The ISM Code:
A Reexamination of Certain Maritime Law Principles

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Abstract

Maritime Safety is one of the most important issues dealt with by the International Maritime Organization (IMO). With the aim at improving maritime safety and pollution prevention, in 1994 SOLAS 1974 was amended and Chapter IX entitled "Management for the Safe Operation of Ships" was added, giving in this way existence to the International Safety Management Code. This amendment took place through the tacit acceptance procedure implemented by IMO, thus it has a mandatory character for SOLAS Contracting States. The Code was established to have effect in two stages, the first stage took place on July 1 1998, and the second stage will take place on July 1 2002.

The ISM Code establishes requirements, which, although not completely new to the maritime industry, will have great incidence in the way maritime activities are carried out to date. Shipping Companies will suffer alterations on their management structure and certain principles in maritime law will probably be changed with the introduction of the Code, however, the precise effects of the ISM Code cannot be outlined before its full implementation takes place in 2002.

Résumé

L'une de plus importantes questions traitées par l'Organisation Maritime Internationale (OMI) concerne la sécurité maritime. En vue de l'amélioration de celle et de la prévention de la pollution l'OMI a adopté, en 1994, les principes directeurs du Code International de Gestion de la Sécurité Maritime (Code ISM). Ce dernier, incorporé à la Convention SOLAS dans un nouveau chapitre XI intitulé "Management for the Safe Operation of Ships" par la mise en jeu de la procédure d'acceptation tacite, est devenu obligatoire pour les pays signataires de la Convention. L'entrée en vigueur du Code ISM a été initialement prévue en deux phases, la première ayant eu lieu le 1er juillet 1998, la deuxième devant intervenir le 1er juillet 2002.

Bien que les principes énonces par le Code ISM ne sont pas totalement étrangers à l'industrie maritime, leur influence potentielle sur la façon dont les activités maritimes sont de nos jours conduites n'est pas négligeable. La structure et la gestion des compagnies maritimes devront en effet être modifiées tout comme certains principes fondamentaux du droit maritime. Il est néanmoins impossible de déterminer avec précision les conséquences du Code ISM avant 2002, date de son entrée en vigueur.

Table of Contents

Acknowledgments i
Abstract ii
Résumé iii
Table of Contents iv

INTRODUCTION 1

Chapter I. The International Maritime Organization (IMO)

1. General Overview 4
   1.1 IMO Structure 7
   1.2 IMO as a Legislative Organ 9
   1.3 Adoption of International Convention 11

2. Convention for the Safety of Life at Sea (SOLAS) 15
   2.1 SOLAS 1914 15
   2.2 SOLAS 1974 18

Chapter II. The International Safety Management (ISM) Code

1. Origins of the ISM Code 22

   1.1 Herald of Free Enterprise Incident 22
   1.2 Resolution A.596 (15) "Safety of Passengers Ro-Ro Feries" 23
   1.3 Resolution A.647(16) "IMO Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention 24
   1.4 Resolution A.741(18) International Safety Management Code for the Safe Operation of Ships and for Pollution Prevention 26
   1.5 SOLAS 1974 Chapter IX entitled "Management for the Safe Operation of Ships" 27

2. Principal Provisions of the ISM Code 28

   2.1 Objectives 28
   2.2 Definitions 31
   2.3 Master's Responsibility and Authority 33
   2.4 Role of the Flag State Administration- ISM 35
   2.5 Document of Compliance (DOC) 37
   2.6 Safety Management Certificate (SMC) 39
   2.7 Port State Control (PSC) 42

Chapter III. Implementation of the ISM Code: Implication on Certain Maritime Law Principles

1. General Overview 46
2. Seaworthiness 49

2.1 General Overview 49
2.2 The Hague and Hague/Visby Rules 50
2.3 The Hamburg Rules 55
2.4 Seaworthiness-Effect of the ISM Code 56
2.5 Seaworthiness - Applicable Legal Regime 64
2.5.1 Canada 64
2.5.2 The United Kingdom 66
2.5.3 The United States 68

3. Limitation of Shipowner's Liability 70

3.1 The 1957 Convention 71
3.2 The 1976 Convention 73
3.3 Limitation of Shipowner's Liability- Applicable Legal Regime 76
3.3.1 Canada 76
3.3.2 The United States 77
3.3.3 The United Kingdom 78

4. Concluding Remarks 78

Chapter IV. Role of the Classification Societies - ISM Code

1. General Overview 80
2. Origins of Classification Societies 81
3. Classification Societies - Legal Regime (SOLAS 1974) 83
4. Classification Process 85
5. Liability of Classification Societies 87
5.1 Liability in Contract 90
5.5 Liability in Tort 91
6. Classification Societies - Current Situation 95

CONCLUSION 98

APPENDIX 1
The International Safety Management (ISM) Code 101

APPENDIX 2
SOLAS 1974 CHAPTER IX Management for the Safe Operation Of Ships 111

APPENDIX 3
Forms of DOC, SMC, and Interim DOC and SMC 115

INDICES 121

I. International Convention Index 121

II. Statute Index
a) Canada 123
b) The United States 123
c) The United Kingdom 124
III. Case Index 125
IV. Monographs 128
V. Secondary Materials: Articles 129
VI. Secondary Materials: Periodicals 133
VII. Electronic Media 136
VIII. Dictionaries 139

INTRODUCTION

The International Maritime Organization (IMO) was founded in 1948 to promote maritime safety in a more effective way, coming into existence in 1958. Right after its creation, IMO's first task was the updating of the International Convention for the Safety of Life at Sea, known as SOLAS whose first version was adopted in 1914. Since its beginning, SOLAS has been object of a number of revisions resulting in formal amendments. As a result of these amendments the International Safety Management Code (ISM Code) came into existence being promulgated by IMO in November 1993, basically with the purpose of both, ensuring the safe management of ships and preventing pollution at an international level.

According to the provisions of the Code, its objectives will be accomplished by requiring owners and operators, *inter alia,* the implementation of a safety management system (SMS), integrating in this way ship and shore operations, establishing lines of communications and ensuring that shipping companies take effective measures towards marine pollution prevention. The compliance of the ISM Code is mandatory in two stages; the first stage was on June 1st 1998 regarding all passenger ships, tankers, bulk carriers, gas carriers and cargo high-speed craft of 500 gross tons or more; and the second stage will be on June 1st 2002 for all cargo ships of 500 gross tons other than those mentioned above and mobile offshore drilling units. The ISM Code undoubtedly brings with it important changes in ships operational practice and will have great implications in the legal, commercial and economic aspects of the shipping industry in general.

The first main issue to be dealt with, will be regarding the Code itself. In order to be able to establish the ISM Code possible further consequences, it is necessary to study the Code's main provisions and have a general view of their real meaning within the maritime industry.

Secondly, this thesis will look at the different issues involving shipowners and operators as far as responsibility is concerned. Will "due diligence" be taken for granted where there is compliance with the ISM Code? What will be the proper channel to claim limitation of liability, taking into account the fact that the Code provides the establishment of a link between the company and those on board? This provision will definitely impose a degree of knowledge and control that, in some cases will deprive owners or operators from limiting their liability under the defence of lack of knowledge. Does this mean that there is a presumption of privity of the owner?

Thirdly, the value of ISM certification, is another issue which needs to be discussed. According to this certification a vessel and owners to which the Code applies must have, as part of the vessel's necessary certificates to enable it to trade at an international level, a Safety Management Certificate (SMC) and a Document of Compliance (DOC) issued by or on behalf of its Flag State. Since these certificates will be issued by Flag State organizations, the method or procedure for its issuance will possibly vary from one another. Furthermore Flag States have delegated the task of vessel inspection and certification to Classification Societies as recognized organizations within the language of the Code. Because the basic function of Classification Societies is the verification of a vessel's compliance with their own rules, should classification societies' verification be considered as a certification of seaworthiness? Should a classification society be negligent, what will be its responsibility or that of the operator?

The process of certification is a matter, which not only concerns Flags States organizations, but also involves Port States. Several regional agreements between neighbouring countries have been drafted in order to ensure detention in case of sub-standard vessels visiting their ports. Since Port States will be taking into account their local legislation, will there be a uniform treatment for all vessels?

Finally, since the adoption of the Code is very recent, and bearing in mind that the second stage is still to come in 2002, this study will aim to judge whether or not the

ISM Code can be seen as a truly useful instrument despite its possible shortcomings that may come about after its complete implementation.

Chapter I. The International Maritime Organization (IMO)

1. General Overview

Shipping has always been recognized as one of the most international and hazardous commercial activities worldwide, thus the need of implementing international rules and standards in order to avoid or at least minimize certain risks. In the 19th century, numerous shipping nations proposed the establishment of a permanent body having as a principal, but not exclusive, goal the promotion of maritime safety. However, it was not until March 1948 when a convention adopted in Geneva formally established The International Maritime Organization[1] as a United Nations' specialized agency. [2]

It is however worth noting, that the real basis of relatively well-organized multinational cooperation in the maritime shipping field goes back to the end of the Second World War in 1944. At this time, having overcome the hard pressure of the war, the United Maritime Authority acting under the name of United Maritime Consultative Council came into existence,[3] yet it was considered to be just a transitory body without major transcendental relevance.[4]

IMO was originally known as the Inter-Governmental Maritime Consultative

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[1] International Maritime Organization U.N.T.S. Vol. 289 [hereinafter *IMO*].

[2] The United Nations was established after a devastating war in 1945 Its chief goal was the stabilize international relations. The Convention establishing IMCO came into force on March 17, 1958 and is contemplated under article 59 of the U.N Charter.

[3] Its original members were: Belgium, Canada, Denmark, France, Greece, the Netherlands, Norway, Poland, the U.K., and the U.S.A. Later in 1946 Australia, Brazil, Chile, India, Yugoslavia, New Zealand, Sweden, and South Africa joined the group. For further analysis on the topic see W.H Lampe, "The "New" International Maritime Organization and its Place in Development of International Maritime Law" (1983) 14 J. Mar. L. & Com. 305 at 311.

[4] M. Nagendra Singh, *International Maritime Law Conventions* Vol. 4 (London: Stevens & Sons, 1983) at 3162.

Organization or IMCO[5]. The original IMCO Convention[6] consisted of sixty-three articles and two appendices. After more than 50 years of existence IMO has adopted more than 40 international treaty instruments, covering more than 98 per cent of world shipping tonnage. Most of the instruments adopted by IMO are intended to improve shipping safety or to prevent pollution from ships[7]. The general purposes of the organization, are summarized in Article 1 of the Convention, which states:

> *"The purposes of the Organization are:*
>
> *(a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from ships; and to deal with legal matters related to the purposes set out in this Article;*
>
> *(b) To encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;*
>
> *(c) To provide for the consideration by the Organization of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II;*
>
> *(d) To provide for the consideration by the Organization of any matters concerning shipping that may be referred to it by an organ or specialized agency of the United Nations;*
>
> *(e) To provide for the exchange of information among Governments on matters under consideration by the organization."* [8]

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[5] IMCO was a consultative body rather than regulatory. Its name was changed in May 22, 1982 to International Maritime Organization.

[6] The original official title was "Convention on the Intergovernmental Maritime Consultative Organization", Mar. 6, 1948, 9, U.S.T. 621, T.I.A.S. No. 4044 [hereinafter *IMCO Convention*]. The title was later changed to " Convention on the International Maritime Organization", Nov. 14, 1975, IMCO No. 68.01.B (entered into force on May 22, 1982) [hereinafter *IMO Convention*]. Lampe, *supra* note 3 at 308.

[7] W. O'Neil, "IMO and the Future" *Fairplay Int'l Weekly* (23/30 December 1999) at 40.

[8] IMO Convention, *supra* note 6 Art. 1.

The first and probably most important mission of IMO since its creation, was the adoption of a new version[9] of the Convention for the Safety of Life at Sea[10], which is considered to be the most relevant of all treaties dealing with maritime safety[11]. The approach taken in this convention was a traditional one, defining a safe ship as one which was designed, built and equipped with safety factors in mind.[12] By the time IMO was created, safety was the main responsibility. Nevertheless, not too long thereafter, a new issue emerged: pollution. The *Torrey Canyon* disaster in 1967, in which 120.000 tons of crude oil were spilled, is an example of the seriousness of the problem.[13] As a result of this incident, IMO adopted several measures aimed at the prevention of tanker accidents and the mitigation of their consequences. In particular, the International Convention for the Prevention of Pollution from Ships (MARPOL)[14] was adopted, being the most important measure taken by IMO at that time. The relevance of MARPOL lies in the fact that it covers not only oil pollution derived from accidents, but also pollution by chemicals, goods in packaged form, sewage, garbage and air pollution.[15]

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[9] By the time IMO came into existence, several important conventions had already been adopted, including SOLAS in 1948.

[10] *International Convention of Safety of Life at Sea*, 1974, 34 U.S.T. 47, T.I.A.S No. 9700, as amended by 1978 Protocol, reprinted in 6B Erastus C. Benedict, Benedict on Admiralty, Doc. No 14-1 (F. Wiswall, ed., 7th ed. Rev. 2001) [*hereinafter SOLAS 1974*].

[11] See K. R. Simmonds, "Introduction" in *The International Maritime Organization* (London: Simmonds & Hill Publishing Ltd., 1994) at 16.

[12] A. J. Rodriguez & M.C. Hubbard, "The International Safety Management (ISM) Code: A New Level of Uniformity" (1999) 73 T.L.R. 1585 at 1587.

[13] See especially R. Balking, "IMO Legal issues" in M.H. Nordquist & J.N. Moore, ed., *Current Maritime Issues and the International Maritime Organization,* (The Hague: Kluwer Law International, 1999) at 291.

[14] *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*, IMCO Doc. TSPP/CONF/11, 16 February 1978, reprinted at 17 I.L.M. 546[hereinafter *MARPOL*]. It was adopted on November 2, 1973. Today, MARPOL, as modified by its 1978 Protocol is considered as the most important international convention for preventing marine pollution from ships. The 1978 protocol was adopted at a Conference on Tanker Safety and Pollution Prevention held in 1978. In 1997, IMO adopted a further Annex VI to MARPOL containing regulations to prevent air pollution by ships. See "Secretary-General marks 25th anniversary of MARPOL convention" (7-11 December 1998) 4 *IMO News* at 2.

1.1 IMO Structure

IMO consists of an Assembly, a Council and four main Committees: the Maritime Safety Committee; the Marine Environment Protection Committee; the Legal Committee; and the Technical Co-operation Committee. There is also a Facilitation Committee and a number of Sub-Committees which support the work of the main technical committees.[16]

The Assembly is the highest governing body of the IMO and comprises all Member States. Having such status, the Assembly is the decisive authority for the activities undertaken by the Organization and is responsible for the approval of the work programme and all matters regarding the financial aspect of the IMO. The Assembly has also been given the task of electing the Council, which is composed of 32 Member States[17] whose election takes place every two years. The Council acting as the Executive Organ of IMO and under the guidance of the Assembly, supervises the work of the Organization.[18]

IMO works by committees, the Maritime Safety Committee (MSC) being the highest technical body of the organization. MSC consists of all Members States and its main function, is stated in article 29 of the Convention:

> *"The maritime Safety Committee shall consider any matter within the scope of the Organization concerned with aids to navigation, construction and*

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[15] *Ibid.*

[16] online: IMO Homepage: <http://imo.org/About/contents.asp?header=false&topic_id=312&doc_id=819> (date accessed : 03 July 2001). See Article 12 of the Convention on the International Maritime Organization "*[t]he organization shall consist of an Assembly, a Council, a maritime Safety Committee, a Legal Committee, a Marine Environmental Protection Committee and such subsidiary organs as the Organization may at any time consider necessary; and a Secretariat*". See *supra* note 1.

[17] However in November 1993 the Assembly adopted an amendment to the IMO Convention which, once into force, will increase the size of the members of the Council to 40, this amendment will enter into force twelve months after being accepted by two-thirds of IMO Member States. *Ibid.*

[18] *Ibid.*

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 investigations, salvage and rescue and any other matters directly affecting maritime safety".[19]

In other words, the Maritime Safety Committee is the principal technical organ responsible for developing and organizing the substantive work of IMO in the field of Maritime Safety, having in this way the responsibility of considering and submitting recommendations and guidelines on safety for possible further adoption by the Assembly.

The Marine Environment Protection Committee (MEPC) is formed of all Member States and has been given a more specific task. MEPC has under its charge the consideration of any issue related to prevention and control of pollution coming from ships. MEPC was first established as a subsidiary body of the Assembly and achieved constitutional status in 1985.

The two main Committees, that is to say, the MSC and MEPC are assisted in their work by the Sub-Committees. There are 9 sub-committees and they are open to all Member States. The main issues dealt with are: Bulk Liquids and Gases (BLG), Carriage of Dangerous Goods, Solid Cargoes and Containers (DSC), Fire Protection (FP), Radio-communications and Search and Rescue (COMSAR), Safety of navigation (NAV), Ship Design and Equipment (DE), Stability and Load Lines and Fishing Vessels Safety (SLF), Standards of Training and Watchkeeping (STW), and Flag State Implementation (FSI).

The Legal Committee is another organ with a great importance within IMO, notably for the purposes of our study. In 1948, when the IMO or the IMCO was

[19] IMO Convention, *supra* note 6 Art. 29.

created, this committee did not exist, IMO was conceived as a technical oriented, rather than a legal oriented Organization.[20]The *Torrey Canyon* disaster constituted the principal factor that led to the creation not only of the Legal Committee, but also to the adoption of the International Convention on Civil Liability for Oil Pollution Damage, The Civil Liability Convention in 1969 and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.[21]

The Legal Committee is in charge of the legal matters within the scope of the organization. There are, however, certain technical issues which are implemented by the Technical Co-operation Committee. The Technical Co-operation Committee is formed of all Member States of IMO and its creation as a subsidiary body of the Council goes back to 1969. Later in 1984 this Committee was institutionalized by means of an amendment to the IMO Convention entering into force in 1984. IMO also counts with the Facilitation Committee which was created in 1972 as a subsidiary body of the Council. The participation within the Committee is open for all States Members and its objective, as reflected on its name, is basically the elimination of unnecessary formalities in international shipping.[22]

1.2 IMO as a Legislative Organ.

The CMI and the IMO Legal Committee have, in certain way, been related as to their active role in the international maritime law legislative field. With the creation of the Legal Committee in 1967, part of the effort to harmonize private international maritime law was transferred from private enterprise (CMI) to the public sector

[20] This fact may be so assumed because the international maritime community was of the opinion that the task of developing and drafting international treaties and related legal instruments had been given to the Comité Maritime International [hereinafter *CMI*] established in 1896. Balking, *supra* note 13 at 292.

[21] *Ibid.*

[22] The 1991 amendments to the IMO Convention institutionalized the Facilitation Committee putting it on the same standing as the other IMO Committees; however, as to May 31st 2001 the 1991

(IMO).[23] The *Torrey Canyon* disaster was final factor which prompted the U.K. government to refer the matter to IMO. In response, the IMO council established the IMO Legal Committee, which to date has focused on the development of international treaties and other legal instruments concerning safety and marine pollution prevention. Currently the chief concern is to update already adopted legislation and achieve the ratification by as many countries as possible.[24] This Committee met for the first time on June 21 to June 22 1967.[25]

IMO's task as legislative body is extremely important for the shipping industry. If every single nation were to separately adopt its own legislation, there would be huge differences as to the consequences of the implementation of such laws. For instance, a nation might put more emphasis on high safety standards whilst some others might be more lax, favouring in this way sub-standard shipping.[26]

It is very important to note that IMO does not implement legislation as such, IMO was established to develop and adopt legislation. Once Governments accept[27] an IMO Convention, they are responsible for its implementation. This practice, however,

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amendments had not yet received enough acceptances to come into force. See IMO Homepage, *supra* note 16.

[23] The CMI and IMO Legal Committee are not the only organizations with active role in the maritime legal field. United Nations Conference on Trade and Development (UNCTAD), the principle organ of the U.N. Assembly in the field of trade and development, has been responsible for a number of Conventions in the shipping field. Some of these Conventions are the Multi-Modal Transport of Goods (1980), Conditions of Registration of Ships (1986) and the convention on Maritime Liens and Mortgages (1993). Patrick J. S. Griggs, "Uniformity of Maritime Law-An International Perspective" (1999) 73 Tul. L. Rev. 1551 at 1559.

