R.v. Caldwell* and *R.v. Lawrence* Stephen. It connotes either carelessness or utter heedlessness of consequence with the result that the perpetrator is deemed to have considered neither the probability or even the possibility of a likely result. (Patrick Griggs, 1986)

Guidance may be sought in the case of *Goldman v Thai airway International Ltd* (1983). The Court of Appeal said that the word "recklessly" had to be construed

in Article 25 of the Warsaw Convention along with the words "and with knowledge that damage would probably result". Eveleigh LJ stated at page 700 that:

"An act may be reckless when it involves risk, even though it can not be said the danger envisaged is a probable consequence. It is enough that it is a possible consequence, although there comes a point when the risk is so remote that it would not be considered reckless to take it. We look for an element of recklessness which is perhaps more clearly indicated in the French term "temerairement". Article 25 however, refers not to possibility, but to the probability of resulting damage. Thus something more than a possibility is required . The word "probable" is a common enough word. I understand that to mean something is likely to happen. I think that that is what is meant in Article 25. In other words, one anticipates damage from the act or omission."

4.5 the Effect of the ISM Code

It is doubtful that the ISM Code will have a significant effect upon a shipowner's right to limit under the 1976 Convention. Leaving aside the possibility of deliberate intent, the claimant must show that the loss resulted from personal act or omission of the shipowner committed recklessly and with knowledge that such loss would probably result. Rule 4 of the ISM Code establishes a link between the safe operation of the ship and the highest level of management in the shipowning or operating company. Therefore, where the wrongful act in question consists of , or arises out of , a breach of the ISM Code, it should be easier to prove a "personal act or omission" on the part of the shipowner. The claimant is still left with the tasks of proving "recklessness" and "knowledge that such loss would probably result".

If the shipowner has failed to correct a shortcoming aboard the vessel which must have been apparent from the documents that the Code requires to be produced, the courts may be prepared to regard such failures as "reckless"

Wording that is remarkably similar to that of the 1976 Limitation Convention also appears in the Hague Rules. It will thus be similarly difficult for a claimant to establish that a carrier is not entitled to limit his liability under the Hague Rules.

It is clear however that the advent of the ISM Code will require management arrangements to be more transparent, and more subject to regular scrutiny than hitherto, and this may expose owners to a great risk of challenge to their right to limitation of liability.

The ISM Code must now represent the internationally recognised standard of good ship management, and failure to comply with the Code's principles (not just failure to produce a DOC and SMC) will amount to a lack of due diligence by the owner. Moreover, Articles 9 and 10.2 of the Code requires the owner to establish procedures for the reporting, investigation and analysis of non-conformities, accidents and hazardous occurrence. It appears probable that cargo interests will be encouraged by these requirements to demand discovery of all such records and documents relating to a ship on which a claim has arisen and possibly her sister ship.

4.6 The Designated Person(DP)

With the purpose of preventing or minimising the occurrence of marine accidents resulting from human error, and emphasising the onshore management, the new regime introduced by the Code is the "Designated Person"(DP) in article 4 as follows:

"To ensure the safe operation of each ship and to provide a link between the company and those onboard, every company, as appropriate, should designate a person or persons shore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include

monitoring the safety and pollution aspects of the operation of each ship and ensuring the adequate resource and a shore-based support are applied, as required.”

This Article has created a totally new post within any shipowning or operating company. It is believed that this post and function is not only a very responsible one but also very delicate. The DP has the responsibility and authority for ensuring that the objectives and requirements of the SMS are carried out. Non-conformities will be reported directly to the designated person who has direct access to the highest level of management. A non-conformity is defined as a deviation from the requirements specified on the owner’s SMS. In many cases, unseaworthiness.

