

## Publications

### **The International Safety Management (ISM) Code: A New Level of Uniformity**

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#### **Table Of Contents**

- I. INTRODUCTION
- II. THE IMO: CREATOR OF THE CODE
- III. ORIGINS OF THE ISM CODE
- IV. PROVISIONS OF THE ISM CODE
  - A. Application
  - B. Definitions and Key Terms
  - C. ISM Code Requirements
    - 1. Safety Management System
    - 2. Designated Person
    - 3. Responsibilities of the Master
    - 4. Certification
- V. LEGAL IMPLICATIONS OF THE ISM CODE
  - A. The Effects of ISM on Principles of Negligence and Unseaworthiness
    - 1. Negligence
    - 2. Negligence per se
    - 3. Unseaworthiness
  - B. The Pennsylvania Rule
  - C. U.S. Limitation of Liability Act
  - D. The Oil Pollution Act of 1990
  - E. COGSA and the Harter Act

- F. [Liability of Companies and Designated Persons](#)
- G. [Investigation, Discovery and Evidentiary Issues](#)
- H. [Charter Parties](#)
- I. [Insurance](#)
  - 1. [P&I Insurance](#)
  - 2. [Hull Insurance](#)
    - a. [Duty to Disclose](#)
    - b. [Implied Warranties](#)
    - c. [London Joint Hull Committee ISM Claims Guidelines](#)
  - 3. [Cargo Insurance](#)

## VI. [EFFECTS OF THE ISM CODE TO DATE](#)

- A. [Code Compliance Statistics](#)
- B. [ISM Certified Companies May Not Adhere to Code Requirements](#)
- C. [ISM Code Enforcement in the United States](#)
- D. [ISM Code Enforcement in Other Nations](#)
- E. [Unequal Enforcement of ISM Provisions](#)

## VII. [CONCLUSION](#)

### **THE INTERNATIONAL SAFETY MANAGEMENT (ISM) CODE: A NEW LEVEL OF UNIFORMITY<sup>1</sup>**

#### **I. INTRODUCTION**

Much has been written of the need for nations to maintain uniform rules governing the legal relationships of those engaged in maritime commerce. Though the intended benefit of such uniformity is promotion of international trade, of greater importance is the need for uniform international standards to protect life and property. The desire to achieve uniform safety and environmental standards is especially pronounced in the maritime industry. A maze of differing and often conflicting laws would exist if each nation developed its own safety legislation. For

example, some nations might insist on very high safety standards while others might be more lax, acting as havens for sub-standard shipping.

For almost forty years, the task of developing uniform measures designed to improve the safety of international shipping and to prevent marine pollution from ships has principally fallen upon the International Maritime Organization ("IMO"), and its predecessor, the Inter-Governmental Maritime Consultative Organization ("IMCO"), a specialized agencies of the United Nations. The IMO was responsible for what has been described as "the most important and influential multilateral treaty dealing with maritime safety,"<sup>2</sup> the Convention for the Safety of Life at Sea (SOLAS) 1974. This Convention adhered to a traditional approach to maritime safety -- an approach which defined a safe ship as one which was designed, built and equipped with safety factors in mind. Accordingly, SOLAS 74 set forth standards for the construction of vessels, requirements for life-saving appliances and navigational equipment and fire safety regulations, but did not address effects of human error in shipboard safety. Safe operation of the vessel remained principally within the domain of the vessel's master.

The IMO helped to establish standards to lessen human error with the Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1978, which was significantly amended in 1995.<sup>3</sup> This agreement, however, applies only to a narrow class of individuals and to a small class of tasks such as watchkeeping. Recognizing that responsibility for safe vessel operations rests with all persons involved in a maritime venture, from the head of the operating company to a deckhand, the IMO implemented the International Management Code for the Safe Operation of Ships and for Pollution Prevention ("ISM Code" or "Code"),<sup>4</sup> the first set of international regulations which attempt to integrate shore-based and shipboard operations to promote the safe operation of vessels. Taken together, SOLAS 74, STCW and the ISM Code create uniform safety standards applicable to all aspects of ship operations.

After exploring the purpose of the IMO and the origins of the ISM Code, this paper will set forth the major provisions of the Code, explain its potential legal impact in the United States and demonstrate the effects of the Code on marine interests during the first few months of its implementation.

## **II. THE IMO: CREATOR OF THE CODE**

What is known today as the International Maritime Organization originated at the United Nations Maritime Conference on March 17, 1948 by means of the Convention for the Establishment of an Inter-Governmental Maritime Consultative Organization ("IMCO").<sup>5</sup> The name of the Organization was changed to the International Maritime Organization in accordance with an amendment to the Convention, which entered into force on May 22, 1982. <sup>6</sup> One of the primary purposes of the Organization is "to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships." <sup>7</sup> This purpose was to be accomplished through the Assembly, the IMO's ultimate policy making authority. <sup>8</sup> The Assembly is composed of representative of all 156-member states and meets regularly every two years. <sup>9</sup> The main technical work of the IMO is conducted by various committees and subcommittees, one of which is

the Maritime Safety Committee. Its function is to "consider any matter within the scope of the Organization concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log books and navigational records, marine casualty investigation, salvage and rescue, and any other matters directly affecting maritime safety." <sup>10</sup> Technical resolutions and recommendations are prepared by the committees and submitted to the Assembly for approval at its regular meetings. <sup>11</sup>

Since 1958, the IMO has adopted more than forty conventions, protocols, and other instruments dealing with maritime safety, the protection of the marine environment and other maritime issues, <sup>12</sup> including SOLAS 1974 and the International Convention for the Prevention of Pollution from Ships (MARPOL). Many of the IMO's conventions apply to more than 98% of the world's merchant shipping tonnage. <sup>13</sup>

### III. ORIGINS OF THE ISM CODE

On the night of March 6, 1987, one of the worst peacetime sea disasters in modern history took place outside the Belgian port of Zeebrugge when the passenger/ car ferry *Herald of Free Enterprise* capsized with the loss of 193 lives. The official enquiry into the accident revealed major errors on the part of management. The judge who conducted the enquiry described the ferry's operating company as infected with "the disease of sloppiness at all levels." <sup>14</sup> Perhaps the most egregious example of deficient management is the fact that the vessel left port with its cargo doors open.

