

ReportISM



The ISM Code Magazine...
by experts for professionals.

INSIDE ISSUE 6

Dr Phil's Diagnosis

Adding Value To ISM

Non-Conformity or Compliance?

Maintenance & ISM

Does Vetting Work?

Legal Exposure of The DPA

ConsultISM...out and about



Dr Phil's Diagnosis...



Welcome to issue 6 of ReportISM – the quarterly electronic newsletter dedicated to exploring issues relating to the ISM Code. I am delighted that our circulation continues to grow with many new subscribers signing up with each issue.

In this issue we will be looking at a number of important, and I hope interesting, topics including maintenance systems, the exposure of DP's to potential criminal liabilities and the possible need for insurance cover, a linguistic exercise distinguishing between non-compliances and non-conformities and an article by Arne Sagen highlighting the need to move out of a compliance culture into a culture of self-regulation – plus much more.

In issue 5 of ReportISM I drew attention to the pending review of ISM which is on the horizon at IMO and I set out my own 'wish list' of amendments and improvements which I believe should be made to the Code. More importantly I threw down a challenge and invited readers to make their own views known to their Administrations, NGO's or indeed the IMO itself. I also invited

readers to share their thoughts through the format of this newsletter.

I received a significant number of individual comments and suggestions – demonstrating that there are not only some strongly held views and concerns about the Code but also there is a clear will to see the Code improve and work in practice.

In accordance with my assurance I will maintain strict confidentiality but I would like to feed back with a selection of the ideas that came forward.

What did become apparent, from many of the responses, was that there appears to be a desire to make the Code much more prescriptive such that a whole range of requirements would be very specifically legislated for and spelt out within the Code itself or at least in ancillary legislation. The implication being that we, as an industry, still have some way to go before we assume the responsibility of self-regulation.

This is sad and, in my view, a backward step – but maybe we do need our hands held for a little while longer by being told very clearly and precisely what is expected of us? Although certain sectors of the tanker industry seem to be making good progress in the right direction with TMSA – see Arne Sagens' article on page 3

One respondent drew attention to the strange situation whereby the ISPS Code mandated that there must be formal training and qualifications for Ship Security Officers as well as Company Security Officers – but no similar requirement with regard to what many may see as the more important Safety Officer and DPA

– for example. Some suggested that it was not just the role of the DPA which required clarification but also the 'authority' which such an individual has or should have.

Potential problems were identified with the actual implementation of Planned Maintenance Systems and the practical difficulties of record keeping. Also on the maintenance side was concern that confusion exists on identifying safety critical systems.

The final issue I will mention on this occasion relates to the requirement for 'Emergency Preparedness' under Section 8.3 of the Code – particularly in light of such incidents as the tragic sinking of the "Al-Salam Boccaccio 98" a year ago. Was this an isolated occurrence? The more recent loss of the "Senopati Nusantara" off Indonesia suggests not, and therefore do we need to better train and prepare generally across the industry.

Should additional fire fighting and crisis management training be mandated or would it be more appropriate to intensify the policing and enforcement of the existing requirements?

These, and many other issues, have been put forward for consideration and debate – a debate we need to develop and expand – so please do send in your further thoughts to me.

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Adding Value To ISM



Perhaps the most influential reference source in the ISM era has been the ISF/ICS "Guidelines on the application of the ISM Code" (1993); a very well prepared commentary on the Code providing sound advice to the shipping community about the implementation of the ISM Code.

The guidelines describe, with great enthusiasm, a Safety Management System as a three-stage development. The basic and historical stage is the blame culture, characterised as a culture of external control, where the essential theme is to identify failure and then to apportion blame.

The second stage is the culture of compliance, based upon regulation by prescription, where the industry is given sets of regulations to follow. But this is not enough, because the rules should only provide the means to achieve safety, and should not be an end in themselves.

The third and final goal is the creation of a culture of self-regulation. This final stage concentrates on internal company management and encourages individual companies to establish their own targets for safety and operational performance.

Self-regulation requires the development of a company specific and a vessel specific safety management system, which will enable the shipping company to set its own priorities, rather than being directed by casual external audits.

Promising experience from other industries was also mentioned, as reduction of unwanted incidents and substantial cost savings. In hindsight, there is little doubt that the shipping industry, to a large degree has neglected this excellent advice to qualify for the culture of self regulation, but has resigned itself to the more elusive compliance level, leaving the important feedback to the casual external auditors.

