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'The ISM Code and its impact on the prosecutions during shipboard pollution incidents'.

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If a pollution incident occurs from a ship then the legal responsibility will almost certainly be dealt on the basis of 'strict liability' – in other words the polluter pays. There are a handful of possible exceptions to this general rule – but they can very rarely be invoked.

Almost certainly the ship operator will have insurance in place, usually through its P&I Club, to indemnify the operator for any expenses it may incur following a spill or compensation it may have to pay third parties. The ship operator will usually be entitled to limit its financial exposure to such incidents in accordance with, for example, the provisions of the appropriate version of the Civil Liability Convention (CLC) and, in addition, additional money may be available, if needed, from the International Oil Pollution Compensation Fund (IOPC) to top up the CLC.

The calculation of damages should be an objective, quantitative, exercise based upon clean up costs, the amount of equipment used, the number of man-hours used, the loss of revenue etc. Whilst it may turn out to be a difficult calculation – and there may be a certain amount of haggling – it should be possible to set out what amount the ship operator must pay.

However, there is another element of a ship operators exposure in the event of a pollution incident which is much more difficult to calculate in any sort of objective manner. That is the level of punitive fine which may be imposed by the local Administration or Prosecuting Authority. In the U.K., for example, under the Merchant Shipping Act 1995(c.21) – Section 131 – Discharge of oil from ships into certain United Kingdom waters:

'A person guilty of an offence under this section shall be liable –

(a) on summary conviction to a fine not exceeding £50,000 (This was subsequently increased to £250,000 by the Merchant Shipping and Maritime Security Act 1997)

(b) on conviction on indictment, to a fine.'

In the United States, under new E.U. regulations and in other parts of the world the penalties are even greater and include possible imprisonment of offenders.

Pollution incidents are, by their very nature, emotive affairs and there will often be pressure on those responsible for administering justice to severely punish the offenders. On some occasions a harsh punishment may be fully justifiable but, I would argue, on other occasions such level of punishment

would be totally inappropriate. Unfortunately, in this world in which we live and work and operate we have to deal with Human beings. We human beings can, and do, and possibly always will – on occasions make mistakes. Accidental, unintended, mistakes – sometimes these mistakes, these accidents, may result in an oil spill or similar.

There are probably two very well known methods available to be adopted when responding to these types of situations – the stick and the carrot. Those advocating the use of the big stick believe that by using threats and a regime of fear you can beat people into submission and compliance. The other school of thought is the use of rational persuasion and encouragement. If the newspaper reports are to be our guide then we can but conclude that the former approach, wielding the big stick, is not only the dominant method adopted but possibly the only method adopted. This perception, I believe, is shared by the vast majority of serving seafarers as well as their ship operating companies. It may actually be a totally unfair perception, it may well be that there are many examples of the 'carrot' being used to good effect – but most of us never hear about these occasions.

It will then fall upon the Magistrate, Judge or other Prosecuting Officer or Authority to decide upon the level of fine most appropriate under the particular circumstances. The spectrum within which they can exercise their discretion and impose the fine will range from Zero to £250,000 in the magistrates court, in the UK under the MSA 1995 as amended by the Merchant Shipping and Maritime Security Act 1997, to very high levels – possibly unlimited in some jurisdictions. If they have the power to impose a prison sentence then again the range will be from Zero to maybe a number of years behind bars.

So, how will the Magistrate, Judge or Prosecuting Officer consider the issues and decide upon the level of guilt and, consequently, the punishment to apply? Will they always use the big stick approach or will they understand the potential benefits to be had from the carrot approach. As with any other judicial process, it is hoped that they will review and consider the best available evidence in a fair and even way and administer justice.

It can be anticipated that the Judges and Magistrates will have limited knowledge and understanding of what happens on board a ship. They will need to be guided by the lawyers, consultants and experts who may be on hand to provide the relevant information. It is quite likely that a local pollution incident will have attracted much publicity and the media will be following the case and expecting heads to roll. There will almost certainly be pressure to bring out the big stick, find a scape goat and severely punish the ship operating company, Master and anyone else who can be blamed. But we must have faith in the judicial system and believe that justice, in the true sense of that term, will be done and be seen to be done.