As a result of the enquiry, representatives of the United Kingdom requested that the IMO immediately investigate measures designed to improve the safety of roll-on/roll-off ferries. <sup>15</sup> This request was heeded during the 15th session of the IMO in November 1987, where the Organization's Secretary-General proposed that certain broad guidelines be developed by the IMO for the use of officers and crews aboard vessels in the management of safety and pollution prevention measures. <sup>16</sup> The Secretary-General told the Assembly that "what we need now are clear and well-established shipboard operating procedures coupled with periodic unscheduled inspections to ensure compliance." <sup>17</sup> This call was unanimously accepted by the Assembly through resolution A.596(15) entitled "Safety of Passenger Ro-Ro Ferries" which instructed the IMO's Maritime Safety Committee to develop guidelines regarding shipboard and shore-based management of Ro/Ro ferries. <sup>18</sup> The resolution referred to the loss of the *Herald of Free Enterprise* and pointed out "that a great majority of maritime accidents are due to human error and fallibility and that the safety of ships will be greatly enhanced by the establishment of improved operating practices." <sup>19</sup>

Measures proposed by the United Kingdom to improve the safety of Ro/Ro ferries included the mandatory provision of indicators to show that loading doors are closed, the surveillance of cargo spaces to detect the movement of vehicles in bad weather and the provision of supplementary emergency lighting. <sup>20</sup> The proposed measures were considered and unanimously adopted by delegates of countries attending the April, 1988 meeting of the IMO's Maritime Safety Committee. <sup>21</sup>

At its 16th session held in October, 1989, the Assembly adopted Resolution A.647 (16) containing the first IMO "Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention."<sup>22</sup> Although the 1987 resolution had applied only to passenger ferries, resolution A.647 (16) applied to all ships.<sup>23</sup> The IMO's Secretary-General stated that this broader application was in "recognition of the importance of sound management to shipping safety in general."<sup>24</sup>

The purpose of the Guidelines was "to provide those responsible for the operation of ships... with the framework for the proper development, implementation and assessment of safety and pollution prevention management in accordance with good practice."<sup>25</sup> The Guidelines provided general principles and objectives for a company to follow when establishing a safety and environmental protection policy."<sup>26</sup>

Resolution A.647 (16) recognized the need to have the Guidelines periodically reviewed and revised in light of experience gained through their implementation. Based on experience with the 1989 version and reviews conducted by the IMO's Maritime Safety Committee and its Marine Environmental Protection Committee, revised Guidelines were adopted by the Assembly at its November, 1991 meeting through Resolution A.680 (17).<sup>27</sup> The review process continued until the Assembly's next regular meeting in November 1993. During this meeting, the Assembly adopted Resolution A.741 (18) whose annex contained the ISM Code.

Like its predecessor, the ISM Code was adopted as a recommendation. However, because of the potential beneficial impact of the Code in advancing safety and pollution prevention and the general ineffectiveness of the Code's voluntary predecessors, the Assembly recognized that the Code should be mandatory.<sup>28</sup> The Assembly determined that the best way to achieve this was by adding the ISM Code to the Safety of Life At Sea Convention, ("SOLAS") 1974.<sup>29</sup> On May 24, 1994, SOLAS was amended to add Chapter IX entitled "Management for the Safe Operation of Ships." The chapter consists of only six regulations, the third of which states: "The company and the ship shall comply with the requirements of the International Safety Management Code." The chapter entered into force under the Convention's tacit acceptance procedure.<sup>30</sup> In its first phase of implementation, the Code became mandatory for passenger ships, high-speed craft, oil tankers, chemical tankers, gas carriers and bulk carriers on July 1, 1998. It will apply to other cargo ships and to mobile offshore drilling units of 500 gross tonnage and upwards by July 1, 2002.

As a signatory to the 1974 SOLAS Convention and the amendatory 1978 protocol, the United States is bound to enforce the ISM Code for vessels flying the United States flag and to foreign vessels calling at U.S. ports in accord with the enforcement regime established by the Convention. Although amendments to SOLAS do not require specific implementing legislation,<sup>31</sup> Congress nevertheless enacted legislation to incorporate the Code into the laws of the United States.<sup>32</sup> On December 24, 1997, the Coast Guard issued final regulations for implementation of the Code.<sup>33</sup>

#### **IV. PROVISIONS OF THE ISM CODE**

The ISM Code was designed by the IMO to provide a vehicle for shipowners to create their own programs individually tailored to meet comprehensive international standards for safety and pollution prevention in the operation of vessels. For the first time, the responsibilities of shore-based safety personnel, up to the highest levels of management, and shipboard personnel are integrated in a system designed to eliminate accidents caused by human error.

The stated purpose of the ISM Code is to establish minimum standards for safety management and operation of ships and for pollution prevention. In the preamble, the drafters emphasize that the Code is purposefully based on general principles and objectives and is expressed in broad terms so that it is conducive to widespread application. They also state clearly that the Code is responsive to the need for a shore-side management organization, which is able to respond to the needs of those aboard ships with respect to safety and environmental protection.<sup>34</sup> The objectives of the Code<sup>35</sup> are to ensure safety at sea, prevent human injury and avoid damage to the environment and to property.<sup>36</sup> The Code does not create specific operating rules and regulations, but provides a broad framework for vessel owners and operators to ensure compliance with existing regulations and codes, to improve safety practices and to establish safeguards against all identifiable risks. It also sets forth the safety management objectives, which "should" be adopted by companies.

Dramatic developments in technology and communication in the last quarter of this century have greatly enhanced the ability of vessels to prevent casualties of all kinds. The fact that accidents still happen is now often attributable to human error. The reduction of human error through training, communication and accountability is one of the main goals of the ISM Code.

The ISM Code appears to be a radical change in an industry where, historically, there were few written instructions and many decisions were, by necessity, delegated to vessel masters. However, as a practical matter, increased attention to safety and regulation of various aspects of shipping by flag and port states and the advent of instant communications have resulted in increased corporate control of vessel operations and safety, and increased record keeping. The ISM Code provides the company with a framework for a system for integrating many existing elements of safety management as well for the articulation and implementation of new policies.