[24] IMO Homepage, *supra* note 15.

[25] Griggs, *supra* note 23 at 1558.

[26] In this regard, Professor William Tetley is of the opinion that even though some maritime law problems can be solved through the adoption of regional regulation (for instance, the European case where a large number of Transport Law legislation has been harmonized over the last 50 years) it is more effective to have institutions such as the IMO legislating for the entire world on maritime law. See W. Tetley, "Uniformity of International Private Maritime Law-The Pros, Cons, and Alternatives to International Conventions- How to Adopt an International Convention" (2000) 24 Mar.Law. at 775. Compare *Herceg Novi v. The Ming Galaxy*,[1998] 2 Lloyds Rep. 454. Lord Justice Staughton in delivering his judgement, stated that the International Maritime Organization is not a legislature.

[27] Acceptance is one of the methods by which a State can express its consent to be bound by a treaty. There are however some other means such as signature, ratification, approval and accession.

works against the effectiveness of the efforts of IMO towards uniformity of maritime legislation. The manner in which each government includes a legal instrument adopted by IMO making it part of its own national law may differ from the others. Many factors come to play important roles in this matter, for instance, lack of expertise and resources, economical development, and most importantly, the place that enforcement of the law occupies in each nation's list of priorities. IMO, in search for ways to overcome these difficulties has formed a special Sub-Committee on Flag State Implementation and has promoted the establishment of Port State control organizations.[28]

1.3 Adoption of International Conventions

The adoption of international conventions has always been considered as a very effective way to achieve a high level of uniformity in the legal field.[29] Uniformity in international maritime law, however, does not fully depend upon the adoption of international convention and protocols.[30]

IMO has six principal bodies involved in the adoption of conventions. The Assembly and Council are the main organs, and the other bodies concerned are the MSC, MEPC, Legal Committee, and the Facilitation Committee.[31] The majority of conventions adopted by IMO may be classified into three main categories. The first

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[28] G.E. Kurz "Implementing IMO Regulations and Oceans Policy" in M.H. Nordquist & J.N. Moore, ed., *Current Maritime Issues and the International Maritime Organization* (The Hague: Kluwer Law International, 1999) at 353.

[29]There are other instruments which serve as vehicle to achieve unification. Codes, Model Laws, and rules are good alternatives in certain circumstances. For instance, the UNICITRAL Model Law on Arbitration, which today represents the basis of arbitration law in a fairly large number of countries. Regarding to Codes and rules, it is noteworthy saying that they can only apply when there is a contractual relationship between the parties, and the Code or rules are susceptible of being incorporated into their contracts. See generally Griggs, *supra* note 23 at 1554. See also Tetley, *supra* note 26.

[30] Tetley, *supra* note 26.

category relates to maritime safety, the second to prevention of marine pollution, and the third to liability and compensation. Needless to say, there are a large number of other conventions dealing with *inter alia,* facilitation, tonnage measurement, unlawful acts against shipping and salvage.

The procedure for adopting a convention starts in one of the main committees. The suggestion is made by a particular Committee and if agreement is reached, the proposal goes to the Council, and as necessary, to the Assembly.[32]

Once the Assembly or the Council gives its authorization to proceed with the work[33], the Committee concerned with the matter under study, considers the proposal in a detailed way and finally draws up a draft instrument. If the subject matter so requires, the proposal may be referred to a specialized sub-committee for further consideration.[34]

Representatives of IMO Member States are given the task of undertaking the work in the committees and sub-committees. In some cases, depending upon the circumstances and the subject under study, the views and advice of intergovernmental and international non-governmental organizations participating in the process are taken into account. The implication of such organizations is in certain cases very helpful for IMO's work, especially where the organizations have experience within the matter or matters under consideration.

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[31] Online: IMO Homepage "Conventions" <http://www.imo.org/Conventions/cont...eader=false&topic_id=148&doc_id=637> (date accessed: 03 July 2001).
[32] *Ibid.*
[33] Both, the Assembly and the Council, have the responsibility of authorizing the following phases with respect to the Adoption of a convention. Whether the responsibility remains either on the Assembly or the Council is a matter regarding the nature of the subject under scrutiny. *Ibid.*
[34] *Ibid.*

The next step is the formal adoption of the convention. The draft convention, along with a recommendation that a conference be convened to consider the draft and finally achieve its formal adoption, is reported to the main bodies. All IMO Member States, as well as, all the States members of the United Nations or any of its specialized agencies, are invited to attend the conference. These conferences are, in consequence, global conferences open to all Governments that would normally take part in a United Nations conference. Prior to the opening of the conference the draft convention is distributed to the invited Governments and organizations for their respective observations.

The draft convention, together with the observations, if any, is then studied by the conference and necessary changes are made to produce a draft accepted by the majority of the entities present. Once this process is concluded, the convention is adopted by the conference and deposited with the Secretary General, who in turn, sends copies to Governments. The convention is usually open for signature by States for a twelve-month period, signatories may then, ratify or accept the convention while non-signatories may accede.[35]

The adoption of a convention constitutes only the first stage of a very long process. Before a convention comes into force,[36] it is necessary that each Government accept it individually. Generally, a convention contains some provisions stipulating

[35] The terms signature, ratification, accept and accession refer to some of the methods by which a State can express its consent to be bound by a treaty. Consent may be expressed by *signature* where the treaty so provides; the negotiating States provide that signature should have such effect; or the intention of the State to give that effect appears from the full powers of its representatives or was expressed during the negotiations (Vienna Convention on the Law of the Treaties,1969 Article 12.1) A State may also sign a treaty subject to *ratification, acceptance or approval.* In this case, signature *per se* does not mean consent of a State to be bound by the treaty, although it obliges the State to refrain from acts which would defeat the object and purpose of the treaty until it has made its intention clear not to become a party to the treaty. Accession, on the contrary, is the method used by a State to become a party to a treaty which it did not sign while the treaty was open for signature. *See* "Ratification, acceptance, approval and accession" *IMO News* 4 (7-11 December 1998) at 11.

[36] Entering into force means the moment when the convention is binding upon the States which have ratified it. At present, IMO conventions enter into force within an average of five years once they have been adopted.

conditions which have to be met before entering into force.[37] Once the required conditions are met, the convention enters into force for those States that have accepted, and they are given a period of grace to take the necessary measures in order to implement it.[38]

The amendment of existing conventions is another important task for IMO. Today, technology and techniques used in the shipping industry change rapidly, causing the need for the adoption of new conventions and the updating of existing ones. The acceptance procedure used to update early conventions, created some difficulties for IMO. The express acceptance procedure implemented by IMO required the approval of a determined number of contracting states, usually, two thirds. This situation produced long delays in bringing conventions up to date. In consequence, a new acceptance procedure was created.

The tacit acceptance procedure has been the solution to the problem. Under this new procedure, any amendment to a convention, enters into force at a determined date unless before that date, objections to the amendment are received from a certain percentage of contracting states.[39] The results of the adoption of this new procedure have brought great advantages to the amendment process. This procedure was used for the first time to bring into force the 1981 amendments to SOLAS, which were effective three years later in 1984.[40]

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[37] For instance, the International Convention for the Safety of Life at Sea (SOLAS) 1974, in order to enter into force, required the acceptance by 25 States whose merchant fleets comprise not less than 50 per cent of the world's gross tonnage.

[38] Frequently, national laws of a given State have to be enacted or changed to enforce the provisions of a convention. For instance, special facilities may have to be provided, notice must be given to shipowners, shipbuilders, and other parties so that they are aware of the provisions of the convention when planning their acts, and an inspectorate may have to be created or trained to undertake functions under the convention.

[39] IMO Homepage "Conventions", *supra* note 31.

[40] Tetley, *supra* note 26.

Because IMO has no authority to enforce conventions, this task is undertaken by Member State Governments.[41] The implementation of a convention by a State may be achieved in several ways, depending upon the legislative methods existing in each state. In some cases, conventions enter into force just by the publishing of the text in a Government Gazette. Otherwise, an act of Parliament or other legislative instrument may be necessary.[42]

2. Convention for the Safety of Life at Sea (SOLAS)

2.1 SOLAS 1914

The Convention for the Safety of Life at Sea (SOLAS) is considered the most important of all international treaties regarding the safety of merchant ships[43]. It is also the oldest convention, the first version having been adopted on January 20, 1914, following the *Titanic*[44] disaster in April 1912.

The importance of the Convention lies upon the fact that it was the first time that maritime safety rules were adopted at an international level. The Convention was composed of eight chapters, each containing specific rules regarding determined areas, such as, Safety of Life at Sea; Ships to which the Convention applies; Safety of Navigation; Construction; Radiotelegraphy; Life-saving appliances and free protection;

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[41] Be that as it may, IMO has the power to examine the training and certification procedures of contracting states to the STCW, 1978. This was one of the most relevant changes resulting from the 1995 amendments, which entered into force in 1997. Kurz, *supra* note 28 at 353.

[42] In the United Kingdom, for instance, the text of the convention will appear as a schedule attached to an act of parliament. The act itself will contain a provision by which the terms of the convention will be part of national law. See Griggs, *supra* note 23 at 1576.

[43] online: IMO Homepage "Index"<http://www.imo.org/index.htm> (date accessed: 03 July 2001).

[44] The sinking of the White Star Liner *Titanic* in April 1912, led to the convening of the 1914 international SOLAS conference. In this incident more than 1.500 passengers and crew died. The disaster raised many important issues regarding the safety standards in force at the time, that the United kingdom Government proposed that a conference be held to develop international regulations and improve safety standards.

Safety Certification; and General. In addition to the eight chapters, the Convention also included a section of Regulations which covered technical details and expanded the articles.

At the time the first version of SOLAS was adopted, principally, as consequence of the *Titanic* incident, the Convention was basically concerned with the safety of human life. Passenger ships were very common at that time, more than they are today and accidents at sea generally produced devastating consequences. During this period the annual loss of life from British ships alone was between 700 and 800.[45]

One of the many issues addressed in the Convention, was in regard to the insufficient numbers of lifeboats aboard the *Titanic*. In response to this problem, Chapter VI of SOLAS 1914 on Article 40, established a basic principle, stating that:

> *"At no moment of its voyage may a ship have on board a total number of persons than that for whom accommodation is provided in the lifeboats (and the pontoon lifeboats) on board"*[46]

In the same way, the Convention provided *inter alia* for the equipment of the ship with lifejackets for every person on board, emergency lighting, and set regulations for manning of lifeboats by certified lifeboatmen. Technical specifications for lifeboats, pontoon lifeboats, davits, lifejackets and lifebuoys, were the main technical regulations included in the Convention.[47]

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[45] IMO Homepage "Index", *supra* note 43.
[46] SOLAS 1914 Art. 40.
[47] "Surviving disaster – life-saving at sea" (January 2000), online: IMO Homepage <http://www.imo.org/index.htm> (date accessed: 06 July 2001).

Despite the adoption by several nations of some of the provisions contained in SOLAS 1914, the Convention did not enter into force as planned in 1915.[48] In 1929, however, another international conference was held in London, this time having an attendance of 18 nations, which adopted a second version of SOLAS. This new SOLAS came into force in 1933 and although adding some new regulations, in general it followed the same principles established in the first version. Fifteen years later, in 1948, due to the development of new technology, a third version of the Convention was adopted. This version was considerably broader in its terms and took into account small details and not merely general requirements. Very important improvements were achieved, for instance, it required cargo ships of 500 gross tons and above to obtain an international safety equipment certificate, which in turn meant, more effective protection of persons on board cargo ships and not merely those on passenger ships.[49]

In 1960, IMO adopted a new version of SOLAS which entered into force on May 26, 1965. The Conference was attended by delegates from 55 Countries, that is to say, 21 more than in 1948. This new version, basically extended the scope of application of the provisions of the convention. In other words, with the adoption of the SOLAS 1960, many of the provisions that were only applicable to passenger ships, were also applied to cargo ships. This Convention was considered very important because of the technical developments taking place in the shipping industry at that time. SOLAS 1960 represented a considerable step forward in modernizing rules adopted in previous conventions. As in the revisions made in 1929 and 1948, the Collision Regulations were annexed to the Convention.

The Convention included resolutions calling upon IMCO to undertake studies, collect and distribute information or take any other necessary action depending on the circumstances. For instance, one of the resolutions, included a request made to IMCO

[48]The principal reason why SOLAS 1914 did not enter into force on the date planned, was the outbreak of World War I.
[49] See *supra* note 47.

to develop a unified international code dealing with the carriage of dangerous goods. This resolution resulted in the adoption, five years later, of the International Maritime Dangerous (IMD) Code.[50] From 1960 to 1973, a series of amendments were regularly introduced in order to keep SOLAS up to date.[51]

2.2 SOLAS 1974

In view of the number of amendments to SOLAS since it was adopted for the first time in 1914, it became clear, that updating the Convention in this way would be a very slow process. As a result, a completely new convention was adopted in 1974,[52] which besides including the amendments agreed upon until that date, also included a new amendment procedure called the ***tacit acceptance procedure.***[53] This new procedure, as explained above, assumes that Governments are in favour of the amendments unless they take any positive action to make their objection known.[54] As a result, the 1974 convention has been updated and amended several times, and changes have entered into force without any major difficulty and in a relatively short period of time.

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[50] International Maritime Dangerous Code [hereinafter *IMD Code*].

[51] The contents of the amendments can be summarized as follows: 1966: amendments to Chapter VI, relating to special fire safety measures for passenger ships; 1967: six amendments were introduced, regarding fire safety measures and arrangements for life-saving appliances for certain tankers and cargo ships, novel types of crafts and the repair and modification and outfitting of ships; 1968: Chapter V was revised and modified, introducing new requirements dealing with shipborne navigational equipment, the use of automatic equipment and nautical publications;1969: several amendments were adopted, basically relating to firefighters' outfits and personal equipment in cargo ships, specifications for lifebuoys and lifejackets, radio installation and shipborne navigational equipment; 1971: amendments concerning radiotelegraphy and radiotelephony and routeing of ships; and 1973: The major amendment was a complete revision of Chapter VI, dealing with the carriage of grains. *Supra* note 47.

[52] SOLAS 1974, *supra* note 10.

[53] See Tetley, *supra* note 26.

[54] *Ibid.*

SOLAS 1974 entered into force on 25 May 1980. From 1974, the year when the conference was held, until 1980, a large number of accidents involving oil tankers had taken place. Unfortunately, the Convention was not yet in force and thus it was impossible to amend it. As a result, IMO convened an international conference on tanker safety and pollution prevention, adopting in this way, modifications to SOLAS, as well as, to MARPOL 1973. In 1978 a Protocol was adopted, which would enter into force six months after ratification by 15 States representing 50 per cent of world tonnage of merchant ships, but not before SOLAS 1974 had entered into force. Eventually, the 1978 Protocol entered into force on May 1 1981.

The first of several revisions made to SOLAS 1974 was done in 1981, under the tacit acceptance procedure, entering into force on September 1 1984.[55] Later in November 1983, IMO adopted a revised Chapter III, which entered into force in 1986. This revision increased the number of regulations from 38 to 53, giving Chapter III a new title: "Life-saving Appliances and Arrangements". Ensuring operational readiness of ships and guaranteeing that following an incident, survivors could safely abandon the ship, survive at sea, be detected and be retrieved by rescuers, were the main issues dealt with in this amendment. All revisions made to the Convention, took into account the deployment of new technology and techniques and also introduced novel life-saving appliances and arrangements.

The 1983 Chapter III, like the original chapter, contained three parts. Part A was in respect of general matters such as, application, exemptions, definitions, evaluations and testing and product tests. Part B was concerned with ship requirements in general and Part C dealt with life-saving appliance requirements, having 24 regulations divided into eight sections.

[55] For a detailed study of the 1981 Amendments, see online: IMO Homepage <http://www.imo.org/index.html> (date accessed: 22 June 2001).

Another important aspect on the revised Chapter III, was the focus on survival of persons after abandoning ship, especially the effect of hypothermia. The leading example was taken from the *Titanic* incident. [56] The 1983 Amendments to Chapter III also included easier ways for survivors to be located. Lifejackets must be fitted with lights and a whistle and provision is made for the use of retro-reflective materials.[57]

On March 06, 1987 the English cross-channel car Ferry *Herald of Free Enterprise* capsized and sank after leaving Zeebrugge harbour in Belgium.[58] This accident brought about serious concerns to United Kingdom Government, given the amount of people that had lost their lives as a result of the incident. Proposals were presented to IMO in order to take measures for the improvement of ship safety. As a result, the new regulations to Chapter II of SOLAS Convention were added.[59] In October of the same year, a second package of amendments was adopted, entering into force on April 29, 1990.

Apart from the emergency measures taken, in response to the *Herald of Free Enterprise* disaster, regular revisions and thus, consequent amendments were included successively from 1988 to 1994. In May 1994 a conference to amend SOLAS was held, being the most important conference as to the purpose of the present study. The result of the conference was reflected in the addition of three new Chapters, one of which makes the International Safety Management (ISM) Code[60] mandatory. The new chapter referred to is Chapter IX, which applies to all tankers, bulk carriers, gas carriers,

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[56] Considerably due to a lack of adequate clothing, flotation equipment and a knowledge of survival procedures none of the 1489 who were in the sea was alive when rescue vessels arrived one hour and fifty minutes after the sinking.

[57] IMO Homepage "Conventions", *supra* note 31.

[58] Online: SafetyLine Institute Homepage <http://www.safetyline.wa.gov.au/ins...eve11/course13/lecture40/140_05.asp> (accessed: 07 July 2001).

[59] The amendments included in 1988 were based upon the findings of the inquiry to the disaster.

[60] The International Safety Management Code, Annex to IMO Resolution A.741(18), November 3,1993 6.1.1, reprinted in 6D Benedict on Admiralty, Doc. No. 14-2 at 14-449 (Frank L. Wiswall, Jr. ed., 7th ed. Rev. 1999) [hereinafter *ISM Code*]. Further discussion of the ISM Code will be found in Chapter II and III, below.

passenger ships, and cargo high-speed craft of 500 gross tonnage and above. The other two Chapters that were added to SOLAS, deal with Safety of High-Speed Craft, in new Chapter X and Special Measures to Enhance Maritime Safety, contained accordingly in Chapter XI.

Because changes in technology were taking place a lot faster after SOLAS had been revised in 1986, IMO in 1996 adopted another completely new version of Chapter III. This version of Chapter III entered into force on July 1 1998 and applies to all ships built after this date.[61] Some other amendments concern Chapter II, which was renamed "Construction-Structure Subdivision and Stability, Machinery and Electrical Installations", while a new part was added dealing with the structure of ships.

Ever since 1996, the Convention has been kept up to date, thanks to the tacit acceptance procedure which has made the amendment process less cumbersome and considerably faster than in the past. Developments and improvements in technology have been a very important factor leading to the adoption of new rules and SOLAS is currently considered one of the most widely accepted conventions.

[61] Certain amendments also apply to existing ships.

Chapter II. The International Safety Management (ISM) Code.

1. Origins of the Code.

1.1 Herald of Free Enterprise Incident

The capsizing of the *Herald of Free Enterprise*[62], served as a means for nations, especially those involved in the shipping industry, to realize the particular importance of the shipping company regarding maritime safety.[63] The official investigation of the accident revealed major errors on the part of the management of the ship.[64] Further, the enquiry made known that the vessel had left port with its cargo doors open, the judge who was in charge of conducting the enquiry, described the ferry's operating company as being infected with "the disease of sloppiness at all levels".[65]

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[62] See *supra* note 58.

[63] Online: IQ Company Homepage <http://www.igo.com/products/ismCodeOverview.htm> (date accessed: 09 July 2001).

[64] "Verdict of Unlawful Killing Returned on Herald Victims" *Fairplay Int'l Weekly* (15 October 1987) at 5.

