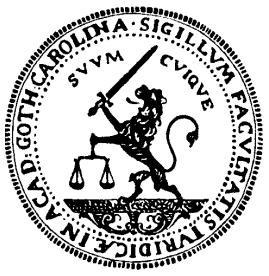

FACULTY OF LAW
University of Lund

Master thesis

SOME CONSEQUENCES OF THE INTERNATIONAL SAFETY MANAGEMENT CODE

By Tobias Mattsson

Tutors:
Marc A. Huybrechts, Katholieke Universiteit Leuven, Belgium
Lars-Göran Malmberg, Lund University, Sweden

Maritime law – Transport law

Autumn 1998

Summary

Safety of human lives and protection of the environment has never been of a more current interest and as important as it is now. After a series of accidents with large numbers of loss both in human lives and in capital, the maritime industry realised that something had to be done. The International Maritime Organisation, IMO, drafted a Code which became part of their flagship, the SOLAS Convention. In the beginning it was only a recommendation but since the 1st of July 1998 it is mandatory for a large number of vessels and by the year 2002 it will be mandatory to about 90 % of the maritime industry.

The ISM Code is thought to have a significant effect on the protection of lives and environment. It requires all Governments to take the necessary steps to safeguard the shipowner in the proper discharge of his responsibilities with regard to maritime safety and the protection of the marine environment.

The ISM Code is also thought to have a significant effect on the shipowners possibilities to limit his liability after a loss. Indeed it will under some of the limitation conventions, but under others it is more questionable and will be up to the legal system to determine. Yet, with all the transparency and available information it will be much harder for the shipowners to hide behind the crew and blame them for the fault.

The ISM Code is also thought to have a significant effect on the shipowners obligation to provide a seaworthy vessel. It will under all circumstances give the authorities a much easier task when assessing in what condition the vessel was at the commencement of the voyage. There are different requirements to provide a seaworthy vessel. When there is an absolute obligation the vessel owner must show that the vessel was in compliance with the ISM Code and it must be established that she was able to encounter the ordinary perils of the particular voyage. When there is a requirement to exercise due diligence to provide a seaworthy vessel, it has to be shown that the highest standard of care was taken, the standard of a reasonable shipowner. With the due diligence requirement it is small chances for a shipowner to claim that he did all he could to make the vessel seaworthy before the commencement of the voyage if non-conformities with the Safety Management System are also found.

For a long time the P&I Clubs and the Insurance industry has been active and prepared for the day when the ISM Code became mandatory. A majority of Clubs and underwriters have made it a requirement that for a vessel to be indemnified he must be compliant with the Code. A non-compliant shipowner is not welcomed in most P&I clubs and underwriters will not sell insurance to him.

Acknowledgements

I would especially like to thank professor Marc A. Huybrechts who have taught me very much about maritime law and been my tutor to this thesis. I would also like to thank Oscar Tiberg, Ken Nelson, Tom Tucker, Michael Pearson, Matthew Marshall, Geoff Hart Davis, Peter Lundahl Rasmussen and Gordon Drake who have given me valuable advice, especially on the ISM Code. I assume that the information I have received from these people are their personal view and not necessarily their employers. Finally I would like to thank Per Palludan at Stena Bulk AB, who gave me the idea in the first place to write about the ISM Code.

1 Table of Contents

2 Introduction

In the world of shipping, a highly competitive trade, many incidents happen upon the high seas and in harbours. Different types of damage and loss occur due to the operation of a ship. Ships are badly maintained, cargo is poorly stowed, collisions happen because of poor navigation systems etc. The immediate cause of damage can often be traced to the master or the crew, i.e. to human error. When an incident occurs often someone has been more or less negligent and becomes liable. He has to pay damages to all those who have suffered loss or injury. Then it is not of great importance whether the injured party can sue the master or the crew because the prospect of enforcing a potential judgement is small. Naturally it is of greater interest whether the shipowner is liable. If the master or the crew in the course of the employment commits a negligent act the owner becomes automatically liable through the 'vicarious' liability. He is not only liable for his own negligence, but also for his employees' negligence. In order to establish liability the plaintiff need not say or prove that the shipowner himself was negligent, but simply that a contract of employment existed between the wrongdoer and the shipowner.

In many cases when found liable a shipowner need not necessarily compensate fully those who have suffered. In general if he fulfils the requirements, he can limit his liability.

One of the obligations a shipowner has is to provide a seaworthy vessel. This is no duty to provide a perfect ship but merely to provide a ship, which is reasonably fit, for the purpose. This can vary greatly depending on what the assignment for the ship is. But there is a basic sound limit, which always has to be reached.

After a series of recent maritime tragedies that resulted in major loss of life's and material, the International Maritime Organisation, IMO, decided to try to prevent this from happening in the future. A group of non-jurists sat down and came up with a code which was introduced as the 'International Safety Management Code', the ISM Code. The main focus is to get rid of human error in ship operations. The code, which is incorporated into the 1974 Safety of life at Sea Convention (SOLAS), the flagship of IMO, came into force on the 1st July 1998.

The ISM Code is thought to have a significant impact on standards of seaworthiness and on the possibilities for shipowners to limit their liability.

3 Purpose

The purpose with this thesis is to describe the ISM Code and to examine what consequences it will have on the owners right to limit his liability, the obligation to provide a seaworthy vessel and indemnity through insurance and P&I cover. This thesis is part of the standard law programme at the University of Lund, Sweden.

During the 9th semester every student is required to write a master thesis.

4 Method

By starting with a brief explanation of the ISM Code, the Limitation of Liability conventions and Seaworthiness and then to match them together, I want to show the reader the background material to understand a possible future scene with the ISM Code.

The ISM Code is a fresh international Code and to my knowledge it is not mentioned in any books so the research has been somewhat different. I have primarily studied articles in reviews and searched on the Internet for information. I have also read books and reviewed my class notes from the maritime law class taught by professor Huybrechts. To get specific information, I have been in contact with several persons working with or in close connection to the ISM Code. I have also studied the conventions, acts and other legal documents which are relevant to this work.

5 Background

5.1 The ISM Code

5.1.1 Introduction

The ISM Code is about a safety management system, SMS. The purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention. Its intention is to provide a tool to check that

'documented' procedures are in place for monitoring compliance with national and international rules and regulations. It is, as expressed in the preamble, purposely written in very general terms not focusing on specific issues: "*Recognising that no two shipping companies or shipowners are the same, and that ships operate under a wide range of different conditions*"[1] and "*The Code is expressed in broad terms so that it can have a widespread application.*"[2] It will provide a standard so that everyone knows what is required of them within the SMS and it will provide standards to ensure that those individuals are "properly qualified, trained and experienced to carry out those tasks".[3] It will moreover provide procedures "for reporting accidents and non-conformities[4] within the system"[5] and will provide procedures "for monitoring that what should be done is being done, by way of internal audits and management reviews".[6] These are management procedures to ensure the safest possible operation of ships and maximum attainable prevention of marine pollution.

Perhaps it is easier to picture this if one has in mind the aviation industry. Before every take off the pilots go meticulously through a detailed checklist of safety procedures and functions to see that everything is perfectly in order. Also, after take off if there is any indication that something is wrong, the main focus is immediately the safety of passengers and plane. The pilots take no chances and try to land the plane. The flight attendants brief the passengers on mandatory safety routines and where to find safety appliances. Furthermore, after the flight every defect, however small, has to be recorded and attended. Everybody who works on an airline, everybody travelling with one takes this for granted. Shouldn't the shipowners and the sailors do that as well?

It is a fact that between 1980 and 1997, in eighteen years, 167 bulk carriers and 1352 lives were lost.[7] It can also be added the maritime disasters "Herald of Free Enterprise" in 1987, "Scandinavian Star" in 1990 and "Estonia" in 1994 took over 1200 lives. Human error plays a vital part in marine claims. It is said to account for around

[1] Section 4 preamble ISM Code.
[2] Section 5 preamble ISM Code.
[3] Section 6.1 ISM Code.
[4] A non-conformity is an observed situation where objective evidence indicates the non-fulfilment of a specified requirement.
[5] Section 9.1 ISM Code.
[6] Anderson, Captain Phil, The ISM Code and fire fighting equipment, I.J.O.S.L. 1998, p. 34.

65% of all major claims and out of these, up to 80% resulting from management failure of one sort or another.[8]

"*The ISM Code can be seen as an 'umbrella' Code. If a ship is not compliant with all applicable port state, flag, national international rules and regulations then she is not compliant with the ISM Code*"[9]

5.1.2 History

In the late 1980s, a growing concern about poor management standards in the shipping industry evolved. This lead to the IMO drafting[10] guidelines on management for the safe operation of ships and for pollution prevention to provide those responsible for the operation of ships with a framework for the proper development, implementation and assessment of safety and pollution prevention management in accordance with good practice.[11]

In November 1991the guidelines were revised. In 1993 the ISM Code itself was adopted as a recommendation and after several years of practical experience, was decided to become mandatory. This was done by means of adding a new chapter IX to the 1974 SOLAS Convention.[12] The Code itself is not actually included in the Convention, but is made mandatory through a reference in Chapter IX.

The Chapter entered into force on 1 July 1998. It concerns 90 % of the world's fleet, with approximately 8000 shipowing and operating companies. It applies to all - passenger ships, oil and chemical tankers, bulk carriers[13], gas carriers and cargo high speed craft – some 18700 ships of 500 gross tonnage and above[14]. To other cargo ships

---

[7] Donaldson of Lymington, Rt. Hon. Lord, The ISM Code: the road to discovery?, L.M.C.L.Q. part 4 November 1998, p. 526.
[8] Ogg, Captain Terry, IMO's International Safety Management Code, I.J.O.S.L. 1996, p. 144.
[9] E-mail Michael Pearson, American Bureau of Shipping, 981020.
[10] "The Code was drafted not by legal committees, as is often the case with IMO originated instruments. Its authors were predominantly individuals with safe and environmental ship management considerations in mind". Andreaoulakis, Manolis, Significant legal implications of the ISM Code, Admiralty news, summer 1998, p.6.
[11] Background to the International Safety Management Code. Newsletter by IMO on the Internet.
[12] Assembly resolution A741 (18) 1993 International Safety Management Code as implemented in chapter IX Management for the Safe Operation of Ships, of the 1974 SOLAS Convention.
[13] Little unclear at the present with the definition of a bulk carrier which, may enable some bulk carriers to masquerade as general cargo vessels, thus giving themselves an extra four years before they need accept the Code.
[14] This does not apply to Government operated ships run for non-commercial purposes.

and mobile offshore drilling units, another 20700 ships of 500 gross tonnage and above, it is required to comply no later than 1 July 2002.