## **A. Application**

Since its effective date of July 1, 1998, the Code has applied to:<sup>37</sup>

- (1) Passenger ships; and
- (2) Oil tankers, chemical tankers, gas carriers, bulk freight vessels, and high-speed craft of 500 gross tons or more.

As of July 1, 2002, other cargo ships and mobile offshore regular drilling units (Modus) of 500 gross tons or more also must be in compliance with the Code.

With regard to the compliance schedule, there was an issue as to whether some vessels fell within the category of "bulk carrier," subject to the 1998 deadline, or whether they should be considered "general cargo vessels" which are not required to comply with the Code until 2002. There was a concern that owners of vessels not specifically designated as bulk carriers, but which occasionally carry bulk cargoes, would choose to consider them as general cargo vessels, but that some port states might consider all vessels carrying bulk cargoes as bulk carriers.

In an attempt to resolve this problem, the IMO reached a definition of bulk carriers as "ships constructed with a single deck, top-side tanks and hopper sidetanks in cargo space and primarily intended to carry dry cargo in bulk; or ore carrier; or combination carrier." This clarification has been adopted for use by the U.S. Coast Guard. <sup>38</sup>

The Code does not apply to towing vessels, barges, vessels solely engaged in domestic trade, domestic passenger vessels carrying fewer than 12 passengers, or fishing vessels. <sup>39</sup>

## **B. Definitions and Key Terms**

The ISM Code regulates vessels and "companies." The only definitions contained in the Code are of "ISM Code", "Company" and "Administration."

The word "company" is broadly defined as the owner or "any other organization or person such as the manager or 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 duties and responsibility imposed by the International Safety Management Code." <sup>40</sup> "Administration" is the government of the state whose flag is flown by a vessel. In most cases, flag states have designated classification societies as the authorized organization to certify compliance with the Code.

Other key terms found in the Code include "Designated Person" and "Safety Management System." A "Designated Person" is the person or persons designated by the Company who has responsibility to monitor the safety of each vessel, to ensure that there are adequate shore-based resources for vessel operations, and who must have direct access to communicate with all management levels ashore and on the vessel, including "the highest levels of the company." <sup>41</sup> The Safety Management System (SMS) is the system designed for a particular company and its vessels to comply with Code, which must be certified by the Administration of the flag state.

## **C. ISM Code Requirements**

### **1. Safety Management System**

The Safety Management System ("SMS") provides the framework for compliance with the Code. It is a written system of safety and environmental protection policies and procedures to be followed by vessel and shore-based personnel, with specific record keeping, reporting and internal audit requirements, which is meant to enable the company to uncover and correct safety deficiencies before they result in a

casualty. It must ensure compliance with applicable mandatory rules and regulations, and must take into account applicable guidelines and recommended standards. The Code contains specific functional requirements for an SMS. It must contain

- (1) safety and environmental protection policy;
- (2) instructions and procedures to ensure safe operations and environmental protection 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 SMS and the Code;
- (5) procedures to prepare for and respond to emergencies; and
- (6) procedures for internal audits and management reviews.

It should be specific to a type of vessel, and may be kept in manual form ("Safety Management Manual" or "SMM"), a copy of which must be kept aboard each vessel. <sup>42</sup>

Although this is a short list of only six required components, each one represents a significant undertaking by a company. Some of the components can be drawn from existing documents, such as vessel's pollution response plan. Other components may require creation of new policies and procedures reflecting the aims of the Code to integrate shore-side and shipboard responsibilities for safety and to systematize procedures for lines of communication and reporting.

## **2. Designated Person**

The Designated Person is the person or entity charged with overseeing internal audits and management reviews of compliance and keeping the SMS up-to-date. The requirement that the Designated Person have access to the "highest levels" of management is meant to ensure that management is informed of and responsible for compliance with the SMS. The role of the Designated Person may be seen as a watch keeper for the SMS, overseeing the integration of management and shipboard responsibility for safety.

The requirement of internal auditing and recordation of all procedures is meant to provide the company (and outside auditors and authorities) with an identifiable "paper trail" for verification of compliance with the SMS. These internal audit procedures reflect a concept that was unknown to many ship owners and operators before promulgation of the Code. Because the Code requires auditing of procedures by people outside the chain of authority for those functions, it may be seen as a particularly burdensome intrusion into areas of authority traditionally delegated to the master. However, in many cases, modern communications already

have allowed management to become involved in those areas. The Code may be seen as recognizing and taking advantage of those changes.

### **3. Responsibilities of the Master**

With management having been given new responsibilities for safety management and the Designated Person being put in charge of overseeing the SMS, it might appear that the vessel master's authority has been undermined. However, the Code contains instructions to companies to reaffirm the master's authority and to set out the specific areas of his responsibility in the SMS:

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.

The goal of the Code is not to diminish the master's responsibility for his vessel, but to recognize developments in technology and communication which have made it possible for shore side personnel to be much more involved in operations than they were before these developments took place.<sup>43</sup> By reinforcing the master's authority and specifying the areas of his control, both shipboard and shore side personnel should gain a clearer understanding of divisions of responsibility and lines of authority.

### **4. Certification**

Once the SMS is in place, it must be certified by means of an outside audit by the flag state or those entities as may be delegated this duty, consisting primarily of classification societies. In practice, some companies may rely on the societies for development of their SMS, or adaption of it from a standard form developed by the society. Assuming that the audit is successful, the Company will be issued a Document of Compliance ("DOC"), valid for 60 months, unless an annually required verification audit or other inspection reveals a "major non-conformity."<sup>44</sup> Once the company has a DOC, each of its vessels receives a 60-month Safety Management Certificate ("SMC") upon satisfactory completion of its safety management audit. If the company's DOC is revoked, its vessels' SMCs will automatically become invalid.