[65] Out of 459 people on board, 189 died. Justice Sheen in his report of the disaster, found that "at first sight, the faults which led to this disaster were the aforesaid errors of omission on the part of the Master, the Chief Officer and the assistant Bosun, and also the failure by Captain Kirk to issue and enforce clear orders. But...the underlying or cardinal faults lay higher up in the Company. The Board of Directors ... did not apply their minds to the question: What orders should be given to the safety of our ships?...From top to bottom the body corporate was infected with the disease of sloppiness ...The failure on the part of the shore management to give proper and clear directions was a contributory cause of the disaster". *Ibid.*

1.2 Resolution A.596(15) "Safety of Passenger RoRo Ferries"

To prevent further incidents like the one suffered by those on board the *Herald of Free Enterprise*, IMO's Secretary-General proposed at the request of the United Kingdom, the development of extensive guidelines in order to be used by officers and crews aboard vessels in the management of safety and pollution prevention.[66] Shortly thereafter in November 1987, at its 15th Session, IMO through Resolution A.596(15)[67], published guidelines which a company should use for the safe management of its ships, these guidelines being entitled "Safety of Passenger Ro-Ro[68] Ferries". The drafting of the guidelines was patterned after the ISO 9000[69] quality standard, needless to say, putting stronger emphasis on safety management and shipping operation. The guidelines are primarily a series of functional management requirements that a Safety Management System should have, including assigning responsibilities for Safety to the shoreside part of the company.[70] The most important part of the text of the resolution reads as follow:

> *"The Assembly,*
>
> *1. RESOLVES that the Organization give a high priority to its work aimed at enhancing the safety of passenger ro-ro ferries;*

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[66] "Assembly Go-Ahead for Ferry Safety Measures" *BIMCO Bulletin* (February 1988) 9041-42.

[67] *Safety of Passengers Ro-Ro,* IMO Res. A.596(15) IMO Assembly, 15th Sess., Agenda item 12 (1987) 3. The resolution was Adopted on November 19, 1987.

[68] Roll On-Roll Off is the method of ship carriage whereby the cargo is driven directly on board ship and at destination is driven directly off. See online: Professor William Tetley's Web Page <http://tetley.law.mcgill.ca/Q-T.htm> Glossary of Terms, s.v. "ro-ro ferries" (date accessed: 07 July 2001).

[69] The ISO 9000 series is a set of standardized guidelines established by the International Organization for Standardization (ISO) which gives organizations guidance and requirements on what constitutes an effective quality management system. ISO 9000 represents an international consensus on good management practices in order to meet quality management requirements. These guidelines lay down what requirements a quality system must meet, but does not impose a determined way of implementation. See online: International Organization for Standardization Homepage <http://www.iso.ch/iso/en/iso9000-14000/iso9000.html> (date accessed: 11 July 2001).

[70] *Supra* note 63.

2. *REQUESTS the Maritime Safety Committee to take all possible action to meet this objective, including the earliest possible consideration and adoption of amendments to the 1974 SOLAS Convention, relating to passengers ro-ro ferries, and the facilitation of rapid entry into force of these amendments;*

3. *URGES that, upon adoption of the amendments to 1974 SOLAS Convention by the maritime Safety Committee, and pending their entry into force, Member Governments encourage shipowners voluntarily to fit on their ships the equipment required by the amendments;*

4. *REQUESTS the Maritime Safety Committee to develop, as a matter of urgency, guidelines, wherever relevant, concerning shipboard and shore-based management procedures to better ensure safe operation of passengers ro-ro ferries."*[71]

Measures proposed in Resolution A.596(15), were later adopted by the MSC in April 1988.[72]

1.3 Resolution A.647(16) "IMO Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention"

In October 1989, at its 16th meeting, the Assembly adopted Resolution A.647(16)[73]. This resolution contained the first IMO Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention. It is worth noting that the Resolution A.596(15), previously mentioned, applied only to passenger ferries, whilst the resolution adopted in 1989 applied to all ships.[74] This is stated as follow:

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[71] IMO Res. A.596(15), *supra* note 67.
[72] Meeting of MSC 57th Session.
[73] *IMO Guidelines on Management for the Safe Operation of Ships and for pollution Prevention,* IMO Res. A.647(16), IMO Assembly, 16th Sess., Agenda item 10 (1989) 35. The Resolution was adopted on October 19, 1989.
[74] "Lassoing the Cowboys-the ISM Code is Coming!" *IMO News* (3 November 1996) at 11.

"2. APPLICATION

2.1 These Guidelines are intended for all companies operating ships and do not seek in any way to define or embrace detailed regulatory requirements, international or national. It is taken for granted that companies comply with such requirement.

2.2 These Guidelines are expressed in broad terms so that they can have a widespread application. Clearly, different levels of management, whether shore-based or at sea, will require varying levels of knowledge and awareness of the items outlined. Persons with particular responsibilities should have detailed and specialist knowledge of their specific tasks.

2.3 These Guidelines are in a recommendatory form only; however, efforts should be made to apply them to the extent possible and practicable."[75]

From the wording of the text, we can clearly note that this Resolution was a recommendation only. The broader application of the newly adopted resolution reflects the better recognition of sound management to shipping safety in general.[76] Basically, the intention when adopting this Resolution was to prepare those who are responsible for the operation and management of ships, providing them with the necessary information in order to design and implement effective safety and pollution prevention management systems, which should be used taking into account the principles of good practice. The Resolution also provided for the periodical revision of the measures and their amendment, if necessary:

"THE ASSEMBLY,

3.REQUESTS the Maritime Safety Committee and the Marine Environmental Protection Committee periodically to review these Guidelines and to consider any need for amendments in the light of experienced gained."[77]

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[75] IMO Res. A.647(16), *supra* note 72 s. 2.
[76] W. O'Neil, "IMO and Implementing the ISM Code" *BIMCO Bulletin* (December 1996) at 14.
[77] IMO Res. A.647(16), *supra* note 73.

Following this request, and considering experience acquired with the 1989 Resolution, the Assembly, at its November meeting, adopted revised guidelines through Resolution A.680(17), which revoked Resolution A.647(16), previously adopted.

1.4 Resolution A.741(18) International Safety Management Code for the Safe Operation of Ships and for Pollution Prevention.

Subsequent major marine casualties continued,[78] therefore successive reviews of the issue were done until the Assembly, on its regular meeting on November 1993, adopted Resolution A.741(18)[79] whose annex contained the ISM Code. The ISM Code was adopted merely as a recommendation, but given its potential advantages in improving safety, it was acknowledged that the Code should be mandatory. In order to give a mandatory character to the Code, the Assembly arrived to the conclusion that the best way, would be by adding the ISM Code to SOLAS 1974 Convention.[80] It is important to recall at this stage, that by means of the tacit amendment procedure implemented by IMO, adding the ISM Code to SOLAS 1974 Convention would fairly easily bring into effect the provisions therein contained , giving them a mandatory character.

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[78] To mention some examples of the accidents which occurred during that period, in 1989 *Exxon Valdez* ran aground off the coast of Alaska spilling 37.000 tonnes of oil causing tremendous environmental damage. One year later, in 1990 *Scandinavian Star Ferry* disaster took place, producing an extensive loss of life. In 1991 *Agip Abruzzo* carrying 80.000 tonnes of light crude on board, collided with the ro-ro ferry *Moby Prince* off Livorno in Italy, in this accident 143 persons lost their lives. On the same year, the Egyptian ferry *Salem Express* struck reef and consequently sank, giving as a result 470 persons killed, and in 1994 the ro-ro passenger ferry *Estonia* sank after its bow door fell off during heavy weather at sea, resulting in an extensive loss of life. See generally P. Anderson, *ISM Code a Practical Guide to the Legal and Insurance Implications* (London: LLP, 1998) at 14.

[79] ISM Code, *supra* note 60.

[80] See *supra* note 10.

1.5 SOLAS 1974 Chapter IX entitled "Management for the Safe Operation of Ships"

On May 24, 1994 SOLAS was amended and Chapter IX, entitled "Management for the Safe Operation of Ships",[81] was added. The Code had mandatory character for States signatories to SOLAS 1974. The entry into force of the Code was established to have effect in two stages. In the first stage of implementation, the Code had a mandatory character for passenger ships, high-speed crafts, oil tankers, chemical tankers, gas carriers, and bulk carriers not later than July 1, 1998; and in the second stage, the Code will apply to other cargo ships and mobile offshore drilling units of 500 gross tonnage and upwards, not later than July 1 2001. The ISM Code does not apply to government-operated ships used for non-commercial purposes.

Previous to 1994, IMO's efforts to improve shipping safety and to prevent pollution from ships, had especially focused on the hardware of shipping, the construction of ships and their equipment being the two main issues earlier addressed. With the advent of the ISM Code, this approach was changed by the implementation of highly effective management systems, the most important of the several issues dealt with.

With the aim at promoting safe operational practices ashore as well as afloat, the ISM Code also deals with the way companies are formed and run. Despite the scepticism felt by many within the shipping industry as to the effectiveness of the ISM Code implementation, IMO's adoption of the Code is seen as one of the most important steps taken it its 50-year history regarding marine safety.

[81] See *supra* note 60 and accompanying text.

2. Principal Provisions of the ISM Code

2.1 Objectives

The Preamble of the ISM Code, as annexed to IMO Assembly Resolution A.741(18), establishes the chief objectives of the Code. To this effect, paragraph 1 states that:

> *"1. The purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention"*[82]

From the wording of this paragraph, it is clear that the Code was intended to be a helpful tool to shipowners, especially, when creating their own safety programs. These programs are considerably important, since the shipping industry has frequently been faced with numerous difficulties to meet international standards for safety and pollution in the operation of vessels.

As pointed out earlier, by the early 1990's human error had started to be the common cause of the accidents. For instance in the "Human Element in Shipping Casualties" report, it was stated that the human element was found to be the cause of about 90 per cent of collisions and groundings and over 75 per cent of contacts and fires/explosions.[83] Taking this into account, and in order to eliminate, or in the worst case, minimize the number of marine casualties produced as a consequence of human error, the ISM Code addressed for the first time the responsibilities conferred on different levels of management, such as, shore-based safety personnel, the highest levels

[82] ISM Code, *supra* note 60 Preamble, s. 1.
[83] Although statistical data are not easily available, it is suggested that human error or human factors have been responsible for most maritime accidents throughout history, and that the figure is perhaps much closer to 100 per cent. See Anderson, *supra* note 78 at 15.

of management, and shipboard personnel. This is expressed in paragraph 5 of the preamble:

> *"5. The Code is expressed in broad terms so that it can have a widespread application. Clearly, different levels of management, whether shore-based or at sea, will require varying levels of knowledge and awareness of items outlined."*[84]

The purpose of the Code, as initially stated on the preamble, is expanded by section 1.2. which establishes that:

> *"1.2. Objectives*
>
> *1.2.1 The Objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment and to property.*
>
> *1.2.2 Safety management objectives of the Company should, inter alia:*
>
> *.1 provide for safe practices in ship operation and a safe working environment;*
>
> *.2 establish safeguard against all identified risks; and*
>
> *.3 continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.*
>
> *1.2.3. The safety and management system should ensure:*
>
> *.1 compliance with mandatory rules and regulations; and*
>
> *.2 that applicable codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken into account."*[85]

[84] ISM Code, *supra* note 60 s. 5.
[85] *Ibid.* s. 1 1.2.

According to P. Anderson[86], the real intention of the ISM Code has been very well summarized by Lord Donaldson of Lymington in "The ISM Code: The Road to Discovery", when he stated that *"[i]n the short and medium term, it [the ISM Code] is designed to discover and eliminate sub-standard ships, together with sub-standard owners and managers, not to mention many others who contribute to their survival and, in some cases, prosperity". He continues "[i]n the longer term its destination is to discover new and improved methods of ship operation, management and regulation which will produce a safety record more akin to that of the aviation industry. But as I readily admit, that is very much for the future".*

In fact the ISM Code does not introduce real novelties for shipping companies. Perhaps, the fact that with the advent of the Code procedures have become more formal, can be considered as new with respect to early regulations, not to mention the fact that the ISM is law, and rapid and effective communication from the ship on any activity falling outside acceptable limits is the norm. Shipowners, operators and managers are compelled to comply with the provisions established by the Code, and to do so, they are or will be, audited by flag states, directly or through recognized bodies to which statutory certification work is delegated.[87] One of the major achievements of the ISM Code is that it is related to the company's operation. Under the Code, a company's operation, its systems, and its method of dealing with marine safety, will be put to test.[88]

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[86] See *supra* note 78.
[87] A. Guest, "ISM assumes even greater relevance" *Lloyds List* (03 January 1995) at 6.
[88] *Ibid.*

2.2 *Definitions*

ISM Code, Company, and Administration are the terms defined in the text of the Code. They are established in Section 1 (1.1) that reads as follows:

> *"1.1.1 'International Safety Management (ISM) Code' means the ISM Code for the Safe Operation of Ships and for Pollution Prevention as adopted by the Assembly, as may be amended by the Organization.*
>
> *1.1.2 'Company' means the owner of the ship or any other organization or person such as the manager, or the 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 Code.*
>
> *1.1.3 'Administration' means the Government of the State whose flag the ship is entitled to fly."*[89]

Regarding Section 1.1.3, which expresses the definition of Administration, it is important to make clear, that in most cases, flag states have delegated the certification of compliance with the Code to classification societies[90], as authorized organizations.

Other important terms are defined in the Code, these terms although not defined in section 1, are found in following sections. Section 1 (1.4) establishes the functional requirements for a Safety Management System[91]:

> *"Every Company should develop, implement and maintain a Safety Management System (SMS) which includes the following functional requirements:*

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[89] ISM Code, *supra* note 60 s. 1 1.1.
[90] Classification Societies will be studied in Chapter III of this paper.
[91] [hereinafter *SMS*].

.1 a safety and environmental protection policy;

.2 instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;

.3 defined levels of authority and lines of communications between, and amongst, shore and shipboard personnel;

.4 procedures for reporting accidents and non-conformities with the provisions of this Code;

.5 procedures to prepare for and respond to emergency situations; and

.6 procedures for internal audits and management reviews."[92]

Designated Person (DP)[93] is the last definition given by the Code. It is defined in section 4:

" 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 to ensure that adequate resources and shore based support are applied, as required."[94]

DP is a relatively new concept introduced by the Code. The role and functions attributed to the DP, with respect to the majority of the companies, can be considered as a novelty within the international shipping industry. With the creation of the DP, it was intended to establish a link between the highest management levels and the ship.[95] The role of the DP(s) in basic terms may be seen as a watchkeeper for the SMS, overseeing the integration of management and shipboard responsibility for safety.[96]

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[92] ISM Code, *supra* note 60 s. 1 1.4.
[93] [hereinafter *DP*].
[94] ISM Code, *supra* note 60 s. 4.
[95] This contact point established by the ISM Code, is not a completely new idea. In traditional shipping companies, that contact often used to be the marine engineer or superintendent. Anderson, *supra* note 78 at 62.
[96] Rodriguez & Hubbard, *supra* note 12 at 1597.

However, there are certain issues referring to this matter that will remain unclear, at least, until the courts arrive to a consensus when applying the provisions of the ISM Code in practical cases.

2.3 Master's Responsibility and Authority.

Christopher Hill[97] in his book *Maritime Law* explains the role of the ship's masters taking into account almost all aspects related to his duties. His work reads as follows:

> *"The master of a ship is a man of many parts. He needs to be part disciplinarian, part accountant, part lawyer and more than part seaman/navigator. Above all, perhaps he needs to command the respect of his fellow men. He needs to have more than a fair measure of self-confidence and an ability to make a cool and rational judgement, sometimes at very short notice, in times of crisis. He is a servant in law, an agent both for his principal, the shipowner, and to some extent the owner of the goods she is carrying. If his ship is under charter and the charterparty so stipulates, he must obey the instructions of the charterer in respect of the employment of the vessel. He is also a commander of men, his crew, and he occupies a position of special trust, a fiduciary relationship with his owners. He is absolutely responsible for the safety of his ship and remains in command regardless of whether or not his ship is in charge of a pilot at any given time".*[98]

The ISM Code imposes even more duties and responsibilities to the master of a ship, this is expressed in section 5, which states:

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[97] C. Hill, *Maritime Law* 4th ed., (London: LLP, 1995)
[98] *Ibid.* at 495.

"5.1 The Company should clearly define and document the master's responsibilities 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;

.5 reviewing the SMS and reporting its deficiencies to the shore-based management.

5.2 The Company should ensure that the SMS operating on board the ship contains a clear statement emphasising 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."[99]

There is a very interesting principle stated in Section 5.2 of this rule. According to the wording, despite the requirements of the Code, the master remains in command, and his position or duties are not, in any way, overridden. This situation is in a great extent understandable, given the fact that the master needs to keep certain degree of freedom to deal with any unexpected situation that might require rapid action in order to be resolved. This does not mean that, due to his position at command of the ship, the master can do whatever he decides with no further explanation, on the contrary, he can be compelled to explain and give justifiable reasons, when for any reason he took any action falling outside the procedures established in the SMS manuals.

Given the paramount importance of the masters' responsibility, the ISM Code also provides for some of the qualifications a master should have. This is especially a company's task as expressed by the Code as follows:

"6.1 The Company should ensure that the Master is:

.1 properly qualified for command;

.2 fully conversant with the Company's SMS; and

.3 given the necessary support so that the master's duties can be safely performed."[100]

According to some experts in the field, what the ISM Code establishes in Section 5, with respect to the duties of the master, is nothing new compared with what masters, in general, had been doing for long time ago. However, it is the author's opinion, that with the express requirements of the ISM Code regarding Masters' duties, there will be no doubt whatsoever, which in turn, will mean easier tracking of safety measures effectiveness, as well as, faster identification of any responsible person for errors or actions falling out of what the provisions of the Code require.

2.4 Role of the Flag State Administration-ISM Certification

As mentioned above, one of the requirements of the ISM Code is the production of the SMS.[101] Once the SMS is issued, yet there is another step to follow, the SMS must be certified by the government of the state whose flag the ship is entitled to fly. To this effect, Section 13 of the Code, entitled *"Certification, Verification and Control"*, specifies that:

"13.1 The ship should be operated by a Company which is issued a document of compliance relevant to that ship.

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[99] ISM Code, *supra* note 60 s. 5.
[100] *Ibid* s. 6 6.1.
[101] See *supra* note 91.

13.2 A document of compliance should be issued for every Company complying with the requirements of the ISM Code by the Administration, by an organization recognized by the Administration or by the Government of the country, acting on behalf of the Administration in which the Company has chosen to conduct its business. This document should be accepted as evidence that the Company is capable of complying with the requirements of the Code.

13.3 A copy of such a document should be placed on board in order that the Master, if so asked, may produce it for the verification of the Administration or organizations recognized by it.

13.4 A Certificate, called a Safety Management Certificate, should be issued to a ship by the Administration or organization recognized by the administration. The Administration should, when issuing a certificate, verify that the Company and its shipboard management operate in accordance with the approved SMS.

13.5 The Administration or an organization recognized by the Administration should periodically verify the proper functioning of the ship's SMS as approved."[102]

It is the author's view that certification, and particularly issues concerned with quality of the organizations in charge of the certification, if that is the case, are matters which will need deep discussion especially after the complete implementation of the Code, in 2002.

Concerns regarding the certification process have been felt since the adoption of the Code in 1994. On one hand, there is the issue of the way Administrations will put into practice the provisions of the Code, and on the other hand is the role of the classifications societies, which appears to be more and more important every day. In response to theses unresolved matters, IMO met in London in 1995 being one of the main subjects discussed the "Guidelines on Implementation of the International Safety Management (ISM) Code by Administrations".[103] The Guidelines, which have a mandatory character for flag states, although not dictating precisely the way a company

[102] ISM Code, *supra* note 60 s. 13.

should be directed in order to comply with the provisions of the Code, recommend that Administrations consider basing assessments on determining the effectiveness of the SMS in meeting determined objectives.[104] To impose specific ways of managements, on companies would mean to overlook the fact that companies, although within the same field, are not operated in the same way and would probably lead to solutions which would not suit all companies concerned.