In this paper I will argue that the evidence to be considered by the Prosecuting Authorities and the Judicial System will exist within the Safety Management System (SMS) of the ISM Code. The ship operator, the Master and the other members of the ship management team will be judged by the

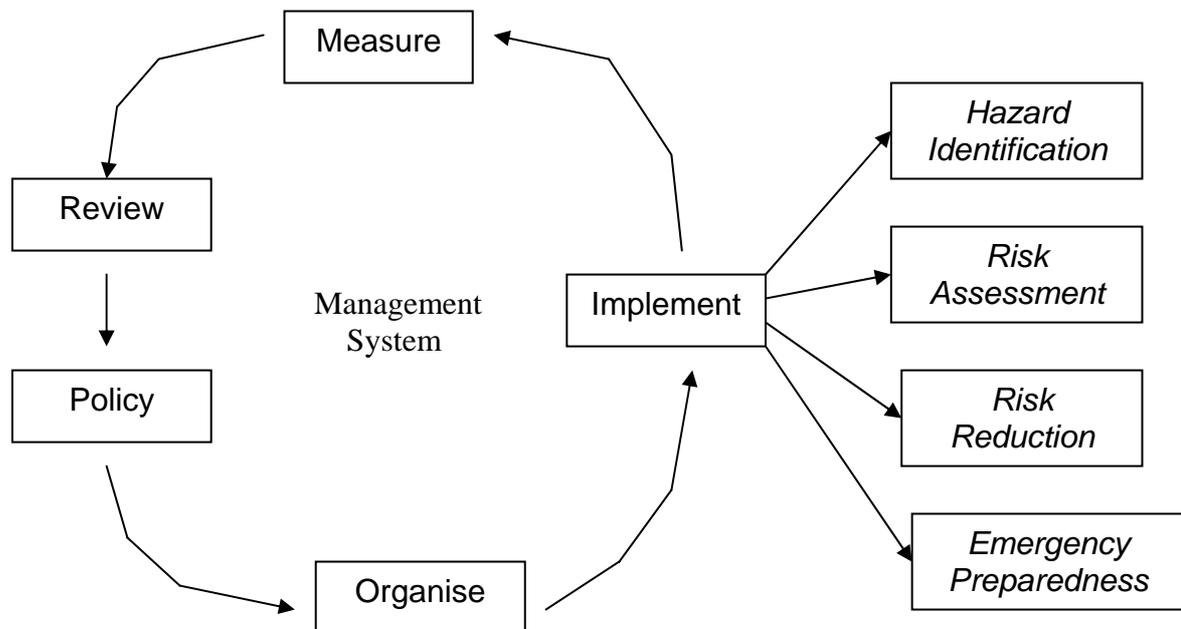
way in which they have developed, implemented and brought into practice the working SMS. If they can demonstrate that they have indeed developed a good system to manage the loading or discharge of cargo, or the taking of bunker fuel, or whatever other activity was taking place which might have led to the pollution incident, with realistic and relevant written procedures, and can demonstrate, with objective evidence, that those procedures were being followed, and had been followed correctly on all previous occasions, but that, on this occasion, a mistake was made which led to the spill, or whatever the nature of the incident might be, – then they should face their responsibility under MARPOL, MSA 1995, OPA '90 or whatever and compensate third parties etc.

However, there can be nothing to be gained by unreasonably punishing the Company or individuals involved. Rather, within the context of the underlying 'no-blame', or an expression I would prefer – 'fair', culture – the opportunity should be taken to learn whatever lessons can be learnt, which should be disseminated, such that the same mistake will not be made again either on board that particular ship – or on board any other ship. In this way the law enforcement agencies have an opportunity to send out a very clear and positive message to the ship operators, their Masters and staff both ashore and on board ship that they will acknowledge the hard work which goes into making a SMS work – and recognising that, even so, mistakes can still be made – such that if they are trying their very best but a mistake happens they will not be unreasonably punished. In this way other ship operating Companies, Masters and all others involved in the implementation process will clearly see that there are very real gains to be had from making the SMS work in practice. On the other hand, if the particular ship operator was not able to demonstrate that they had developed a good SMS or that it was being properly implemented within the spirit intended by the ISM Code then they can expect an example to be made of them when the fine is imposed or, where they have the ability, custodial sentences are imposed.

