

The London Shipping Law Centre

University College London

LSLC Seminar - 17.01.01

Corporate Structures - Liabilities & Insurance

The ISM Code - A Seafarers Perspective

Paper presented by: Phil Anderson, Master Mariner, FNI, BA(Hons.)

Vice President - The Nautical Institute

Associate Director - North Insurance Management Ltd.

Head of Loss Prevention - North of England P&I Assn.

.....

- Introduction
- The Implementers - The Master and his Crew
- Proactive and reactive nature of ISM Compliance
- The SMS - A Cycle of Continual Improvement
 - The need to learn from our past mistakes
 - A conflict of public and private interests
 - Possible ways forward
 - Conclusion

.....

Introduction

As each year goes by I must confess that I can lay less and less claim to the 'seafarer' title. It has now been more than 20 years since I came ashore and clearly much has changed in the way ships are run. This is particularly so when we consider the number of people on board and the make-up of the crew of today. However, my day to day work in P&I Insurance and more-so my work within the Nautical Institute does help me to keep in touch and regularly brings me into direct contact with those who still earn their living on the ocean waves.

Those formative years which I did spend at sea however did provide me with an invaluable foundation on which to work and to apply much of what I have learnt ashore - hopefully with some benefit to both sides of the ships rail.

We are now well over two years since the final compliance date which required almost all bulk carriers, tankers and passenger ships to have a fully functioning Safety Management System (SMS) and for the Companies to obtain the necessary Safety Management Certificates (SMC) for their vessels and the Documents of Compliance (DOC) for their

offices ashore. We are now less than two years before the rest of the ships of the world must comply.

There has been little by way of empirical evidence to establish, one way or the other, to what extent the ISM Code is, or is not, achieving its stated goal of *making ships safer and seas cleaner*. One of the smaller P&I Clubs has indicated that their statistics show a clear improvement since 1998 which they attribute, at least in part, to the ISM Code. I would be getting much more excited if the same optimism was being expressed by one of the larger clubs with a more significant industry sample. My own experience has shown me a few companies who have fully embraced the ISM Code as it was intended where the companies can demonstrate a significant reduction in their accidents and claims and, as a direct consequence, their profitability has increased, their insurance premiums have decreased and the moral in those companies appears to be at an all time high. Unfortunately I have encountered many more companies, and individuals both shore based and seagoing, who reveal a very different picture. I am presently involved, as part of a Doctoral research project, in a major survey of the international shipping and related industries, both ashore and on board ship, to try and establish to what extent the ISM Code is working and to identify significant problems which may be impeding its successful implementation. In this paper I would like to explore some of the issues which I think are involved.

The Implementers - The Master and his Crew

Whilst the regulators, the International Maritime Organisation (IMO) and the Flag State Authorities, produced the ISM Code and made it mandatorily applicable, and the enforcers, the port state control - or similar bodies, along with the legislators will check and ensure compliance, and the ship operating companies will act as facilitators - a major factor and, I would suggest, part of the key to the successful implementation of the ISM Code lies with those at the sharp end - the Master and his crew. I am sure we could find the best written procedures manuals in the world - but if those who need to implement those procedures are not on side then all that exists is a whole lot of words on paper.

Section 5 of the Code clearly identifies the very important role of the Master and sets out some guidelines as to his responsibility and authority. The Code is unambiguous in placing the final decisions with regards to safety and pollution prevention firmly with the Master - I fear however that many Masters would consider such statements to be nice in theory but difficult in practice in the 'real world' in which they have to operate. I am not qualified to pass comment on the legal points on which their Lordships came to their decision in the Hill Harmony case recently but I would have to express concern at the message this will send out to ship operating companies and their masters around the world. Under what circumstances dare a master exercise his judgment for the safety of his crew, ship and cargo? I am sure we can theorise at length about such issues in the law courts or in our academic institutions - but try and consider the masters dilemma for a moment. If he considers, in his professional judgment, that he should take one particular line of action rather than another and it can be subsequently demonstrated that his caution

was perhaps unwarranted on that occasion - he and his employers stand exposed to quite severe consequences and possibly punishment. If he could not fully justify his professional opinion and therefore feels obliged to follow the alternate line of action but then things go seriously wrong - it subsequently transpires that his original professional opinion was correct - then he and his company now face other serious penalties. Maybe, as a consequence, there has been damage to the cargo, pollution, loss of life, stranding or any of the other potential accidents which might arise. It is almost a no-win situation. Perhaps we can return to some of these issues during the discussion session later.