2.5 Document of Compliance (DOC)

The Document of Compliance (DOC)[105] as expressed by the Guidelines will be issued by the flag state to the company "following an initial verification of compliance with the requirements of the ISM Code".[106]

> *"The Administration is responsible for verifying compliance with the requirements of the ISM Code and issuing Documents of Compliance (DOC) to Companies and Safety Management Certificates to ships."*[107]

The DOC will be issued by the Administration, only after having certified that a company has met all the requirements established to that effect and that the company has developed and implemented a SMS in accordance with the ISM Code. It is important to note, that the DOC is issued with respect to a determined type of ship, and if the company, requires a different type of ship to be covered by the DOC, that

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[103] *Guidelines for Flags Administrations on the Implementation of the ISM Code,* IMO Res. A.788.(19), IMO Assembly, 19th Sess. (1995) reprinted in Anderson, *supra* note 78 appendix 3 at 243.
[104] T. Ogg, "IMO's International Safety Management Code (The ISM Code)" (1998) Int'l J. S. L. 143.
[105] [hereinafter *DOC*].
[106] IMO Res. A.788(19), *supra* note 103 s. 3.1.1. *"The DOC should be issued to a company following an initial verification of compliance with the requirements of the ISM Code".*
[107] *Ibid.* Introduction "Verification and certification responsibilities".

company must show compliance with the terms of the Code with respect to the additional types of ships.[108]

The period of validity of the DOC is five years and during this period the DOC is subject to annual verifications, as expressed by the Guidelines in the following terms:

> *"3.1.5 The DOC is valid for a period of five years.*
>
> *3.1.6 The validity of the DOC is subject to annual verification within three months before or after the anniversary date to confirm the effective functioning of the SMS. This should include examining and verifying the correctness of the statutory and classification records presented for at least one ship of each type to which the DOC applies. Corrective actions and modifications to the SMS carried out since the previous verification should be verified."*[109]

The possibility of renewal of the DOC is also provided in the text of the Guidelines. This renewal will have a validity of five years and should include an appraisal of every element of the SMS concerning its effectiveness in meeting the objectives established by the ISM Code.[110] Regarding the withdrawal of the DOC, it is only the Administration which issued such document that is entitled to exercise this power. Two conditions have to be met in order to withdraw the DOC, firstly, when the periodical verification was not requested, and secondly, when there is evidence of major non-conformity[111] with the ISM Code.[112]

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[108] *"3.1.3 The DOC is valid for the types of ships on which the initial verification was based. 3.1.4 The validity of the DOC may be extended to cover additional ship types after verification of the Company's capability to comply with the requirements of the ISM Code for such ship types. In this context, ship types are those referred to in SOLAS chapter IX." Ibid.* s. 3.

[109] *Ibid.* s. 3 3.1.6.

[110] *Ibid.* s. 3 3.1.7.

[111] According to the Resolution A.788(19), *"Major non-conformity means an identifiable deviation which poses a serious threat to personnel or ship safety or a serious risk to the environment and requires immediate corrective action; in addition, the lack of effective and systematic implementation of a requirement of the ISM Code is also considered as a major non-conformity". Ibid* s. 1.1.11.

[112] *Ibid.* s. 3 3.1.8.

Where a change of flag or company takes place, the Guidelines establish special transitional arrangements through the issuance of interim DOC(s). The purpose of these arrangements is to simplify the implementation of the ISM Code in its initial stage, for instance, when a company is newly established or in the case a new ship being added to a previous DOC.[113]

> *"An Administration may issue an Interim DOC, valid for no more the twelve months, to a company following a demonstration that the Company has an SMS that meets the objectives of paragraph 1.2.3 of the ISM Code. The Administration should require the Company to demonstrate plans to implement an SMS meeting the full requirements of the ISM Code within the period of validity of the Interim DOC".*[114]

2.6 Safety Management Certificate (SMC)

Safety Management Certificates[115] will be issued by the Administration, with respect to each vessel owned by a determined Company. Prior to the issuance of the SMC, an external verification takes place in order to certify *inter alia,* that the DOC is appropriate for the type of ship covered, that the SMS, and in general all the procedures are in accordance with the ISM Code, and that the SMS has been functioning well for a period of at least three months.

Section 3.2.1 of Resolution A.788(19) states:

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[113] *Ibid.* s. 3 3.3.2.

[114] *Ibid* s. 3 3.3.3. It is important to note that the requirements that this provision refers to, concerns to section 1.2.3 of the ISM Code which establishes that the SMS should ensure compliance with mandatory rules and regulations; and that applicable codes, guidelines and standards recommended by the Organization , Administrations, classification societies and maritime industry organizations are taken into account.

[115] [hereinafter *SMC*].

"3.2.1 The SMC should be issued to a ship following an initial verification of compliance with the requirements of the ISM Code. This includes the verification that the DOC for the Company responsible for the operation of ship is applicable to that particular type of ship, and assessment of the shipboard SMS to verify that it complies with the requirements of the ISM Code, and that is implemented. Objective evidence demonstrating that the Company's SMS has been functioning effectively for at least three months on board the ships should be available, including, inter alia, records from the internal audit performed by the Company".[116]

The SMC, like the DOC, will have a validity of five years. According to Resolution A.788(19) there will be at least one intermediate verification, however the Resolution does not specify the point in time when the verification should be done, differing in this way with the DOC, which requires annual verification.[117]

"3.2.2 The SMC is valid for a period of five years.

3.2.3 The validity of the SMC is subject to at least one intermediate verification, confirming the effective functioning of the SMS, and that any modifications carried out since the previous verification comply with the requirements of the ISM Code. In certain cases, particularly during the initial period of operation under the SMS, the Administration may find it necessary to increase the frequency of the intermediate verification. Additionally, the nature of non conformities may also provide a basis for increasing the frequency of intermediate verifications."[118]

As well as in the case of the DOC, the Guidelines contemplate the possibility of SMC renewal. The renewal of the SMC is carried out following the same pattern that the DOC renewal. The period is also for five years, and the study of all the conditions and elements of the SMS pertaining to the concerned ships is compulsory and of course the meeting of the requirements specified in the ISM Code is the rule.[119] The withdrawal of the SMC is carried out in the exactly the same terms as the DOC withdrawal, that is

[116] IMO Res. A.788(19), *supra* note 103 s. 3 3.2.1.
[117] See Anderson, *supra* note 78 at 31.
[118] IMO Res. A.788(19), *supra* note 103 s. 3 3.2.2.
[119] *Ibid* s. 3 3.2.4.

to say, if intermediate verification is not requested of if there is evidence of major non-conformity with the ISM Code.[120]

It is very important to recall that although, Administrations are in charge of issuing the DOC and the SMC, this function is often delegated to classification societies. As seen above, this possibility of delegation is considered in Section 13 of the ISM Code which uses the term "organization recognized by the administration". The delegation terms are regulated by IMO Resolution A.739(18)[121], entitled *"Guidelines for the Authorization of Organizations Acting on behalf of the Administrations"*. The Guidelines establish, *inter alia,* the minimum standards for recognized organizations acting on behalf of the Administrations and the elements that should be including in the agreement by which Administrations delegate some of their functions. The power of acting on behalf of the Administrations was given to some organizations mainly seeking the promotion of maritime uniformity. This is possible by establishing a method by which inspections are to be carried out following similar terms and requiring the compliance with comparable minimum standards.

There is also another form of delegation, that is, the Administration of another contracting government issuing the certification on behalf of the actual Administration. The possibility of delegation given by the ISM Code has become practically the norm and almost all nations have been exercising it.[122]

Flag States' role however, does not end with its initial certification of compliance with the ISM Code, Regulation 6 to Annex 1 of the Chapter IX of SOLAS,

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[120] *Ibid* s. 3 3.2.5.

[121] *Guidelines for the Authorization of Organizations Acting on behalf of the Administrations,* IMO Res. A.739(18), IMO Assembly, 18th Sess., Agenda Item 11 (1993).The Resolution was adopted on November 22, 1993.

requires that Flag State shall *periodically* verify the proper functioning of the Ships' Safety Management System. The Code does not specify what "periodically" exactly means, therefore, the determination of the period to carry out verifications is left to each Flag State, according with its own legislation.[123]

2.7 Port State Control (PSC)

Despite the fact that there is no express mention of the role of the Port State Control (PSC) in any of the provisions of the ISM Code, PSC will be in charge of policing the compliance with the ISM Code. PSC is the inspection of foreign ships in national ports with the purpose of verifying that the condition of the ship and its equipment comply with the requirements established by international conventions and that the ship is manned and operated in compliance with applicable international laws.[124] PSC also involves the possible detention by the concerned authorities of a ship that calling at a port within its territory does not meet the Code requirements. PSC has become very important in the last decade, partly because flag State implementation alone has proved unable to detect and eliminate substandard shipping.[125]

The basis of the authority of the PSC to effectively carry out inspections, is found in international conventions, especially the Law of the Sea Convention. It is

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[122] There are of course some exceptions, such as, United Kingdom which has chosen to retain the functions within the administration of the Maritime and Coast Guard Agency (MCA), formerly the Marine Safety Agency (MSA).

[123] For instance United Kingdom, regulation 15 of the Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, requires that there be an annual audit for the Safety Management System within three months of the anniversary date of the Document of Compliance. See P. Morgan & D. Hodgson, "ISM Code: the First Nine Months" *International Business Lawyer* (July/August 1999) at 299.

[124] Dr. H. Hoppe "Port State Control – an update on IMO's work" Online: IMO Homepage <http://www.imo.org/InfoResource.contents.asp?topic_id=406&doc_id=1079> (date accessed: 12 July 2001).

therefore necessary that the Port State be a party of the convention, in order to exercise its authority as a PSC. PSC inspections are carried out by Port State Control officers who are officials representing the government of the country which the ship is visiting.[126] In view of this situation, it is clear that international cooperation is required between PSC and governments in different countries of the world, therefore, international agreements such as Memoranda of Understanding[127]are concluded in order to effectively coordinate the efforts of Port State inspections.

Port State inspections may be carried out on the basis of the initiative of the Party; the request of, or on the basis of, information concerning a ship provided by another Party; or information regarding a ship provided by a member of the crew, a professional body, an association or any other individual with an interest in the safety of the ship, crew and passengers, or the protection of the marine environment.[128]

The Paris MOU[129] is one of the best known MOUs, and was signed in 1982. The Paris MOU did not introduce new legislation or rules, instead, it included the Load Line Regulations 1966 with LL Protocol 88; SOLAS 1974 with protocols 78/88; STCW Convention 1978, 1995 revision; International Regulations for Preventing Collisions at Sea (COLREGS) Convention1972, International Labour (ILO) Convention 147 Organization already in existence at the time it was signed, making them the basis of the Port State inspection.[130] The Paris MOU text stressed the fact that states were "*mindful that the principal responsibility for the effective application of standards laid down*

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[125] F. Plaza, "Flag State Implementation and Port State Control" in M.H. Nordquist & J.N. Moore, ed., *Current Maritime Issues and the International Maritime Organization* (The Hague: Kluwer Law International, 1999) at 199.
[126] See Anderson, *supra* note 78 at 41.
[127] A memorandum of understanding is defined as a written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement. *Black's Law Dictionary,* 7th ed., *s.v.* "memorandum of understanding".
[128] See Hoppe, *supra* note 124.
[129] The current members of the Paris MOU are: Belgium, Canada, Croatia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Russian Federation, Spain, Sweden, and the United Kingdom. *Ibid.*
[130] Anderson, *supra* note 78 at 41.

in international instruments rest upon the authorities of the state whose flag a ship is entitled to fly, recognizing nevertheless that effective action by port states is required to prevent the operation of sub-standard ships, recognizing also the need to avoid distorting competition between ports and convinced of the necessity for these purposes of an improvised an harmonized system of port state control...reached the understanding laid down in the document."[131] The authorities of Member States were required to carry out inspections of vessels visiting their ports ensuring, without any discrimination as to the flag, that they complied with the regulations under the MOU. Generally this is done by a visit to the ship to verify that all required documentation is in order. If that is not the case, or there are strong reasons to believe that that the condition of the ship does not meet the requirement of any relevant instrument, a more detailed inspection should be carried out.[132]

Later, a Latin American MOU was signed on November 5, 1992. The agreement is officially known as Acuerdo de Viña del Mar.[133] The Acuerdo de Viña del Mar follows the same pattern of the Paris MOU, being the principal instrument for the preservation of marine safety and improvement of the quality of Port State inspections in Latin America.

These two agreements, the Paris MOU and the Latin American MOU, were later followed by the Tokyo MOU in 1993, the Caribbean MOU in 1996, the Mediterranean MOU in 1997, and more recently the Indian Ocean MOU in 1998 and the Abuja MOU in 1999.

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[131] Sir A. Clarke, "Port State Control or sub-standard ships: who is to blame? What is the cure? (1994) LMCLQ at 202.

[132] "The Effect of a Port State Control Detention on a Ship's Contractual Obligations" in. J.Bassindale, ed., Clifford Chance Maritime Review (December 1995) at 20.

[133] The current members of de Acuerdo de Viña del Mar are: Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Panama, Peru, Uruguay and Venezuela.

To illustrate the effectiveness of PSC, a campaign verifying compliance with the ISM Code took place from July 1st to September 30th 1998. The campaign was a cooperative action between the Paris MOU and the Tokyo MOU having under its inspection a total of 1.719 ships. Almost 5 percent of ships were detained in port for major non-conformities.[134]

Flag State implementation, together with PSC are crucial factors for the achievement of a safe marine environment. It is essential to enhance the quality and the number of the human resource capability necessary for an effective PSC. As seen above, it is clear that, through MOU(s), a global PSC is already set up, comprising the majority of the shipping nations of the world, as well as, those which are becoming involved in the maritime industry. The complete success of flag State implementation and PSC in eradicating substandard vessels worldwide will, in a great extent, depend upon the efforts made to achieve total harmonization of the procedures, a common code of conduct, and most necessarily, interchange of information and coordination among the various existing regimes.[135]

[134] The most frequent major non-conformities found were: Seniors officers not able to identify "designated person" (18%), certificates and particulars not in order (18%), no maintenance routine and record available (15%), no certificates on board (14%), programmes for drills and exercises to prepare for emergency actions not available (10%). See online: Swedish Club Homepage <http://www.swedishclub.com/lossprevention/ism/bulletinboard.htm> (date accessed: 22 July 2001).
[135] Plaza, *supra* note 125 at 209.

Chapter III. Implementation of the ISM Code: Implications on Certain Maritime Law Principles

1. General Overview

The complete implementation of the ISM in the year 2002 will undoubtedly bring about changes in maritime law. Some of the most important principles known in the maritime law field will suffer alteration which will have direct a incidence in the way marine claims are argued before courts. The ISM Code is a revolutionary set of provisions aimed at the regulation of marine safety and pollution prevention whose implementation will affect every aspect of marine activity and all those involved in the shipping industry, some of the alterations will be seen for instance, in existing corporate procedures, traditional legal structures and private commercial relationships. In summary, and put in the words of G.E.C Maitland, *"if a buoy or lighthouse is an aid to navigation, the ISM Code is an aid to litigation."*[136]

The metamorphosis that the maritime industry has undergone and yet will be undergoing for the next few years, due to the implementation of the Code, will affect, weather directly or indirectly, every single aspect of the marine activity. *"The ISM Code is a major development in safety at sea. It heralds a period of significant change in the marine industry and I believe its repercussions will be felt right up to the very top of the marine food chain..."*[137]

[136] G.E. Maitland, online: Marine Activity Reports, Inc. Homepage <http://www.marinelink.com> (date accessed: 21 February 2001).
[137] Ogg, *supra* note 104 at 143.

Due to the uncertainty of the results, the effect of the Code on the maritime field is difficult and delicate to assess. Up to date, a large number of works have been written, numerous conferences have taken place in order to understand how the implementation of the ISM Code will affect not only the shipping industry as such but also marine claims. Many have seen these works as simple speculations and conjectures on the part of their respective authors, which is to a certain extent understandable, since the Code is not yet fully implemented, thus, it is impossible to know how legislators will interpret compliance, or rather non-compliance of the Code. There are, however, some ways to at least try to accurately assess the nature of the ISM Code potential legal implications. They are relevant legal cases prior to the implementation, statements from different experts on the field, and finally, the provisions of the Code. From all of this, certain predictions can be arrived at.[138]

No doubt, the years ahead will clarify to what extent the ISM Code will touch and therefore change the way certain maritime principles have been conceived and the way marine claims have been argued before the courts. Currently the most important issue must be the actual implementation of the Code by Administrations which is probably one of the most difficult stages.

The ISM Code can be considered as a tool for shipowners. To this effect, shipowners cannot merely claim that they have met all required minimum standards provided by the Code. They must design and implement their own regulatory regime containing achievable objectives in practice and show that they are complying with it. "*When the ISM Code uses the word "should", this really means **must**!*".[139][Emphasis added]. It is very important to recall that the Code is not a recommendation, it is mandatory on all accounts.

[138] Anderson, *supra* note 78 "Preface" at viii.

The majority of commentators agree that the ISM Code will be an excellent tool for those involved in the shipping industry to achieve their objectives. However, others are of the opinion that the ISM Code brings nothing new and instead its real outcome will be cumbersome procedures and unnecessary paperwork. United Kingdom Chamber of Shipping President, Simon Sherrard, referred to the ISM Code as a "failure" with a disappointing lack of real impact. He said *"[t]here is no evidence that the ISM Code has improved safety at sea...[t]here is quite a lot of anecdotal evidence around about fraudulent ISM certificates and ISM certificates that have been issued without the necessary diligence on the part of the examiner and I think these things tie in"*[140] It is true that, due to the rush experienced by some companies to comply with the Code requirements, some fraudulent cases of ISM certificates have taken place. It is precisely within this scenario that flag State implementation, aided by the PSC inspections come to play an essential role.

No one can predict exactly what will happen in the shipping world during the next few years but there are indications that, from a safety point of view, implementation issues will be the starting point aimed at the achievement of a "safety culture".

Despite the far-reaching consequences of the ISM Code, and the changes it is introducing, this chapter will be devoted to the analysis of the legal implications of the implementation of the Code with respect to two fundamental pillars in maritime law, being (a) seaworthiness in the Hague[141] and Hague/Visby Rules[142] and (b) limitation of shipowners' liability.

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[139] P. Anderson, "The ISM Code and bridge procedures" (1997) I.J.O.S.L. at 211 [hereinafter *Anderson "procedures"*].
[140] S. Sherrard, " 'Failure' of the code" *Fairplay Int'l Weekly* (22 February 2001) at 18.
[141] 1924 *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading,* 25 August 1924, 51 Stat. 233, 120 L.N.T.S. No. 155 [hereinafter *The Hague Rules*].
[142] *Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 23 February 1968, Cmnd. 6944, reprinted in 4 Nagendra Singh, *International Maritime Conventions* 3045 (3rd ed., 1983) [hereinafter *The Hague/Visby Rules*]. The

2. Seaworthiness

2.1 General Overview

The term seaworthiness is of great relevance in maritime law, especially when dealing with carriage of goods by sea. Generally, once the cargo is loaded into a ship, the shipowner takes responsibility of their safe carriage and custody for the period of time it remains in his possession.[143] Certain requirements established by the ISM Code are very likely to have direct effect on the way seaworthiness has been conceived throughout recent years. The purpose of this section is to evaluate the different implications the implementation of the provisions of the Code may have, starting by the study of the real meaning of seaworthiness and due diligence and then looking at the legislation pre-implementation of the Code in Canada, United Kingdom and United States, being the main regulatory framework, the Hague Rules and Hague/Visby Rules

According to Professor William Tetley, seaworthiness may be defined as the state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage.[144] Seaworthiness thus includes, for instance, a tight hull and hatches, a proper systems of pumps, valves and boilers, and that the engine and refrigerators are in good order. For a vessel to be seaworthy it is also

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Protocol should not be considered as a separate convention, Art. 6 states: *"As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument. A party to this Party to this Protocol shall have no duty to apply the provisions of this Protocol to bills of lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol."*

[143] Anderson, *supra* note 78 at 115.

[144] W. Tetley, Marine Cargo Claims 3rd ed. 1988 Montreal: Yvon Blais, 1988) at 370 [hereinafter *Tetley MCC*] See also *McFaden v. Blue Star Line* [1905] 1 K.B. 697, the judge in the case stated: *To be seaworthy, a vessel must have that degree of fitness that an ordinary careful and prudent shipowener would require his vessel to have at the commencement of the voyage having regard to all probable circumstances of it."*

necessary that it be equipped with up-to-date charts, notices to personnel, and a crew properly trained to properly carry out the operation of the ship.[145]

2.2 The Hague and Hague/Visby Rules.

The carriage of goods by sea is primarily governed by the International Convention for the Unification of Certain Rules relating to Bills of Lading, commonly known as the Hague Rules, signed at Brussels on August 25 1924. Later in 1968 the Hague Rules were amended and a protocol signed in Brussels gave birth to the Hague/Visby Rules, today in force, and ratified by most shipping nations of the world, with the major exception of the United States which instead has remained with COGSA 1936,[146] its version of the Hague Rules 1924.