To note is that the ISM Code became mandatory to Ro-Ro ferries operating at a regular service to or from a port of a member state of the European Community already on the 1st of July 1996.[15]

5.1.3 Objectives

The ISM Code objectives are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to environment and property. It also establishes safety management objectives for "the Company"[16] to provide for safe practices in ship operation and a safe working environment, to establish safeguards against all identified risks and to continuously improve safety management skills of personnel, including preparing for emergencies.[17]

With the help of the SMS, the Company should develop a safety-culture where safety is raised to the highest priority. Safety of lives and environment should naturally be seen through all the procedures and routines onboard the vessel. Cost effectiveness and profits should always come in second hand.

5.1.4 *Safety Management System – section 1.4*

The Code requires a "Safety Management System", SMS, to be established.[18] This is a structured and documented system enabling Company personnel to effectively implement the company safety and environmental protection policy.[19] This system should ensure the shipowners compliance with mandatory rules and regulations. Moreover that the applicable codes, guidelines and standards recommended by the IMO, administrations, classification societies and maritime industry organisations are taken into account.[20] Administrations[21] should confirm compliance with the requirements of the

[15] Huybrechts, Marc A. , The International Safety Management Code and it's application to Ro-Ro and passenger vessels : From human failure to achivement, April 29 1998, p.2.
[16] Section 1.1.2 ISM Code, "The Company"- is defined as the shipowner or any person, such as the manager or bareboat charterer, who has assumed responsibility for operation the ship.
[17] Section 1.2 ISM Code.
[18] Section 1.4 ISM Code.
[19] Section 1.1.4 IMO Assembly Resolution A.788 (19) – 1995.
[20] Section 1.2.3 ISM Code.

Code by determining that the conformity of the Company's safety management system with the requirements of the ISM Code and that the SMS ensures that the objectives defined in section 1.2.3 of the Code are met. In other words, the shipowner will be unable to turn a blind eye[22] to best practice. If he does not follow suit, he will have to explain why.[23]

The Company should, as suited best for its conditions, develop, implement and maintain the system which, should contain:[24]

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

These procedures must be in manuals, on signs and in common knowledge, on how to deal with normal routines onboard the vessel. In case of incidents or accidents the manuals shall give information to a proper action. Naturally it wont be time to read in the manual but this should have been practised and repeated many times before so there should not be a need to consult the manual.[25] Incidents and non-conformities are supposed to be reported and it must be a simple, natural and well-known praxis how to communicate this. In case of an emergency it should be easy for the crew to find clear and proper information on how to confront the emergency, e.g. how does the fire fighting systems work, how to rescue someone in an enclosed space. But of course this should also be well known routines and practised before it happens.

The system should also establish that the master has the overriding authority and responsibility to make decisions with respect to safety and pollution prevention and to

---

[21] Section 2.1.2 IMO Assembly Resolution A.788 (19) – 1995.
[22] For a description on "blind eye", see below under Privity, p.28 below.
[23] Donaldson of Lymington, Rt Hon. Lord, The ISM Code: the road to discovery?, L.M.C.L.Q. part 4 November 1998, p. 531.
[24] Section 1.4 ISM Code.

request the Company's assistance as may be necessary.[26] The master will be the person who sees to it that the SMS is implemented and carried out.[27] The shipowner should ensure that the master is allowed to deviate from the procedures laid down in his vessel's SMS if the circumstances need it.

To ensure that the SMS is being complied with, regular checks and audits should be held by the Company and the system itself should be reviewed periodically to evaluate its efficiency.

5.1.5 Designated person – section 4

Each individual company should designate a person or persons ashore having direct access to the highest level of management, to provide a link between the company and those onboard. "This 'link' now imposes a degree of knowledge and control that could seldom, in the past, be documented and verified".[28] The designated person is responsible and has the authority of monitoring the safety and pollution prevention aspects of the operation of each ship in the company fleet and to ensure that adequate resources and shore based support are applied.[29] "This latter function suggests that when it comes to safety and environmental protection the designated person enjoys executive powers and may be considered the highest level of management for all intents and purposes".[30]

Deviations from the requirements specified in the owner's SMS should be reported to the designated person who has direct access to the highest level of management. "From this it appears as if the designated person can be considered the directing mind of the company with regard to safety. If not, it seems to imply that he is obliged to pass on what he knows directly to the person who is the directing mind of the owner".[31] This is not only one of the most important parts of the Code, but also the errant shipowners' Achilles heel. The "blind eye" shipowner is faced with a "Catch 22"

---

[25] Section 8 ISM Code.
[26] Section 5.2 ISM Code.
[27] Section 5.1 ISM Code.
[28] Maitland, Guy E. C., The Legal, Commercial And Economic Consequences Of The ISM Code, Maritime Reporter & Engineering News, issue February 1997.
[29] Section 4 ISM Code.
[30] Andreaoulakis, Manolis, Significant legal implications of the ISM Code, Admiralty news, summer 1998, p.7.

situation. It is not enough for a shipowner to wait for the designated person to report, if he hears nothing he will be bound to call himself and ask for reports[32]. It is inconceivable there will be nothing to report. There will always be something to report since there is a constant change in conditions concerning the vessel and cargo. "A safety management system is clearly intended to be a dynamic system which is subject to continuous change in the light not only of experience of the individual ship, and of the company as a whole, but also of the experience of others in the industry".[33]

Another very important and interesting issue is what the designated person is *expected* to report? If every non-conformity was reported, probably the owners would drown in reports, and it would be difficult to act according to them. There is a need for some kind of determination on what to report and not and the owner, in practise, probably has to delegate certain aspects of dealing with non-conformities, accidents and hazardous occurrences to the designated person, enabling him to deal with some of the simpler ones. Every company has to find the way that suits them the best, much depending on how the management structure is build up and also on the size of the company. "It should be perfectly acceptable that certain matters need not reach the top level, however, if a major incident evolves by some misfortune out of them, top management should not expect to be exonerated of privity".[34]

What kind of liability will then be given to the owner? For example in situations where the owner claims that the vessel was seaworthy, he is responsible for the vessel all the way irrespectively of any delegation of the responsibility[35]. Since there is no guidelines in the Code it will be up to the courts to closer determine what the designated person should pass on to the most senior levels of the management. When a non-conformity is never communicated to the designated person and rests with the vessel crew, it is hard to see that it would be any different liability compared to the time before the ISM code. If a situation like this is found with inadequate reporting procedures,

---

[31] Ogg, Captain Terry, IMO's International Safety Management Code, I.J.O.S.L. 1996, p. 148.
[32] Section 3.3 ISM Code.
[33] Donaldson of Lymington, Rt Hon. Lord, The ISM Code: the road to discovery ?, L.M.C.L.Q. part 4 November 1998, p. 531.
[34] Andreaoulakis, Manolis, Significant legal implications of the ISM Code, Admiralty news, summer 1998, p.20.

probably there is a few changes needed to improve the effectiveness of the SMS and should be looked on severely by the owner.

5.1.6 Personnel - section 6

A very important part of the ISM Code is of course the personnel. To be able to run a safe ship the Company is required to have competent personnel, given proper familiarisation with the correct procedures. All personnel involved in the SMS must have an adequate understanding of the relevant rules, regulations, codes and guidelines. Procedures must be established and maintained to identify any training required to ensure that all concerned understand the correct procedures. The information on the correct procedures must be provided to ship's personnel in a language they can understand[36]. Furthermore, the personnel must be able to communicate effectively in the execution of their duties relating to the SMS. The ISM Code emphasises on on-going exercises and requires the Company to establish programmes for drills and exercises to prepare for emergency situations.[37]

5.1.7 Reports and analysis of non-conformities, accidents and hazardous occurrences – section 9

This is one of the more interesting sections in the Code concerning the reporting. If this part of the SMS works as intended then there is little chance for the owner to claim no knowledge or privity. In section 9.1 it is stated that *"The SMS should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the Company",* which in this case means the designated person who has to determine what to do with the information. It continues by stating that there should be procedures ensuring that the non-conformities are *"investigated and analysed with the objective of improving safety and pollution prevention"*. The second part of section 9 is also of highest importance. Here is stated that *"the Company should establish procedures for the implementation of corrective action"*. It is very important that when found, non-conformities are corrected.

[36] Section 6.6 ISM Code.
[37] Section 8.2 ISM Code.

5.1.8 Company verification, review and evaluation – section 12

5.1.8.1 Internal audits

To verify that all the required procedures subscribed to in the SMS are in compliance, the Company should carry out internal safety audits. The idea behind these internal audits is to discover non-conformities in and fundamental faults with the vessels SMS at an early stage and to be able to work out new procedures that are better. Internal audit follow-up should be performed to ensure appropriate corrective actions have been taken and are effective. At any time, the shipowner can be called upon to produce documentary evidence of his internal audits of every area of his system, including the work of the designated person.[38]

5.1.8.2 Management reviews

The company management should conduct reviews of the management system at defined and sufficient intervals. They should investigate the results of the internal and external audits, if there has been corrective actions and how the result from them turned out. They should look at non-conformities, and find ways to avoid them in the future. "The review may consider revisions to the management system to respond to technology changes, quality concept changes, market strategies and social and environmental conditions."[39]

5.1.9 Certification, verification and control – section 13

5.1.9.1 Issuance of Document of Compliance, DOC

Once the shipowner has been satisfactorily audited as complying with the ISM Code, he will be issued with a "Document of Compliance" by his flag state administration, specifying the types of ships covered and the period for which it applies. A DOC is a document certifying, in effect, that he is a fit and proper person to be a ship

[38] Donaldson of Lymington, Rt Hon. Lord, The ISM Code: the road to discovery ?, L.M.C.L.Q. part 4 November 1998, p. 531.
[39] Management Systems - Guideline for marine management and ship operation based on the requirements of ISO 9002 and the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), rev. October 31 1997.

operator in the light of the safety-management policies that he has evolved and is enforcing in relation to himself and each of his ships.[40]

Every flag state, or whoever the particular flag state may delegate the responsibility to, will do external inspections to audit the SMS in connection with the initial certification and then at regular intervals to confirm continuing compliance.[41] Port State control is also likely to carry out external audits.[42]