It should be recognized that the certification process takes a significant amount of time. First, a company specific SMS must be developed and implemented. Following implementation, the company then must be successful in obtaining its DOC as a result of an outside audit by the designated certification authority. Thereafter, the company's vessels are expected to operate in accordance with the policies and procedures set forth in the SMS for a period of three months before being permitted to seek individual SMCs. The designated certification authority is expected to ensure by its audits that the requirements of the Code are being met by every vessel under review.

## V. LEGAL IMPLICATIONS OF THE ISM CODE

The ISM Code mandates written documentation of a comprehensive safety and environmental program, including training and internal auditing, and extends the traceable chain of responsibility for safety straight to the top of management. This documentation creates a paper trail of a company's compliance (or non-compliance), and gives rise to share responsibility for all those in the company's chain of command. Although we do not yet have reported decisions on the legal effects of the Code, it is certain to play a large role in future casualty investigations and litigation.

### A. The Effects of ISM on Principles of Negligence and Unseaworthiness

#### 1. Negligence

Will the ISM Code result in a heightened standard of care for vessel owners? There have been dire warnings to the effect that the ISM Code will force companies to set impossibly high standards to which they can never fully comply, and that by doing so, they will lay bare all their shortcomings for investigators and opposing parties in lawsuits. Actually, the Code does not create any specific new standards, but only creates a systematic framework for companies. What it will do is force companies to set their own standards, the violation of which is likely to constitute negligence.

Negligence has been defined as:

1. the existence of a duty required by law, which obliges the person to conform to a certain standard of conduct in order to protect others against unreasonable risks.
2. A breach of that duty by engaging in conduct that falls below the applicable standard or norm. This breach is usually called by the rubric "negligence"; but "negligence" presumes the existence of element one, the standard of conduct.
3. A reasonably close casual connection between the offending conduct and the resulting injury; this element is called "proximate cause."
4. Actual loss, injury, or damage suffered by the plaintiff. The burden of proof of these elements is on the plaintiff. <sup>45</sup>

The ISM Code should have no impact on the proximate cause elements of the equation, except insofar as the Pennsylvania Rule shifts the burden of proof on causation to the vessel owner, discussed *infra*. However, it will have significant effect on the duty and breach of duty elements. Professor Schoenbaum summarizes the sources of the duty element as "dictates of reasonableness and prudence." <sup>46</sup> The ISM Code will become a key to defining "reasonableness." As a general proposition, failure to comply which results in a casualty will be seen as breach of a reasonable duty; on the other hand, full compliance with the Code and with one's certificated SMS should constitute reasonable care. However, even if an owner is in full compliance with his SMS, it still may be found to be negligent if the standard of reasonable care under the circumstances is held to require more than the SMS. <sup>47</sup>

Plaintiffs have long cited an operator's failure to abide by its own safety and operational procedures as support for arguments that the operator's acts or omissions negligently caused a casualty. Conversely, if an operator can show that it had adequate safety procedures in place to discover dangerous conditions and that it complied with those procedures, the operator may not be liable for negligence, as long as the procedures are reasonably adequate.<sup>48</sup> In the future, an operator's Safety Management System and, in particular, its Safety Management Manual, will certainly be cited by companies, investigators and litigants to support or defend against a finding of negligence in the same way that other safety manuals and procedures are currently used.

## 2. Negligence *per se*

ISM violations can, under certain circumstances, constitute negligence *per se*. Negligence *per se* may be demonstrated by a violation of an applicable statute or regulation, but only when the plaintiff is within the class of persons sought to be protected and the harm must be of a kind sought to be prevented by the statute or regulation.<sup>49</sup>

Because the scope of ISM is so broad as to seek to protect all persons from all sources of harm related to vessel operations, any casualty which occurs on a non-certificated vessel could be said to result from negligence *per se*. However, because of the strict compliance policies of many flag and port states, it is unlikely that most attorneys will be involved with non-certificated vessels. The more common situation will involve a non-conformity with a company's SMS. One question which must be answered by the courts is when does non-conformity with one's SMS rise to the level of a violation of the ISM Code? We submit that only particularly egregious violations should be said to place a company in violation of the Code, such as those which reflect a clear intent by the company to appear to comply while not actually doing so. Simple non-compliance with one's own SMS should not give rise to application of the doctrine of negligence *per se* because the SMS is not a statute or regulation, but an internal operating guide.

## 3. Unseaworthiness

A vessel owner has an absolute and non-delegable duty to seamen to provide a seaworthy vessel,<sup>50</sup> which has been defined as one which is reasonably fit for its intended purpose.<sup>51</sup> A regulatory violation can result in *per se* unseaworthiness.<sup>52</sup> The causation standard in an unseaworthiness claim by a seaman is "proximate cause in the traditional sense."<sup>53</sup> Courts have held this to require that (1) the unseaworthiness play a substantial part in bringing about or actually causing the injury and (2) the injury is either a direct result or a reasonably probable consequence of the unseaworthiness.<sup>54</sup> An operator can be held liable for an unseaworthy condition even if it is shown that the operator complied with the provisions of an adequate safety manual.<sup>55</sup>

Can it be argued that failure to comply with the ISM Code renders a vessel unseaworthy? Arguably, without ISM certification, a covered vessel cannot be insured or used to carry cargo to most world ports. Thus, she could be said to be unfit for her intended purpose of transporting cargo. Most non-conformities with an SMS should not give rise to a finding that the Code has been violated. However, it

will be argued that non-conformities with the SMS which cause a casualty constitute evidence of lack of due diligence. Conversely, conformity with the SMS will assist an owner in proving the defense of due diligence. Prior to the ISM Code, this was often difficult because in many cases there was no written proof of the owner's efforts. If properly implemented, the SMS should lead to a reduction of unseaworthy conditions.