The most relevant articles contained in the Hague/Visby Rules for the purpose of defining seaworthiness, are those concerning the responsibilities of the carrier, which are set out in Article 3, rules 1 and 2 and Article 4 which establishes the possibility of the carrier avoiding liability in certain circumstances.

With the amendment of the Hague Rules and the advent of the Hague/Visby Rules, the ship does not need to be seaworthy at all, there is no obligation of seaworthiness absolute or otherwise[147], this is evidenced in Article 3 as follows:

"Article 3

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[145] Tetley MCC, *supra* note 144 at 370.
[146] *Carriage of Goods by Sea Act1936* , c. 229, 49 Stat. 1207 (codified as amended at 46 U.S.C. § 1300-1315 (1994)). [hereinafter *US COGSA*].
[147] Tetley MCC, *supra* note 144 at 371.

1. *The carrier shall be bound before and at the beginning of the voyage to exercise* ***due diligence*** *to*

   (a) Make the ship seaworthy.

   (b) Properly man, equip and supply the ship.

   (c) Make the holds, refrigerating and cool chambers, and all other parts on the ships in which goods are carried, fit and safe for their reception, carriage and preservation.

2. *Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, care for, and discharge the goods carried."*[148][Emphasis added].

Due to the uncertainty and the extensive interpretation of the term "due diligence" it has become one of the most contentious rules applied by the courts. In *Grain Growers Export Co. v. Canada Steamship Lines Ltd.*,[149] due diligence was defined as:

> *"not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it [seaworthy] so, as far as diligence can secure it."*

Due diligence is also defined by W. Tetley as "a genuine, competent and reasonable effort of the carrier to fulfill the obligations, set out in subparagraphs (a), (b) and (c) of Article 3(1) of the Hague/Visby Rules."[150]

The wording of Article 3 clearly establishes that the only obligation is to exercise due diligence before and at the beginning of the voyage, therefore, the idea of absolute diligence or absolute seaworthiness was completely excluded from the rules, an

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[148] Hague/Visby Rules, *supra* note 142 Art. 3.
[149] *Grain Growers Exports Co. v. Canada Steamship Lines Ltd.*, [1918] 43 O.L.R. 330 at p. 344-345 (Ont. S.C. App. Div.). See also *C.Itoh & Co. (America) Inc. v. M/V Hans Leonhardt* 719 F. Supp 479 at 504, 1990 AMC 733 at 743 (E.D. La. 1989); *Tuxpan Lim. Procs.* 765 F. Supp. 1150 at 1179, 1991 AMC 2432 at 2445 (S.D. N.Y. 1991).
[150] Tetley MCC, *supra* note 144 at 369-370.

interpretation trying to imply absolute character, would be in any effect erroneous.[151] The relative character of seaworthiness and due diligence was clearly established by Lord Summer in *Bradley & Sons v. Federal Steam Navigation Co.*[152]:

> *"In the Law of Carriage by Sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standards prevailing at the time."*

Currently the prevailing standard referred to in the dictum of *Bradley & Sons*, concerning management of ships, is the ISM Code. As the preamble of the Code states, there is *an international standard for the safe management of ships* which, so widely accepted, constitutes the set of principles that will serve as a guide for all recognized industry bodies to improve safety at sea and to prevent marine pollution.

It is worth mentioning that in the light of Article 1[153] of the Rules, "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper. By using the word "includes", the drafters' intention was not to restrict the definition of carriers to the persons therein mentioned, it rather leaves the possibility to have other carriers who, depending upon specific circumstances applicable to each

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[151] See *Maxine Footwear Co., Ltd. v. Canadian Government Merchant Marine*, [1959] 2 Lloyd's Rep. 105 at p. 113 [1959] A.C. 589 at p. 603 (P.C.); "[*t*]*he obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank*"According to the judgement in this case, there was a failure to exercise due diligence from the beginning of the loading until the ship sank. As a result the ship became unseaworthy and that unseaworthiness caused the damage to and loss of the goods. See *also Paterson Steamships, ltd. v. Robin Hoods Mills Ltd.*,[1937] 58 Ll.Rep. 33 at 40; *Dobell v. Steamship Rossmore Company*, [1895] 2 Q.B. 408; *C.Itoh & Co. (America) Inc. v. M/V Hans Leonhardt*, *supra* note 149 at 504; and *The Kapitan Shakarov* [2000] 2 Ll.R. 255 at 272 (C.A.). It is also important to mention that the French version of the Rules, which is the official version uses the term *"diligence raisonnable"*, this also confirms that the diligence required by the wording of Article 3 is not in any way absolute, but reasonable.

[152] *Bradley(F.C.) & Sons, Ltd. v. Federal Steam Navigation Co. Ltd.*, [1927] 27 Ll. L. Rep. 395.

[153] Article 1 of the Hague/Visby Rules reads as follows: *"(a) 'carrier' **includes** the owner or the charterer who enters into a contract of carriage with a shipper."*[Emphasis added].

particular case, and even though not expressly mentioned in the provision, can be considered as carriers.

By examining Article 3, we can see that the carrier has a primary obligation not only to make the ship seaworthy, but to properly man and equip the ship and also to make the vessel's carrying cargo compartments suitable to carry the intended cargo. In addition to this obligation, the carrier has also the responsibility of looking after the cargo that is under his custody. It is important however, to understand that the obligation to make the ship seaworthy before and at the beginning of the voyage will be of relevance in a claim when it is evidenced that a particular unseaworthiness contributed to a loss. In that case, it is with respect to such unseaworthiness that the carrier must prove his due diligence.[154]

Article 4, Rule 1 also constitutes an important rule in the light of this study, because it establishes the conditions to be met by the carrier in order to be able to avoid liability, even if the ship is not seaworthy before and at the beginning of the voyage.

> *"Article 4*
>
> > *1. Neither the carrier nor the ship shall be liable for loss or damge resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article 3.*
> >
> > *Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article."*[155]

[154] Tetley MCC, *supra* note 144 at 378.
[155] Hague/Visby Rules, *supra* note 142 Art. 4 (1).

Article 4, Rule 2 provides a list of defenses available to the carrier:

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the ***management of the ship****.*

(b) Fire, ***unless caused by the actual fault or privity of the carrier****.*

(c) Perils, dangers and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of War.

(f) Act of public enemies

(g) Arrest or restraint of princess, rules or people, or seizure under legal process.

(h) Quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agent or representative.

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, weather partial or general.

(k) Riots and civil commotions.

(l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising ***without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier****, but the burden of proof shall be on the person claiming the benefit of this exemption to show that neither the*

actual fault or privity of the carrier not default or neglect of the agents or servants of the carrier contributed to the loss or damage."[156] [Emphasis added].

The implications of the ISM Code in seaworthiness, sections (a), (b) and (q) of Rule 2 and Article 4 are very important because they concern issues specifically dealt with in the Code. Section (a), refers to the act or neglect *in the management of the ship.* Sections (b) and (q) deal with matters regarding fault and privity. This rule, however, will be studied in depth in the following section concerning liability.

2.3 Hamburg Rules

The Hamburg Rules[157] were adopted by the United Nations Convention on the Carriage of Goods by Sea in 1978. It is not the author's intention to deeply study the Hamburg Rules provisions; it is important, however, to outline some interesting aspect of the Rules regarding seaworthiness which differ from the provisions of the Hague/Visby Rules.

As explained above, under the Hague/Visby regime the carrier is obliged to exercise due diligence to make the ship seaworthy before and at the commencement of the voyage and he has the burden of proving it. The obligation to exercise due diligence does not apply under the Hamburg regime, however the approach taken by the Hamburg Rules is wider and imposes an even higher duty and burden of proof on a carrier.[158] Article 5 of the Hamburg Rules stipulates:

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[156] *Ibid.* Art. 4 (2).
[157] *United Nations Convention on the Carriage of Goods by Sea,* 3 March 1978, 17 I.L.M. 608, reprinted in 6 Benedict 1-32.6 (entered into force Nov. 1, 1992) [hereinafter *Hamburg Rules*].
[158] See Anderson, *supra* note 78 at 132.

"1. The carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."[159]

As opposed to the exercise of due diligence required by the Hgue/Visby Rules, the Hamburg Rules provide for reasonable care during the period when the cargo is under the carrier's custody. To this effect it is noteworthy that this obligation is to be exercised during the whole period the carrier is in charge of the cargo and not only before and at the beginning of the voyage. Regarding the defenses available to the carrier, there is no provision expressly listing them as in Article 4 of the Hague/Visby Rules. Nevertheless, certain provisions with respect to claims resulting from fire are found under Article 5, Rule 4 and regarding live animals under Article 5, Rule 5, these rules primarily dealing with who has the burden of proving fault. The principal burden of proof under the Hamburg Rules is upon the shipowner, who has the obligation to prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[160]

2.4 Seaworthiness- Effect of the ISM Code.

The question of seaworthiness gains relevance in the light of the ISM Code with respect to compliance or non-compliance with the requirements established by the Code. The fact that the ISM Code established a set of international standards for the safe operation of merchant ships and for pollution prevention, implies that a failure on the part of the Company to comply with the Code requirements could be seen as a failure of owner the owner to exercise due diligence to make the ship seaworthy before

[159] Hamburg Rules, *supra* note 157 Art. 5.
[160] Anderson, *supra* note 78 at133.

and at the beginning of the voyage. G.P. Pamborides[161] has stressed the importance of seaworthiness regarding the fundamental requirements of the ISM Code in the following terms:

> *"The new code has the potential of affecting the meaning of those aspects of 'seaworthiness' which have to do with the human factor. It is considered well-established by now that each member of a ship's crew must be competent to carry out his duties and the whole crew as a unit must be in a position to perform as a team. Competence would now include the training of each crew member in the provisions of the SMS of the Company as well as his familiarization with the instructions which must be provided prior to sailing by the Company to each crew member. This information must be provided to the crew member in a language which can be understood by him. Furthermore, in order for the crew to be in a position to act as a team in carrying out their duties as a single unit, they must be able to communicate effectively between them."*

The principle is that seaworthiness must be exercised by the carrier, who must show due diligence in providing a seaworthy vessel. The obligation to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage is personal to the carrier, that is to say, the shipowner cannot delegate his obligation.[162] The leading case reflecting the principle of non-delegation was the *"Muncaster Castle"*[163]. In this case, the vessel was loaded with a consignment of tinned foodstuffs to be carried form Australia to the U.K. The contract of carriage was evidenced by bills of ladings to which the Hague Rules applied. Upon discharge, the cargo was found damaged as a result of seawater having entered the particular cargo hold through defective inspection covers of storms valves. Prior to the voyage, the vessel had undergone a special survey performed by a well-known ship repairers firm. The firm

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[161] G. P. Pamborides (Holman, Fenwick & Willan), "The ISM Code: Potential Legal Implications" (1996) 2 Int'l.. M. L. 56 at 62.

[162] The carrier may employ other person to exercise due diligence, but in case the delegate is not diligent, the carrier, based on the no diligence of the delegate, will not be able to avoid responsibility. See *supra* note 140 at 391. See also *Riverstone Meat Co. Pty. v. Lancashire Shipping Co.(The Muncaster Castle),* [1961] 1 Lloyd's Rep. 57 at 69 [1961] A.C. 807 (H.L.).

[163] *Riverstone Meat Co. Pty. v. Lancashire Shipping Co. (The Muncaster Castle),* [1961] 1 Lloyd's Rep. 57, [1961] A.C. 807 (H.L.).

had been selected by the shipowner's marine superintendent. The classification society surveyor carried out his inspection of the storm valves and afterwards a fitter from the shipyard closed up the inspection covers. However, it was later known that the fitter had failed to secure the nuts adequately. This omission by the fitter could not have been discovered by a visual inspection. During the voyage the vessel encountered some rough weather. The movement of the vessel probably contributed to the loosening of the nuts on the storm valve cover, which in turn, allowed seawater to enter the hold. The court held that *the shipowner had failed to demonstrate that he had exercised due diligence to make the vessel seaworthy at the commencement of the voyage.* The court also made it clear that *the repairer was to be regarded as the agent of the shipowner and, as a consequence, the shipowner was responsible for the negligence which occurred in the repairer's yard.*

The personal and non-delegable obligation to exercise due diligence to make the ship seaworthy may have direct implications within the context of the ISM Code. Let us take, for instance, a case where the shipowner delegates the operation of the SMS to the DP or even to other line managers and as a result of a breakdown on the SMS, cargo is found to be lost or damaged. In a case like this, the shipowner will not be able to avoid responsibility arguing that he had delegated his task to others in the line of management.

Section 10 of the Code "Maintenance of the Ship and Equipment" has to be considered in the light of a case such as the *Muncaster Castle* , this section on its third paragraphs establishes:

> *"10.3 The Company should establish procedures in SMS to identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The 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."[164]

It is important to recall at this point that "Company" in the light of the ISM Code means the owner of the ship or any other organization or persons such as the manager, or the bareboat Charterer, who has assumed responsibility for operation of the ship from the shipowner and who on assuming that responsibility has agreed to take over all the duties and responsibilities imposed by the Code.[165] Section 7 of the ISM Code also plays an important role in a case such as the one previously mentioned. Section 7 deals with the development of plans for shipboard operations, and states that:

"The Company should establish procedures for the preparation of plans and instructions 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."

Based on these two sections, it is the author's view, that it will be necessary for the shipowner, in order to demonstrate that he exercised due diligence, to show that proper and adequate procedures were in place for carrying out correct inspections and that those procedures are actually implemented and were being adhered to. On the view of G.P. Pamborides, the owner's obligation to exercise due diligence looked upon the terms established by the Code is expressed in the following terms:

"With the introduction of the Code, it appears that a shipowner's due diligence will be judged with a two-stage test: first, the content of his SMS will be evaluated to ascertain whether it was a system capable of ensuring safety and marine environment protection; second, the application of the SMS will be judged as well as the actions of the shipowner to ensure its application. Any failure to pass any of these two stages of the test could mean

[164] ISM Code, *supra* note 50 s. 10.
[165] *Ibid.* s. 1 1.1.2.

great difficulties for a lawyer trying to prove that his client demonstrated due diligence in providing a seaworthy vessel."[166]

Going further and examining the second paragraph of Article 3 of the Hague/Visby Rules which sets out the obligation to carefully load, handle, stow, carry, keep, care for and discharge the goods carried, it is clear to notice the relevance of the obligation as far as the ISM Code is concerned. All the activities mentioned on the second paragraph are closely involved with human performance, therefore section 7 of the ISM Code, has special relevance in this matter. Earlier in this paper, it was explained that the obligation to exercise due diligence to make the ship seaworthy was on the shipowner and was not by any means delegable. The same is the case with Rule 2 of Article 3, the obligation carefully to carry the cargo is on the shipowner. In consequence carriers may not be excused for improper care of cargo by arguing that the loss or damage is attributable to the advice of independent contractors whose services were contracted for.[167] This was reflected in *International Packers London Ltd. V.Ocean Steam Ship Co., Ltd.,*:[168]

"The obligation imposed by Art. III, r. 2, like the obligation imposed by Art. III, r. 1, to exercise due diligence to make the ship seaworthy, is an obligation imposed upon the shipowner himself which he cannot escape on proof that he employed a competent independent contractor who was in fact negligent...I can see no difference in principle between the shipowner's obligation under Art. III,r. 1, and that under Art. III, r. 2. As a matter of law, therefore, I would hold that the defendants would be liable if the surveyor gave negligently wrong advice."

Although the shipowner will be responsible where he does not sufficiently prove that he exercised due diligence to make the ship seaworthy, Article 4 of the Hague/Visby Rules provides certain defenses available to the owner to rely on. It is

[166] Pamborides, *supra* note 161 at 58 .
[167] W. Tetley, "Properly carry, keep and care for cargo – Art. 3(2) of the Hague Visby Rules (2001) ETL 9-35.

worth noting that the defenses provided by the Rules cannot be relied on if the carrier does not prove that he exercised due diligence. Artcle 3, Rule 1 is an overriding obligation, in case of non fulfillment, Article 4 cannot be invoked. The overriding character of Article 3, Rule 1 was clearly established in *Maxine Footwear Co. Ltd. v. Can. Government Merchant Marine*[169],

> *"Article III, rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument."*

It is not the author's intention to go through every one of the exceptions laid down on the Rules, however, there are certain clauses which are of special relevance to the effect of the implementation of the ISM Code.

Rule 2 (a) refers to act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or *management* of the ship. We must remember that the governing principle is that the duties of the carrier are non-delegable, thus it is only if these duties have been discharged that a shipowner is entitled to benefit from the exceptions of liability contained in Article 4. According to P. Martyr[170], *"[t]here was very little prospect of mounting a successful challenge to the exception of crew negligence prior to the ISM Code, because there was little chance of showing other than in the most obvious cases, that the ship was not properly manned for the purposes of Article 3."* He continues: *"[the] ISM Code may well widen the effect of the Rules, for example by reducing the number of cases in which the defense of crew negligence is found to be the sole cause of a loss. A number of cases which are presently regarded as arising out of crew negligence, will certainly be viewed in the*

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[168] *Packers London Ltd. v. Ocean Steam Ship Co., Ltd.*, [1995] 2 Lloyd's Rep. 218 at p. 236.
[169] *Maxine Footwear Co. v. Can. Government Merchant Marine, supra* note 151.

future as arising not solely by crew negligence, but instead by a lack of systems on board the ship, or through inadequate training."

Other relevant defenses in respect of the ISM Code, are those established in Article 4, rule 2 (b) and (q) which deal with issues relating to fault or privity of the carrier. Rule 2 (b) regulates cases of fire "unless caused by the actual fault or privity of the carrier". Article 4, rule (q) goes further, comprising "any other cause", this is expressed as follows:

> *"(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."*

If the shipowner intends to exculpate himself, trying to use the defense established in this clause, the onus of disproving negligence and privity is placed expressly upon the shipowner. The SMS plays a crucial role in this matter. Depending upon the documentation created by the SMS, the owner will be in the position to exculpate himself by the use of this defense, otherwise he will try to settle the claim on the best possible terms.

As a conclusion drawn from the analysis of the most relevant Articles of the Hague/Visby Rules concerning seaworthiness, with respect to the ISM Code implementation, we can say that seaworthiness will now be evaluated taking into account *inter alia* the adequacy of the SMS in two different aspects. The first aspect will be that an adequate SMS actually exists; and secondly, that the SMS is being

[170] P. Martyr (Norton Rose), "ISM Code/Pollution – Lawyer" (International Marine Insurance

properly implemented. The shipowner's failure in demonstrating either of these aspects could mean a breach of Article 3 rule 1, and secondly, the owner's failure in properly caring for the cargo will mean a breach of Article 3 Rule 2 of the Hague/Visby Rules.

In addition, under the ISM Code, the claimant will have a huge array of means to request documentary evidence to establish whether or not the owner is in breach. The SMS or any document evidencing important information as to the management systems implemented on a determined vessel will surely be disclosable in litigation. The claimant, by means of these documents, will have actual knowledge of the type of system in place, meaning that he will know if that system was adequate for the type of ship and finally if the system was properly implemented and operated by the Company. In this case, if the owner is asked to produce any document required under the ISM Code, he will have to produce it, otherwise he will not be complying with the requirements established by the Code and this would be very prejudicial to his defense.[171] Even though there is no guidance regarding the circumstances under which a ship could lose its SMC or any other document required by the code, it is certainly probable that the owner will not be in the position to claim that the documents have been lost, since the Code on its Article 11 provides that:

> *"11 Documentation*
>
> *11.1 The company should establish and maintain procedures to control all documents and data which are relevant to the SMS.*
>
> *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.*

Conference – A Time for a Change (London 12/13 February 1997).
[171] Anderson, *supra* note 78 at 132.

11.3 The documents used to describe and implement the SMS 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."

2.5 Seaworthiness-Applicable Legal Regime in Canada, United States and United Kingdom

2.5.1 Canada

Canadian maritime law finds its origins in the British common law.[172] In 1936 Canada enacted the Carriage of Goods by Water Act [173] which made the Hague Rules part of Canadian Law, although the Rules do not apply under the Act for carriage from another country to Canada, they do apply to carriage outward from Canada.[174] By virtue of Chapter 21 of the COWA, in 1993 Canada also ratified the Hague/Visby Rules, to this effect, Part I Rule 7 (1) states:

"7.(1) The Hague/Visby Rules have the force of law in Canada."