A copy of the DOC is always to be on board the ship relevant to it, so that the master upon request may produce it for verification by the authorities. "A shipping company without either a full term or interim Document of Compliance is not allowed to operate the ship types requiring SMS. If a DOC is removed from a company then all associated SMC's are invalidated and in theory all vessels must remain in port until the DOC is reinstated".[43]

5.1.9.2 Issuance of Safety Management Certificate, SMC

The flag state administration will issue to every Company and its shipboard management that operates in accordance with the SMS a "Safety Management Certificate" specific to a particular ship. To earn a certificate a Company must comply with all the statutory requirements of the state of the ship's flag, relating to the manning, construction, adaptation, condition and equipment of the entered ship. Moreover it must at all times maintain the validity of all statutory certificates as are issued by or on behalf of the state of the ship's flag in relation to such requirements and in relation to safety management system.[44]

---

[40] Donaldson of Lymington, Rt Hon. Lord, The ISM Code: the road to discovery ?, L.M.C.L.Q. part 4 November 1998, p. 532.
[41] The DOC should be renewed every 5 years. Huybrechts, Marc A. , The International Safety Management Code and it's application to Ro-Ro and passenger vessels : From human failure to achivement, April 29 1998, p. 5.
[42] Anderson, Captain Phil, The ISM Code and bridge procedures, I.J.O.S.L. 1997, p. 213.
[43] E-mail, Michael Pearson, American Bureau of Shipping, 981020.
[44] Purvis, S. H., ISM (International Safety Management) Code, North of England P&I Association Ltd., March 27 1998.

As with DOC, every flag state, will do external inspections to audit the SMS in connection with the initial certification and then at regular intervals to confirm continuing compliance.[45]

5.2 Limitation of Liability

5.2.1 Introduction

Centuries ago a shipowner would probably face an instant bankruptcy if a serious maritime disaster occurred to his ship. Many times he would have to abandon the ship and her freight into the hands of those third parties with valid claims against him. In a way this itself produced in practical terms a form of limitation of liability.

Limitation of Liability came about as an encouragement to shipowners to carry on their business. Going to sea in ships and often gamble with all the capital they had, the owners knew that they were faced with exposure to unlimited liability far beyond their wealth and many times in situations over which they maybe had no personal control.

International trade needed ships for transport of goods but it was an adventurous pursuit. So as a form of State support in the interest of promoting and protecting the international trade and to encourage the shipowners many shipping nations adopted the concept of Limitation of Liability mainly starting in the seventeenth century.[46] In those days it was in every nations interest to have as big fleet as possible.[47]

As time went by things developed and ships became more outfitted and modern. This transformed the risks involved in maritime trade and enabled an owner to keep his investment under closer control.

The justification nowadays of the owner's right to limit his liability is hardly the same as what made the rule come about centuries ago. In a case in the sixties Lord Denning MR came to the conclusion that it "*is not a matter of justice…but has its justification in convenience*".[48] The convenience of the rule is responsible for its survival.

The shipowner can limit his total liability to all those who have suffered loss or

[45] The SMC is valid for a period of five years. Section 3.2.2 IMO Assembly Resolution A.788(19) – 1995. The validity of the SMC is subject to at least one intermediate verification after half the period.
[46] Gaskell N.J.J, Debattista C., Swatton R.J., Chorley & Giles' Shipping Law, p. 394.
[47] Since all vessels riding country's flag was considered to be part of their naval fleet, and could be used in case of a conflict.
[48] The Bramley Moore: Alexandra Towing Co. v. Millet [1964] P. 200, 200.

injury to a sum of money calculated in relation to the tonnage of his ship.[49] With this sum, in respect of a particular occurrence, a shipowner is required to establish a limitation fund from which the claimants are compensated. This is done in proportion of their actual loss if the fund is not large enough to allow payment in full and no payments are made from such a fund until all claims have been presented.[50]

During the centuries different approaches and conventions have been in force and today the two major conventions in force are the 1957 Limitation of Liability convention and the 1976 Limitation of Liability convention. The majority of the world's shipping tonnage has adopted either one or both of these conventions. The few exemptions are USA who have their own '1851 Limitation of shipowners liability act' and a few countries which still use the 1924 Limitation of Liability convention. Where The Hague or Hague/Visby Rules govern the contract of affreightment, there is also a possibility to limit under these rules and then the value is per package or unit.

The effect of the differing regimes in the conventions and the act means that the extent of a shipowners liability and his ability to limit the same will depend upon where any limitation action is commenced. It is for example generally easier to 'break limit' i.e. make the owner fully responsible to a claim, in the United States than under the 1957 or 1976 conventions.[51] Also in United States, where limitation of liability is generally disliked by the courts, they tend to do their best to keep the shipowners liable, no matter which convention is being applied. After an incident in the world of shipping it is often very likely that several jurisdictions can be involved since f. ex. contracts of affreightment and area of operation for the ships are international.

5.2.2 1957 Convention on Limitation of Liability for Owners of Seagoing Ships

Under this convention a successful claimant is entitled to full reimbursement of his claim unless the defendant is able positively to prove his right to limit liability by

[49] Under the 1957 and 1976 conventions. Under the 1851 act it is calculated in relation to the value of the vessel after the incident or a lump sum and under The Hague or Hague/Visby rules it is calculated in relation to the value per package or unit. See below.
[50] For a more detailed analysis se: Gault S., Hazelwood S. J., Plant G., Tettenborn A., Marsden on Collisions at Sea, 12th ed., p. 535, 745.
[51] For a more detailed analysis se: Underhill, Sally-Ann, Limitation of liability: forum shopping, I.J.O.S.L. 1998, p. 82.

satisfying the court that there is no 'actual fault or privity' on his part.[52] "To claim the privilege of limitation a person must satisfy the words of the statute. If he cannot do so he will be liable for the full amount of the damages".[53]

In a test for 'actual fault or privity' it has to be determined whether or not that particular person was or could be said to have been to all intents and purposes 'in control' of the particular situation. It also has to be determined whether or not it is reasonably likely that if that particular person had performed and carried out his obligations properly the occurrence that resulted in loss or damage would not have occurred.

The claims are restricted to those arising from acts, faults or neglects of those on board the ship, or, if not on board, committed in the course of the navigation or management of the ship.[54]

The defendant is the owner of a seagoing ship, the charterer, manager and operator of the ship. Liability of the ship owner "includes the liability of the ship itself".[55] This means that also the master, member of the crew or other servants of the owner, charterer, manager or operator acting in the course of their employment, has a right to limit their liability.

The burden of proof is on the defendant and "it may be very difficult to show".[56]

5.2.3 1976 Convention on Limitation of Liability for Maritime Claims

Under this convention the defendant can limit his liability unless the claimant proves that the 'person liable' is guilty of a conduct barring limitation.[57] What used to be a way of protection has now emerged into a way of harmonisation.

The burden of proof, which is a heavy burden[58], has changed hands and is instead placed upon the claimant against the defendant.[59] In fact it was deliberately intended to

---

[52] If one is 'privy' to something this means, in this case and generally speaking, that one has certain knowledge, either confidential or otherwise, of some relationship or agreement or situation existing between two or more other people.
[53] Gaskell N.J.J, Debattista C., Swatton R.J., Chorley & Giles' Shipping Law, p. 399.
[54] Article 1b.
[55] Article 6.
[56] Gaskell N.J.J, Debattista C., Swatton R.J., Chorley & Giles' Shipping Law, p. 402.
[57] Article 4., "A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act of omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result".
[58] The Bowbelle [1990] 1 Lloyd's Rep 532, at 535, per Sheen J.

make the loss of the right to limitation of liability much more difficult to prove.[60] But on the other hand the sum that the shipowner now has to pay after he has limited his liability is also set considerably higher.

The claimant must prove that the loss resulted from the personal act or omission of the person seeking to limit, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.[61] What really has to be proved is that f. ex. the master of one ship with intent or recklessly tried to hit the other ship before his ship collided with the other ship. Those trying to deny limitation has to prove that the 'person liable' definitely intended to cause the loss complained of.

The requirement of proof that there has been reckless behaviour and with knowledge that loss would probably result is capable of being satisfied by a more objective test. The burden of proving intention, however, must be by its very nature a subjective test.[62]

The meaning of 'person liable' in the opening words of Article 4 presumably has to be set against Article 1, where the persons entitled to limit liability are defined and set out. But whose 'personal act' will it be that can break the right to limit? Undoubtedly if it is the personal act of the person liable, then he will be prevented from limiting his own liability. Yet, would the personal act of one category of person able to limit prevent another category of person being able to limit if the liability arose from the same occurrence?[63] If there is any doubt as to the owner's conduct he will be entitled to the right to limit liability.[64] Or as some authors put it "One might say that the 'privilege' has become a right."[65]

The defendant is the shipowner or the salvors. In this convention a shipowner is the "owner, charterer, manager and operator of a seagoing ship" and the salvors are "any person rendering services in direct connection with salvage operations".[66] "The liability

---

[59] Gault S., Hazelwood S. J., Plant G., Tettenborn A., Marsden on Collisions at Sea, 12th ed., p. 544.
[60] Shaw, Richard, The ISM Code and limitation of liability, I.J.O.S.L., 1998, p. 169.
[61] Article 4.
[62] Hill, Christopher, Maritime Law, 4th ed., p. 408.
[63] Hill, Christopher, Maritime Law, 4th ed., p. 407.
[64] Gault S., Hazelwood S. J., Plant G., Tettenborn A., Marsden on Collisions at Sea, 12th ed., p. 544.
[65] Gaskell N.J.J, Debattista C., Swatton R.J., Chorley & Giles' Shipping Law, p. 411.
[66] Article 1.

of a ship owner shall include liability in an action brought against the vessel herself".[67] There can be no limitation for oil pollution damage or nuclear damage.[68]

The right to limit applies whether the ship in question is sea-going or not. Structures (completed or not) launched and intended for use in navigation as a ship (or part of it) are also subject to limitation.[69]

This convention entered into force on 1 December 1986 and builds on the practice established by the earlier conventions.