The Master and his crew are commissioned with the implementation of the Code but possibly with a *Sword of Damocles* precariously dangling overhead!

Proactive and reactive nature of ISM Compliance

I have already started to touch upon some of the problem issues as I perceive them with regard to the seafarers role in the implementation of the ISM Code but I would now like to go back to one or two basic issues in order to try and explain why I feel there may be some very serious problems a little way below the surface.

The Code itself is very brief and deliberately restricts itself to setting out only general guidelines on the requirements of a SMS. It certainly incorporates a proactive approach to accident prevention or risk management by its requirement to have clear written procedures for many activities on board - in particular what the Code calls key shipboard operations. There is also a requirement to have contingency plans in place for identifiable emergency situations which might arise. There are also requirements with regard to the training and familiarisation of people and the maintenance of the ship and equipment. There is also a very clear reactive approach to accident prevention or risk management - in particular the requirement to report not only accidents but also hazardous occurrences, near misses and non-conformities. Not only must they be reported but corrective action must be taken and checks carried out to ensure that the corrective action is working.

The SMS - A Cycle of Continual Improvement

Both the proactive and the reactive approaches to accident prevention or risk management anticipate a cycle of continual improvement. Indeed it is fundamental that the SMS is a dynamic thing which is constantly being examined, tweaked and improved. The goal is obviously to identify the problem or potential problem and to reduce the risk of it becoming an accident before it has a chance to manifest itself. How exactly that is achieved will vary but will probably comprise a combination of improving the written procedures and developing the safety awareness or culture of those implementing the procedures.

A diagram depicting the Cycle of Continual Improvement is incorporated at Appendix 1. This is the dynamo of the SMS and what makes the ISM Code quite different from the type of safety management which had previously existed in the shipping industry. Safety

Management Systems however are not new inventions - they have been developed in the airline, petrochemicals, nuclear, offshore and many other high risk industries for quite a few years. What is perhaps strange is that within the shipping industry we seem to have treated the ISM Code and the SMS as though they were something completely new. In my own research I will be endeavoring to establish how similar safety management systems have been implemented in other industries and what lessons may already have been learnt.

The need to learn from our past mistakes

If an accident does actually happen then it usually involves loss or suffering of one description or another - frequently financial, sometimes environmental and often personal loss or suffering. There are a number of ways we can respond and react to such an incident - we can adopt a fatalistic resignation, take it on the chin as it were, and conclude that these things happen and unfortunately it happened to me on this occasion. Or, it is perhaps possible to adopt a much more positive response and learn from the incident - to analyse the events and situations which culminated the accident - to identify the mistakes and other contributory causes and to implement procedures which will reduce the chances of such a set of circumstances coming together again and consequently reducing the chances of such an accident happening again. Ideally the 'lessons learned' should be disseminated widely in order that others can share in the learning experience. In that way many can benefit from the unfortunate situation which befalls the few. I think most reasonable people would see the sense in the latter approach.

However, it seems that we all too easily fall into a little trap of self-deception. If a major incident happens - the Herald of Free Enterprise, the Braer, the Sea Empress the Bowbelle / Marchioness come to mind - where there is a great public out-cry - a formal inquiry is ordered, an enormous amount of time and energy is consumed focusing on that particular problem when the next major incident is bubbling away just below the surface waiting to strike. I do not wish to minimise the importance of such formal inquiries but I would suggest there is other work of considerable importance which the ISM Code attempted to address but which I fear is not receiving the attention it deserves and is possibly undermining the chances of the SMS being properly implemented and indeed the chances of the ISM Code ever working satisfactorily.

