

THE ISM CODE AND ITS IMPLICATIONS

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Introduction

Risk inherent in the shipping economy can not be eliminated fully. There were many approaches to deal with the problem. A decade ago, the maritime world concentrated its loss prevention efforts on technical matters. This was forcing the shipowners to make a huge investment on `hardware`, in other words to a ship^{2[2]}, training the crew and risk management was not considered in a great depth. Nowadays-new approach takes priority that is the risk management. But before shipowners can put a realistic risk management plan together, they need to be able to identify, assess and priorities the main risk^{3[3]}. It appears that greatest majority of claims is human error. To deal with this problem the port states introduced ISM Code^{4[4]} and STCW'95^{5[5]}.

The Spirit of The ISM Code

The aim of the Code is to provide `an international standard for the safe management and operation of the ships`. Its objectives are `to insure safety at sea, prevention of human injury or loss of life, and avoidance of damage ...in particular..to property^{6[6]}`. It was said that `...to achieve the objectives of the Code it is self-evident that commitment by the top management and other people involved in exploitation of the vessel is necessary^{7[7]}`. This identification is a crucial one; it points out for new undertaking by the company. What writer had in mind presumably is that, taken general approach in the Code will make the management of the company to establish a management's safety and environment policy in general. Whereas in past they operated on daily requirements. The advantage of such a process might be seen as a total revision of the so far applied day-by-day working practice of the company. Another positive effect might be a psychological effect on employees of the company. Because they will gain positive motivation by the fact that managers are paying them more attention. Regarding position of a master it becomes stronger and duties of the master to be been underlined by the company. Bu it is possibly to argue otherwise as well. By listing duties of the master the Code actually cuts authority of the master. It may be possible to maintain this argument to the some extends but we do not agree with this proposition. We would suggest that the masters authority as far as safety and environmental pollution prevention is concerned has increased.

To ensure that the objectivities in the Code are achieved the Code devised a system of certification of the shore-based and shipboard management system, namely a SMC (safe management certificate) which is given to the ships and the DoC (document of compliance) which is given to the companies. These certificates are given after inspection of the ship and on approval that safe system of management –with particular emphasize on safety and protection of environment- has been set up for the ship and it is in operation on board of ship respectively^{8[8]}.

Human Error in Liability Claims and STWC'95

None of us are perfect. If we analyse most of our problems in today's world ultimately connects to human error. Although claims resulting from human error are decreasing slowly in absolute terms, their relative importance is increasing where ship failure is significantly reduced. Three out of every five major claims^{9[9]} (nearly 60%) are directly related to human error. This percentage increases significantly, those amounting up to nearly 80%, when we additionally consider marine claims that are lower than US\$ 100.000^{10[10]}.

Principal Cause of major claims:

- 1) 1) 25%- Deck officer error
- 2) 2) 2%- Eng. Officer error

^{1[1]} Barrister with Istanbul Bar since 1991.

^{2[2]} LUMBERS Karl, he describes in same way by saying `the maritime world concentrated its loss prevention efforts on technical matters, such as the water-tightness of hatchcovers`. `The International P&I Seminar`, notes, 25-27 October 1999, London.

^{3[3]} LUMBERS, seminar notes.

^{4[4]} Adopted on November 4 1993 by Resolution A. 741(8) and incorporated on 19 May 1994 into the SOLAS Convention 1974 as Chapter IX entitled *Management for the safe operation of ship*.

^{5[5]} See other related legislation, ILGIN Sezer, `ISM Kodu Uygulaması`, Deniz Hukuku Dergisi, 1998, year: 3, issue: 1-2, pg., 61-65.

^{6[6]} See cl. 1.2.1.

^{7[7]} ILGIN, pg. 61.

^{8[8]} HODGES Susan, 1998-1999 UWC lecture notes.

^{9[9]} LUMBERS, those statistics are based upon analysis of all major claims (more than US\$ 100.000) filed by UK P&I Club Members between 1987 and 1997. Club membership accounts for around 20% of the world's deep-water fleet, seminar notes.

^{10[10]} ILGIN, pg. 61.