5.2.4 The Athens convention 1974

This convention regulates the liability of the carrier for death, personal injury and damage to luggage. The shipowners liability depends on any of those events being 'due to the fault or neglect' of the carrier or of his servants or agents in the course of their employment.[70] A passenger according to this convention is any person carried in a ship under a contract of carriage and also persons who, with the carriers consent, accompany live animals or vehicles, for instance, on roll-on, roll-off ferries.[71]

The carrier loses his right to limit if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.[72]

This provision is identical to the one in the 1976 convention on limitation, so for a further discussion see above.

5.2.5 1851 Limitation of Shipowners' Liability Act (USA)

Foreign vessels had for a long time enjoyed the advantage of limitation of liability before Congress finally, after heavy pressure from American shipowners, passed the 1851 Limitation of Shipowners Liability Act, which is still the applicable maritime law in the United States.

---

[67] Article 1(4).
[68] Article 3.
[69] Gaskell N.J.J, Debattista C., Swatton R.J., Chorley & Giles' Shipping Law, p. 409.
[70] Article 3(1).
[71] Article 1(4).
[72] Article 13(1).

It is the federal district courts who have original admiralty jurisdiction, exclusive of state courts.[73] For an event or incident to be treated under admiralty jurisdiction it has to have occurred in, on or above navigable waters and also it must bear a significant relationship to traditional maritime activity. All vessels seagoing, used in lakes, rivers, or for inland navigation, whether the owners are American or alien applies to limitation.

Under the 1851 act, a person having legal title to a vessel or a bareboat charterer, whether American or alien, may limit his liability to the his interest in the value of the vessel and freight pending for Maritime claims against that vessel. That is the value after the incident! In some cases however there is also a possibility for certain types of claims to use a lumpsum approach on limitation.

A person or entity that has complete legal control and dominion over a vessel may also be regarded as an 'owner' and limit his liability.[74]

Under this act a shipowner has to show that he had no actual 'privity or knowledge' of the cause of the incident. He even has to show that he shouldn't or couldn't have had any 'privity or knowledge'. 'Privity or knowledge' means not only actual knowledge but also constructive knowledge about the condition and operation of a vessel as well as the competence of both managerial personnel and the crew of the ship. A heavier burden is placed on the shipowner to exercise reasonable diligence in foreseeing conditions that may be the cause of incidents.[75]

Within six months after receipt of a written notice from a claimant for damages, a vessel owner must file a 'complaint' with the court in order to limit his liability. Moreover, the vessel owner will have to deposit with the district court a 'limitation fund', security equal to the value of the vessel and freight due.

Where several claims are being made against the shipowner, they are consolidated. Thereafter, the limitation fund will be distributed proportionally to the claimants if they are successful in proving their damages.

---

[73] Section 1333 of Title 28 of the United States code, 1988 "Any civil case of admiralty or maritime jurisdiction – saving to suitors in all cases all other remedies to which they are otherwise entitled".

[74] Trustees, life tenants, government agencies, and others have been regarded as "owners", entitled to limit liability, because they had "legal control and dominion" over a vessel. Mangone, Gerhard J., United States Admiralty law, p. 187.

[75] Mangone, Gerhard J., United States Admiralty law, p. 191.

In the United States it is relatively easy to break the limit, and the general opinion is that shipowners should not be subsidised at the expense of those whom they injure or affect, for example, seamen.[76]

5.2.6 Per-package limitation

Normally as has been seen, the shipowner can limit his liability to either the value of his vessel or the tonnage of his vessel. Where The Hague or Hague/Visby Rules govern the contract of affreightment, there is an interesting possibility for the shipowner when it comes to limitation of liability. Article IV rule 5 of the Hague Rules, gives the shipowner the option to limit his liability per package or unit. He is not liable to more than £ 100 gold values[77] per package or unit. Yet, problems have arisen in many countries in interpreting the term's 'package' and 'unit'. What and how much is a package or unit? Is size relevant and is it essential that the article carry some form of wrapping? What about a container or pallet? Different approaches have been done to interpret these terms and there is plenty of case law on this matter.[78]

When the Hague/Visby amendment came in 1968 an alternative formula was introduced, based on the weight of the cargo, the shipper being entitled to invoke whichever alternative produces the higher amount.[79] This solved a number of problems in respect to the per-package limitation. The prescribed limitation amounts are 666.67 units of account[80] per package or unit or units of account per kilo of the gross weight of the goods lost or damaged whichever is the higher.

5.2.7 Differences

5.2.7.1 Who is entitled to limitation of liability?

Under the 1957 convention the owner, including the liability of the ship itself, the charterer, the manager and operator of the ship is entitled to limit liability. Under the

[76] Underhill, Sally-Ann, Limitation of liability: forum shopping, I.J.O.S.L. 1998, p. 85.
[77] This has been defined as the quantity of gold which was equivalent of £ 100 sterling in 1924. Wilson, John F., Carriage of goods by sea, p. 195 (fotnote 98)
[78] For a more detailed analysis see; Wilson, John F., Carriage of goods by sea, p. 196 and Tetley, William, Marine Cargo Claims, 2nd ed., p. 433.
[79] Article IV rule 5a.
[80] One 'unit of account' is one 'Special Drawing Right', SDR, as defined by the International Monetary Fund.

1976 convention this is extended to include also the salvors. Under the 1851 Act, it is only the ones with a legal title to the vessel, the owners, or a bareboat charterer that are entitled to limit.

5.2.7.2 When is the right of limitation of liability lost?

It is possible to limit liability under the provisions set out in the conventions and in the act.

But if under the 1957 convention, the ones entitled to limit had "actual fault or privity" to "the occurrence giving rise to the claim", they lose this right. The burden or proving the right to limit is on the owner.

Under the 1976 convention it is considerably more difficult to 'break' the right to limit liability but on the other hand the limit available to the plaintiffs is much higher. The thing is that the plaintiffs have now taken over the burden of proving that the owner was intentional or recklessly to cause the loss and with the knowledge that such loss would probably occur, and therefor not entitled to limit liability.

Under the 1851 act, it is relatively easy to break the limit, the owner has to show that he did not have any actual "privity or knowledge" of the cause of the incident, that he shouldn't or couldn't have had any. This has been difficult many times.

Under the 1851 act it is possible to limit liability to the value of the vessel, whilst under the 1957 and 1976 conventions it is possible to limit liability to the tonnage of the vessel.

5.3 Seaworthiness

5.3.1 Introduction

In a contract of affreightment, usually by law or by an implied obligation, the shipowner has to provide a vessel which is seaworthy at the commencement of the voyage.[81] Yet in the majority of charterparties this undertaking is reinforced by an express term to the same effect.[82] This is an absolute obligation for the shipowner, meaning that irrespective of fault, the owner will be liable. Moreover, a shipowner can not say that he

[81] Under common law, this is an absolute obligation.
[82] Wilson, John F., Carriage of goods by sea, p. 9.

did his best to make the ship fit, the undertaking requires that the ship really is fit. 'Seaworthiness' is a relative and flexible term. It varies according to the nature of the voyage, thus, a ship may be seaworthy for one voyage, but not for another. There is no fixed or absolute standard of seaworthiness.

Two criteria are primarily used to measure the seaworthiness of a ship. 'How a ships ability to encounter the ordinary perils of the sea is', and also 'the standard of which a prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it'.[83]

For a ship to be reasonably fit to encounter the ordinary perils of the seas of the voyage does not mean that the ship has to be able to manage every peril of the sea, or every possible storm. She only has to be furnished and equipped reasonably suitable for the intended use or service on the particular voyage she is about to commence. For a peril to be ordinary it has to be one that normally can be expected on a particular voyage in a particular region. Even hurricanes and cyclones can be considered as 'ordinary perils of the sea'.

The second one 'the prudent owner' is an objective test and very simple: a ship is seaworthy if an ordinary, careful and prudent owner would send her to sea in her present condition.[84] Here it is also depending on the nature of the voyage, plus the type of cargo to be carried and the likely dangers to be faced with.

The aspects of a ship, which can affect her seaworthiness, are usually related to the ship itself, machinery, equipment and navigational aids but also the crew, the fuel and the cargos stowage and stability. "A Ship is efficient as an instrument of transport if hull, tackle and machinery are in a state of good repair, if she is sufficiently provided with fuel and ballast and is manned by an efficient crew".[85]

Concerning a voyage charter party, the obligation is fulfilled if the vessel is seaworthy at the time of sailing, no matter what happens afterwards. This means that the seaworthiness has to be fulfilled, only at the time of sailing and does not continue in the sense that the ship shall continue to be fit during the voyage. In the case of a consecutive

[83] Hodges, Susan, Law of Marine Insurance, p. 125, se also, Wilson, John F., Carriage of goods by sea, p. 10.
[84] Chanell J in McFadden v Blue Star Line [1905] 1 KB 697 at p. 706.
[85] Gaskell N.J.J, Debattista C., Swatton R.J., Chorley & Giles' Shipping Law, p. 187.

voyage charter, the obligation arises at the beginning of each voyage undertaken in performance of the charter. In respect of a time charter party it is different. Here the obligation is fulfilled if the vessel is seaworthy at the time of delivery of the vessel under the charter party.

5.3.2 Insurance

Seaworthiness has the same meaning in marine insurance as in the law relating to carriage of goods by sea, although, in insurance the word 'warranty' is used instead of 'obligation', as in obligation to provide a seaworthy vessel. At least when it comes to voyage policies, where an implied warranty of seaworthiness for the vessel is found unless explicitly exempted. "The underwriter when assessing the risk of a particular voyage must have the right to assume a certain fitness of the vessel to encounter the ordinary hazards of the adventure in order to fix an appropriate premium".[86]

The Marine Insurance Act 1906[87] does not imply the same type of warranty to the voyage policy, as to the time policy, see below.

5.3.2.1 Voyage policy

In the 1906 Act section 39(1) it is declared that, "*In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.*" It continues in section 39(4) with a broad and general definition, "*A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured*". As we saw in the discussion above it is asked for 'reasonably fitness' and 'ordinary perils'. The ordinary, careful and prudent shipowner test can also be invoked in insurance matters. This is if he is insured![88]

The implied warranty of seaworthiness is confined to the commencement of the voyage.[89] Yet, where different legs of the one voyage contain different maritime conditions, the seaworthiness of a vessel will be judged at the commencement of each

[86] Bennett, Howard, The Law of Marine Insurance, p. 293.
[87] Hereinafter simply referred to as "the 1906 Act".
[88] Hodges, Susan, Law of Marine Insurance, p. 126.
[89] Section 39(1).

stage by the reference to the circumstances of that stage. This does again not mean that the warranty is a continuing warranty of seaworthiness, but it operates at several isolated points during the voyage.[90]

A breach of the warranty of seaworthiness automatically discharges the insurer from liability as from the date of the breach. The insurer is discharged even though unseaworthiness arises from hidden causes which, no ordinary examination could possibly reveal.[91]

If a vessel after a casualty is found for any reason unseaworthy, the underwriter need not prove any causal link between the unseaworthiness and the casualty, since an unseaworthy vessel represents a completely different risk from that presented to the underwriter. But it is the insurer who has to prove that the vessel was unseaworthy at the relevant time.[92]

5.3.2.2 Time policy

When it comes to time policies there is no implied warranty of seaworthiness. Section 39(5) of the 1906 Act provides as follows: "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness".