Within other modern industries, the self regulation principle has been the dominating management principle for the last decades, known under different names as self assessment, internal control, internal rating, loss control management, etc. The most prudent shipping companies have introduced similar systems to improve the rather elusive ISM Code compliance.

A very promising initiative to enhance the safety management assurance for oil transportation, was

recently taken by the Oil Companies International Marine Forum (OCIMF), by their development of a formal tanker management self assessment system (TMSA).

The TMSA system is based upon 12 key elements, in four increasingly demanding stages. Covering the six functional elements of the ISM Code, they are also providing the necessary guidelines, telling HOW to achieve the various objectives.

Word from the tanker industry indicates that operators who have a well implemented ISM system will have no problem with the first stage, and those who have advanced further report very promising results as incident-free operations and significant continuous improvement. Has the tanker industry shown the way?

The TMSA may well provide the long sought after solution for a self assessment safety management system, providing enhancement of safety and quality for all kinds of ship operations. It has the propensity to be the forerunner of a more general Ship Management Self Assessment System, as the missing link for the needed upgrading of the "compliance-based" ISM Code, fully in line with the self regulation culture, as predicted by ISF/ICS.

This article was provided by
ConsultiSM staff associate Arne
Sagen.

There are very few people involved in the shipping industry with more experience of the ISM Code than Arne. He was actively involved in the development of safety management tools for a leading Classification Society well in advance of the Code becoming mandatory, His Masters degree focussed on the self regulatory nature of successful SMS's.

Non-conformity or non-compliance?



It is unfortunate, in the English language version at least, that the ISM Code involves two quite separate situations which involve very similar sounding terms – Non-conformity and Non-compliance. The two expressions are not intended to be synonymous.

In this article we will endeavour to draw the distinction between the two.

Perhaps the starting point would be to recognise that the task of interpreting the requirements of the Code is left to the individual Companies and, at the end of the day, to the Administration to decide whether any particular Safety Management System (SMS) has achieved compliance. On the basis of their assessment the Administration, or a Recognised Organisation acting on their behalf, will decide whether it would be appropriate to issue a Document of Compliance (DOC) to the Company and a Safety Management Certificate (SMC) to the ship. At that level the holding of a DOC and SMC demonstrate compliance with the Code. A failure to hold a valid DOC and / or SMC would demonstrate a non-compliance.

In addition to the requirement under Chapter IX of SOLAS, there are various contractual requirements

which may oblige a ship operator to demonstrate compliance. For example, many time charters and contracts of carriage incorporate the BIMCO ISM Clause or similar which requires Owners to ‘...procure that both the vessel and the owner/managers shall comply with the requirements of the ISM Code...’, also insurance contracts such as the International Hull Clauses 2003 and the Rules of most P&I Clubs which either require specific compliance with the requirements of the ISM Code or, by implication, through a general requirement to ‘...comply with all statutory requirements of the vessel’s flag state relating to ...operation and manning of the vessel...’ – or similar.

What do we mean therefore by the term ‘non-conformity’? The Code does actually provide us with two definitions:

- 1.1.9 “Non-conformity”**
means an observed situation where objective evidence indicates the non-fulfilment of a specified requirement.
- 1.1.10 “Major non-conformity”**
means an identifiable deviation that poses a serious threat to the safety of personnel or the ship or a serious risk to the environment that requires immediate corrective action and includes the lack of effective and systematic implementation of a requirement of this Code.

What is involved here is a failure to follow some specific procedure or other part of the SMS or some particular requirement of legislation or other rules or regulations to which the management system should be ensuring compliance – e.g. some other part of SOLAS, or MARPOL, or STCW etc. These ‘non-conformities’ are likely to be picked up during an internal or external audit although they may be detected on other occasions.

So far, so good - but what about a situation where the non-conformities are so serious or so numerous that the integrity of the SMS itself is brought into question? Such a situation may come to light, when say, a new Master joins a ship and conducts a review, or a port State control Inspector visits. Another occasion may be following a serious incident when lawyers or other investigators examine the evidence.

The DOC and SMC are quite likely to be still in place. The only people with the power and authority to withdraw, suspend or cancel the Certificates are the Flag State Administration who issued them. It maybe that the Administration would withdraw the certificates if they became aware of the situation but on our definition of ‘compliance’ or rather ‘non-compliance’ the Company and the ship would be OK until such time that the Certificates were withdrawn.

This surely must be a nonsense. A sensible – although maybe not strictly legal - interpretation must be say that a major non-conformity, or at least a number of major non-conformities must be synonymous with a ‘non-compliance’. If that is correct then it may have very serious implications as far as charterparties and insurance contracts are concerned.