We need to persuade ship operating companies, Masters, seafarers, insurers and other interested parties that prosecuting authorities, the magistrates and judges do understand the systems approach to managing safety. Clearly the most important element of such a management system is the cycle of continual improvement – to continually make the system better and better – to use the system to prevent accidents but if something does go wrong then to use those accidents as learning opportunities to establish what went wrong with the system, to understand why it went wrong and to use that knowledge to tighten the system to prevent a recurrence. The ship operating companies, Masters and seafarers who have adopted the systems approach will be well aware that for those lessons to be learnt and the results implemented will require an open and transparent environment. Within such an environment there must be the confidence that people can reveal all details without the fear that these revelations will be used against them. Without that detail the true underlying cause would not be established and without that knowledge only the apparent symptoms can be treated and not the real cause of the problem. Of course we are not only dealing with actual accidents but also hazardous occurrences and near misses. We can learn much from these events – which

will help considerably in our attempts to prevent actual accidents from occurring – which has got to be a more efficient, profitable and healthy approach than that which seems to exist in certain sectors of our industry where the ‘blame’ culture prevails.

A typical ‘Management System’ can be expressed diagrammatically:



The central element is a Management System which has five components:

- Policy formulation
- Organise resources and the communication of information
- Implement the agreed policies and actions
- Measure that the required standards are being met
- Review performance and make relevant refinements.

The other four elements of the concept are:

- *Hazard identification*
- *Risk assessment*
- *Risk reduction*
- *Emergency preparedness*

If you understand this basic model you should have little difficulty understanding any other, specific, management system.

If we use a carrot approach – we must mean it and be prepared to back it up with action – we must persuade ship operating companies, Masters and other seafarers that they can trust and believe in the ‘fair’ system – but be warned: let them down once and that credibility will possibly never be recovered. Enormous damage has been done in recent years by certain countries who have imprisoned Masters without proper justification.

The media also have a crucial role to play here – they have an enormous responsibility in communicating the important message but perhaps they need convincing that ‘good’ and encouraging news can sell newspapers just as much as the headline grabbing \$10 million dollar fines.

Let us then consider those elements of the ISM Code and the Safety Management System (SMS) which will provide the evidence for evaluation by the Prosecuting Authorities and Judiciary in determining whether the particular pollution incident arose out of a sloppy system, where not much more than lip service was being paid, or a fundamentally good system which had experienced an unusual blip.

Within the confines of this paper there will not be sufficient time to explore all the relevant issues in detail. I will therefore keep to the basics but, hopefully, highlight those areas of the Code of special interest.

What can a ship operator expect by way of interrogation of their SMS? If you are a ship operator perhaps you would care to reflect and think about how you would measure up? I would argue strongly that neither ISM nor the prosecuting authorities nor the judiciary should realistically expect perfection but they should expect ship operating company, and their staff both ashore and on board their ships to be trying their very best to make their SMS work

Of course it will be necessary to check and ensure that the Document of Compliance (DOC) and Safety Management Certificate (SMC) are fully in order and in date. Assuming they are, then it will be a matter of analysing how the SMS is set up, implemented and is working in practice.

Section 7 provides a requirement for the main activities of shipboard operations to be identified and procedures to be written down such that a standardised approach is adopted, which should reflect industry best practice as it is applied within the philosophy of that particular Company. Where appropriate, checklists should be prepared to assist in the implementation process.

7 DEVELOPMENT OF PLANS FOR SHIPBOARD OPERATIONS

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

What actually constitutes a 'key shipboard operation' may depend upon the type of ship – some may apply to all ships. For example loading, carrying and discharging oil cargo would be particular to oil tankers, taking bunkers would be common to all ships. The starting point therefore, when interrogating the SMS, following a pollution incident, would be to review the written procedures for cargo operations or bunkering as appropriate. Records should have been maintained which can be checked to confirm that the correct procedures were followed not only in respect of the pollution incident under consideration but also going back into the history of the vessel. The record should demonstrate / confirm that the correct procedures were consistently followed, including the use of checklists if appropriate.