Since the Hague/Visby Rules are part of Canadian law, the provisions earlier studied with respect to seaworthiness are applied by Canadian courts in the same terms, thus the effects of the ISM Code previously referred to, are likely to be found in future Canadian judgments. In addition to the parameters established by the Hague/Visby Rules with respect to seaworthiness, the definition of seaworthiness is also found in the

[172] D. Morrison, "The ISM Code background and legal implications" (27 May 1998) [unpublished].
[173] Carriage of Goods by Water Act, R.S. C. 1993, c. 21. C-27.01.
[174] Tetley MCC, *supra* note 144 at 1016.

text of certain Canadian legislation such as the Quebec Civil Code[175] and the Marine Insurance Act[176].

The Québec Civil Code , art. 2063 defines seaworthiness as:

"2063. At the beginning of the voyage and even before, the carrier is bound to exercise diligence to make the ship seaworthy, properly man, equip and supply it, and make fit and safe all parts of the ship where property is to be loaded and kept during the voyage."

The Quebec Civil Code on its Article 2064 also makes reference to the obligation of the carrier to properly load, handle, keep and discharge the goods contained in the Hague/Visby Rules. In this order of ideas, Article 2064 establishes:

"2064. The carrier is bound to proceed in an appropriate manner with the loading, handling, stowing carrying, keeping and discharging of the property carried.

Except in the coasting trade, a fault is committed by the carrier if, without the consent of the shipper and in the absence of rules or customs so permitting, he stows the property on deck. Consent is presumed where containers are loaded on a ship fitted for the carriage of containers."

The Canadian Marine Insurance Act also provides a definition of seaworthiness, it is stated in Article 37 as follows:

"37(5). A ship is deemed to be seaworthy if it is reasonably fit in all respects to encounter the ordinary perils of the seas of the marine adventure insured."

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[175] *Civil Code of Quebec* L. Q., 1991, c.64.
[176] *Marine Insurance Act*, R.S. C. 1998, c. 10 C-6.7.

As evidenced by these two definitions, seaworthiness in Canada, is contemplated as having the same meaning as the definition given by the Hague/Visby Rules. It is still early to anticipate the precise effect of the implementation of the Code in Canada, but surely the impact of the Code will influence in the way shipping industry has been managed and most importantly in the way marine cargo claims have been argued up to this date.

2.5.2 The United Kingdom

The United Kingdom formally ratified the Hague Rules in 1930, however the Rules had previously been adopted by copying them the Carriage of Goods by Sea Act[177] 1924. In October 1, 1976 the United Kingdom formally ratified the protocol amending the Hague Rules, thus, adopting the Hague/Visby Rules which came into force on June 23 1977.[178]

The 1971 Act applies to any bill of lading issued in the United Kingdom as well as to any bill of lading issued by any state party of the Hague/Visby Rules. The United Kingdom ratified the 1979 Protocol in 1982, it was implemented by the Merchant Shipping Act 1981.The Rules apply to all outward shipments from the UK. There is major loophole in the Rules that if by custom no bill of lading is issued, the carrier is not legally bound to apply them and can, subject to national law, apply his own terms.[179]

Carriage of Goods by Sea Act 1971.

"Article 1 Application of Hague Rules as amended.

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[177] *Carriage of Goods by Sea Act, 1992* (U.K.) 1992, c.50.
[178] Tetley MCC, *supra* note 144 at 1098.
[179] Online <http://www.pslgroup.net/convention2.html> (date accessed: 27 July 2001).

1. In this Act, 'the Rules' means the International Convention for the unification of certain rules of law relating to bills of ladings signed at Brussels on 25th August 1924, as amended by the Protocol signed at Brussels on 23rd February 1968.

2. The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law."

"Article 3 Absolute warranty of seaworthiness not to be implied in contracts to which rules apply

3. there shall not be implied in any contract for the carriage of goods by sea to which the Rules apply by virtue of this Act any absolute undertaking by the carrier of the goods to provide a seaworthy ship."

Standard Oil Co. v. Clan Line[180] is an interesting case regarding the issues under study. The relevant issue in this case was not the unseaworthiness of the vessel, but the lack of specific and special knowledge by the master of the ship. The decision not only addressed seaworthiness, but the question of exercising due diligence. It was held by the Court that even if the vessel was seaworthy at the beginning of the voyage, the lack of special knowledge on the part of the master constituted unseaworthiness.[181]

Since United Kingdom applies the Hague/Visby Rules, the situation with respect to seaworthiness under the ISM Code is similar to Canada. From what has been earlier discussed, it is clear that judges and arbitrators will have be obliged to carefully consider the questions of seaworthiness and due diligence to make the vessel seaworthy in light of the ISM Code requirements.[182]

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[180] *Standard Oil Co. v. Clan Line* [1924] A.C. 100. See however *The Fjord Wind* [2000] 2 Lloyd's Rep. 191 at p. 199 (C.A.) It was clearly stated that *"... seaworthiness is concerned with the state of the vessel rather than with whether the owners acted prudently or with due diligence. The only relevance of the standard of the reasonably prudent owner is to ask whether, if he had known of the defect, he would have taken steps to rectify it."*

[181] See Anderson, *supra* note 78 at 121.

[182] *Ibid.* at 127.

2.5.3 The United States

The Hague Rules 1924 are incorporated to the Carriage of Goods by Sea Act 1936[183], which is the US domestic version of the Hague Rules. However, this incorporation is subject to the understanding that COGSA should prevail to the extent that its text differed from that of the Hague Rules. COGSA 1936 applies of its own force, from the time goods are loaded on, to the time when they are discharged from the ship, both inbound and outbound shipments in foreign trade, this is stipulated in Section 13 as follows:

> *"This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries..."*[184]

The Harter Act[185] constitutes a local law in the United States. It applies to contracts of carriage between ports within the United States and to inland water carriage.[186]In addition to its application in domestic trade, COGSA expressly preserved the coverage of the Harter Act and any other applicable laws for the preloading and post discharging period.[187]

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[183] US COGSA, *supra* note 146.
[184] *Ibid.* § 1312; See also *Wirth, Ltd. v. S.S. Acadia Forest*, 537 F.2d 1272 (5 cir. 1976).
[185] *Harter Act*, 46 U.S.C. § 190-196.
[186] *Ibid.* § 190; *All Alasken Sea Foods, Inc. v.M/V SEA PRODUCER*, 882 F. 2d 425, 430,1989 AMC 2935 (9th Cir. 1989). Generally contracts of carriage provide for application of COGSA to even these carriages. G. W. Poulos, "Legal implications of the ISM Code: New Impediments to Sea Fever" (1996) 9: 1 37 at 66.
[187] US COGSA, *supra* note 182 § 1311.

In United States COGSA and the Harter Act apply outward from U.S. ports as well as inward, differing in this way with the Hague Rules.[188] Both regulatory regimes impose a duty on the carrier to properly and carefully load, handle, stow, carry, keep, care for, and discharge the cargo, and to exercise due diligence to make the vessel seaworthy.

It is very important to note that under the Harter Act the shipowner has the obligation to prove that he exercised due diligence to make the ship seaworthy in all respects, which in turn leads us to the assumption that any failure regarding seaworthiness would prevent the owner from invoking the exception therein contained. Under COGSA the situation is different, due diligence is required only in respect to the loss[189], making necessary, the existence of a causal connection between the lack of due diligence and the cargo loss or damage. To this effect in *Firestone Syn. Fibers Co. v. Black Heron*[190], it was held that:

> *"...the defense of error in the management of the ship is not conditioned , as it is under the Harter Act, ..., on a showing of seaworthiness or due diligence to make the vessel seaworthy."*

The Hague/Visby Rules have been neither ratified nor acceded by the United States.

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[188] Tetley MCC, *supra* note 144 at 21.
[189] U.S. COGSA, *supra* note 182 § 1304(1).
[190] *Fyrestone Syn. Fibers Co. v. Black Heron* 324 F. 2d 835 at p. 837, 1964 AMC 42 at p. 44 (2 Cir. 1963).

3. Limitation of Shipowner's Liability

For years, shipowners have been given the privilege of limiting their liability resulting from their fault. The right to limit liability has been influenced by and has been the result of many important factors.[191] As mentioned earlier, shipping is one of the most hazardous commercial activities worldwide, thus the risks involved are greatly numerous. The real issue to be studied regarding limitation of liability is whether the owner in the light of the ISM Code provisions will be able to limit his liability in the same terms previous to implementation of the Code. Different limitation of liability regimes will be studied taking as reference point Canada, the United Kingdom and the United States.

The right of the owner to limit his liability, is not absolute. In other words, there are certain exceptions provided in law by which the owner is deprived of the right of limitation. First, however, in order to understand how the implementation of the ISM Code may in any way affect directly or indirectly the right of limitation of liability, it is essential to study the different regulatory frameworks regulating shipowner's limitation.

[191] During early times it was very common for the master of a ship to be the owner or at least part owner of that ship, thus, his active participation in matters such as the way the ship was maintained, operated and managed on a daily basis. Often the shipowner was a businessman who remained at the home port, being at the head office rather than sailing with his vessel. Given the situation the shipowner relied upon the master of the ship as to the seaworthiness of the vessel and its well maintenance. Therefore it was said to be unfair to expose the owner to be unlimitedly liable for the actions of others (masters or officers on board) without the owner's own actual fault or privity. With the advent of telecommunications developments, this argument started to waken, but it was kept anyway.

3.1 The 1957 Convention

The first Convention to be studied is the 1957 Convention on the Limitation of Liability of Owners of Seagoing Ships[192] The 1957 Convention is no longer in force in most shipping countries of the world, having been superseded by the 1976 Convention[193]. In spite of the fact that the 1957 Convention was superseded by the 1976 Convention, and thus rarely applicable, it is useful to understand the test under each convention which determines whether the shipowner was entitled to limit his financial liability.

The right to limit liability according the 1957 Convention is granted to a shipowner *"unless the occurrence giving rise to the claim resulted from* ***the actual fault or privity of the owner****"*.[Emphasis added]. The wording of this provision brings about consideration of two main terms: fault and privity.

The term fault is defined by Black's Law Dictionary as *"[a]n error or defect of judgment or of conduct; any deviation from prudence or duty resulting from inattention, incapacity, perversity, bad faith or mismanagement"*[194]. In most cases the question of fault does not really posse major problems for the owner. Since the owner is physically separated from the vessel, it is relatively easy for him to show that any loss or damage resulting in a claim was not product of his actual fault. The real issue is concerning privity, this is a term which relates specifically to the personal knowledge of the owner.

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[192] [hereinafter *the 1957 Convention*].
[193] *International Convention on Limitation of Liability for Marine Claims* (1976), reprinted in 6B Erastus C. Benedict, Benedict on Admiralty, Doc. No 5-4 (7th ed. 1995)[hereinafter *the 1976 Convention*].
[194] *Black's Law Dictionary*, 7th ed., *s.v.* "fault".

Actual fault or privity is defined by W. Tetley, as *"a faulty act or omission of a party, or his knowledge of or complicity with the faulty act or omission of another for whose conduct he is responsible"*[195]

Black's Law Dictionary defines privity in the following terms:

> *"The connection or relationship between two parties, each having a legally recognized interest in the same subject matter."*[196]

When the term "privity" is used in maritime law, a number of phrases are used to describe the person who represents the corporate body.[197] "The directing mind and will", "the very ego", the person "for whom the company is liable because his actions is the very action of the company itself" are some of the terms that have been used in several judgments to describe this person.

One of the most important cases regarding privity was *Compañia Maritima San Basilio S.A.v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd. "The Eurysthenes"*.[198]The incident took place in April 1974, when *The Eurysthenes* on a voyage from the United States, stranded causing loss and serious damage to the cargo she was carrying to Philippines. The judgment resulted good and helpful comments which have been frequently quoted in other cases. In particular, two issues were raised directly connected with privity. First, as to who in the company must have the necessary knowledge, in regard to privity, Lord Denning MR stated:

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[195] Professor William Tetley's Web page, *supra* note 68 s.v. "actual fault or privity" (date accessed: 22 July 2001).
[196] *Supra* note 194 *s.v.* "privity".
[197] Ogg, *supra* note 104 at 148.
[198] *The Eurysthenes* [1977] I Q.B. 49 (C.A.) [1976] 2 Lloyd's Rep. 171 [hereinafter *The Eurysthenes*]. See also *The Lady Gwendolen* [1965] p. 294; [1965] 1 Lloyd's Rep. 335 (C.A.);*The Marion* [1984 A.C. 563; [1984] 2 Lloyd's Rep. 1 (H.L.); *Societé Anonyme des Minerals v. Grant Trading Inc.(The Ert Stephanie)* [1989] 1 Lloyd's Rep. 349 (C.A.); *The Aegean Sea* [1998] 2 Lloyd's Rep. 39 (Q.B.)

"the knowledge must also be the knowledge of the shipowner personally, or his alter ego, or in the case of a company, of its head man or whoever may be considered their alter ego."[199]

Lord Denning's statement means that the right people must have the relevant knowledge, and thus, the person whose knowledge is relevant must be identified. In this case, Lord Denning concluded that privity[200] "*embraces not only actual knowledge but also constructive knowledge*", "*the sort of knowledge expressed in the phrase 'turning a blind eye'. If a man suspicious of the truth, turns a blind eye to it, and refrains from inquiry – so that he should know it for certain – then he is to be regarded as knowing the truth. This 'turning a blind eye' is far more blameworthy than mere negligence*".

The judgment in *The Eurysthenes* seemed to indicate that the extent to which a company could be privy to the fault of others, was when the fault was known, or when eyes were deliberately kept shut ("turning a blind eye"). Currently this test is no longer enough to show privity. [201]

3.2 The 1976 Convention

The 1976 Limitation replaced the 1957 Convention. Its major change to the effect of the subject under study is the change in the test. This is evidenced on its Article 4 which reads as follows:

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[199] Anderson, *supra* note 77 at 95.
[200] *The Eurystenes, supra* note 198 at 171.
[201] R. Grime, *Shipping Law* 2nd ed. (London: Sweet &Maxwell, 1991) at 274.

"A person shall not be entitled to limit his liability ***if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.*** " [Emphasis added]

The new test introduced by the 1976 Convention requires that the act or omission be done either with intent to cause such loss or recklessly and with knowledge that such loss would probably result. As a result it is more difficult for the claimant to "break limitation". To demonstrate that the shipowner was reckless, meaning careless, or utterly heedless of the consequences of an action under the wording of Article 4 of the 1976 limitation Convention, it is necessary to see these terms in the context of the words "and with knowledge that such loss would probably result". Adopting a wild course of action may be possible,[202] but it is not enough to show the reckless conduct, being also necessary to show that the shipowner's action was performed with the actual knowledge that damage would probably result, which in the author's point of view results practically impossible.

In addition to this, the 1976 Convention also introduces the word "personal" which did not appear in the 1957 Convention. This brings us to the question: whose personal act or omission is to be considered as to held the owner liable? In order to give an accurate answer to this question, it is essential to take into consideration the role of the DP in the Company.

The application of the ISM Code provisions regarding the shipowner's right to limit liability brings about two important issues. The first is related to the real position of the DP in the company, that is to say, whether the DP will be deemed to be high enough such that his acts, omissions and knowledge will be regarded as those of the Company. Whether the DP's privity or knowledge can be attributed directly to the Company will depend upon a particular analysis of the company seeking limitation , as

well as, the extent of his authority and duties on that particular vessel. It is important to recall that the ISM Code requires the DP ashore to have "direct access to the highest level of management" of the Company. The Code does not attribute any management authority to the DP.

Dr. A. Mandaraka-Sheppard in her article "The International Safety Management Code in Perspective"[203] makes reference to some important considerations in this matter. She is of the view that *"[I]f the evidence shows that the DP had knowledge of certain facts, amounting to non-conformity with the Code, which he communicated to the highest levels of management, then such evidence would point strongly to recklessness by them, if they did nothing or very little to correct reported non-conformities. It would still have to be proved by the person trying to break limitation that the legal persone of the owner acted with knowledge that such loss (as claimed) would probably result from such non-conformities with the Code."*

In view of the above, it will first be necessary to clearly identify who the alter ego of the Company is. Despite the knowledge the DP may have, according to the wording of the Code, the DP does not have the necessary requirements to be considered the head man or alter ego of the Company, therefore this issue *per se* will not produce any major effect. Secondly, since the responsibilities given to the DP by the Code, include the fact that he should know of any defect the vessel may have, this does not amount to proof that there was intent or recklessness on the part of the DP[204]; thirdly, given the personal character of the test, in a case where the Company in charge

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[202] *Ibid.*

[203] Dr. A. Mandaraka-Sheppard, Director of the London Shipping Law Centre, "The International Safety management Code in Perspective" (1996) 10 *P&I International;* (17 April 1996) *Lloyd's List.*

[204] For instance in *The Apostolis Case* a fire had broken out in cargo in a ship's hold as a result of welding work on deck. The issue was whether the general manager knew that the welding work was going on. The judge found there was a regular contact between the general manger and his port captain and superintendent engineer. Based on that regular contact he concluded that it was not

of implementing the Code is not the owner, it is not very clear, even though the claimant succeeds in proving his case against the manager, whether the owner can still exercise his right to limit his liability. It is the author's view that the owner could still limit. This statement being based on the fact that according to the 1976 Convention the "personal" character is necessary in order to lose the right to limitation of liability.

It could be also argued that following exactly the wording of the conventions, owners could use separate management companies in order to evade the possibility of being held responsible. This is a very delicate matter which has to be deeply considered and based upon the real facts of a particular case. As long as the provision of the Code and the Convention remain working merely on paper, many arguments and potential effect can be said to be likely to occur. Time and long deliberations in Court will show how, and to what extent the ISM Code will affect the shipowner's right to limit his liability, in the light of the applicable regulatory regime to that particular case and the provisions of the Code.

3.3 Limitation of shipowner Liability- Canada, United States and United Kingdom

3.3.1 Canada

Canada is not a party of any of the above conventions, however it did include provisions of the 1957 convention into the Canada Shipping Act.[205] Canada recently enacted legislation including the principal provisions of the 1976 Convention as

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possible that the general manager did not know that the welding was taking place, and this was in the face of specific oral evidence from the general manager to the contrary. [1996] 1 Lloyds Rep. 475.

[205] *Canada Shipping Act,* R.S., 1985, c. S-9, s. 583; 1998, c. 6, s. 2.

amended by the 1996 Protocol into the Canada Shipping Act S.C. 1998 c.6 coming into force on 10 August 1998 at ss. 574-584.

> *"583. (3)This section does not apply if it is proved that the loss or damage resulted from the personal act or omission of the owner committed with intent to cause the loss or damage or recklessly and with knowledge that the loss or damage would probably result."*

3.3.2 The United States

The United States is not a party of any of the two conventions earlier examined. Instead, the United States enacted the Limitation Act 1851[206], which contains rules regarding limitation of liability.

The purpose of the Limitation Act is to permit a vessel owner to limit his liability to the extent of his interest in the vessel at the end of the voyage. Section 183 provides that an owner may limit its liability with respect to claims by cargo, or for collision, or personal or death *"done...or received without the privity and knowledge of such owner"* to the value of the interest of such owner and the vessel at the end of the voyage.[207]

In United States at least one expert in the field believes that with the implementation of the ISM Code, a shipowner's qualified right to limit liability will be probably eliminated, to the extent that Federal Courts continue to expand the concept

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[206] *Limitation of Liability Act,* 3 March 1851, ch. 43, s. 3, 9 Stat. 63 (codified at 46 U.S.C. § 181-196 (1994)).
[207] Online <http://www.soulelaw.com.maritimelaw.htm> (date accessed: 07 July 2001).

of shipowner's privity or knowledge under the Limitation Act and embrace the concept of objective knowledge.[208]

3.3.3 The United Kingdom

The 1976 Limitation Convention was set out in the Merchant Shipping Act 1979[209] coming into force on 31 January 1980. Currently the Limitation Convention has the force of law in the UK by virtue of the Merchant Shipping Act 1995[210] in force in January 1996, such Act states:

> *"185. (1) The provisions of the Convention on Limitation of liability for Maritime Claims 1976 as set out in part I Schedule 7 (in this section and part II of that Schedule referred to as 'the Convention' shall have the force of law in the United Kingdom."*

4. Concluding Remarks

From what has been discussed in this chapter, it is the author's opinion that due diligence to make the ship seaworthy and the shipowner's right to limit liability as such, will remain much as they are and as they have been conceived to date. It is unquestionable that the implementation of the ISM Code will touch in different ways these two important principles of maritime law. The ISM Code will bring about a new international criterion of due diligence, and thus, the test of proving due diligence to make the ship seaworthy before and at the beginning of the voyage, now will have to be looked upon under compliance with the terms of the Code.