The future will show that there is considerable room for argument, how far the responsibility of the DP goes as far as safety and environment pollution prevention is concerned. He or she will be the link between the company and those on board. In past times this was the superintendent. The person appointed as the DP is required to be able to speak and understand the language that is spoken on board and has direct access to the highest level of management. In addition, according to the ICS Guidelines, the DP should meet the following requirements:

“ The designated person(s) should be suitably qualified and experienced in the safety and pollution control aspects of ship operations and should be fully conversant with the company’s safety and environmental protection policies.

The designated person should have the independence and authority to report deficiencies observed to the highest level of management.”

The pitfall may lie in the management not taking the DP seriously. According to the requirements of the ISM Code, any information about inadequacies in safety and environment pollution prevention may be attributed to the management, who can not escape the responsibility if he or she failed to be active response or only turned “a blind eye” on the deficiencies that the DP has reported. However, the DP also has to be alert as well as to a failure on his part to provide for the adequate resources and

shore based support, which may impose a personal liability on him. If a DP performs his job properly and skilfully- as the traditional superintendent did, this will be a rewarding position, giving him satisfaction that he personally not only contributed to but also provided for the safety of his seafaring colleagues and also the integrity of the ship and cargo or passenger carried.

✓ What is the legal position of the DP? What is the legal consequence of the DP's personal act or omission? In other words, could the DP's personal act or mission result the shipowner losing his right to limit liability? Another question to be asked is whether the knowledge acquired by the designated person or persons about deficiencies in a ship or the management practice of the relevant company in the exercise of his duties could amount to knowledge of the highest level of management of the company. Some people said that the DP is part of that management and his action can represent "the direct mind and will" of the company, therefore, his personal act or mission could make the shipowner no right to limit liability.

The author has the totally different views from the above mentioned. Firstly, the DP is not part of the management, he is lower down the authority chain with the specific task of monitoring the safety and pollution prevention aspects of the ship operation as well as ensuring that adequate resource and shore-based support are applied. If doing his job properly, he will get large number of information from the ships much of which will stay with him and some of which will be communicated to others laterally in the organisation of action, and some of which will be reported to his superiors. Secondly, the DP's personal act or omission shall not defeat the shipowner's right of limitation of liability. According to Article 4 of the 1976 Convention, a personal liable shall not be entitled to limit his liability if it proved that the loss resulted from his "personal" act or mission, in other words, if loss arose as a result of the personal act of the DP, he would not be able to limit his liability, which can not affect the right of the shipowner to limit his liability because the act or omission would not be necessarily the shipowner's personal act or omission.

However, the new regime of the DP can make the operation of the ship more transparency and also force the shipowner unable to turn a blind eye for the non-conformities existing in the SMS, otherwise it might threat his right of limitation of his liability.

For example, the problem of crew fatigue on board the ship due to lack of competent officers has been reported to the DP, who has reported this non-conformity to the top management . However, the shipowner failed to take appropriate corrective actions timely, one day there was a collision accident occurring on the specific ship and resulted loss of life as well as serious marine pollution. Investigation indicated the accident was caused by the duty officer falling asleep on the bridge due to excessive work and lack of sleep, in other words, there was a causal link between the lack of competent officers on board ship and the collision. In that case, the claimant was easy to prove that the loss resulted from the shipowner's personal omission committed with recklessly and with knowledge that such loss would probably result and further could break the shipowner right of limitation of his liability. According to Article 10.2 of the ISM Code, the company should ensure that. " inspections are held at appropriate intervals; any non-conformity is reported, with its possible cause, if known; appropriate corrective action is taken; and records of these activities are maintained." Therefore it is favour of the claimant to find the evidence if there is the shipowner's personal act or omission through these records when an accident occurring.

There is no doubt that requirements of the ISM code to document thoroughly all measures following an incident will provide a fertile ground for legal disputes in the years to come.