Additional evidence which may assist would be details of the historical record of the other ships in the fleet operating under the same SMS showing, for example, how many oil cargoes loaded / discharged during, say, the last three years or number of occasions of taking bunkers? How many oil spill incidents during this time? Of course any such claims would need to be verifiable and capable of being substantiated.

Once evidence has been produced to demonstrate that the correct procedures were being consistently followed then additional evidence should be collected which will demonstrate the commitment of the Company and the people.

One such category of evidence would demonstrate compliance with Section 8 of the Code:

8 EMERGENCY PREPAREDNESS

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

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

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

Clearly, the evidence produced should show that an oil spill, or other pollution related incident, was identified as a potential shipboard emergency situation. The evidence should show when drills and exercises were conducted with, for example, an oil spill as the subject of the drill. It should also show what actually occurred during the drill and details of any debriefing sessions / analysis of the drill. There may, for example, be records of a safety committee meeting when the drill was discussed to consider any lessons to be learnt or improvements which could be made to the response, etc. There should be records of the involvement in the shore office part of the emergency response

exercise as well as from the ship. All of this will be good, contemporaneous evidence to demonstrate that this Company, and its people, take pollution prevention very seriously.

It may very well be appropriate for the Company to demonstrate its commitment to safety, pollution prevention and the ISM Code generally. This could include producing any evidence which would demonstrate clear commitment and application of the principle identified and referred to in paragraph 6 of the Preamble to the Code:

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

Part of the demonstration of commitment by the most senior levels of management will be the content of the Safety and Environmental Protection Policy required under Section 2 of the Code:

2 SAFETY AND ENVIRONMENTAL-PROTECTION POLICY

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

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

It can be anticipated that this Safety and Environmental Protection Policy will be scrutinised very carefully by the Court as well as the media - with the Company being called upon to demonstrate that they do live up to the claims made in that Policy. A policy with wonderful prose and high ideals which is not being lived up to will be a source of considerable embarrassment for the Company.

It may also be appropriate for the Company to demonstrate how they comply with the requirements of Sections 3.2 and 3.3:

3 COMPANY RESPONSIBILITIES AND AUTHORITY

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

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

Actual examples of instances where the Designated Person (D.P.) has requested additional resources and was provided with those resources would be useful. Indeed details of the relationship between the D.P. , the Ships staff and the senior levels of management would help to demonstrate how the SMS functions in practice.

4 DESIGNATED PERSON(S)

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

The Master obviously holds a very important position on board – particularly with regard to the proper implementation of the SMS. The procedures setting out what the Company expects of its Masters should be produced along with evidence to demonstrate and show how the particular Master on board the ship involved in the pollution incident satisfied those requirements as set out in Section 5.1 of the Code.

5 MASTER'S RESPONSIBILITY AND AUTHORITY

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

- .1 implementing the safety and environmental-protection policy of the Company;*
- .2 motivating the crew in the observation of that policy;*
- .3 issuing appropriate orders and instructions in a clear and simple manner;*
- .4 verifying that specified requirements are observed; and*
- .5 reviewing the safety management system and reporting its deficiencies to the shore-based management.*

It is very likely that the main causal factor which resulted in the pollution incident will involve a human activity or inactivity. Section 6 of the Code sets out various requirements with regard to the recruitment, training and familiarisation of personnel. It may therefore be necessary to demonstrate that adequate procedures are in place to ensure that the correct people are recruited, trained and familiarised and also that the particular people who might have been involved in the pollution incident were recruited, trained and familiarised in accordance with those procedures.