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[208] C.H. Allen, "The Future of Maritime Law in the Federal courts: A Faculty Colloquium": Limitation of Liability (2000) 31 J. Mar. L. & Comm. at 263.
[209] *Merchant Shipping Act* 1979 c. 39 § 4 Part 1.

Regarding the shipowner's right to limitation, it will also depend on the legal regime adopted in a specific country and the way claims are argued in that specific country. In any case, it may be now harder for the owner to limit his liability, given the reporting and documentation stages introduced by the Code. It is not feasible to exactly predict the outcome of the impact of the ISM Code in these two fundamental aspects of maritime law. There will be cases where the vessels will be found to be unseaworthy but owners may not be able to demonstrate that they exercised due diligence in the same terms they would do it pre-implementation of the Code, if they did not comply with its requirements.

In years to come, we will see all these apparently slight, but in reality dramatic changes, probably without having to enact new laws, but just amending existing ones. In the author's view, the success and the real legal consequences of the new standard established by the Code will depend to a great extent on the functions of verification and certification of flag State Administrations. As long as these functions are properly carried out by the respective Administrations and adequately followed by shipping companies, shipping nations will benefit from the huge potential of the Code. We will also probably see much more uniformity with respect to the criteria used to prove that due diligence to make the vessel seaworthy was exercised as well as to effectively elucidate in a given case, whether the owner will or will not be entitled to exercise his right to limitation. Since the flag State Administrations duties under the provisions of the Code have been practically left, by delegation, to Classification Societies, is on their hands where much of the real future of the ISM Code lies.

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[210] *Merchant Shipping Act,1995* (U.K.), 1995, c. 21, s. 185 (1) sch. 7. Part 1.

Chapter IV. Role of the Classification Societies - ISM Code

1. General Overview

When discussing the role of the Flag State Administrations, it has been noted in this paper that the majority of Administrations[211] have delegated their certification and verification functions to classification societies. Since the process of verification and certification of compliance with the ISM Code is crucial to the success of the Code in achieving a higher level of safety at sea, the role of classification societies takes a paramount importance within the scope of this study. Pre-implementation of the ISM Code, classification societies had already undertaken the issuance of certain statutory certificates, however, currently the certification and verification procedure is mandatory under the terms of the Code.

It is a true responsibility of the flag State Administration to make sure the company takes the adequate steps to comply with the requirements of the Code and applicable guidelines. Although administrations are permitted to delegate the functions of verification and compliance with the provisions of the ISM Code as well as, the issuance of DOCs and SMCs, the responsibility remains under the Administration. In other words, Administrations may delegate their functions, although not their responsibility.[212] Section 13 of the ISM Code stipulates that the functions attributed to the Administrations may be carried out by an "organization recognized by the Administration."[213] Since most shipping nations worldwide seem to have exercised the option of delegation, the capability of classification societies to undertake commercial and regulatory function must be analyzed. There appears to exist another very

[211] The Administration is defined at section 1.1.3 of the ISM Code as follows: *"1.1.3 Administration means the Government of the State whose flag the ship is entitled to fly".*
[212] Anderson, *supra* note 78 at 37.
[213] ISM Code, *supra* note 60 s. 13.

important issue regarding the role of the classification society verifying the compliance with the Code; this is the possibility of being held liable after allowing ships to sail, having failed in detecting defects on the ships, resulting in serious marine casualties. In order to examine the important issues around classification societies and their real impact within the scope of the ISM Code implementation it is very important to understand their true nature and the reason why classification societies first came into existence.

2. Origins of Classification Societies

Classification Societies were initially formed in the 17th and early 18th centuries as a result of the needs of marine insurance. At that time, insurers had no reliable information on which to base the calculation of premiums. Nor did have accurate statistical or accurate data on ships.[214] The first classification societies that came into existence were: Lloyd's Register of Shipping[215], Bureau Veritas[216], Det Norske Veritas[217] and the American Bureau of Shipping.[218]

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[214] P. Boisson, "Classification societies and safety at sea" (1994) 18: 5 Marine Policy at 364.

[215] In 1760 the most important underwriters and brokers formed a committee in order to publish a shipping register. This register was intended to contain basic information of the ships to be insured as well as some details to be able to assess the risks to be covered. The first edition of this register was published in 1764 and subsequently publications were referred to as the Underwriters' Register or the Green Book. *Ibid* at 365.

[216] In 1828 in Antwerp, Belgium two insurers founded the Information Bureau for Maritime Insurers which was later renamed Bureau Veritas The objectives of the institution were: *" To inform insurers of the qualities and defects of ships frequenting ports in the kingdom, and keep them as far and possible cognizant of the premiums and particular conditions on which maritime insurance business is being carried on in the various markets where such business is handled." Ibid.*

[217] In Norway classification societies emerged directly from the clubs and mutual insurance societies. Det Norske Veritas was founded by six mutual insurance companies in 1864. [hereinafter *DNV*] The first register appeared in 1865. *Ibid.* at 366.

[218] The American Shipmasters' Association was established in 1872, it was originally responsible for organizing examinations and issuing diplomas to captains and officers in the US merchant navy. Later this original role was modified to include the survey, rating and registration of merchant vessels. In 1867 the first booklet entitled *Record of American and Foreign Shipping* was published, and at the end of the 19th century the society adopted its current name: American Bureau of Shipping [hereinafter *ABS*].

Under the influence of many factors, classification societies moved form the simple assignment of ratings to certification. Currently, the surveys carried out and the certificates issued by classification societies are important not only to insurers, but also to charterers, cargo owners , buyers, bankers, and those who for any particular reason require to know the ship's condition at a specific time.[219]

The surveys conducted by the classification societies may vary depending upon whether they are imposed by public or private entities.[220] The certificates may also vary according to the issuer, whilst the private role of the issuer emphasizes the safety of property, the public role of the issuer emphasizes the safety of life at sea.[221] It is important to outline that despite variations as to the private or public character of the entities requiring that certification be done, both types of requirements aim to enhance the safety of ships and their equipment. The result of the certification is a certificate attesting compliance with specific rules.[222]

The services provided by classification societies have in one way or another helped to improve the quality and safety of carriage by sea. The certification of ship safety implies the declaration by the classification society that the ship conforms to the required minimum standard. To this effect, shipowners require their vessels' compliance with the requirements established by flag states, generally under the terms of international conventions as well as national regulations, and maritime insurers, who before underwriting the risks of a determined ship, wish it to be classed.[223]

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[219] See P.F Cane, "The Laibility of Classification Societies" (1994) L.M.C.L.Q. 363 – 373.
[220] Boisson, *supra* note 214 at 371.
[221] H. Honka, "The classification system and its problems with special reference to the liability of classification societies" (1994) 19 Tul. Mar. L.J. at 1.
[222] Boisson, *supra* note 214 at 371.
[223] See generally, Boisson *supra* note 214 at 372-375.

3. Classification Societies – Legal Regime (SOLAS 1974)

Under SOLAS 1974, Administrations have the responsibility and obligation to perform statutory surveys on international basis. Vessels are required to undergo periodic surveys and inspections and to hold valid certificates demonstrating that vessels comply with the statutory requirements established by the Convention. While administrations have this responsibility, classification societies, through their technical expertise, have become an impartial means of meeting these responsibilities.[224]

IMO Resolution A.739(18) adopted on November 1993 establishes the Guidelines for the authorization of organizations acting on behalf of administrations, entrusting in this way, survey work to Recognized Organizations (RO). The Guidelines were made mandatory in SOLAS 1974 Chapter XI.[225] The Guidelines set up a series of rules that must be followed by the administrations when authorizing RO to act on their behalf in the surveys and certification of their vessels. In this order of ideas, Rule 2 of the Guidelines states:

> *"2. Control in the assignment of such authority is needed in order to promote uniformity of inspections and maintain established standards. Therefore, any assignment of authority to recognized organizations should:*
>
> 1. ***determine that the organization has adequate resources in terms of technical, managerial and research capabilities to accomplish the tasks being assigned,*** *in accordance with the Minimum Standards for Recognized Organizations Acting on Behalf of the Administration set out in appendix 1;*

[224] M. Hidaka, IACS Chairman, Seatrade Safe Shipping Conference, 10th April 2001, online: IACS Homepage <http://www.iacs.org.uk/> (date accessed: August 07, 2001).
[225] *Ibid.*

2. *have formal written agreement between the Administration and the organization being authorized which should as a minimum include elements as set out in appendix 2 or equivalent legal arrangements;*

3. *specify instructions detailing actions to be followed in the event that a ship is found not fit to proceed to sea without danger to the ship or persons on board, or presenting unreasonable threat of harm to the marine environment;*

4. *provide the organization with all appropriate instruments of national law giving effect to the provisions of the conventions or specify whether the Administration's standards go beyond convention requirements in any respect; and*

5. ***specify that the organization maintains records which can provide the Administration with data to assist in interpretation of convention regulations.*** " [Emphasis added]

In addition to this, the Guidelines also provide for the establishment by the Administrations of a system in order to ensure the adequacy of work performed by the RO.[226] Such system should, *inter alia*, include:

1. *Procedures for communication with the organization.*

2. *Procedures for reporting from the organization and processing*

3. *Additional ship's inspections by the Administration*

4. *The Administration's evaluation/acceptance of the certification of the organization's quality system by an independent body of auditors recognized by the Administration.*

5. *Monitoring and verification of class-related matters, as applicable*

Under SOLAS, classification societies do not have real enforcement powers. Basically when required repairs or corrective actions are not carried out or a survey is

[226] IMO Res. A.739(18), *supra* note 121 s. 3.

not passed satisfactorily, classification societies do not have the police powers to detain a ship. The only possible action the societies can take is to withdraw the statutory certificates or declare them invalid, and notify the ship's flag State and the Port State where applicable.[227]

4. Classification Process

Ship classification, as a minimum, is to be regarded as the development and worldwide implementation of published Rules and/or Regulations which will provide for:

1. the structural strength of (and where necessary the watertight integrity of) all essential parts of the hull and its appendages,
2. the safety and reliability of the propulsion and steering systems, and those other features and auxiliary systems which have been built into the ship in order to establish and maintain basic conditions on board,

thereby enabling the ship to operate in its intended service.[228]

Classification Societies are independent legal entities that establish basic minimum standards for the design, construction, and maintenance of the principal hull and machinery components of vessels.[229] Classification Societies are hired and paid for by the owners of vessels that are classified, the certificates of class, issued by

[227] Hidaka, *supra* note 224.
[228] online: IACS Homepage <http://www.iacs.org.uk/> (date accessed: August 07 2001).
[229] P. Boisson, "The liability of Classification Societies in the Marine Industry Context" (Jonathan Lux ed., 1993) 1 at 3-6.

classification societies are relied upon by all sectors of the marine industry as proof and assurance that the ship is reasonably fit for its intended voyage.[230]

With the purpose of creating public confidence in classification societies, the International association of Classification Societies[231] (IACS) was formed. One of the main purposes of the IACS is to design and implement standards to prevent classification society shopping. The classification surveyor's position is to give advice as to what a determined vessel requires to be fit for her purposes, but a surveyor cannot be held responsible for the failure to maintain a vessel between limited, periodic surveys.[232] According to PR 9[233] for ISM Code certification, the certification process begins with the Company's application for certification to the IACS Society. Once this application is made, the next step is the initial verification:

> *"5.2 Initial Verification*
>
> *5.2.1 The initial verification for issuing a DOC to a Company consists of the following steps:*
>
> *(i) document review- in order to verify that the SMS and any relevant documentation comply with requirements of the ISM Code, the auditor is to review the safety management manual. If this review reveals that the system is not adequate, the audit may have to be delayed until the company undertakes corrective action. Amendments made to the system documentation to correct deficiencies identified during this review may be verified remotely or during the subsequent implementation audit described in (ii) below.*
>
> *(ii) Company audit – in order to verify the effective functioning of the SMS, including objective evidence*

[230] M.A. Miller, "Liability of Classififcation Sociaties from the perspective of United States Law" (1997) 22 Mar. Law at 75. It is, however, worth noting, that a certaificate of classification does not as such constitute absolute proof of seaworthiness and does not provide any guarantee that the vessel had no defects. See *Hof Van Beroep te Antwerpen* [1992] ETL 375.

[231] IACS Members are: ABS, BV, China Classification Society (CCS), DNV, Germanicher Lloyd (GL), Korean regiser of Shipping (KR), Lloyd's register (LR), Nippon Kaiji Kyokai (NK), Registro Italiano Navale (RINA), Russian Maritime Register of Shipping (RS). Associates: Croatian Register of Shipping (CRS), Indian register of Shipping (IRS). [hereinafter *IACS*].

[232] Hidaka, *supra* note 224.

[233] *Procedural Requirements 9 for ISM Code Certification,* 1995/Rev. 6 2000, s. 5.

that the Company's SMS has been in operation for at least three months, and at least three months on board at least one ship operated by the Company. The objective evidence is to inter alia, include records from the internal audits performed by the Company, ashore and on board, examining and verifying the correctness of the statutory and classification records for at least one ship of each type operated by the Company."

Once the DOC is issued and valid for that type of ship, the initial verification for issuing a SMC takes place.[234] Periodical safety management audits are also carried out to maintain the validity of the DOC and the SMC. The main purpose of the periodical verifications is, *inter alia,* to verify the effective functioning of the SMS; that possible modifications of the SMS comply with the requirements of the ISM Code; that corrective action has been implemented ; and that statutory and classification certificates are valid, and no surveys are overdue.[235]

5. Liability of Classification Societies

First of all it is important to state that Classification societies are first and formally accountable to their respective governing bodies, but their behavior and operations are equally subject to mandatory compliance with both IACS' Code of Ethics.[236] The liability of classification societies has been discussed for a number of

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[234] *"The initial verification for issuing a SMC to a ship consists of the following steps: (i) verification that the Company DOC is valid and relevant to that type of ship, and that the other provisions of paragraph 4.2.3 are complied with. Only after on board confirmation of the existence of a valid DOC can the verification proceed; and (ii) verification of the effective functioning of the SMS, including objective evidence that the SMS has been in operation for at least three months on board the ship. The objective evidence should also include records from the internal audits performed by the Company." Ibid* at s. 5.2.2.

[235] *Ibid* at s. 5.3.

[236] IACS Briefing, Class- Responsibility & Regulation, No 8, January 1999, online: IACS Homepage <http://www.iacs,org.uk/> (date accessed: 07 August 2001).

years and will probably continue but now within the context of the legal implications of the ISM Code.[237]

In the United States courts have not regarded suits favorably by shipowners to recover damages arising from the failure of a classification society to detect deficiencies that compromise the seaworthiness of the classified vessel to such an extent that it does not comply with the classification society's rules and standards.[238]

Generally shipowners and classification societies have contractual relationship which includes exemption from liability clauses formulated by the societies. These clauses protect classification societies from claims by the contracting party, which would mean the shipowner, and also from third party claims.[239] Another question respecting liability of classification societies is that regarding limitation. If a classification society were to be held liable, would it be possible for it to limit its liability?, as far as the 1976 Convention is concerned, there is not provision establishing limitation for such entities.

In the *Great American*[240] case, which was one of the major cases in United States to question the potential liability of a classification society, the court found that the duty of a classification society when it undertakes to perform a survey is "to perform the surveys in a safe and competent manner so as not to expose [the owner and the charterer] to risk of loss or liability to others."[241] In this case Bureau Veritas had surveyed the *Tradeways II*, a vessel that disappeared leaving no trace on a voyage from Antwerp to the Great Lakes in 1965. In the *Great Lakes* the court acknowledged that

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[237] Anderson, *supra* note 78 at 39.
[238] See e.g., *Somarelf v. American Bureau of Shipping,* 704 F. Supp 59, 1989 AMC 1061 (D.N.J. 1988)
[239] Release clauses protect classification societies against claims by the contracting party, and indemnity clauses protect the society against third party claims. Honka, *supra* note 221.
[240] *Great American Ins. Co. v. Bureau Veritas* 338 F. Supp. 999, 1012 (S.D.N.Y. 1972).

by classifying a vessel, a classification society is obliged to perform two specific duties with due care:

> *" (1) To survey and classify a vessel in accordance with the rules and standards established by the society for that purpose; and*
>
> *(2) To detect and notify the owners and charterers of any defect in the ship, provided that such defects are not already known or apparent."*

Despite the recognition of care owed by the classification society to the owners or charterers, it was expressed concerns based on policy driven fears, that in practice such a remedy would produce many undesirable and incalculable effects, therefore the court avoided its responsibility to impose liability. The court based its decision sustaining that holding a classification society liable, would in turn mean, making it an absolute insurer of every vessel it surveyed and certified, therefore the classification society should be immune from liability to owners or third parties as a matter of law and policy in order to preserve the independency and integrity of the classification process[242] However, the court ultimately held that that the shipowning interests failed to establish proximate cause. This failure consisted in lack of proof of the existence of a causal nexus between the society's negligence and the loss of the vessel, even though the society surveyed and certified the vessel prior to its voyage.

It is important to remember that one of the primary reasons for the services of a classification society is the need, on the part of the owners, to obtain insurance for their vessels. Once the classification society's survey is concluded and reveals that a determined vessel does not conform with certain standards, it would be the owner's decision either to make the necessary repairs, or to pay higher premiums, or finally to sail without insurance, which in the majority of the cases is not the owner's choice.[243]

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[241] *Ibid.* at 1014. See also R.M. Leslie (Shutts & Bowen), "Civil Liability Responsabilities of Vessels Owners and Classification Societies" (35th International Conference of the Comité Maritime International (CMI) Sydney, Australia, 4 October 1994).
[242] *Ibid* at 2.
[243] *Ibid.*

5.1 Liability in Contract

In the *Sundancer*[244] the United States Court of Appeals for the Second Circuit basically "sounded the death knell for suits against classification societies by vessels owners and their subrogated insurers."[245] In 1984 the *Sundancer*[246] flying a Bahamian flag struck off an underwater rock off the coast of British Columbia. The Bahamian government had authorized the ABS to issue legislative safety certificates; all surveys were conducted under control of ABS. Safety and classification inspections took place at different intervals before the first public cruise form Vancouver. ABS issued a series of one-voyage provisional certificates followed by a five-month provisional SOLAS and load line certificates in June 1984, two days before the first public cruise. A week later, the ABS issued an interim class certificate back-dated to the same date as the safety certificates.[247] The owner of the vessel failed a suit against ABS which was the classification society that had issued the corresponding certificates to the vessel and its owners. Since the vessel flew a Bahamian flag, the court applied Bahamian law and found the classification society to be immune on a theory of respondent superior. The appellate court affirmed the trial court, but found that the individual surveyor was immune under the Act[248] and not only vicariously immune as an agent of the classification society.

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[244] *Sundance Cruises Corp. v. American Bureau of Shipping*, 799 F. Supp. 363, 1992 AMC 2946 (S.D.N.Y. 1992), aff'd 7 F. 3d 1077, 1994 AMC 1 (2d Cir. 1993), cert denied 114 S. Ct. 1399 (1994) [hereinafter *Sundancer*].

[245] Miller, *supra* note 230.

[246] *The Sundancer* was originally a passenger car ferry named *Svea Corona*. The vessel was purchased in January 1984 by a Panamanian corporation. Not too long after the purchase, the vessel was converted into a luxury passenger cruise vessel with new owners and new name: *the Sundancer* flying the flag of the Bahamas. After the conversion was almost complete in Sweden, the *Sundancer* sailed to Miami and ultimately arrived in Vancouver. Conversion work continued during the voyages.

[247] 1992 AMC, *supra* note 244 at 2954.