Chapter 5 The Impact on the Marine Insurance

Shipping is one of the highest risk industries in the world. During the routine operation of ships, they will encounter all kinds of risks not only from the sea but also from the human beings. Heavy weather, rough sea, grounding, collisions and fire etc. will result in loss of life, personal injury, damage to property and/or serious pollution to the environment especially to the marine environment; at the same time, maritime fraud and piracy etc. , man-made disasters, are also likely threat to the sustainable development of the shipping industry. Therefore, it is necessary for all parties engaged in the shipping business to insure their properties as well as their liabilities against the negative consequences of such disasters. They can keep the shipping business running by sharing the risks among them through the insurance.

The entry into force of ISM Code is to ensure safety at sea, the prevention of human injury or loss of life and the avoidance of damage to the environment, in particular to the marine environment and to the property. The ISM Code can affect several aspects of marine insurance. It has some potential impacts on the insurance rules, seaworthiness, duty of disclosure and cover.

5.1 Change of rules

The International Group clubs made recommendations to their member clubs to change the rules to support the implementation of the ISM Code. The recommendations were that club rules should be changed to achieve at least three criteria: firstly, the possession of valid ISM Code certificates in accordance with flag state requirements would be obligatory as a term of the insurance; secondly the uncertificated member would be denied the right to recover claims arising from failure to comply with flag state ISM Code requirements. And finally clubs would include, in their existing programmes of ships visits and inspections, checks that

there was an effective safety management system in operation and in compliance with ISM Code requirements.(Fairplay, 1998)

The rules of all International Group P&I clubs will contain a provision that the entered vessel shall comply with statutory requirements. Skuld Club rules have been amended to read:

“The member shall comply with all statutory requirements of the state of the vessel’s flag, relating to the construction, adaptation, condition, fitment, equipment, manning, operation and management of the entered vessel(including applicable requirements of the ISM Code) and maintain the validity of all statutory certificates issued by or on behalf of the vessel’s flag state in relation to such requirements. In the event of any failure to comply with this requirement (whether or not the member has been negligent), the member shall not be entitled to any recovery from the Association, except insofar as the member can prove that liabilities, losses, expenses or costs would have been incurred in any event and would have been covered by the Association if the member had complied with those requirements...”(Skuld, 1999)

Skud(and some other clubs have publicly said the same) also will decline to accept as new members any shipowners that do not have valid ISM certificates as required by the vessel’s flag state.

A new clause was introduced in the cargo insurance by London’s cargo underwriters in May 1998 as an active step to support what the ISM Code is trying to achieve. The Joint Cargo Committee(JCC) of Lloyd’s and the Institute of London Underwriters(ILU) have devised and circulated a new clause within the market, which is being recommended as an ISM endorsement. According the new clause, cargo owners who are aware of or should have been aware that the insured cargo is carried by a non-ISM compliant vessel or whose owners/operators do not hold a DOC will lose insurance cover from cargo underwriters. However, innocent cargo

insured who may unwittingly find their cargoes on non-certified vessels are still be entitled to recover from their cargo underwriters.

5.2 Unseaworthiness and cover

The traditional legal basis of carriage of goods by sea, and of insurance for P&I liabilities, is the owner's duty to exercise "due diligence" to make sure a vessel is seaworthy. The principle was introduced by the US Harter Act in 1893 and embodied in the Hague and Hague/Visby rules. Article 3 of the Hague/Visby rules stated that "the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

- Make the ship seaworthy;
- Properly man, equip and supply the ship;
- Make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation."

(+) As far as the impact of the ISM Code on due diligence is concerned, the requirement of the Code that all procedures be the subject of documentation will inevitably provide more chance and means to find an act or omission on the part of the shipowner that will ground liability or lend support to contentions being advanced in litigation. The ISM Code provides a framework for detailed procedure with regard to all aspects of ship management, maintenance and operations. Failure to abide by these requirements may result in inference as to what of due diligence on the part of the shipowner.

While the requirements of the ISM Code that each company must keep records of orders and instructions to its crew, ensure their adequate understanding of rules, regulations and guidelines, keep documentation of all activities in a safety management manual, and delegate the monitoring of safety and pollution prevention

aspects to a designated person will provide evidence of exercise of due diligence under the Hague/Visby rule, equally any non-compliance with the Code or deficiencies in the operational system of a company will undoubtedly provide ammunition to the opposition.