To invoke this section, the loss has first to be brought under the policy. This means that it has to be shown that the loss is caused by an insured peril and therefore recoverable. To escape liability the insurers then have to defend themselves by saying that the assured is to be disentitled of his right of claim by reason of his privity to the vessels condition of unseaworthiness.

In this case the seaworthiness may be present at any time the vessel puts to sea, whether or not at the commencement of a voyage or a stage thereof. "The unseaworthiness to which the assured is privy has not to be the sole cause of the casualty, as long as it was the immediate cause and causally linked to the unseaworthiness".[93]

---

[90] Bennett, Howard, The Law of Marine Insurance, p. 297.
[91] Gaskell N.J.J, Debattista C., Swatton R.J., Chorley & Giles' Shipping Law, p. 567.
[92] Bennett, Howard, The Law of Marine Insurance, p. 300.
[93] Bennett, Howard, The Law of Marine Insurance, p. 316.

5.3.2.3 Privity

The meaning of the word privity in section 39(5) has been analysed well many times. "*The knowledge must be that of the shipowner personally, or of his alter ego, or in the case of a company, of its headmen or whoever may be considered their alter ego*".[94] In other words, the right people must have the relevant knowledge. Concequently, the first step is to identify the person whose knowledge is relevant. Whose act is for the purpose in hand to count as the act for the company? Who are the headmen? The next step will then be to find out if this person or persons had any actual knowledge. In The Eurysthenes[95], Lord Denning concluded that it "*embraces not only actual knowledge but also constructive knowledge*", "*…the sort of knowledge expressed in the phrase 'turning a blind eye'. If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry – so that he should know it for certain – then he is to be regarded as knowing the truth. This 'turning a blind eye' is far more blameworthy than mere negligence*." If the owner has reason to believe that his ship is in fact unseaworthy, and deliberately refrain from enquiry in order to avoid having suspicion transformed into certainty, he might properly be held privy to the unseaworthiness of his ship.[96] What must the assured be privy to? Lord Denning again: "*To disentitle the shipowner, he must, I think, have knowledge not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea.*"

5.3.3 Hague-Visby rules (Hague rules)

Where The Hague or Hague/Visby Rules govern the contract of affreightment, the implied absolute obligation to provide a seaworthy vessel is substituted for a due diligence obligation. The carrier[97] has to "*exercise due diligence to make the ship seaworthy, to properly man, equip, and supply the ship, make holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation"*.[98] Thus, while the carrier will no longer be strictly liable in the absence

[94] Lord Denning in The Eurysthenes [1977] I Q.B. 49, CA., on privity.
[95] The Eurysthenes [1977] I Q.B. 49, CA.
[96] Hodges, Susan, Law of Marine Insurance, p. 137.
[97] "The owner or the charterer who enters into a contract of carriage with a shipper." Art I a.
[98] Art. III, rule 1 a, b and c.

of any fault, he will be liable not only for his own negligence but also for the negligence of any party, to whom he has delegated responsibility for making the vessel seaworthy, even if the fault is attributable to an independent contractor. The basis of liability is fault.

This is not a continuos obligation, but due diligence has to be exercised before and at the beginning of the voyage. This has been interpreted as meaning at least from the beginning of the loading and until the vessel starts its voyage.[99] In the case of a consecutive voyage charter, the obligation arises only at the beginning of the first voyage undertaken in performance of the charter.

In article IV rule 1, it is further stated that the owner or the charterer shall not be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part to make the ship seaworthy. The burden of proving the exercise of due diligence whenever loss or damage has resulted from unseaworthiness shall be on the owner or charterer or any other person claiming exemption under the article.[100]

In article IV rule 2, the carrier is discharged of the liability if it can be established that the loss or damage resulted from an act of negligence in the navigation or management of the ship rather than from any inefficiency or incompetence. Concerning navigation, this would be the case whenever the vessel is stranded or involved in a collision, and management, for example a wrongdoing by one of the ships engineers when working with the safety of the ship. It concerns only the transport and maintenance of the ship and not the storekeeper aspect or the carriage.[101] The key distinction is whether the master, officer or crewmember in question was simply negligent or incompetent. If simply negligent, the carrier will have the usual defence available to him under the article. If incompetent, then the carrier may be in breach of his duty to "properly man" and/or make the vessel seaworthy.[102]

There is no possibility for the shipowner to further reduce or exclude his responsibility to provide a seaworthy ship.[103]

[99] Wilson, John F., Carriage of goods by sea, p. 187.
[100] Art IV, rule 1.
[101] Gaskell N.J.J, Debattista C., Swatton R.J., Chorley & Giles' Shipping Law, p. 204.
[102] White, Roger, The human factor in unseaworthiness claims, p. 223.

5.3.3.1 Inefficiency/incompetence

It is the carriers duty to investigate the crewmembers competence and to see to that they are efficiently trained and able to perform their job right. If a crewmember does not know his job properly, he is considered incompetent. He does not possess the level of capability or skill to be reasonably expected of an ordinary crewmember of his rank. He is not adequate to discharge the usual duties, and to meet the usual dangers to which the ship is exposed.[104] It might be that he just isn't trained enough, or he might not be familiar to a certain assignment on a position he has not held before, or if on a new vessel, he has not been instructed on a certain routine of importance on that particular vessel. If a crewmember that usually is considered competent, shows up for work with a temporary disability like extremely tired or drunk, he is also considered incompetent.[105] A simple thing as not being able to communicate in the same language might also render a crew incompetent.

5.3.3.2 Negligence

Liability depends on negligence, and the important question is what conduct, whether by act or omission, in the handling, management or navigation of a ship amount to negligence. Usually a person is considered as negligent if he shows a want of that attention and observation which is due to the security of other vessels that are navigating the same seas. For example if a crewmember is competent to perform his duties properly but fails to carry them out to a reasonable standard on a particular occasion. If he has a lack of will and inclination to use his skill and knowledge. If the job is within his competence but still he is doing it wrong, perhaps because he is lazy.[106]

5.3.3.3 Due Diligence

Even if a carrier is found unseaworthy due to one of its crew being incompetent, a bad ships repairer being hired etc., he can still escape liability if it can be established that he exercised due diligence in providing a competent crew. He has to show that the

---

[103] Art III, rule 8.
[104] White, Roger, The human factor in unseaworthiness claims, p. 223.
[105] This state has to be present at the commencement of the relevant voyage, Wilson, John F., Carriage of goods by sea, p. 257.

highest standard of care was taken, the standard of a reasonable shipowner.[107] Before someone is hired he should be interviewed and tested thoroughly to see if he has the competence needed. Then after being hired he should be informed about and instructed and supervised in relation to the vessel he is to work on. A carriers obligation to exercise due diligence to make a vessel seaworthy cannot be delegated to others. This is so that the owners can not hide behind an agent and put the blame on him for recruiting substandard crew.

5.3.4 Hamburg rules

Where the contract of affreightment is governed by The Hamburg rules, there is no individual obligation to provide a seaworthy vessel. Instead it is a general liability were "*a carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.*"[108] Also here the liability is based on fault, but under these rules the liability must be exercised at all times not merely before and at the beginning of the voyage.[109] To successfully escape liability for unseaworthiness the carrier has to prove that he adopted all measures reasonably required to avoid the occurrence. It is not sufficient for him to generally prove that he has acted as a reasonable and prudent carrier. The carrier would be deemed to have taken all measures that could reasonably be required, if he could prove to have entrusted the maintenance or repair work to a first-class yard.[110] In The Hamburg rules there are no exonerations from liability when it comes to navigation and management of the vessel, as in The Hague/Visby rules art. IV rule 2.

---

[106] White, Roger, The human factor in unseaworthiness claims, p. 227.
[107] White, Roger, The human factor in unseaworthiness claims, p. 234.
[108] Art. 5, rule 1.
[109] Tetley, William, The Hamburg Rules: A commentary, p. 19.
[110] Berlingieri, Francesco, and others, The Hamburg rules: A choice for the E.E.C.?, p. 97.

6 Analysis

6.1 Consequences of the ISM Code

6.1.1 In practice

Before assessing the consequences of the ISM Code it is best to start with a view on what the reality looks like for the shipowners.

Shipowners cannot just claim that they have met the minimum standards provided by the existing regulatory framework. They have, in effect, to create their own regulatory regime and show that they are complying with it. Say it, do it and prove it! "When the ISM Code uses the word 'should' – this really means must!"[111]

The code is not a recommendation it is mandatory on all accounts. The owner of every vessel required to comply with the ISM Code has to develop an individual Safety Management System, implement it, verify it, review it and evaluate it. Yet the objectives a shipowner sets have to be achievable through the procedures that follow.

The ISM Code has a mission to squeeze human error out of ship operations. To do this, it must bear down on the owner's systems of operation. As a result, the owner's well-established right to rely on the negligence of his crew in the event of an accident giving rise to a claim is challenged. The company now may not land all blame for an occurrence on the master. "Section 4 requires the designated person to provide a link between the ship and the highest levels of management while section 3.3 requires the Company to provide adequate shore based response and resource in support of the designated person carrying out his function."[112] Section 9 requires reporting, investigation and analysis of all non-conformities, accidents and hazardous situations.[113] Yet, does this lay a presumption that the shipowner is privy to all that the designated person finds out or is informed of? It sounds hard but the Code demands the 'safest possible operation' and its intentions are serious. "This makes the Company fully responsible for compliance therefore if an incident occurs the Company must determine how they let it happen".[114]

[111] Anderson, Phil, Captain, The ISM Code and bridge procedures, I.J.O.S.L. 1997, p. 211.
[112] E-mail Pearson, Michael, American Bureau of Shipping, 981020.
[113] "The SMS should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the Company, investigated and analysed with the objective of improving safety and pollution prevention."
[114] E-mail Pearson, Michael, American Bureau of Shipping, 981020.