Maintenance & ISM

The International Safety Management (ISM) Code rigorously enforces the concept of maintenance, of both the ship and equipment, and Section 10 sets out the requirements in a fairly unequivocal manner.

Put simply the Code requires that a company must establish procedures and schedule maintenance of their fleet and equipment to ensure that:

- 1) maintenance is planned and inspections carried out 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 kept.

Even that is not the end, as 10.3 stresses that 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”.

Further to this, the safety management system (SMS) “should provide for specific measures aimed at promoting the reliability of such equipment or systems. These measures should include the regular testing of stand-by arrangements and equipment or technical systems that are not in continuous use”.

Finally, “the inspections”, and “the measures” taken should be integrated into the ship’s operational maintenance routine”.

Having been given such clear and unambiguous guidance, it may come as a surprise that the majority of ISM non-compliances, according to Lloyd’s Register (LR), are related to maintenance issues. It seems that it is a time for a change, with maintenance taking on a more significant role than ever. In fact many see that an effective maintenance strategy is now a fundamental business process.



A study of the domestic Philippine fleet, by the Japan International Co-operation Agency (JICA), (See www.jica.go.jp for more details) found that most ship fires start in the engine room, and are often caused by lack of proper maintenance. The primary causes of fire identified were ‘gas blow-by’ – when hot combustion gasses leak past worn piston rings, igniting oily sludge in the scavenging air trunk.

Another cause of fire is turbo-charger explosion. The report stated that lack of engine maintenance often leads to loose connection bolts and a build-up of oil and dirt on the electrical switchboard, both of which can lead to fires.

JICA stressed that many incidents could be prevented by ensuring that appropriate watch keeping and inspection plans are in place, and by cleaning and overhauling correctly.

Such warnings are slowly combining with a number of factors to push maintenance from being a “costly inconvenience” to second nature. One major catalyst has been the increasing influence of port State control regimes, with their inspectors actively seeking signs of effective and proper maintenance.

It seems obvious, but Owners looking to decrease the number of port state control deficiencies or detentions, must ensure that maintenance is

effective and that maintenance schedules are up to date, particularly on critical items, such as life saving equipment.

Naturally a vessel’s port State control record reflects badly on the ship’s operator, flag and classification society. So all must join together to help improve maintenance practices through the provision of guidance, statistical analysis of detentions and through open dialogue.

It is better to spot a problem early and to fix it, than to wait until the port State Inspector finds it, or worse still, someone is injured. Though as LR points out, “in practice not all owners meet this responsibility and lack of maintenance is one of the key factors on ships where class deficiencies are found.”

We must remember, deficiencies lead to detentions, which in turn lead to disputes. These disputes can often have a knock on effect to a vessel’s insurance.

A lack of proper and effective maintenance, and of the systems underpinning it, can lead to a collapse of the commercial viability of any vessel.

It seems that the age old expression, “Don’t spoil the ship for a Ha’pworth of tar”, meaning to spoil something completely by trying to make a small economy, is as true today as ever.

Does Vetting Work?



What can you do? What should you do? What would you do?

These were just three questions posed by ConsultISM to a number of vetting officers during a recent debate.

We asked how they would realistically react when faced with a vessel they considered unsafe, and where they wished to contest the issuance of a Safety Management Certificate (SMC).

One officer advised that under such circumstances the only recourse

would be to inform the respective port authority, only if there was “a real and imminent danger to the port infrastructure” and it would be their decision to liaise with Class/ Flag.

It was felt such issues highlight the frailties of the system, especially when there is no independent “ethics and compliance” function. While LNG tankers, and VLCC’s may be given a thorough vetting, it seems that there are other types of vessels being allowed to slip through the net, and no-one wants to plug the holes.

The one mechanism we do have to address such concerns is port State control, however we must remember that if ships are trading within a very small geographical area with no effective port State regime, with a ‘friendly’ Flag and Classification Society they may escape serious enquiry completely. Yet another possible flaw is made apparent.

When challenged Flag States and Classification Societies ask for specific examples of incidents where they have fallen short – they insist

that if these matters are brought to their attention then they will act – they need to be put to the test. IACS insist that ships will not be allowed to move from one society to another to escape compliance; the P&I Clubs insist that the same is true, but is it true?

Cases, such as the Erika, demonstrate that when something goes wrong it can suck in all those down the chain, from Charterers, Classification Societies, Commercial and Technical managers, to the Master and crew.