Although the Code is not directly concerned with issues of civil liability and the insurance, it is inevitable that it will have a significant impact on the way in which the carrier's liability is assessed in the event of a casualty, or where there is loss or damage to cargo. Among the issues of civil liability, seaworthiness is the one which might be most affected.

Seaworthiness is covered in the Hague/Hague-Visby Rules, Hamburg Rules, charter parties and marine insurance policies. The traditional test is that, for a vessel to be seaworthy, it " must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it.(Mc Fadden v Blue Star Line, 1905).

The impact of the ISM Code will be in the following aspects:

First, it is normal to expect that vessels are in possession of documents which bear on their seaworthiness, such as certificates required by the law of the flag state or by the laws, regulations and lawful practices of the government and local authorities at the vessel's ports of call. Failure to possess necessary documentation, including those provided by the Code could amount to unseaworthiness.

Second, even if a satisfactory SMS is in place, but the owner or operator has failed to live up to it on the occasion in question, this may result in arguments either that the ship is seaworthy due to the SMS not being implemented properly, or that the owner failed to properly care for the cargo. It would be wrong to say that the Safety Management Certificate was merely an additional certificate for inspection.

The Hague-Visby Rules require that for liability to be shown not only was the vessel unseaworthy but the unseaworthiness resulted from a lack of due diligence on the part of the shipowner.

According to this rule, owners that fulfil this obligation were not liable for crew errors in navigation or maintenance. Cargo interests have rarely attempted the difficult task of proving negligence on the part of shore management. However, the Code's requirement for a continuous interface at top management level between ship and shore places a strict responsibility on senior management to ensure that safety systems are maintained and documented throughout the voyage. This means failure to provide a proper system for the vessels' management and operation may well amount to "unseaworthiness". The owner will no longer be able to plead "I did my best, I didn't know the ship wasn't seaworthy." Furthermore, the underwriters may successfully argue that non-compliance with ISM Code may amount to unseaworthiness, and it will be harder to get the recovery from the underwriters.

In addition, under the Code these defences will no longer be available where the loss is caused by a failure of safety management. The ISM chain of command to top management through a designated person precludes a plea of ignorance. Either the owner or the designated person will have known: or if they did not, they would be in breach of the Code. DP

There is an undeniable connection between rules to improve maritime safety and issues of unseaworthiness. The comprehensive nature of the new requirements makes it easier to link unseaworthiness with failure in compliance. Unseaworthiness can be proved in any instance where proper maintenance is not planned, where planned maintenance is not carried out, or where similar defects have been detected in the past on the same ship or on similar ship, but have not been rectified on the vessel in question. The Code's hidden burdens on owners will make it harder for clubs to avoid or minimise liability for cargo claims.

The consequence of unseaworthiness has been very serious impact on the insured and usually would amount to the insured losing of right to recover any loss or damages resulted from unseaworthiness. For example, Marine Insurance Act 1906, Section 39(5) stated: ".... Where, with the privity of the insured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

Among all implied warranties in marine insurance, the most important one is the implied warranty in any voyage policy that the ship will be seaworthy when the risk commence. With respect of time policy, there is no such implied warranty of seaworthiness, except that if with the ^{consent} privity of the assured, the ship is sent to sea in an unseaworthy state, the underwriters are free from liability for any loss attributable to such unseaworthiness.

It can be seen that issues of seaworthiness will therefore be directly relevant to an owner's ability to recover under both a voyage and a time policy. The Code is likely to have a direct impact on these issues. First it may be used as a yardstick for ^{criteria} _{name} ascertaining whether the ship is indeed unseaworthy. And secondly, it may have an impact on the question of whether the owner was privity to this.