The events leading to an accident has to be examined. Did they result from poor safety management or were they genuinely accidental and 'came out of the blue'. If one of those events has been conditioned by the ISM Code and there is non-conformity it won't 'help' the vessel when trying to exculpate itself.

"The mere existence of a code which addresses safety management makes clear that a significant amount of what passes for crew negligence will now be treated as management failure".[115]

Before case law has determined the assessment on the ISM Code it is difficult to say in anything but in general terms and speculations what the legal consequences will be. The Code carries significant legal implications, which interested parties should consider before finalising their documented safety management systems. The Code will leave a paper trail that will be like a double-edged sword. On the one hand it will be a main source of information for insurers, cargo interests and damaged third parties to build their case on. On the other hand it will be a great help for the shipowners equipped with a workable management system to show that they have been due diligent in trying comply with the Code and to make the ship seaworthy. Important is that the shipowner should maintain a record of non-conformities and his doing so should be seen as evidence of compliance with the Code, not non-compliance. It will with the result in hand be a good indicator on how well run the vessel is.

Owners that don't take the ISM Code seriously and install a safety management system that barely gives them the necessary DOC and SMC to be able to trade, i.e. just above the 'limit', will probably run a higher risk of being found with non-compliance's. If it is found that a vessel's Safety Management System is not in compliance with the ISM Code despite the fact that she has a Safety Management Certificate, it will be up to the owner to make a correction. This will probably happen not too seldom and in the reality this is why we have the ISM Code - to discover non-conformities before any incidents happen and giving the owner a possibility to correct them and improve the system to preclude re-occurrence. If non-conformity is found after an internal audit it is up to the owner to immediately give it the appropriate corrective action and if found by

[115] Ogg, Captain Terry, IMO's International Safety Management Code, I.J.O.S.L. 1996, p. 144.

authorities they should give the owner a chance to correct it, depending on how serious the non-conformity is.

After the Code came into force, any ship required to comply with the ISM Code and to hold a SMC, has to fulfil this requirement to be allowed to trade i.e. she may not sail, if it is not fulfilled. Practically this means she will run into problems with Port State Control and is either prohibited entry to or departure from a port.[116]

Courts, P&I Clubs, Underwriters and others should try to find a balance when assessing vessels and vessel owners. They should not just reject a prudent shipowner and turn him down. Instead they must help him as much as they can and encourage him to avoid non-conformities in the future. For example, an underwriter should avoid answers like "your ship wasn't fully compliant so you have no claim". He should at the same time lean in the opposite direction and say "well, we know you were running an unsafe ship but we can still pay your claim for such and such reason".[117] Or maybe part of it but only when the owner can show that the vessel is fully compliant.

Everybody in the world of transport, from customers to banks is expected to play their part in putting pressure on shipowners and to show them the advantages of the ISM Code. One example is BIMCO[118] that implemented an ISM Code requirement clause in their standard charter party. Compliant shipowners that spend time, efforts and large sums of money to be compliant should be the only ones allowed trading. Another example is the Panama Canal where for all relevant vessels ISM compliance is expected.[119]

6.1.2 After accident

If a non-conformity is found after an accident it must be reported, investigated and analysed. "The root cause of the incident can be determined and a effective corrective action applied to ensure that repetition is avoided on that ship and prevented from occurring on other ships in the fleet".[120] A shipowner with excellent history of compliance with very little non-conformity will probably not be to affected and should

[116] E-mail Pearson, Michael, American Bureau of Shipping, 981020.
[117] E-mail Marshall, Matthew, Institute of London Underwriters, 981020.
[118] Baltic and International Maritime Council. (http://www.bimco.dk)
[119] Recent developments world wide, I.J.O.S.L., 1998, p. 309.

have a chance to be treated as the prudent shipowner he is. Of course if deliberate or for a second time the same non-conformity a shipowner should be treated tougher.

It is important to prevent the temptations of covering non-conformities in order to give shipowners a fair chance to run an honest business. Since all shipowners will have non-conformities at some point, it is vital that they communicate them to give others a chance to avoid them in the future.

6.2 Consequences

6.2.1 On Limitation of Liability

What the consequences of the ISM Code will be on the owner's possibilities to limit his liability will mainly depend on how much of the knowledge of the non-conformity that can be derived to the shipowner and what his reaction to it was. "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 greater risk of challenge to their right to limitation of liability".[121]

The appointment of a designated person with access to the highest level of management, and with express duties to monitor the safety and pollution prevention aspects of the operation of each ship, will make it harder for the shipowner to claim limitation of liability. Again, it will be interesting to see if the Code lays a presumption of privity on the owner. "For a shipowner to reject the presumption of privity, he must argue that his reporting system is defective or inefficient".[122] But if the reporting system is defective or inefficient then the SMS is not working and the owner will be found responsible for a SMS with non-conformity and risk loose his SMC and/or DOC. Moreover he might still not get the Limitation of Liability.

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. Yet it will, as before the ISM Code, depend on which convention or act is applicable.

---

[120] E-mail Pearson, Michael, American Bureau of Shipping, 981020.
[121] Shaw, Richard, The ISM Code and limitation of liability, I.J.O.S.L., 1998, p. 171.
[122] Ogg, Captain Terry, IMO's International Safety Management Code, I.J.O.S.L. 1996, p. 149.

6.2.1.1 1957 Convention on Limitation of Liability for Owners of Seagoing Ships

As long as the fault of the incident that happened was of someone for whom the owner of the ship or the other person in control was liable, the privilege of limitation can be used. But the ISM Code "will make it impossible for the 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".[123] The burden of proof is on the shipowner and if it was very difficult for him to show that he had no actual fault or privity before, then it will be really difficult now. As long as the SMS is in good order and the reporting and investigation requirement in section 9 is properly implemented, the owner should have knowledge of the problems and should act thereafter.

6.2.1.2 1976 Convention on Limitation of Liability for Maritime Claims

By design under this convention it is very difficult to 'break the limit'. This is probably also the case under the ISM Code. Since the right to limit is only denied if it is proved that the loss resulted from personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Even if there is significant evidence that any crew or the designated person personally informed the shipowner about the non-conformity and that he did not take action. It has also to be proved that he with intention or recklessly with knowledge that that would be the result, caused the loss. It probably has to be a situation where there is documented or common knowledge that a non-conformity as this one will in the majority of cases lead to loss or if a similar non-conformity lead to an incident before to the same vessel or a sister vessel. If a shipowner then ignores the information he might be considered with intention or reckless. In most cases it needs to be a non-conformity of a certain importance since it must be possible to know that "such loss would probably result". If a shipowner order the crew to sink his vessel, then he is barred limitation of liability but it must be prove that he ordered it!

[123] Shaw, Richard, The ISM Code and limitation of liability, I.J.O.S.L., 1998, p. 169.

6.2.1.3 The Athens convention 1974

The provisions in this convention is similar to the 1976 convention when it comes to what must be proved to be able to 'break the limit'. It is as hard under this convention as the one above. A concrete example might be where a shipowner sent the ship to sea knowing that it had no lifeboats, in a severe storm and the boat then sinks because it was not build for anything but sailing on small lakes.

6.2.1.4 1851 Limitation of Shipowners' Liability Act (USA)

In the United States the opinion is among the legislators that a shipowner should be fully responsible for his vessel and outlined the limitation Act with this in mind. It is not difficult to 'break the limit'. The ISM Code will normally make it almost impossible for the shipowner to prove that he had no actual 'privity or knowledge' of the cause of the incident. Shipowners by tradition have had a hard time in courts to prove no privity or knowledge under this Act. In fact courts go to great lengths to find such privity. Clearly the ISM Code will from now on be a powerful asset to lawyers and judges in doing so.[124]

6.2.2 On Seaworthiness

The obligation to provide a seaworthy vessel is the same after as before the implementation of the ISM Code. The same criteria are required and probably the evaluations will be the same. What will happen now is that the systems implemented on each vessel will in many cases be like an open book to read for the authorities to help determine how seaworthy the vessel is under the contract of affreightment. Since seaworthiness is a relative and flexible term and varies according to the nature of the voyage and assignment, there must be times when a vessel is regarded as seaworthy and others when she is not with the same non-conformity. Yet non-conformity with a vessels SMS is always non-conformity. Does this mean that from now on every non-conformity will render the vessel unseaworthy? Surely not, just as before some cases without a doubt are instantly unseaworthy while others less serious do not affect the seaworthiness. One can always ask if the ordinary, careful and prudent owner would have send the vessel to

[124] Maitland, Guy E. C., The Legal, Commercial And Economic Consequences Of The ISM Code, Maritime Reporter & Engineering News, issue February 1997.

sea even when he knew that something was not right with the vessel. Remember that the reason why owners risk their money is because they speculate on a profit. Should not the prudent owner also think about the profit and say that he will fill the fire extinguisher at next port. Maybe, maybe not but again it will have to be decided in each individual case.

The implied obligation is absolute and irrespective of fault, the owner will be liable. Most certainly the ISM Code will help the shipowner to provide a seaworthy vessel.

6.2.2.1 Insurance

6.2.2.1.1 Voyage policy

The ISM Code is surely a help to insurers. They will have a much easier job to fix an appropriate premium since assessing the risk can be done with all the records of the SMS. They will know in what shape the vessel is and if needed they can add terms of requirements such as the vessel is not allowed under the insurance contract to sail in certain conditions the vessel is not likely to manage. Or if the vessel is anyway sailing in such conditions, the underwriters can set an appropriate premium to weigh up the risk with this particular vessel. It is in the interest of the vessel to reveal and have an up to date accurate SMS that shows the prevailing state of the vessel since an unseaworthy vessel represents a completely different risk from that presented to the underwriter. In that case as said before, the underwriter does not have to pay!

6.2.2.1.2 Time policy

Under a time policy there is no warranty of seaworthiness. Nevertheless, if the vessel is unseaworthy with the privity of the owner then the insurer is not liable for any loss attributable to the unseaworthiness. The ISM Code through the designated person and section 9 will many times make the shipowner privy. Immediately anything is discovered by the crew or by the internal audits it should be reported according to the procedures required in section 9.1. The moment this is done there is reason to say that from then on the owner is privy.