In an instance where there is a charge of unseaworthiness based on crew incompetency, the SMS may set the standard for crew training. In such circumstances, the company's compliance with its SMS may demonstrate the exercise of due diligence as a defense. <sup>56</sup>

## **B. The Pennsylvania Rule**

The Pennsylvania Rule, in its simplest terms, provides that where a vessel violates a statute or regulation, the defending ship must show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" <sup>57</sup> the cause of the casualty. United States Circuit Courts of Appeal have not restricted the rule's application to collision cases. <sup>58</sup> The rule constitutes an evidentiary rule reversing the burden of proof. It does not render immaterial negligence, fault, or damages but does impose a substantial burden upon the party at fault in proving its innocence. <sup>59</sup>

If the rule applies, a statutory violator may still rebut it by making a clear and convincing showing that the violation could not have been a proximate cause of the casualty, or that the accident would have occurred despite the statutory violation. <sup>60</sup> Thus, a statutory violator may still avoid liability. <sup>61</sup>

As set out above in the discussion of negligence *per se*, application of the Pennsylvania Rule will in part depend on what types of non-conformities with an SMS are held to constitute a "violation" of the ISM Code. Certainly, it is a violation to operate covered vessels without an SMS, a DOC or an SMC. However, not all non-conformities should rise to the level of a statutory violation. For example, Section 12.6 of the Code requires that "management personnel for the area involved should take timely corrective action on deficiencies found." What is "timely" will vary according to the circumstances. A court could find a Code violation giving rise to the Pennsylvania Rule in that circumstance, if it found that corrective action was delayed for such a period of time that it amounted to an ISM Code violation and not a simple SMS violation.

## **C. U.S. Limitation of Liability Act**

Obviously, if the "highest levels" of management are fully informed as to safety and training operations on a vessel, that knowledge may affect a shipowners' ability to limit liability under the U.S. Limitation of Liability Act. <sup>62</sup> Under that Act, the shipowner is entitled to limit his liability only if he shows that the fault causing the loss occurred without his "privity or knowledge." <sup>63</sup> United States courts have held that a shipowner is not entitled to limit liability when he should know of faults causing a casualty, such as equipment defects, unsafe operating procedures, deficient crew qualifications, training or manning. <sup>64</sup> Therefore, there is little question that the SMS will be used to challenge a vessel owner's claimed lack of

"privity or knowledge of fault."

The owner's SMS will demonstrate, in writing, the scope of the Designated Person's knowledge or presumptive knowledge. The Code requires that the Designated Person have access to the highest levels of management, but does not require that the Designated Person be part of management, or that he inform management of his activities. Thus, a company could argue that its Designated Person was not part of management and did not inform management of the fault which caused a casualty. It is doubtful that such an argument would be successful.

First, the Code requires "management reviews" of the SMS, which should include reports of non-conformities and corrective actions. If management personnel do not receive this information, that should constitute notice that the Designated Person is not fulfilling his responsibilities, which should give rise to a duty to inquire and take corrective action. Second, a Designated Person appointed by management will be likely to be held to be a part of management or an agent of management for purposes of the Limitation Act. Therefore, the ISM mandated records of inspection, audits and corrective measures will be likely to establish the scope of management's presumed knowledge.

On the other hand, the ISM Code recognizes the authority of the master, and sets out the requirement that the SMS define and document his responsibilities.<sup>65</sup> Accordingly, if it can be established that a company has a valid DOC and has complied with its SMS in terms of communications, corrections of non-conformities, self-audits and procedures, despite which an accident occurred as a result of immediate operational negligence, limitation of liability should be available. Indeed, in the past, vessel owners have often found it difficult to meet their burden of proving lack of privity and knowledge because of a lack of documentation and the resulting need to rely on testimony which could be seen as self-serving. A properly maintained SMS should make it more likely that an owner will have documentary proof with which to meet this burden.

#### **D. The Oil Pollution Act of 1990**

Vessel owners also stand to lose their ability to limit their liability under OPA. Pursuant to this statute, one basis under which the right to limitation will be lost is in cases where "a violation of an applicable federal safety, construction or operating regulation by the responsible party" occurs and is the proximate cause of the oil spill.<sup>66</sup> Because courts will most likely determine that the ISM Code is an "applicable federal safety regulation," violations of the Code leading to a spill should result in loss of the right to limit liability. Again, the question arises: At what point will a violation of an SMS constitute a violation of the Code?

#### **E. COGSA and the Harter Act**

The Harter Act<sup>67</sup> and the Carriage of Goods by Sea Act ("COGSA")<sup>68</sup> govern liability for damage to and loss of cargo by their terms. The Harter Act applies to inland and domestic contracts of carriage, while COGSA applies to foreign carriage by sea, to or from ports in the United States. As a practical matter, many contracts incorporate COGSA, with the result that the Harter Act has little application. Moreover, because the ISM Code applies only to vessels on foreign voyages, it is

unlikely that there will be much interplay between it and the Harter Act.

Both Acts oblige the "carrier" <sup>69</sup> to exercise "due diligence" to make the vessel seaworthy and to properly load, stow, carry and discharge the cargo, and both acts contain "excepted perils." <sup>70</sup> Although COGSA contains a longer list of exceptions, both seek to exonerate the carrier from liability where fault for cargo loss or damage lies outside the control of the carrier. Under the Harter Act and COGSA's complicated burden shifting analysis, a carrier must establish that it used "due diligence" in providing a seaworthy vessel in order to claim statutory exceptions to liability. The difference is that under COGSA, unseaworthiness must be a cause of the loss or damage, whereas, under the Harter Act, any unseaworthiness will preclude a carrier from claiming an exception. <sup>71</sup> Failure to comply with other SOLAS requirements has been held to constitute lack of due diligence under the Harter Act. <sup>72</sup>

## **F. Liability of Companies and Designated Persons**

Although the Code will have impact on various existing principles of maritime law, it does not create new legal causes of action or provide penalties for non-compliance. However, flag and port states may do so. As an example, the U.S. Coast Guard may detain a foreign vessel for non-compliance until, in its opinion, "the vessel can go to sea without presenting an unreasonable threat of harm to the port, the marine environment, the vessel or its crew." <sup>73</sup> Vessels found to be operating without an SMC and a copy of the company's DOC may result in civil penalties to the owner, charterer, operator, agent, master or "any other individual in charge of the vessel." <sup>74</sup> For foreign vessels, clearance to enter port may be withheld or revoked. <sup>75</sup> U.S. regulations do not make specific reference to penalties against a "Designated Person."