In addition to the newly introduced designated person regime, Article 9 of the Code provides that the onboard Safety Management System(SMS) should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the company, investigated and analysed with the objective of improving safety and pollution prevention. And the company should establish procedures for the implementing of corrective action. Failure of reporting, investigating, analysing and correcting these non-conformities may amount to turning a blind eye, and result in constituting privity to unseaworthiness on the part of the shipowner.

The Code requires that the designated person reports to the highest levels of management, and also requires that the highest levels of management enquire of the designated person what problem exist and what action is being taken. It is therefore impossible for an operating company to claim ignorance of any problem that may lead to unseaworthiness in a vessel. Failure to be aware is no longer a mitigating circumstance for the operator. On the contrary it becomes an evidence of unsafe operation because the ISM Code has laid down an industry standard that should make ignorance impossible.

5.3 Disclosure and cover

Before entering into a contract of insurance, it is important for the insurer to obtain the best available information about the risk to be undertaken. At the same time, it is important that the apparent scope of risk does not change significantly during the insurance contract's duration.

The person effecting insurance and/or the assured plays a central role in supplying information regarding risks, and change of risks, of the item or interest. Moreover, the same person may increase the risk of encountering an insured accident through his actions or failure to take actions. Therefore, it is important for the insurer to obtain correct disclosure from the insured.

The duty of disclosure of the insured means the duty of the person effecting insurance to make correct representation and full and complete disclosure as to circumstance which are material when the insurer is to decide, if and under what conditions, he will undertake the insurance. If the duty of disclosure has been breached, the insurer normally has the right to end the contractual relationship for the future.

infringido

The specific requirements of the disclosure written in the rule 28.1.1 of Skuld are as follows:

The member shall make full and correct disclosure to the Association, before the contract of insurance is concluded, of every circumstance,

- (a) which is known to the member or any agent ^{effecting} effecting the insurance on his behalf, or which, in the ordinary course of business, ought to be known by the member or agent and
- (b) which would influence the Association in deciding whether and what terms to provide cover.

✓ According to the ISM Code requirements, all deficiencies found during the routine operation of the ship must be recorded and also be required to report to the shore-based management of the company. The company has an obligation to carry out safety audits. The results of the safety audits should be brought to the attention of all personnel having responsibility in the area involved so that timely corrective actions can be taken on any non-conformities found. It is obviously that the reporting and auditing system will make the operation of the ship much more transparent. This is thought to be especially so in relation to the designated person and his direct access to the top management.

✗ The shipping company must disclose full and complete material information to the insurer at the time of making the contract of insurance. Especially he or she must disclose all deficiencies of the SMS and defeats that he should know existing during the operation of the ship because he or she has no excuse to fail to know these deficiencies according the ISM Code.

A purpose of the ISM Code is to establish a chain of command leading up the "highest level of management" of a shipowning or operating company and fix every person in that chain with a degree of responsibility for monitoring safety procedures aboard the vessel. As a result, it will become more difficult for a person or persons

who comprise the alter ego of the "top management" of an insured company to claim that they "did not know of defects aboard the vessel."

A situation which may frequently happen is that, although the owner has obtained all necessary ISM documents and certificates, he failed to disclose to his insurers some defects in the SMS or in its implementation, which should have been disclosed and which in due course become apparent from a review of the ship's ISM records following a casualty and a claim on the policy, or which is discovered during port state control inspection. In such circumstances, the insurer may be liable to avoid his liability under the policy.

✗ A more complicated situation will arise if the potential member informs the club that he has DOC and SMC in place, but later on it appears that this is not correct. If incorrect information was given and the insured can, in one way or another, be blamed for giving such incorrect information, then there would be no cover if the insurer would not have written the risk, had the correct information been disclosed.

5.4 Non-conformity and cover

If a vessel has been entered when the owners or managers have their DOC in place and the vessel its SMC, then there is a continuous obligation on the member to comply with all the statutory requirements of the flag state of the vessel including the applicable requirements of the ISM Code.