With a perfectly working SMS the vessel is most likely to be reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured. Still there

will be cases where there, at the commencement of the voyage, is unseaworthiness of which the senior management genuinely has no knowledge. Maybe "the system procedures are not properly applied by individuals, or simply do not work in practice as effectively as was intended on paper. These are not cases in which the insurer should be reciting to his client section 39(5) of the Marine Insurance Act."[125] The owner should know but doesn't and the authorities must investigate why he never knew about the non-conformity. If the shipowner does not know (whether innocently or negligently) that his ship is in an unseaworthy condition "the insurer still has to respond".[126] But if a shipowner has reason to suspect that the condition of his vessel may be poor and turns 'a blind eye' and deliberately avoids finding this out for certain, the insurer will be released from any obligation to reimburse the owner in respect of any loss caused by unseaworthiness.[127]. It will probably in practice be really difficult to know what the real situation was but with the aid of the SMS it might be easier to find the truth.

6.2.2.2 Hague-Visby rules (Hague rules)

As said before, the absolute requirement to provide a seaworthy vessel is here changed for a 'due diligence' requirement which is considered easier to fulfil. In many cases, non-conformity will amount to unseaworthiness. It is most likely that a shipowner will have a hard time to successfully argue that due diligence had been exercised to make the vessel seaworthy before or at the commencement of the voyage if there is records showing non-conformities which had not been treated effective with corrective action. The Code is raising the benchmark of what constitutes due diligence.

In the past many cases of poor management and vessels in poor condition, were not discovered before an accident or collision. Only after the accident or collision it was determined that the vessel was unseaworthy at the commencement of the voyage. After the 1st July the owners are forced to maintain and care for their vessels, crew and environment much more actively and also put this in documents which are to be kept – at all time. It has become both easier and more difficult to show due diligence. A prudent shipowner will have a big advantage when he can show evidence of an effective

[125] E-mail Drake, Gordon, Thomas Miller P&I Ltd., 981117.
[126] E-mail Drake, Gordon, Thomas Miller P&I Ltd., 981117.
[127] E-mail Drake, Gordon, Thomas Miller P&I Ltd., 981117.

management system, whilst a shipowner with a questionable management system will probably be placed at a disadvantage in proving that he showed due diligence. For example, the ISM Code emphasises on on-going exercises and requires the Company to establish programmes for drills and exercises to prepare for emergency situations. “A shipowner who fails to ensure that such preparations take place may have difficulty in establishing the exercise of due diligence should a crew member prove to be incompetent in an emergency”.[128]

A working SMS will prevent many of the causes that made a vessel unseaworthy in the past.

6.2.3 On Insurance

A number of commentators seem to fear that the implications of the Code will overturn much of what is considered the established maritime law regime. They argue that many underwriters will deny numerous insurance claims the support on grounds of “breach of the duty of utmost good faith, non-disclosure, misrepresentation and proof of want of due diligence”.[129] A shipowner that runs a nice vessel fully compliant and therefore very few incidents will probably lower his insurance premiums. For a non-compliant shipowner the cost of insurance probably will go up, that is if there is any to obtain. Serious underwriters must show their good intentions and require SMC from the potential customer, to keep their reputation. In addition, “legal advice suggests that an insurer who knowingly insures a non-compliant ship is himself committing an illegal act”.[130] A underwriter that sell insurance to non-compliant shipowners risk being out-frozen by the industry and former faithful customers will perhaps turn to other companies. It is a fact that many underwriters have indicated that ISM is a pre-condition of coverage.[131] If a fully compliant vessel collide with a non-compliant vessel and it is decided that it was the non-compliant vessel that is to be blamed for all fault and negligence. The compliant vessel will get his claim indemnified but then there is a risk that his underwriter wont get any money from the other, non-compliant, vessel since

[128] White, Roger, Human unseaworthiness, L.M.C.L.Q. 1996, p. 27.
[129] Andreaoulakis, Manolis, Significant legal implications of the ISM Code, Admiralty news, summer 1998, p.6.
[130] E-mail Marshall, Matthew, Institute of London Underwriters, 981020.

there probably was a requirement that the vessel had to be compliant to be indemnified by her underwriter. This situation might as well happen when it comes to P&I coverage.

6.2.4 On P&I coverage

Most P&I clubs have taken standpoints in regard to coverage of non-compliant Companies. For example SKULD has declared that "*Non-compliance with the Code will have severe consequences for Members, both with regard to their ships' trading patterns and their insurance cover*".[132] This is a common comment in different circulars to the members of the P&I club's. Latter in the SKULD circular it is stated; "*whenever the Association becomes aware of a Member not complying with the ISM Certification Requirements, the Association will on immediate notice terminate the entry of any vessel which requires ISM Code certificates as an assumption of valid Class, and otherwise on 30 days' notice*". North of England P&I Association Ltd. requires all members asking the Club to put up security "*to provide the Managers with a copy of a valid SMC before the Managers will consider whether to exercise their discretion to provide Club security for vessels required to have ISM documentation*".[133] Many P&I club's also urges its Charterer Members when entering into a charter party to ensure that it contain a clause warranting Owners' operation of a SMS in compliance with the ISM Code.

6.2.5 Detention and refused access to port

Many Port States in the U.S. and Western Europe have been very definite in saying that vessels not in compliance will not be let into their ports and will be turned away. A vessel will be detained if it does not have or have the right compliance documentation. "Port State Control may inspect a ship, note existence of SMC but that the ship is not operating in compliance with the safety and or pollution prevention requirements of the ISM Code and detain the ship. Usually in such circumstances the flag is alerted and if deficiencies warrant the SMC is removed by the flag and the ship is

---

[131] E-mail Tucker, Tom, American Bureau of Shipping , 981019.
[132] Advice on ISM Code Certification, Circular to all Members dated 7 January 1998, Håvar Poulsson, SKULD. In e-mail from Lundahl Rasmussen, Peter, Technical Consultant, BIMCO Technical Division, 981021.
[133] ISM (INTERNATIONAL SAFETY MANAGEMENT) CODE, Circulated to all Members, 27 March 1998, S.H. Purvis, Manager, North of England P&I Association Ltd. In e-mail from Lundahl Rasmussen, Peter, Technical Consultant, BIMCO Technical Division, 981021.

required to be re-audited".[134] No need to mention that this will take longer time than what any owner can afford and the plain fact that the owner risk detention and re-certification should make him do anything he can to comply with the Code. No shippers will risk a delay and probably won't send their cargoes on such ships. It is the responsibility of the flag states to see to that it stays like this to prevent trade with a non-complying vessel and to remove DOC and SMC from a shipowner and vessel if necessary. A very useful tool to see that the ISM Code is correctly implemented and followed is the Port State Control. As long they are given necessary means and support they will be one of the best ways for the shipping industry to have a much safer and cleaner environment. Hopefully it wont be to many detentions or entry denials carried out by the Port State Control on the grounds of non-compliance. Until 23 December the U.S. Coast Guard had only detained 3 vessels.[135]

7 Conclusion

Upon the high seas and in harbours, in the world of shipping, there will always be accidents. The new ISM Code can not stop all incidents but perhaps limit the numbers of them to a minimum. There will always be incidents that could not have been prevented, even with the best of will and all the Safety Management Systems. Yet hopefully there will be plenty of incidents for each shipowner that won't happen because of the tailor made SMS he is using.

It will be a period during which the ships should be allowed to try out their SMS. Surely some shipowners will do fundamental faults or misjudge their situation. They should be encouraged to create a better system for perfection in their safety and environmental thinking and not be pushed back.

ISM is not about compliance with the aim of obtaining certification. It is about compliance with a simple, logical and wholly uncompromising concept, based on quality assurance principles. Remember that the objective of the Code is to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to environment and

[134] E-mail Pearson, Michael, American Bureau of Shipping, 981020.
[135] ISM Denials of entry, USCG Internet homepage 991101.

property. It's a safety-culture where safety is raised to the highest priority, safety of lives and environment.

The ISM Code will change the shipowners well-established possibility to blame his crew for negligence and make him responsible to a larger extent concerning his vessels. On the other hand it will help him discover bad routines and weaknesses on his vessels and give him a chance to correct them before an incident happens. It is a tool for the shipowner to show his good intentions and prudence as well as a tool for a lawyer's litigation. A shipowner that chooses to not comply with the Code will be out of business permanently and if he complies poorly he will have a hard time running his business.

The ISM Code will have a significant effect on the possibility for shipowners to limit their liability since it will give the shipowner much more privity or knowledge and more often put him at fault. At least when it comes to the 1957 convention and the 1851 liability act.

The ISM Code will have a significant effect on seaworthiness since it will clearly take away many situations that earlier made a vessel unseaworthy. The Code makes all shipowners that fully comply with it to ordinary, careful and prudent shipowners and as such they don't put a vessel to sea in an unseaworthy condition because if they do they are no longer prudent.

The ISM Code will have a significant effect on insurance market since it will help the underwriters to better evaluate the risk and through this be able to put a correct price. The shipowner wants to have as low premiums as possible and a vessel with a working SMS and few incidents will probably lower his premiums. A good incentive to be able to pay for the inevitable costs that the Code brings by lowering your insurance costs. Also for the underwriters it is better with a working ISM since they will probably have less claims to indemnify. At the end of the day this will lead to safer and cleaner environment and that lives are spared.

The ISM Code will have a significant effect on P&I cover for mostly the same reasons as for insurance. P&I clubs are shipowners who have gathered to help each other. Since a shipowner needs his P&I club and almost all clubs for sure has it as a requirement that the vessel is compliant with the Code, then there will be very few vessels non compliant and those who are will have a hard time out in the cold.

Having been a market where information was a great deal secrets the maritime industry now has become a transparent market where information can be used both to protect shipowners and give him privileges, but also to attack him in litigation and to take away his privileges. Some authors are worried about this, but don't forget that perhaps the only way to make the shipowners to work for maritime safety and the protection of marine environment is to reveal this kind of information to force dishonest shipowners out of the market.

How effective the ISM Code is will probably emerge over several years but one thing is clear and that is that the Code will contribute towards increased care for safety and environment.