6 RESOURCES AND PERSONNEL

6.1 *The Company should ensure that the master is:*

- .1 properly qualified for command;*
- .2 fully conversant with the Company's safety management system; and*
- .3 given the necessary support so that the master's duties can be safely performed.*

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

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

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

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

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

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

If it does transpire that faulty equipment was involved in the causal chain which led to the pollution the Company would need to demonstrate that it had procedures in place to comply with Section 10 of the Code:

10 MAINTENANCE OF THE SHIP AND EQUIPMENT

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

10.2 *In meeting these requirements the Company should ensure that:*

- .1 inspections are held at appropriate intervals;*
- .2 any non-conformity is reported, with its possible cause, if known;*
- .3 appropriate corrective action is taken; and*
- .4 records of these activities are maintained.*

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

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

Of course the Company would also need to produce the relevant records to demonstrate that the equipment had been inspected at regular intervals, any non-conformity reported and corrective action taken. This would include any relevant checklists.

The ISM Code requires accidents, hazardous occurrences and non-conformities to be reported, analysed and appropriate corrective action taken. Details of how this requirement has been implemented and is working in practice should help significantly to demonstrate the level of commitment and understanding at which the Company is operating. Hopefully, the number of actual accidents will be kept relatively low but it can realistically be anticipated that, during the course of operating any ship, hazardous occurrences and near misses will arise with greater frequency than actual accidents and the way these are dealt with will be most useful in demonstrating the attitude of the Company to the managing safety through the systems approach.

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

9.1 *The safety management system 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.*

Records should be available of such reports, not necessarily restricted to pollution incidents, and an audit trail possible to track the report through the

analysis stage on board to the company review and feed back and implementation of corrective action.

It can be anticipated that the documented system which is supporting the SMS will be interrogated and, clearly, it should be possible to show that it is a well structured system which is dynamic and the subject of regular updates and improvement.

11 DOCUMENTATION

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

11.2 The Company should ensure that:

- .1 valid documents are available at all relevant locations;
- .2 changes to documents are reviewed and approved by authorized personnel; and
- .3 obsolete documents are promptly removed.

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

Of crucial importance will be the ability of the Company to demonstrate how it complies with the requirements set out in Section 12 of the Code to show that it is constantly, or at least regularly, monitoring what is going on with regard to the operation of the SMS and ensuring that the system is being implemented properly.

12 COMPANY VERIFICATION, REVIEW AND EVALUATION

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

12.2 The Company should periodically evaluate the efficiency of and, when needed, review the safety management system in accordance with procedures established by the Company.

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

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

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

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

Details of internal audits should provide evidence the status of the SMS on board the ships, and in the office, but additional documentary evidence would be required by way of minutes of management review meetings, follow up correspondence etc., amendments to procedures etc. which might have arisen out of the audit. This again will provide a good opportunity to demonstrate the Company commitment to the proper running of the SMS.

The ISM Code will be the greatest friend a ship operator could ever wish for – or the worst enemy it could ever imagine – it will all depend upon how well the SMS has been prepared, implemented and has been brought alive in practice.

If a ship operator can demonstrate that they are doing all that they reasonably can to manage safety and pollution prevention then they should be congratulated and their efforts rewarded even if, on occasions, something does go wrong. Nothing would be gained by imposing large fines or prison sentences – indeed it would more likely have a very negative effect with good people leaving the industry disillusioned and in disgust. However, if they are but paying lip service to managing safety and pollution prevention then they can and should face the consequences. If it requires a large fine to encourage them to start taking safety and pollution prevention seriously then so it must be.

Accidents may still happen, on occasions, even with a well structured and properly implemented SMS. If something does go wrong then the most productive response is almost certainly going to be a detailed analysis of what went wrong and why the SMS did not prevent it, such that appropriate corrective action can be implemented to prevent it happening again. By inflicting serious punishments it is unlikely that the true cause would ever be established and, consequently, a serious risk of recurrence is introduced.

It may well be that prosecuting authorities are recognising the wisdom of this approach and are not proceeding with prosecutions in appropriate cases – if that is the case then I would urge them to report those occurrences just as much as the incidents which they do prosecute. I would urge the media to pick up and publish such reports of non-prosecution along with the reason why the decision was taken not to prosecute. In this way we will have the chance to communicate to the ship operators and their personnel the important message that if they are trying their very best to achieve full and proper compliance with the requirements of the ISM Code, and can demonstrate this, then will be rewarded – even if, on occasions, something does go wrong.