As the Judges’ gavel bangs, the management team of many an oil major will breathe more easily knowing that their vetting division had been granted true freedom to clampdown, far removed from commercial pressures, and fears of company discord.

For more information on any of the issues raised here, or to provide your own comments, please contact ConsultISM.

Legal Exposure of the DPA



The entity ‘Designated Person’ (D.P.) did not appear in the early drafts of working documents which eventually led to the ISM Code – rather it was introduced at a relatively late stage.

However, since that time there has been much academic and professional speculation and debate as to the potential legal significance of the role of the D.P. and the legal consequences both for the Company and for the individual D.P.

The ISM Code is not involved with the legal implications of non-compliance – either in a commercial or criminal sense – it is interested only in making ships safer and protecting the marine environment.

Different countries have, however, introduced, or have amended / reinterpreted pre-existing regulations, to impose liabilities on Companies and / or individuals who fail to comply. A classic example is UK

Statutory Instrument (1998) No. 1561. At Section 19 there are a range of specific violations for which the Company as well as individuals, including the Designated Person can be found liable and, if proved, faces substantial monetary fines as well as long prison sentences.

Interestingly there have been very few prosecutions either under the UK legislation or internationally – however, the exposure is there and the potential consequences will be very serious. The United States Department of Justice have certainly brought prosecutions against individuals including DP’s and the European Union appear to be moving in the same general direction. But what if an action is commenced against an individual DP? Will he or she be left on their own to face the music or can they

Legal Exposure of the DPA continued...

rely upon their employers and their insurers to provide legal assistance? The answer is far from clear and any DP, and their employer, would be well advised to consider their own situation very carefully.

It may well be that, in certain circumstances, the ship operators P&I or FD&D or indeed a separate D&O insurance, would provide the necessary cover – but that cannot be guaranteed – indeed such insurances may specifically exclude the very risks to which the D.P. is most likely to be exposed. Consider, for example, where a conflict, or potential conflict, exists between the interest of the Company and that of the DP, or where the insurer adopts a position at an early stage that there has been a breach of cover, or where the Company, or indeed the insurer

has become bankrupt or maybe the Company just hasn't paid the premium.

Of course the consequences of a criminal act are not insurable – e.g. the fine which may be imposed by the Court or the financial losses which may be suffered whilst serving a prison sentence – but the general rule, under English Law at least – is that a person is 'innocent until proven guilty'. Accordingly, there would be nothing illegal in providing insurance to pay for lawyers to defend an accused in the courts.

Such insurance for Designated Persons is available on the commercial market and this has been developed and led by Galatea Underwriting Agency* at Lloyds. If you are a DP you may care to

discuss with your employers what contingencies they have in place should you find yourself facing criminal charges.

Neither ConsultISM Ltd. nor ReportISM endorse any particular product but we are pleased to provide contact details of Galatea who will be happy to provide you with additional information about the specialised cover they provide for DP's and other PI insurance in respect of individuals negligence:

***Galatea Underwriting Agencies**
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“Out and About”

At the time of publication, Dr. Anderson was heading off for a short visit to Malta. He has been invited by the Malta Maritime Law Association to make a presentation at their AGM addressing the legal liabilities related to ISM implementation.

He is honoured to share the platform with speakers from the Malta Maritime Authority who will be explaining the role of the Administration in the verification, certification and review process'.

Dr Anderson will also present a lecture to students and staff at the International Maritime Law Institute (IMLI). He has also been invited to speak to the students at the Malta Nautical College.

In April Dr Anderson will be in Beijing joining about 1,500 lawyers and members of the Inter Pacific Bar Association at a major conference event. He has been invited to participate in a mock maritime arbitration, which will involve ISM related issues, playing the role of ISM Expert Witness.

Having played a similar role in three ISM Mock trials during this last year, organised by the London Shipping Law Centre, he is considering applying for his actors 'Equity Card'!

Whilst the commercial work of ConsultISM must take priority, we do pride ourselves on trying to put something back into our industry – particularly if we can make a small

contribution towards making ships safer and protecting our marine environment. If you would like us to help your own organisation then please do contact Dr Phil Anderson who will be pleased to consider requests.

Web-links

Whatever your industry role, whether a ship operating company, lawyer, insurer – if you share our concern about safety management and related issues we would like to invite you to establish a reciprocal website link. If this would be of interest to you please contact our Webmaster on webmaster@consultism.co.uk

Issue 7 of ReportISM is out May 2007 - for back copies see our website

www.consultism.co.uk

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