There are various versions of the 'accident pyramid' around - one example is reproduced at Appendix II. The point is that for every one major incident there will be a few hundred less serious incidents, a few thousand near misses and many thousand unsafe acts. Anyone who has analysed accidents and claims related incidents will have quickly realised that the accident itself was the culmination of a series of events - some connected to each other some not - all coming together at one particular geographical location at a particular time. Remove any one of those causal factors and the accident would not have occurred - although in reality it may only have been postponed for a short while until all the factors were again present. The point I am trying to make is that we can continue the way we are going and have a great deal of information available from a very small

number of incidents which have happened or we can tap into this enormous source of information about the accidents and incidents which ‘almost’ happened, identify what was going wrong and to prescribe a remedy before the final causal event occurs which takes that near miss or minor accident into a major event. That brings me back to the main issue of this paper - the ISM Code and the seafarer for the information we will be looking for will have to come from the seafarers themselves and that in itself may be something of a problem!

A conflict of public and private interests

Section 9 of the ISM Code sets out a very clear requirement with regard to reporting – it is perhaps worth setting out that small section in full:

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 analysed with the objective of improving safety and pollution prevention.

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

In theory therefore we should be seeing reports coming through of a good number of accidents and a significant number of non-conformities and hazardous occurrences. What I have seen over the last couple of years is that accidents are being reported – possibly because those involved cannot avoid reporting them – too many people are already aware that something has happened – but in general there is considerable reluctance to report anything that is not already known about to others. I have discussed this apparent situation with a number of people, both seagoing and shore-based, and the indications are that very few, if any, hazardous occurrences / near-misses are being reported. Little is being done with regard to serious analysis of accidents and implementation of corrective action. All these opportunities to identify and rectify potential accidents before they happen are being lost. What is quite distressing, and should be a major concern, is the apparent reason why there seems to be such reluctance to comply with this requirement to report.

At this time my conclusions are based only on the informal observations and discussions with people working in the industry although my research should confirm, or otherwise those observations. There were a few masters and ships officers who declared that they could see no useful purpose either in the ISM Code or in reporting generally, others explained that they were too busy, with too few people, and did not have time to report anything but the most serious incidents. For most however it has become quite clear that the overriding factor was fear – fear that they would lose their jobs, fear that their career prospects would be jeopardised, fear that they would face civil or even criminal prosecutions – basically fear that the documentation which they are being asked to produce as part of the dynamic SMS will be used as incriminating evidence against the original authors. It has also become apparent that some ship operators have an

‘unwritten’ agreement with their sea staff that they do not actually want this documentation produced for similar fears. Indeed there is still an unresolved debate that is causing anxiety to some ship operators and that is the implications of the role of the Designated Person (DP) – if reports are sent to the DP will this be considered equivalent to the senior levels of management having knowledge of those issues – since the DP must have direct access to those highest levels of management? The implication of this being that the ship operator may lose his right to limit his financial liability in a major incident and may lose his insurance cover. I fear this ‘head in the sand’ attitude is possibly more widely held than any of us dare admit! The ISM Code anticipated a safety culture developing within the shipping industry where safety was raised to the highest priority and this level of reporting could take place in a very open and healthy way – perhaps that was a little naïve. On the contrary, we appear to be living in a culture of blame and fear. It seems to me that we have this enormous conflict between the public interest and personal self preservation. What has perhaps not yet been fully appreciated by seafarers and colleagues ashore is that by failing to undertake the reporting, analysing and corrective actions they are potentially putting themselves and their employers in very serious breach of the ISM Code itself – a failure to implement a functioning safety management system. Maybe gambles are being taken on the chances of being caught out - but I would suggest that the consequences of such a serious non-compliance would be much worse than any of the anticipated problems which might arise out of reporting. At best the ship could be delayed for a few days – at worst the Master as well as other Company officials could face fines and possible imprisonment, the ship could also have its SMS revoked and the Company its DOC – which would basically mean that that ship and other ships operated by that Company would not be allowed to trade. There could also be serious questions raised about the right to limit liability and insurance cover if the non-compliance became a serious issue.