As set out above, the Code can be expected to affect existing principles of law and statutes and in these areas, a company could have increased exposure to liability. Will the Designated Person be exposed to independent liability? That should be the case only where another statute or rule of law so provides. We believe that in most instances, the Code requirement for "management review" of the SMS and its documentation will result in management - not only the Designated Person - being held to have knowledge of compliance or non-compliance with the SMS, and any exposure which could follow.

## **G. Investigation, Discovery and Evidentiary Issues**

The most immediate, if not the most significant, effects of the ISM Code on litigation will be in the areas of investigation, discovery and evidence. The auditing and management review procedure represents a dramatic shift in the maritime community's approach to safety in that it is intended to change the current approach of regulatory compliance from the industry's passive defect notification and correction response to an aggressive approach to safety. Under this approach, potential discrepancies are supposed to be resolved by the companies themselves before casualties occur. One downside of this pro-active approach is that reports and other documents generated in the audits which detail deficiencies in an operator's safety management system may be used against the operator in subsequent legal or administrative proceedings.

In every case involving a casualty on a ship covered by the Code, the SMS is a critical body of documents to be reviewed in the initial shipboard investigation. It is safe to assume that the SMS is one of the first documents which will be sought by governmental investigators, such as the U.S. Coast Guard or the National Transportation and Safety Board ("NTSB"). In connection with these or other governmental investigations, an SMS with documentation of compliance will be a valuable tool, while evidence of non-compliance, even if unrelated to the casualty, may lead to heightened scrutiny of all operations aboard the vessel.

In litigation, if a party is not required to produce the SMS as an initial disclosure under Rule 26(a) of the Federal Rules of Civil Procedure, opposing counsel should demand production of all documents related to the SMS, including, not only the SMM, SMC and DOC, but all internal reports of inspection, reports of non-conformities and records of correction of non-conformities. None of these documents fall within exceptions to discovery contained in the Federal Rules of Civil Procedure. There is no basis, at the present time, for arguing that these documents are subject to exclusion from evidence at trial except on general grounds recognized in the Federal Rules of Evidence (or applicable state evidentiary rules). However, the U.S. Coast Guard has been authorized to conduct an eighteen month study of whether records of non-conformities and corrections such as internal audits should be excluded from evidence. <sup>76</sup>

Although U.S. Coast Guard findings and conclusions related to casualty investigations conducted under 46 USC § 6301 are already protected from admissibility by statute, <sup>77</sup> Coast Guard documentation of other inspections and citations for ISM violations and non-conformities are not within the scope of the statutory exclusion as written, but could be incorporated in an exclusion from evidence of audits and other documents intended to promote corrections of non-conformities.

In light of the fact that details regarding an operator's SMS, including documentation concerning the deficiencies, are likely to be admissible evidence, companies should be encouraged to aggressively ensure compliance with ISM requirements.

## **H. Charter Parties**

A bareboat charterer can be considered a "company" under the ISM Code, assuming that it meets the definition of having assumed responsibility for operating the ship and having agreed to take over the duties and responsibilities as imposed by the ISM Code. <sup>78</sup> Time and Voyage Charterers are not likely to be considered "companies," as they do not normally assume responsibility for operating the ship. Thus, it is in their best interest to ensure that any delays or problems associated with ISM compliance are for the account of owners or bareboat charterers.

Most standard time and voyage charter parties contain relatively broad requirements that the vessel owner ensure that the vessel is in compliance with all relevant international rules and regulations in order to permit the vessel to operate within agreed trading limits. The Baltic and International Maritime Council ("BIMCO") has taken the position that there is no need for a clause specific to

compliance with the ISM Code. However, in a response to concerns raised by its members, it devised the BIMCO Standard ISM Code Clause:

From the date of coming into force of the International Safety Management [ISM] Code in relation to the Vessel and thereafter during the currency of this Charter party, the Owners shall ensure that both the Vessel and the Company [as defined by the ISM Code] shall comply with the requirements of the ISM Code. Upon request the Owners shall provide a copy of the relevant Document of Compliance (DOC) and Safety Management Certificate (SMC) to the Charterers.

Except as otherwise provided in this Charter party, loss, damage, expense or delay caused by failure on the part of the Owners or the Company to comply with the ISM Code shall be for the Owners' account.

We can expect to see this and similar clauses incorporated in virtually all time and voyage charters.

## **I. Insurance**

### **1. P&I Insurance**

The International Group of P&I Clubs have made ISM Code compliance a condition of cover in member clubs, and it can be expected that other P&I insurers will follow suit. Some clubs refer to the Code with specificity, while other club rules contain a more general requirement that the member maintain certifications required by a vessel's flag state.

### **2. Hull Insurance**

With respect to hull insurance, under United States law,<sup>79</sup> the ISM Code will be likely to set standards for the assured's duty of disclosure to underwriters and for the implied warranty of seaworthiness.

#### **a. Duty to Disclose**

Under U.S. Law, if an assured fails to disclose or misrepresents facts to an underwriter material to the risk insured, and the underwriter relies upon those representatives (or lack thereof) in issuing the coverage, the policy is void *ab initio*.<sup>80</sup> The duty to disclose facts material to the risk is ongoing.<sup>81</sup> If a company fails to obtain a DOC or SMS for its vessels, or if those certifications are withdrawn, it is to be expected that an insurer could successfully argue that those facts were material and relied upon. The question of materiality will be key in determining the extent of the requirements to disclose every instance in which an internal audit reveals a non-conformity.<sup>82</sup> As a practical matter, the provision of audit documentation to insurers should alleviate concerns of assureds that inadvertent failure to disclose could result in lack of coverage.

## **b. Implied Warranties**

The two relevant implied warranties under United States law are that the vessel is seaworthy at the inception of the policy <sup>83</sup> and that the owner will not knowingly or negligently allow the vessel to be unseaworthy at the inception of a voyage. <sup>84</sup>

A seaworthy vessel is one that is reasonably fit for its intended purpose. <sup>85</sup> It is hoped that courts will not automatically conclude that every non-conformity with its SMS will render a vessel unseaworthy, but that they will focus on the nature and severity of the problem. However, in this context, the SMS will give the underwriter a road map with which to locate possible grounds for denial of coverage.