✗ P&I insurance is a liability insurance and the whole idea of the cover is for the insured member to have insurance in place for errors and omissions made by the employees such as the captain, officers or the crew, for which the member can be held liable. The introduction of the ISM Code does not change this at all. It is still the intention to provide cover to a member for the captain's breach of instructions in relation to what he has to do before leaving a port, or an engine officer's breach of

instructions in relation to bunkering of the vessel. This would be irrespective of such breaches being seen subsequently by an auditor as non-conformities. (Hans Levy, BIMCO, 1998) *infringings*

However, if a non-conformity is reported to the member and he does not take any steps to rectify the non-conformity or, if the member turns a blind eye by not ensuring that a system is in place where non-conformities are reported to him, then the member shall not be entitled to any recovery from the Association except in so far as the member can prove that liabilities, losses, expenses and costs would have been incurred in any event according to Skuld rule 29.1.10.

This rule will apply whether or not the member has been negligent. On the other hand, it is only applicable to losses where there is a causal relation between the loss and the member's non-conformity. In other words, the losses where there is no such causal relation will still be covered by the club.

The rule in relation to compliance with ISM is not different from the one with respect to the member's obligations to comply with other statutory requirements. But the reporting requirements of the ISM Code will make it easier to investigate the extent to which the member has followed up on reported non-conformities, and also if the member has cared whether such non-conformities are actually reported to him. It is believed that there will be some cases where the consequences of the member's failure to comply with the ISM Code will lead to no recovery from the club.

✓ Although the ISM Code has several aspects to affect the marine insurance, it will not be used by P&I club and underwriters as an excuse for refusing or delaying the payment of valid claims. Over the last few years we have seen both a reduction in hull losses and that P&I claims have stabilised. Perhaps the preparation for the ISM Code is part of the reason for this so that to a certain degree the objectives of the Code have been already reached.

5.5 Evidence

When a claim arises, questions are asked as to whether the ship was seaworthy, whether the carrier failed to care for the goods, whether the crew were competent, whether the limitation could be broken, and whether the underwriters and or P&I insurance could pull cover legally. In order to solve these issues, the claimant seeks disclosure of those documents in the owner's possession which go to demonstrate how well the vessel has been maintained, how well qualified were the crew, when was the last class survey and how safety was managed both on board the vessel and ashore. Before the Code came into force, it was difficult to get sufficient documents for these purposes.

The most important aspect of the Code is the fact that each shipping company must now have a written document in which its policies and instructions to its crew will be written and clear lines of communications between the ship and shore-based management exists.

Furthermore, records of all reports to and from the ship and the designated person must be kept. This system of transparency would allow interested parties to go through these records and scrutinise the whole management system of a company. This recording of information will allow more details to find their way to courts to provide evidence on the facts of each particular case. The types of documents that could interest potential claimants include:

- Documents relating to frequency of inspections
- Documents showing non-conformity together with reports of any known or probable causes
- Documents indicating corrective actions and results
- Documents recording the maintenance of such activities

- Documents illustrating the crew's history, ongoing training and competence for their current jobs

If these documents are asked for and not provided, this may prejudice the owner, as the absence will reflect badly on the owner. He will not merely be able to say that the documents have been retained or have been lost, since Article 2 of the Code requires the company to establish and maintain procedures to control all documents and data which are relevant to the SMS. ✓

Chapter 6 Conclusion

The purpose of the Code is to ensure safe practice in ship operation, to safeguard against identified risks, to improve safety management skills of personnel and thus achieve a substantial decrease in or even elimination of substandard and dangerous ships.

Briefly, the Code aims to reduce human error and improve management on shore by introducing mandatory rules and regulations for systematic operational system and procedures for reporting accidents and non-conformities with the Code. It requires a designated person or persons, having direct access to the highest level of management, to be appointed ashore and have responsibility and authority to monitor aspects of safety and pollution prevention and ensure that adequate resource including shore-based support are applied.