8 Bibliography

International Conventions, Statutes and Acts

1851 Limitation of Shipowners' Liability Act

1906 Marine Insurance Act

The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading - *The Hague Rules*

1957 International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships

The Protocol to amend the International Convention for the Unification of Certain Rules of Law Relation to Bills of Lading – The Hague Rules as Amended by the Brussels Protocol 1968 (*The Hague/Visby Rules*)

1974 International Convention for the Safety of Life at Sea - *SOLAS*

1974 International Convention on Carriage of Passengers and their Luggage by Sea (Athens conv.)

1976 Convention on Limitation of Liability for Maritime Claims

1978 United Nations Convention on the Carriage of Goods by Sea – *The Hamburg Rules*

Assembly resolution A741 (18) – 1993. International Safety Management Code as implemented in chapter IX Management for the Safe Operation of Ships, of the 1974 SOLAS Convention.

IMO Assembly Resolution A.788(19) – 1995.Guidelines on the Implementation of the International Safety Management (ISM) Code.

Books

Bennett, Howard, The Law of Marine Insurance, Claredon Press, Oxford, 1996.

Berlingieri, Francesco, and others, The Hamburg rules: A choice for the E.E.C. ? – "The period of responsibility and the basis of liability of the carrier", Maklu uitgevers, 1994.

Falkanger, Bull & Brautaset, Introduction to Maritime Law, Nordisk Institut For Sjörett, 1997.

Griggs and Williams, Limitation of liability for maritime claims, Lloyd's of London press Ltd., 1986.

Gaskell N.J.J, Debattista C., Swatton R.J., Chorley & Giles' Shipping Law, 8th ed., Pitman Publishing, 1987, reprinted 1988, 1992.

Hill, Christopher, Maritime Law, 4th ed., Lloyds of London press Ltd., 1995.

Hodges, Susan, Law of Marine Insurance, Cavendish Publ. Ltd., 1996.

Mangone, Gerhard J., United States Admiralty law, Kluwer law international, 1997.

Gault S., Hazelwood S. J., Plant G., Tettenborn A., Marsden on Collisions at Sea, 12th ed. Sweet & Maxwell, 1998.

Tetley, William, Marine Cargo Claims, 2nd ed., Butterworths & Co., 1978.

Wilson, John F., Carriage of goods by sea, 3rd ed., Financial Times/Pitman Publishing, 1998.

Articles

Anderson, Captain Phil, North of England P&I Club gives warm welcome to ISM Code, North of England P&I Association Ltd., July 27 1998.
(Internet, http://www.nepia.com/News/Press/ISMWelcome.htm)

Anderson, Captain Phil, The ISM Code and fire fighting equipment, The International Journal of Shippinglaw (I.J.O.S.L.) 1998 , p. 34.

Anderson, Captain Phil, The ISM Code and bridge procedures, I.J.O.S.L. 1997, p. 210.

Andreaoulakis, Manolis, Significant legal implications of the ISM Code, Admiralty news, summer 1998, p.6.

Donaldson of Lymington, Rt Hon. Lord, Safer ships; cleaner seas - full speed ahead or dead slow, Lloyd's Maritime and Commercial Law Quarterly (L.M.C.L.Q.) part 2, May 1998, p. 170.

Donaldson of Lymington, Rt Hon. Lord, The ISM Code: the road to discovery ?, L.M.C.L.Q. part 4 November 1998, p. 526.

Gilbert, Randall R., Economic benefits of pro-active safety management, Institute of Safety Management International.
(provided by Peter Lundahl Rasmussen,MNI, BIMCO Technical Division)

Griggs, Patrick, Limitation of liability for maritime claims: the search for international uniformity, L.M.C.L.Q. 1997, p. 369.

Huybrechts, Marc A. , The International Safety Management Code and it's application to Ro-Ro and passenger vessels : From human failure to achivement, April 29 1998 (rev. June 7 1998), From author.

Maitland, Guy E. C., The Legal, Commercial And Economic Consequences Of The ISM Code, Maritime Reporter & Engineering News, issue February 1997.
(Internet, http://www.marinelink.com/feb97/mr02401.html)

Ogg, Captain Terry, IMO's International Safety Management Code, I.J.O.S.L. 1996, p. 143.

Purvis, S. H., ISM (International Safety Management) Code, North of England P&I Association Ltd., March 27 1998.
(Internet, http://www.nepia.com/Circulars/ISMCode.htm)

Recent developments world wide, I.J.O.S.L., 1998, p. 309.

Shaw, Richard, The ISM Code and limitation of liability, I.J.O.S.L., 1998, p. 169.

Steel, David, Ships are different: the case for limitation of liability, L.M.C.L.Q. 1995, p. 77.

Tetley, William, The Hamburg Rules: A commentary, L.M.C.L.Q. 1979, p. 1.

Underhill, Sally-Ann, Limitation of liability: forum shopping, I.J.O.S.L. 1998, p. 82.

White, Roger, The human factor in unseaworthiness claims, L.M.C.L.Q. 1995, p. 221.

White, Roger, Human unseaworthiness, L.M.C.L.Q. 1996, p. 24.

Newsletters & Circulars

Advice on ISM Code Certification, Circular to all Members dated 7 January 1998, Håvar Poulsson, SKULD. In e-mail from Lundahl Rasmussen, Peter, Technical Consultant, BIMCO Technical Division, 981021.

Background to the International Safety Management Code.
(Internet, http://imo.org/imo/ismcode/ismcode.htm)

Baltic and International Maritime Council.
(Internet, http://www.bimco.dk)

Coast Guard Publishes Final Rule on the Reporting of ISM Code Certificate Status, "Marine Safety Newsletter" - September 1998.
(Internet, http://www.chamber-of-shipping.com/members/circ/ism.html)

ISM Denials of entry. Homepage of U.S. Coast Guard, December 23 1998.
(Internet, http://www.uscg.mil/hq/g-m/psc/ismdeny.htm)

ISM (INTERNATIONAL SAFETY MANAGEMENT) CODE, Circulated to all Members, 27 March 1998, S.H. Purvis, Manager, North of England P&I Association Ltd. In e-mail from Lundahl Rasmussen, Peter, Technical Consultant, Bimco Technical Division, 981021.

Management Systems - Guideline for marine management and ship operation based on the requirements of ISO 9002 and the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), rev. October 31 1997.
(Internet, http://iscincusa.com/ism%20management%20system.htm)

The ISM Code and Club Cover, The origins of the ISM Code and the meaning of “human error”., Thomas Miller P&I Ltd., in e-mail from Gordon Drake.

E-mails

Drake, Gordon, Thomas Miller P&I Ltd., 981117.

Hart Davis, Geoff, Maritime Safety Management PTY Ltd., 981103.

Lundahl Rasmussen, Peter, Technical Consultant, Bimco Technical Division, 981021.

Marshall, Matthew, Institute of London Underwriters, 981020.

Nelson, Ken, Head - ISM Code Certification, American Bureau of Shipping - America, 981109.

Pearson, Michael, Head - ISM Code Certification, American Bureau of Shipping - Europe, 981020.

Tucker, Tom, American Bureau of Shipping , 981019.

Cases

Alexandra Towing Co *v* Millet. ***The Bramley Moore*** [1964] P 200, **17.**

The Bowbelle [1990] 1 Lloyd's Rep 532, **19.**

Compania Maririma San Basilia S.A. v The Oceanus Mutual Underwriting Association (Bermuda) Ltd., ***The Eurysthenes*** [1977] I Q.B. 49, CA., **27.**

McFadden *v* Blue Star Line [1905] 1 KB 697; 93 LT 52; 10 Asp MLC 55, **24.**

9 Annex 1

The International Safety Management (ISM) Code

Annex to IMO Assembly Resolution A.741(18) – 1993

Preamble

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

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

3.The Assembly also adopted resolution A.680(17) by which it further recognized the need for appropriate organization of management to enable it to respond to the need of those on board ships to achieve and maintain high standards of safety and environmental protection.

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

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

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

1. GENERAL

1.1 Definitions

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

1.1.2 "Company" means the Owner of the ship or any other organization or person such as the Manager, or the Bareboat Charterer, who has assumed the responsibility for operation of the ship from the Shipowner and who on assuming such responsibility has agreed to take over all the duties and responsibility imposed by the Code.

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

1.2 Objectives

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

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

1) provide for safe practices in ship operation and a safe working environment;

2) establish safeguards against all identified risks; and

3) continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.

1.2.3 The safety and management system should ensure:

1) compliance with mandatory rules and regulations; and

2) that applicable codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken into account.

1.3 Application

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

1.4 Functional requirements for a Safety Management System (SMS)

Every Company should develop, implement and maintain a Safety Management System (SMS) which includes the following functional requirements:

1) a safety and environmental protection policy;

2) instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;

3) defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel;

4) procedures for reporting accidents and non-conformities with the provisions of this Code;

5) procedures to prepare for and respond to emergency situations; and

6) procedures for internal audits and management reviews.

2. SAFETY AND ENVIRONMENTAL PROTECTION POLICY

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

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

3. COMPANY RESPONSIBILITIES AND AUTHORITY

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

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

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

4. DESIGNATED PERSON(S)

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

5. MASTER'S RESPONSIBILITY AND AUTHORITY

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

1) implementing the safety and environmental protection policy of the Company;

2) motivating the crew in the observation of that policy;

3) issuing appropriate orders and instructions in a clear and simple manner;

4) verifying that specified requirements are observed; and

5) reviewing the SMS and reporting its deficiencies to the shore based management.

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

6. RESOURCES AND PERSONNEL

6.1 The Company should ensure that the master is:

1) properly qualified for command;

2) fully conversant with the Company’s SMS; and

3) given the necessary support so that the Master’s duties can be safely performed.

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

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

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

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

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

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

7. DEVELOPMENT OF PLANS FOR SHIPBOARD OPERATIONS

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

8. EMERGENCY PREPAREDNESS

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

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

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

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

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

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

10. MAINTENANCE OF THE SHIP AND EQUIPMENT

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

10.2 In meeting these requirements the Company should ensure that:

1) inspections are held at appropriate intervals;

2) any non-conformity is reported with its possible cause, if known;

3) appropriate corrective action is taken; and

4) records of these activities are maintained.

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

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

11. DOCUMENTATION

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

11.2 The Company should ensure that:

1) valid documents are available at all relevant locations;

2) changes to documents are reviewed and approved by authorized personnel; and

3) obsolete documents are promptly removed.

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

12. COMPANY VERIFICATION, REVIEW AND EVALUATION

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

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

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

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

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

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

13. CERTIFICATION, VERIFICATION AND CONTROL

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

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

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

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

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