- 3) 3) 9%- Equipment failure
 - 4) 4) 5%- Mechanical failure
 - 5) 5) 5%- Pilot error
 - 6) 6) 17%- Crew error
 - 7) 7) 9%- Structural failure
 - 8) 8) 9%- Shore error
 - 9) 9) 12%- Other
 - 10) 10) 6%- Under investigation
- (Source: UK P&I Club survey)

It is difficult to reach exact conclusion why people are making mistake. Most sensible answer probably lays in inadequate education of the personnel. Latest figures supports convincing argument for placing the emphasis on education. However, the evidence is that even properly trained personnel can become careless and even reckless when responding to excessive commercial pressures or suffering from fatigue, discomfort boredom or stress. The UK P&I Club survey identify^{11[11]} some specific risk areas:

Language problem: in mixed nationality ships, and between ship and shore-side personnel, particularly when engaged in critical activities such as berthing or bunkering.

Confusion: due to poor communication between master and pilot.

Fatigue: resulting from smaller crews and shorter turnaround times in port.

Minor miscalculations: leading to ship instability and consequent cargo loss.

Pride: including crew to carry out task single-handedly when should be executed with assistance.

Calculated risk: by master and officers responding to commercial pressures.

(Source: UK P&I Club survey)

The industry is facing with burden of cargo claims and intractable problem of human errors as the root cause of the major claims. This well reflects the greater emphasis to be given to crew training in STCW'95. But one must be remembered that the level of the manning on the board of a seagoing ship is independent decision of the shipowner. The Flag State does not set the manning level, because they are not an authority to say how to run the ship. Only they can do is to ask the shipowner to explain how he going to handle certain scenarios. This includes berthing, unberthing, operating the ship and responding to an emergency situation. If the shipowners safe system of management plan requires certain amount of man. The regulators in practice can challenge it and some cases to refuse permission for entrance to the port. The trouble here would be that they would be under an obligation to prove to the court that the ship was undermanned. This is very difficult task and that is why the port authorities are reluctant to exercise this power^{12[12]}. As Lord Donaldson pointed out that the undermanning is a common situation in shipping. The way shipowners are dealing with this problem is that the Master have standing instructions if in the situation he can not handle to go to the nearest port and take a crew required. From shipping economy it said to be much cheaper^{13[13]}. The hardware of the ship is good as a people running it; therefore uniformity in the officers or crew training must be standard for contracting states. The explicit responsibilities of shipping companies for ensuring that the seafarers they employ meet minimum international standards of competence is one of the main step to achieve objectives in the ISM Code. Therefore it is inevitable link between STCW'95 convention and the Code. As international law has developed Club Rules gradually expanded to present current attitude. It is a common condition of the cover afforded under Clubs` rules that `... the Member shall comply with all statutory requirements in relation to the ISM Code^{14[14]}. Now, crewing managers are sliding into a more exposed and responsible position. Because if any claim based upon error of the seafarer which may expose in form of insufficient training, with doubtful certificates or being in a poor medical fitness then a company may face an unlimited liability in a large casualty. Because the documentation required under the ISM Code will put claimants` lawyer in an advantageous position. There is always a possibility to miss some document or to do some procedural mistake. If anything happened like that the shipowner would be really in a vulnerable situation. The claimant lawyer would explode this `gap` to the very end. It will be very difficult for defendant to escape liability. Because `...essential material relating to particular company's safety and environmental protection system (SMS, safety management system) has been established and the crew familiarized with this...`^{15[15]}.

^{11[11]} UK P&I Club Survey `Analysis of Major Claims`, Other interesting findings of this survey is that the highest risk ships are between 10 and 20 years old (in the bulk carrier ships this is 14 and 19 years) and between 10.000 and 100.000gt.

^{12[12]} CUBBIN Alan: (The UK maritime and coastguard agency) `The missing link in regulation of shipping/the quality of shipping`, seminar, 18.01.2000.

^{13[13]} Seminar notes. Some shipowners face with this kind of situation 21 times in six months.

^{14[14]} Rule 23v The Steamship Mutual P&I.

^{15[15]} ILGIN, pg. 63.

The Concept of Seaworthiness in the Light of ISM Code

We consider the question of the necessity of the port State control in the light of ISM, STWC'95. It is not difficult to understand this consideration, because the port state control is a way of enforcing these regulations. In summary it can be said that the introduction of both these initiatives will improve a quality of the industry. The implication of both these regulations will have impact on same well-established concept as well such as seaworthiness.