The ISM Code is an important step in the right direction. Main element of the ISM Code is to establish a safety system involving the ship as well as the shore-based personnel, including certain procedures and documentation in connection with the implementation and maintenance of the Safety Management System(SMS).

The ISM Code requires that the minimum standard to be met by a careful shipowner based on the existing doctrine of due diligence. What is new is that the shipowner is now obliged to establish that a system exists to secure that due diligence is exerted and maintained both on board the vessel and ashore, and that routines are established to follow up and to report any so called non-conformities, accidents and

hazardous situations, with the objective of improving safety and pollution prevention.

The ISM Code seems "paper tiger" unless it is implemented fully and effectively by the shipowner as well as flag states. It is the shipowner's primary responsibility to establish the Safety Management System(SMS) and ensure this system is really working both on board the vessels and shore, otherwise it is just creating additional certificates for inspection. Shipowners, Flag states, Classification Society and port State shall work together and maintain co-operation to ensure that the ISM Code can be well implemented and all goals of the ISM Code will be achieved, namely

Meanwhile, the ISM Code has some legal impacts on shipowner's civil liability related for loss or damage to cargoes, on the limitation of the shipowner's liability and on the insurance.

The ISM Code sets up another standard to assess whether the ship is seaworthy at the commence of the voyage with the exercise of due diligence by the shipowner. Non-conformity of the ISM Code would amount to unseaworthiness and consequently make the shipowner be unable to escape the liability for the loss or damage to the cargoes resulted from the unseaworthiness. It has been said that the introduction and implementation of the ISM Code will make the job easier for the courts, as the judge will now have available first hand evidence as to whether the shore-based operation and the routines on board were organised in a diligent way. The court would also be able to compare a shipowner's operation with the existing minimum standard of due diligence in order to evaluate his performance.

The Code is not directly concerned with the shipowner's ability to limit liability to a particular figure under any limitation conventions. However, the standard of

supervision and management required by the Code is bound to have an effect on assessing "actual fault or privity" or "recklessness" in the limitation cases.

Implementation of the Code will make it easier to establish actual fault or privity on the part of the owner. It is a clear obligation for the top management of any shipowning company to put an SMS into place, but not merely put onboard. Therefore, having set up an SMS and trained the crew to abide with it may not be a defence for the owner to discharge such a duty.

In litigation, it is the shipowner on whom the burden of proving the absence of fault or privity is placed. Fulfilment of the Code could be very helpful for the owner to do so. Otherwise, disclosure of the Code-inspired documentation will assist the claimant to challenge this.

✓ It is more difficult to prove the owner's recklessness, and a mere failure to comply with the requirements of the ISM Code will seldom be sufficient for this purpose. However, the reporting procedure, the designated person regime and the documentation required by the Code will draw away the owner's defence of not being aware. If he does not know, he is not applying the standard of prudence an average shipowner should demonstrate. If the senior management then deliberately ignores or turns a blind eye to serious problems, the owner could be held to have been reckless.

✓ P & I clubs rules contain a provision that vessels entered shall comply with the statutory requirements. As the ISM Code forms a part of SOLAS, the lack of the necessary certification under the ISM Code will result in the termination or waiver of the cover. This will be the position, irrespective of the fact the vessel is actually in class and her technical condition in other respects satisfies the club's requirements. Non-certification can be described as a lack of formal compliance with the ISM Code. Lack of compliance might be the failure by the shore-based operation to give

instructions or follow up that instructions are complied with. Other examples are inadequate or obsolete reporting procedures, lack of, or insufficient, instructions by the master, training of the crew and reporting systems to the shore-based operations.

✓ The ISM Code, with its detailed documentation system, will have a direct impact on proving that the vessel was seaworthy as of the moment of the attachment of the insurance and the vessel owner did not knowingly permit the vessel to break ground in an unseaworthy condition.