The second "negative warranty" is applicable only if the breach is a proximate cause of the casualty, and requires knowledge or negligence of the owner. <sup>86</sup> Here again, the scope of the knowledge or imputed knowledge of the owner should be clear from the SMS.

## **c. The London Joint Hull Committee ISM Code /Claims Guidelines:**

<sup>87</sup>

In the event of an occurrence giving rise to a claim under an Assured's policy, insurers in addition to the documentation currently provided by the Assured, will require the following:

Copy of the current Safety Management Certificate (SMC)

Copy of the current Document of Compliance (DOC)

A statement from the "Designated Person" confirming that all relevant aspects of the ISM Code for which he has specific responsibility have been carried out in accordance with the provisions stated therein.

These guidelines may be controversial, as the Designated Person may be able to confirm only that "to his knowledge," all relevant aspects of the Code have been carried out. There is also an issue as to what aspects of the ISM Code are "relevant." If the cause of a casualty has not been determined, it is not possible to determine which aspects of the code are relevant, and the Designated Person may not be in a position to confirm that every aspect of the company's SMS has been carried out.

## **3. Cargo Insurance**

Cargo underwriters have undertaken to insure delays caused by a vessel owner's non-compliance with the Code, but only where the assured cargo owner does not know or have reason to know of the non-compliance. In many arm's length transactions, a shipper or receiver would not be in a position to evaluate a vessel's level of compliance. However, it should become common practice for shippers to obtain copies of ISM certificates from carrying vessels.

## VI. EFFECTS OF THE ISM CODE TO DATE

Since July 1, 1998, a vast majority of the world's merchant fleet has been ISM certified and detention rates for non-compliance have been low.

### A. Code Compliance Statistics

Early reports on ISM Code compliance rates showed that a low percentage of vessel covered by Phase I of the implementation schedule met Code requirements only a few months before the deadline. One survey conducted by the United States Coast Guard from December 1997 to March 1998, showed that only thirty-seven percent of foreign flag vessels entering United States ports were in compliance.<sup>88</sup> Such figures prompted many in the maritime industry to predict widespread non-compliance by the July 1, 1998 deadline and massive congestion in major ports due to detention of non-compliant vessels.<sup>89</sup> Such predictions proved to be unfounded.

In the months immediately preceding the deadline, there was a strong industry effort toward compliance. For example, Intertanko announced that its members had to comply with the Code or be expelled.<sup>90</sup> Intertanko reported that its full membership of 274 tanker companies, operating 1,968 tankers collectively, possessed ISM Code certification prior to the compliance deadline.<sup>91</sup>

According to the IMO, on July 1, 1998 eighty-seven percent of the 12,700 vessels which required documentation in Phase I had complied with ISM Code requirements.<sup>92</sup> A database maintained by the International Association of Classification Societies (IACS) shows that 10,557 Phase I vessels possessed Safety Management Certificates as of December 31, 1998,<sup>93</sup> which represents 83% of the estimated 12,700 Phase I vessels. Although this figure is less than the IMO's initial estimates, the IACS recognizes that its database underestimates the percentage of ISM compliant vessels.<sup>94</sup>

### B. ISM Certified Companies May Not Adhere To Code Requirements

Some in the maritime industry noted with skepticism the rapid rise in compliance rates in the months leading to the Code's implementation deadline. Twelve months before the deadline, most vessel owners were slow to implement the Code and classification societies complained of the lack of qualified Code auditors.<sup>95</sup> The statistics demonstrate that these obstacles were overcome and only thirteen percent of Phase I vessels failed to obtain certification by the deadline. This rapid change raises the issue of whether the bodies authorized to conduct ISM Code audits, either classification societies or flag administrations, have performed such audits properly.<sup>96</sup>

Some have charged that ISM Code conditions are being eased by classification societies so that ships can obtain a Safety Management Certificate.<sup>97</sup> Such a practice would greatly impede the effectiveness of the Code because a certification could not be relied upon as proof that an operator complied with the Code. Further, lax certification procedures would place the burden of enforcing the Code on Port State Control programs. These programs may not possess the resources or desire

to actively police operators by ascertaining whether vessels are in compliance with the Code notwithstanding certification. <sup>98</sup> Moreover, the spot check nature of Port State Control means that most vessels will not be comprehensively examined for Code compliance. <sup>99</sup> Port State Control alone will probably be insufficient to enforce the Code. <sup>100</sup> The most effective way to ensure Code compliance is to ensure that the initial certification procedures are properly undertaken. <sup>101</sup>

There are a number of ways to discourage the issuance of sub-standard Safety Management Certificates, including responsible self-policing by classification societies, <sup>102</sup> close scrutiny by flag administrations of organizations they authorize to issue certificates, <sup>103</sup> and the identification of classification societies and flag administrations which frequently issue sub-standard SMCs. <sup>104</sup> Ultimately, a classification society could have its certification authority revoked by the flag administration if the society repeatedly issued sub-standard Certificates.

### **C. ISM Code Enforcement in the United States**

If Safety Management Certificates are not reliable indicators of ISM Code compliance, then Port State Control programs are the principal means by which Code provisions are enforced. <sup>105</sup> In the United States, the Coast Guard is charged with the task of enforcing the ISM Code. The Coast Guard is authorized to board a vessel and determine the existence of a valid DOC or SMC or other documentation relating to the company's SMS. <sup>106</sup> For countries not a party to Chapter IX of SOLAS, other equivalent evidence is required. <sup>107</sup>

According to the U.S. Coast Guard, a vessel operating with obvious defects, including apparent defects in hull and superstructure steel work, will be stopped for further inspection. Additionally, the Coast Guard may also deny port entry or detain a vessel for failure to comply with the ISM Code or a recognized equivalent certification under 33 CFR § 96.360. <sup>108</sup> The Coast Guard has announced that all denials of entry due to non-compliance with the Code will be reported as an official detention. <sup>109</sup> The effect of such a report is that the vessel will be regarded as a higher priority for boardings and heightened inspections each time it enters a U.S. port. <sup>110</sup> Failure to comply could also result in civil penalties against the vessel owner, charterer, managing operator, agent, master or any other person who may be responsible for compliance with the Code.