Possible ways forward

What we need to do is try and find a way of reducing this fear; to move out of this culture of fear and blame into a culture where such reporting and continual self improvement is part of the daily way of life of seafarers and the operators ashore. Certainly there would appear to be a sociological and psychological dimension to this fear culture. I have personally witnessed examples of shipping companies who have embraced the Code and it was intended and where it is working well to the benefit of the Company and its staff. We have much to learn from those companies and we must try and study what it is that they have done. One thing I am sure about is that each of those companies will tell of a long, hard road which they traveled before starting to see results – but the end results have exceeded their expectations. There is one common factor which I have noticed which really does differentiate those companies who have adopted the Code from the majority is the attitude of the very senior levels of management to the ISM Code. It is quite fascinating to see the enthusiasm of the Managing Directors of those companies where the Code is working and to see how that enthusiasm is almost contagious amongst the rest of the staff – who in turn pass it on down the line. Compare that with so many other companies where the MD or other senior executive officer is very well aware of the ISM

requirements but demonstrates no personal commitment beyond the minimum of obtaining and maintaining the SMC's and DOC's – I have not yet come across a company which can be said to have an effective, working SMS where such an attitude prevails. The SMS must be led from the top – that responsibility cannot be delegated.

The other element of fear of course is the fear of punishment by the courts. I am not sure at this point in time whether any changes in the laws of disclosure of evidence, discovery and the like should be considered – it is certainly something which I would like to look at in more detail and discuss with those much more knowledgeable about such matters than I. Of course in a number of the major enquiries which have been, and are being, carried out at this time such as the Formal Investigation into the collision between *Bowbelle* and *Marchioness* under the chairmanship of our chairman today – Lord Justice Clerk - quite wide ranging immunities have been granted by the Attorney General to encourage witnesses to disclose the whole story without fear of self incrimination in order that valuable lessons can be learnt. Extending such a concept to a wider field will no doubt fill many with absolute horror – but it is perhaps a road that needs exploring if it will ultimately lead to the end result of safer ships and cleaner seas.

Another area which perhaps needs exploring further is the possibility of the learned judges recognising and positively rewarding those ship operators who have made genuine and concerted efforts to implement a functioning SMS. They would need to recognise that even the most enthusiastic proponent of the Code will not achieve perfection overnight – they will still experience accidents but through a process of continual improvement the risk of accidents will be reduced further and further. But if an accident did happen then they should not allow potential claimants to take advantage of the numerous accident reports, corrective action reports and audit reports which will no doubt come to light in discovery – rather these reports should demonstrate a Company who really is ISM compliant and is clearly exercising considerable due diligence to make their ships seaworthy in every respect and to operate good and safe ships.

In an attempt to encourage masters, seafarers and ship operators to embrace the ISM Code I often assure them that if the SMS has been properly implemented and has been brought to life and is working – even though they may still be experiencing some accidents and claims – they have nothing to worry about. I sense that some are not convinced by my assurances and may even detect a little doubt in my words!

If there were any offers of help from this learned group to provide me with some guidance in this difficult area then I can assure you that I would be most grateful indeed.

Conclusion

If the ISM Code is to have a significant impact on accidents and claims, if ships are to become safer and the seas cleaner – I would suggest that we need to create an environment whereby masters and seafarers, as well as their employers, can feel comfortable and confident that they can report problems, preferably before they fully

manifest themselves, such that those problems can be dealt with before people or property becomes injured or damaged. We need to remove the fear that currently pervades much of our industries attitude towards reporting – we need to find a way of moving from a culture of fear and blame to a culture of safety and continual improvement. To achieve that goal will require positive and meaningful input from a wide range of influential individuals and organisations linked with the shipping industry – non more-so than the regulators, legislators, the judges and the legal professions as well as legal academics. We all have our parts to play – let us confront those responsibilities together and find a solution.