The ISM Code requires that non-conformities be reported by the master to the company. It also provides for the recording and alleviation of deficiencies. It requires extensive internal safety audits which must be brought to the attention of all personnel having responsibility in the area involved and requires that management personnel take timely corrective action on deficiencies found. Although the goal is to correct deficiencies, their very record could give rise to a claim by an insurer that the vessel was not seaworthy at the time the insurance attached if any deficiencies existed at that time.

The ISM code requires such extensive documentation of shipboard operations, it may provide the owner with a greater ability to prove due diligence that he had in the past. On the other hand, because of reporting of non-conformities, deficiencies and so forth, unless the documentation is carefully crafted, the ISM code may have the opposite result and give rise to a finding of want of due diligence to make the vessel seaworthy, which will impact both on insurance and cargo damage issues.

On the other hand, a shipping company being sued will now be subject to a much more detailed scrutiny by the court and the plaintiff's lawyer. While this may be a useful way of having all facts disclosed, it can certainly also be misused by plaintiff's lawyers to embark on a "fishing expedition"

effects ↑

It is obviously not the aim of the ISM Code to encourage such behaviour, but it is an unavoidable side effect. It will be up to the courts and arbitration tribunals to make sure the ISM code is not misused in this way, and to determine the invisible borderlines between privileged documents and evidence which may be disclosed.

Although there are certain drawbacks, the spirit behind the ISM Code is clear, namely to improve the safe operation of ships and pollution prevention. Much depends on the implementation in practice, but the training and awareness of shore-based staff and of the seafarers is the best way of reducing maritime accidents.

BIBLIOGRAPHY

AR Hill(1998). " Getting a standard, golden opportunity not to be missed". *Fairplay*, 1st January, 1998.

Andrew Guest(1998). " Will ISM send you to jail". *BIMCO Weekly News*. No 17. 22 April, 1998.

Chris Hilton(2000). " The legal implications of the ISM Code". *BIMCO Bulletin*. Vol. 95. No.2. 2000.

Captain Terry Ogg(1996). "IMO's International Safety Management Code.". *The International Journal of Shipping Law*, Part 3, June,1996, pp143-152.

Griggs, P and Williams, R(1998). *Limitation of Liability For Maritime Claims*. London: LLOYD'S OF LONDON PRESS LTD.

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

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

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

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

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

James Bell(1998). " No other alternatives, joint effort needed to make it work". *Fairplay*. 1st January 1998.

Mottram, D(1998). " Management Structure for the Maritime Industry". *BIMCO Bulletin*, Vol. 93, No.2.

Nigel Carden(1998). " P&I Clubs warn clients on ISM certification". *LLOYD'S List*. Friday, September 18, 1998. No.57070. Page5.

Pamborides, G P(1996). " The ISM Code: potential Legal Implications". *International Maritime Law*, No.2,1996.

Shaw, R(1998). "The ISM Code and limitation Liability". *The International Journal of Shipping Law*, Part 3, September,1998, pp169-172.

Richard Williams(1997). "What limitation is there on the right to limit liability under the 1976 Limitation Convention?". *The International Journal of Shipping Law*, Part 3, September,1997, pp117-126.

Richard WJ Schiferli(1998). " PSC'S new frontier". *Fairplay*, 1st, January, 1998.

Rick Hogben(1998). " London insurers act on ISM, new cargo clause introduced". *Fairplay*, 21st, May, 1998.

Seant. Connaughton(1998). " Shielding your ISM Code documents". *Echert Seamans Cherim &Mellott*. Washington, D. C.

Tony Vlasto(1998). " The impact of ISM on limitation of liability". *BIMCO Bulletin*. Vol. 93. No.6 98.

W E Astle(1982). *Shipping and the Law*. London: Fairplay Publications.

William A O' Neil(1998). " Nothing can stop it, the importance of the ISM Code". Annual preview, *Fairplay*. 1st, January, 1998.

Zhao jingsong(1999). "ISM era: impact on shipping, insurance and maritime law".

Asian Shipping, June 1999. 37.