To cope with the problem of resources, the U.S. Coast Guard requires arriving vessels to report their ISM Code compliance status to Captains of the Port when filing mandatory Advance Notice of Arrival reports. The Coast Guard also warns that monitoring for ISM compliance extends beyond port entry. According to the Coast Guard's Director of Field Activities for Port States, "[i]n those rare instances when a vessel without ISM certification slips through the pre-arrival screening process, arrives in port and is subsequently boarded, it will be detained, cargo operations restricted, civil penalty action initiated, and the flag-state and class society contacted." <sup>111</sup>

Although the U.S. Coast Guard engaged in an active compliance program in the first three months after the Code's effective date, only minor violations were reported. <sup>112</sup> During this three month period, the Coast Guard boarded 1,628 vessels and detained only three vessels for Code deficiencies. During the period

from July 1, 1998 to March 4, 1999, the Coast Guard has detained only fourteen vessels for non-compliance with ISM Code provisions. For all fourteen detentions, classification societies were engaged to perform external audits of the ISM Code programs in place for each vessel. These audits revealed that eleven vessels had minor Code violations while three were found to have committed major violations. The vessels cited for minor violations were allowed to stay in U.S. waters if the noted deficiencies were immediately corrected. The three vessels cited for major Code violations were ordered to leave U.S. waters. These detention and expulsion figures are statistically insignificant considering the number of Coast Guard boarding incidents since July 1, 1998. Additionally, the disparate treatment of major and minor Code violators by the Coast Guard demonstrates that the United States will only expel vessels from its waters for gross non-compliance with the Code. <sup>113</sup>

#### **D. ISM Code Enforcement in Other Nations**

Most major maritime nations throughout the world have instituted a policy which bans all non-compliant ships from their ports. Thirty nations instituted such a policy through the Vancouver Declaration <sup>114</sup>, signed at a joint conference of signatories to the Memorandum of Understanding on Port State Control in the Asia-Pacific Region ("Tokyo MOU") <sup>115</sup> and the Paris Memorandum of Understanding on Port State Control ("Paris MOU"). <sup>116</sup> The European Union has taken a more flexible approach whereby first time offenders will be released but warned not to re-enter an EU port until after certification is completed. <sup>117</sup>

In the Vancouver Declaration, members of the Paris MOU and Tokyo MOU announced that they would conduct a Concentrated Inspection Campaign to check for ISM Code compliance during a three month period commencing July 1, 1998. <sup>118</sup> During the campaign, Paris MOU countries detained 81 vessels for ISM Code violations out of 1,575 vessels which were inspected, a detention rate of 5.1%. In the inspection campaign conducted by Tokyo MOU countries, 1,820 vessels were inspected. <sup>119</sup> A total of 63 detentions were recorded for lack of proper ISM Code certification or major non-conformities in ship Safety Management Systems. <sup>120</sup> The average detention rate was 3.5% <sup>121</sup> No maintenance routine and records available 11.4%. The Tokyo MOU Secretariat concluded that "while it may be too early to assess the successfulness of the ISM Code through this campaign, it is a positive sign that there was not a large number of ships detained for ISM Code non-compliance." <sup>122</sup>

#### **E. Unequal Enforcement of ISM Code Provisions**

As can be said of any international safety regime, there are differences in the ways the ISM Code is enforced by the various port and flag states. There are countries in the world where very low or no enforcement efforts will be made. <sup>123</sup> Such countries may be those which lack resources to effectively enforce the Code or those which are so closely aligned to vessel operator interests that they are reluctant to commit to a rigorous enforcement regime. <sup>124</sup>

A survey of individuals involved in various aspects of the marine industry revealed that 87% were concerned over the possible development of a two-tier system of Code compliance, with one tier representing countries which vigorously enforce the Code and the other tier representing those which do not. <sup>125</sup> Such a system could

allow recalcitrant operators to relocate operations to parts of the world where enforcement of the Code may be lax. <sup>126</sup>

In an effort to promote the uniform enforcement of Code provisions, the IMO has adopted Guidelines for Implementation of the International Safety Management by Administrations, <sup>127</sup> through Assembly Resolution A.788(19). In the preamble to the Resolution, the IMO urges governments to adhere to the Guidelines, particularly with regard to the validity of the Document of Compliance and the Safety Management Certificate required by the Code. <sup>128</sup> The Guidelines include sections on verification of compliance with the Code, how DOCs and SMCs should be issued and what should take place in the certification process. <sup>129</sup> The Guidelines are designed to promote a consistent approach to shipboard inspections of ISM Certificates. <sup>130</sup> If these Guidelines are followed by maritime authorities, disparate enforcement of the Code may be avoided.

## VII. CONCLUSION

The ISM Code is tangible evidence of the increasing success of the IMO in setting uniform standards worldwide. While vessel owners and operators welcome increased uniformity, many of them have approached the ISM Code with trepidation, particularly those with vessels calling in the United States. Whether viewed as a needed advance in casualty prevention or a burdensome intrusion into a company's internal operations, the Code is being enforced in a vast majority of countries and enforcement is likely to be expanded. Without at least superficial compliance, it will be difficult or impossible for a vessel to enter most ports, be chartered or be covered by insurance.

Without doubt, a company which gives only lip service to the Code will suffer, because non-conformities with its SMS will be evident to anyone who inspects the documentation required therein, and it is certain that the SMS will be inspected after a casualty by government investigators, underwriters and courts. On the other hand, the Code is of great value to prudent owners and operators, as it provides a single system incorporating all aspects of safety policies and procedures. The internal audit and management review elements of the SMS allow such a company to inspect for, recognize and correct problems before they cause casualties. Initially, the cost of implementation and training may appear to be high, but should be offset by savings resulting from fewer and less serious casualties. Additionally, the costs of compliance with the SMS will appear small in the event of a casualty, when the company is able to use reports and audits mandated by its SMS to demonstrate affirmatively that it has taken an aggressive stance with regard to safety.

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