Seaworthiness of the ship is a flexible concept. Even if implied by law, in every contract for the carriage of goods (in a vessel) that ship is tight and fit for the purpose or employment for which she is chartered. The ship must have that degree of fitness, which an ordinary, careful, prudent shipowner would require her to have at the commencement of the voyage having regard to all the probable circumstances of it. The ship may be a seaworthy under strict legal terms but still remain unsafe. That is why contribution of the ISM Code is important: elaborate a proper system of inspections-to take preventive actions. The seaworthiness has different aspects of occurrence that was recognized by the courts. It was said that, 'the vessel must be in a fit state as to repairs, equipment and crew and in all other respects to encounter the ordinary perils of the voyage insured at the time of sailing on it'^{16[16]}. The contribution of the human element in the seaworthiness of the ship is widely recognized by the courts and the shipping industry. The ISM is a philosophical approach to safety in the marine industry in that it focuses on process rather than hardware. This code is a compromise, it prescribes safety management objectives generally but it leaves up to the shipowners and managers to develop their own systems for achieving the prescribed objectives. We should emphasize the difference between unseaworthiness and mismanagement. If the ship is unseaworthy the ship is 'ill'. The mismanagement of a ship might lead to unseaworthiness (as a drunken master) but the mismanagement itself is not a proof of the physical condition of the ship. To ensure that objectives in the ISM Code are achieved, the Code has devised a system of certification^{17[17]}. The failure to obtain the necessary certificate cannot by itself render the ship unseaworthy^{18[18]}; for a ship may in fact be, at the time of loss, safely managed and operated. On the other hand, it has also to be point out that even if documentary demands of the Code are complied with, that is the ship has been issued with necessary certificates, certification alone does not necessarily prove that the ship is in actual fact safely managed and operated: the mere fact that a company has been issued with certificates does not conclusive evidence seaworthiness^{19[19]}. In other words, no owner does or should rely on issuance of the certificate as a substitute for his own responsibility of his ship^{20[20]}.

CONCLUSION

It is difficult to predict whether an incident will lead to a major claim or a minor claim. But that is for sure that to avoid major claims it is essential to concentrate on avoidance of claims of any size^{21[21]}. On the training side –which can be described as a 'software' of a ship- the effort is to improve the quality of education, training and communication. The necessary tool for this role is the STCW'95. We can see importance of the total STCW'95 package that intended to ensure that the principal factors determining standards of training and crew competence will be sufficiently regulated internationally. With regard to the documentation side, there is a requirement to employ the ISM Code. Non-compliance of the requirements might lead to ship to be described as a sub-standard ship and can be published on the Internet by some institutions.^{22[22]} The importance of keeping accurate records can not be overstated. Even in normal operating conditions mariners may face problems if they fail to comply with this requirements^{23[23]}. It is a competition in a new safety culture as the only best will survive which at the end will recover its cost automatically^{24[24]}.

^{16[16]} *The Dixon v Sadler* [1839] 5 M&S 405.

^{17[17]} See cl. 3.

^{18[18]} HODGES Susan, 'Seaworthiness and safe ship management', *International Journal of Insurance Law*, pg. 162-171.

^{19[19]} *The Australian Star* [1940] 67 Ll.L.R. 110, *The Asbestos Corp. Ltd. v Compagnie de Navigation Fraissinet et Cyprien Fahre* 480 E2d 669 (2d Cir. 1973).

^{20[20]} *The Star Sea* [1995] 1LLR 651 (per. Tuckey J.).

^{21[21]} LUMBERS, seminar notes.

^{22[22]} Lloyds Register of Shipping, European Quality Shipping Information (EQUASIS) web site: www.IACS.ORG.UK, this page will give to users a wide range safety related information such as insurance details, inspections, other matter related to judging a ship's quality.

^{23[23]} ANDERSON, Philip, 'The mariners role in collecting evidence', *P&I International*, Vol. 13, No 9, September 1999, pg. 194-198.

^{24[24]} WEHRN Ronald, 'The ISM-Code', *BIMCO BULLETIN*, 19 July 1996.