[248] Bahamian Shipping Act 1976. The Act provided *inter alia: "Every officer appointed under this Act and every person appointed or authorized under this Act, shall have immunity from suit in respect of anything done by him in good faith or admitted to be done in good faith in the exercise or performance or in the purported exercise or performance, of any power, authority or duty conferred or imposed by him under this Act". Ibid.*

The court in the *Sundancer* based its decision upon two reflections. First, the shipowner ultimately is responsible for and in control of the activities of the vessel, which is supplemented by the shipowner's non-delegable duty to furnish a seaworthy vessel. Secondly, the disparity between the fee charged by ABS for its services and the damages sought by the owner indicates that the parties did not intend to impose liability of this magnitude upon the classification society.[249]

5.2 Liability in Tort

Another case worth mentioning is the *Nicholas H*[250] The vessel loaded cargo in January and February 1986 in Peru and Chile for carriage to Italy and the Soviet Union. The vessel deviated and anchored off San Juan, Puerto Rico due to a crack in her hull.[251] While at anchor further cracks developed and N.K.K was required to survey the vessel. The N.K.K surveyor required that repairs be done at the nearest port. Temporary repairs were done in San Juan and the surveyor allowed the vessel to proceed to the next discharging port before completing the remaining repairs.[252]

One day after having sailed from San Juan, the vessel reported that the welding of the temporary repairs had cracked. Despite attempted repair at sea, the vessel sank with all its cargo. The cargo owners filed suit against the owners and N.K.K. the claim against the owners was settled for about $ 5000,000. The cargo owners filed a tort claim against N.K.K. for the balance of the alleged loss, about $ 5.5 million. The preliminary issue was whether N.K.K owed a duty of care to the cargo owners giving rise to liability in damages.[253]

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[249] See Sundance Cruises Corp., *supra* note 244, 1994 AMC at 11.
[250] *Marc Rich & Co. v. Bishop Rock Marine Co.*, [1995] 2 Lloyd's Rep. 299 (H.L.) [hereinafter *Nicholas H*].
[251] *Ibid.*
[252] *Ibid.*
[253] *Ibid.*

The Commercial Court held that NKK owed the cargo owners a duty of care.[254] The Court of Appeal reversed, holding that no such duty existed.[255] The House of Lords affirmed the Court of Appeal stating:

> *"[T]he recognition of a duty would be unfair, unjust and unreasonable...towards classification societies, notably because they act for the collective welfare and unlike shipowners they would not have the benefit of any limitation provisions. Looking at the matter from the point of view of cargo-owners, the existing system provides them with the protection of the Hague or Hague – Visby Rules. But that protection is limited under such Rules and by tonnage limitations provisions. Under the existing system any shortfall is readily insurable...the lesser injustice is done by not recognizing a duty of care.."*[256] [Emphasis added].

In view of the decisions in the *Sundancer* and the *Nicholas H* , there are two elements worth consideration[257]. Firstly that a shipowner is not entitled to rely upon a classification society certificate as a guarantee to the owner that the vessel is seaworthy. Secondly that the shipowner is ultimately responsible for and in control of the activities aboard ship.[258]

As a consequence of the implementation of the ISM Code and understanding the paramount role classification societies are to play, IACS member societies introduced a specially developed PR9on ISM Code certification which reflects, as applicable, the IMO Resolution A.788(19) "Guidelines on the Implementation of the

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[254] *Ibid* at 312.
[255] *Ibid.*
[256] *Ibid* at 317.
[257] The responsibility of the classification societies to third parties will be dealt with below.
[258] D. Croom-Johnson "Accountability of Classification Societies" (LSLC Seminar, 21 February 2001) [unpublished].

ISM Code by Administrations"[259]. The main purpose of the PR9 is to provide the IACS Societies with the criteria for issuing a DOC to a Company and/or a SMC to a ship once having certified that their SMS is in compliance with the ISM Code. In addition to this, IACS member societies also developed their own guidelines for IACS auditors in charge of certification and a mandatory series of model training courses for auditors.[260]

There are some aspects regarding classification societies that should not be overlooked. As said earlier, classification societies play an essential role in marine safety and over the last years this role has considerably increased. Since classification societies have the necessary knowledge, experience and expertise, flag states rely almost completely upon classification societies to carry out the functions of certification. Now with the advent of the ISM Code the shipping community requires higher standards of ship safety and operation, thus the classification societies have a great responsibility on their shoulders.

Bearing in mind the importance of the liability of classification societies, P. Boisson gives four reasons why classification societies need to limit their liability:

> *"Firstly, classification work applies to assets of very high value which are exposed to even higher liabilities. But class does not charge fees related to this exposure, it charges for the services performed, and fees are not related to the size or value of the asset. The charges for checking a particular piece of equipment are the same for a small, relatively safe cargo ship as they are for a large chemical or gas carrier.*
>
> *Secondly, classification services do not contribute to the risk level. Class reduces risk, and class does not take the place of other players. It is true that class is paid by the shipowner, but class does not operate the ship itself, and*

[259] IMO Guidelines on Implementation of the ISM Code by Administrations, Resolution A.788(19) emphasises that the ISM Code should support and encourage the development of a safety culture in shipping.The Guidelines introduce a new dimension of mandatory application of the ISM Code for the Administrations in the requirement of ensuring "Compliance with mandatory rules and regulations". See generally, S. Arne, "The ISM Code in Practice" (Norway: Tano – Aschehoug, 1999) at 64.
[260] Anderson, *supra* note 78 at 39.

cannot cause or be responsible for an incident. Class ca omit to discover something which should nave been discovered , but that is the extent of its potential to contribute to risk.

Thirdly, there is the exposure of class to multiple third parties. The shipowner pays and is the client, but a lot of other bodies rely on class. Underwriters, charterers, vessel purchasers, government authorities and others could not do without it. The number of parties linked with class raises the potential level of failure.

Fourthly, but crucially, there is public interest . If the exposure to liability of serving the public interest gets too high, class will be forced to discontinue this work. Governments with sovereign immunity would be forced to take it on. Unfortunately , most Governments have simply not got the necessary expertise or control to replace class. Things would be bound to go wrong, but as governments are immune, the potential liability for any default would be nothing at all, which is a lot less than class is willing to stand behind."(P. Boisson (legal Adviser for BV) "Are classification Societies above the law?

It is true that lately classification societies have been subject to considerable criticism, especially after the Erika[261] incident. Since the rules of every society have to conform to international law, the ISM Code will be leading the way towards harmonization.[262]

Liability of Classification Societies is one of the most difficult issues before the maritime industry. With unlimited liability, one of the options being considered, societies must reconsider the way in which they conduct themselves. The possibility of being sued for gross negligence could force IACS members to adopt new structures and

[261] The Erika was a single skin tanker built in 1975 in Japan. On 12 December 1999, the vessel carrying more than 30.000 tons of heated heavy fuel oil ran into a winter storm. It was reported that the crew detected cracks forming in the deck and the ship developed a significant list, but the master was refused shelter in one of the French harbours. The Erika altered course but the hull broke in two and the ship sank. About 20.000 tons of heavy fuel oil cargo have washed ashore and polluted a stretch of about 500 km of the Atlantic coast of France, online: IACS Homepage <http://www.iacs.org.uk/> (date accessed: 07 August 2001).

[262] H.G. Payer, Executive Board Member Germanisher Lloyd, "The Role of Classification Societies is it changing? September 2000, online: IACS Homepage <http://www.iacs.org.uk/> (date accessed: 07 August 2001).

rewrite contracts with owners.[263] The risk of liability makes it very difficult for classification societies to carry out their role as a result of the introduction of the ISM Code which as we have seen, is one of the most significant steps forward in ship safety. Classification Societies are uniquely placed to assist builders and owners to comply with all aspects of classification Rules and Convention regulations, specifically ISM Code regulations, and thus to achieve fully internationally recognized standard of ship safety and marine pollution prevention.

It is the author's view, that the need of a framework regulating the liability of classification societies is now more imminent than ever before. Since SOLAS contemplate the existence and allows Administrations to delegate their duty of certification, classification Societies should not be above the law.

6. Classification Societies - Current Situation

In the past years the fact that a vessel was classed with any IACS member used to mean, or at least it was understood that, there was sufficient standard of quality and no further inquiries were carried out.[264]Today the situation has changed and shipowners, as well as, underwriters, have become more demanding in view of their need to be more protected.

It was expressed in IACS briefing published on January 1999, that because a classification society checks the compliance of vessels with its own structural rules, therefore it requires as much cooperation as possible of the owner, who at any rate,

[263] "IACS aims to make reform clear" (May 2001) *Lloyd's List* at 6.
[264] Croom-Johnson, *supra* note 258.

retains the primary and ultimate responsibility "the duty of care" for the safe maintenance, operation and manning of his ships.[265]

IACS is currently calling for action as ISM Code phase 2 deadline approaches. With less than a year to go, about two-thirds of the vessels covered by the ISM Code's phase 2, which will take place July 1, 2002, have yet to be certified.[266] Around 17.000 vessels designated Phase 2 ships are classed by IACS members. Currently IACS member are offering practical advice on ISM Code implementation, especially to the companies new to the ISM Code. The surveyor's work is carried out in accordance with PR9. According to IACS the important issue for companies to be ale to comply with phase 2 of the implementation of the Code is not to leave it to the last minute.

Recently three of the major classification societies, ABS, DNV, and LR, launched a joint initiative on ISM, with the aim to tackle the shortcomings in the arrangements for implementing ISM audits. In an article recently published, the three class top trio catalogued the ISM system as an ineffective on-board ship management tool. Their statement, in particular made a very telling point. According to three classification societies, one of the main problems regarding the ISM certification, is that many of the vessels which have been detained by Port States hold a SMC issued by a classification society which is different from the society which classed it. As a result the three classification societies decided that from July 2001, they would decline to issue SMC on vessels that they do not class and will no longer renew SMCs issued to such vessels.[267]

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[265] IACS Briefing, *supra* note 236.
[266] R. Bradley, IACS Permanent Secretary, IACS Press Release, August 17, 2001, online :IACS Homepage <http://www.iacs.org.uk/> (date accessed: 18 August 2001).
[267] "ISM is not working say class top trio" *Fairplay Int'l Weekly* (06 June 2001).

Classification societies are, and will continue to be, a very important source of information in case of casualty investigations of ships of their class.[268] Currently, entities within the maritime industry, can request and acquire data on IACS Class Transfers, ISM Code certifications by IACS Members and vessels suspended from IACS' Members Class,[269] but it is important not to forget that every single player involved in maritime industry has a very important role to play. Shipowners, cargo owners, Administrations, and classification societies, are all parties of the chain of responsibility to ensure maritime safety.[270]

[268] According to Rule 3.7 of the Classification Societies' Code of Ethics *"In accordance with the general principles laid down in Clause 1 of the IACS Charter, the societies shall favour participation in formal investigations into ship casualties. However, only the society with which the ship concerned is classed shall consider acceptance of an invitation to participate in any such formal investigation."*

[269] For instance, IACS has introduced measures to enhance a society's knowledge of a ship it is taking into class. These measures were included in a revision made to Transfer of Class Agreement (TOCA) which took effect on July 1, 2001. One of the most important changes included in this revision, is the commitment by all IACS members to make available the vessel classification histories for full use in the process of transfer of class. See R. Bradley, "IACS toughens TOCA" *Fairplay Int'l Weekly* (August 02 2001.)

[270] Croom-Johnson, *supra* note 258.

CONCLUSION

The Actions taken by IMO have undoubtedly helped to solve many of the problems regarding maritime safety, being the adoption of the International Safety Management Code, one of the most important achievements of the last decade.

The ISM Code has been considered by some as a double-edged sword, a view the author agrees with, in the sense that the Code can be employed to a company's benefit or detriment. A company seeking to demonstrate it has complied with all the requirements established by the Code, will use its ISM Documentation to establish that it is a responsible operator undertaking the identification of problems and properly correcting them. The whole scenario would be different for a Company which is non-compliant with the Code, given the fact that through the ISM documentation, that company will be opening the doors to regulators and prosecutors and at the same time will make it easier for them to show the companies' lack of commitment to the ISM Code and therefore its possible responsibility.

The complete Implementation of the Code will necessarily have repercussions in different aspects of the maritime industry, not only regarding the introduction of basic functional requirements for shipmanagement, but also directly influencing the way marine cargo claims are argued before courts. It is important to make clear that the ISM Code does not introduce real novelties for shipping companies, the whole issue is laid down in the fact that the Code is mandatory and imposes formal procedures to shipowners, operators, and managers who will be audited by flag states directly or indirectly in order to verify compliance with the Code. The owning or operating company is required to develop, implement and maintain a Safety Management System (SMS). The company is also compelled to obtain a Document of Compliance (DOC),

which will be issued by the Administration, once having developed and implemented a Safety Management System. Each ship must also be certified by a Safety Management Certificate (SMC) issued by the Administration, once an initial verification of compliance by way of an external audit on board the particular ship has taken place.

Certain principles in maritime law such as due diligence to make the ship seaworthy before and at the beginning of the voyage and the liability the owner, will not suffer a dramatic change as to their nature and the manner they have been laid out in legislation. Although the due diligence principle will remain as it is now understood, there will be changes as to the demonstration of the exercise of due diligence. The provisions of the ISM Code will now be a decisive factor in establishing whether or not, the owner exercised due diligence to make the ship seaworthy. The owner's right to limit his liability in case of a marine casualty will also be affected by his compliance or non-compliance with the terms of the Code.

The most crucial factors with respect to the success of the ISM Code are in the first place, its effective implementation by Administrations and secondly the establishment of uniform enforcement policies worldwide. Successful implementation depends upon many different factors, but it requires that all entities involved engage themselves in taking proper actions to carry out their tasks with the necessary commitment and dedication. The effective implementation of the Code will be in the hands of all those involved in maritime activities, such as flag States, Port States, shipowners, seafarers and most importantly classifications societies, which have been delegated by Administration to carry out the work of verification and certification of compliance with the Code. To this effect an effective system establishing to what extent classification societies may be held liable for a marine casualty must be implemented. This issue could be approached, for instance, by including rules expressly identifying the cases where a classification society is susceptible to be held liable. The new regulation could be complemented by the contractual terms classification societies and shipowners agree upon, taking into account that the terms should be as uniform as possible.

It has been only three years since the first phase of the ISM Code took effect. The next phase will be effective on July 1st 2002. Despite some views as to the failure of the Code, it is the author's opinion that it is still too early to anticipate the exact outcome of the ISM Code, and that its effectiveness or failure will have to be put to test once the Code is fully implemented and its regulations are properly followed by those who are given certain specific responsibilities in the light of the provisions of the Code. Problems will inevitably emerge during the early phase of implementation, thus, actions will necessarily be taken to communicate with seagoing personnel and especially increase their awareness and understanding of the ISM Code.

How effective the Code really is or will be, will probably be only known after several years of implementation, once it is understood that compliance with the Code is foremost based on principles of quality. The ISM Code will not completely prevent all marine casualties, but it will prevent many of them. Whatever the final outcome, it is clear that the ISM Code is shaping and will continue to shape the maritime industry and maritime trade for a very long time.

APENDIX 1

The International Safety Management (ISM) Code

Annex to IMO Assembly Resolution A.741(18)

PREAMBLE

1. The purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention.

2. The Assembly adopted resolution A.443(XI) by which it invited all Governments to take the necessary steps to safeguard the shipmaster in the proper discharge of his responsibilities with regard to maritime safety and the protection of the marine environment.

3. The Assembly also adopted resolution A.680(17) by which it further recognized the need for appropriate organization of management to enable it to respond to the need of those on board ships to achieve and maintain high standards of safety and environmental protection.

4. Recognizing that no two shipping companies or shipowners are the same, and that ships operate under a wide range of different conditions, the Code is based on general principles and objectives.

5. The Code is expressed in broad terms so that it can have a widespread application. Clearly, different levels of management, whether shore-based or at sea, will require varying levels of knowledge and awareness of the items outlined.

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.

1. GENERAL

1.1 Definitions

1.1.1 "*International Safety Management (ISM) Code*" means the International Management Code for the Safe Operation of Ships and for Pollution Prevention as adopted by the Assembly, as may be amended by the Organization.

1.1.2 "*Company*" means the Owner of the ship or any other organization or person such as the Manager, or the Bareboat Charterer, who has assumed the responsibility for the operation of the ship from the shipowner and who on assuming such responsibility has agreed to take over all the duties and responsibility imposed by the Code.

1.1.3 "*Administration*" means the Government of the State whose flag the ship is entitled to fly.

1.2 Objectives

1.2.1 The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular, to the marine environment, and to property.

1.2.2 Safety management objectives of the Company should, inter alia:

.1 provide for safe practices in ship operation and a safe working environment ;

.2 establish safeguards against all identified risks; and

.3 continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.

1.2.3 The safety and management system should ensure:

.1 compliance with mandatory rules and regulations; and

.2 that applicable codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken into account.

1.3 Application

The requirements of this Code may be applied to all ships.

1.4 Functional Requirements for a Safety Management System (SMS)

Every Company should develop, implement and maintain a Safety Management System (SMS) which includes the following functional requirements:

.1 a safety and environmental protection policy;

.2 instructions and procedures to ensure safe operation of ships and protection of the environment 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 provisions of this Code;

.5 procedures to prepare for and respond to emergency situations; and

.6 procedures for internal audits and management reviews.

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 as well as shore based.

3. COMPANY RESPONSIBILITIES AND AUTHORITY

3.1 If the entity who is responsible for the operation of the ships is other than the owner, the owner must report the full name and details of such entity to the Administration.

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.

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 to ensure that adequate resources and shore based support are applied, as required.

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 SMS and reporting its deficiencies to the shore based management.

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.

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 SMS; 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 SMS have an adequate understanding of relevant rule, 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 SMS 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 SMS in a working language 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 SMS.

7. DEVELOPMENT OF PLANS FOR SHIPBOARD OPERATIONS

The Company should establish procedures for the preparation of plans and instructions 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.

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 programs for drills and exercises to prepare for emergency actions.

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

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

9.1 The SMS should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the Company, investigated and analyzed with the objective of improving safety and pollution prevention.

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

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.

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 SMS to identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The 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.

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

11. DOCUMENTATION

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

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 SMS 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.

12. COMPANY VERIFICATION, REVIEW AND EVALUATION

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

12.2 The Company should periodically evaluate the efficiency and when needed review the SMS in accordance with procedures established by the Company.

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

13. CERTIFICATION, VERIFICATION AND CONTROL

13.1 The ship should be operated by a Company which is issued a document of compliance relevant to that ship.

13.2 A document of compliance should be issued for every Company complying with the requirements of the ISM Code by the Administration, by an organization recognized by the Administration or by the Government of the country, acting on behalf of the Administration in which the Company has chosen to conduct its

business. This document should be accepted as evidence that the Company is capable of complying with the requirements of the Code.

13.3 A copy of such a document should be placed on board in order that the Master, if so asked, may produce it for the verification of the Administration or organizations recognized by it.

13.4 A Certificate, called a Safety Management Certificate, should be issued to a ship by the Administration or organization recognized by the Administration. The Administration should, when issuing a certificate, verify that the Company and its shipboard management operate in accordance with the approved SMS.

13.5 The Administration or an organization recognized by the Administration should periodically verify the proper functioning of the ship's SMS approved.

APPENDIX 2

International Convention for the Safety of Life at Sea, 1974 (1994 Amendments)

CHAPTER IX. Management for the Safe Operation of Ships

Regulation 1 *Definitions*

For the purpose of this chapter, unless expressly provided otherwise:

1 *International Safety Management Code (ISM) Code* means the International Management Code for the Safe Operation of Ships and for Pollution Prevention adopted by the Organization by resolution A.741(18), as may be amended by the Organization, provided that such amendments are adopted, brought into force and take effect in accordance with the provisions of article VIII of the present Convention concerning the amendment procedures applicable to the annex other than chapter 1.

2 *Company* means the Owner of the ship or any other organization or person such as the Manager, or the Bareboat Charterer, who has assumed the responsibility for the operation of the ship from the shipowner and who on assuming such responsibility has agreed to take over all the duties and responsibility imposed by the International Safety Management Code.

3 *Oil tanker* means an oil tanker as defined in regulation II-1/2.12.

4 *Chemical tanker* means a chemical tanker as defined in regulation VII/8.2

5 *Gas carrier* means a gas carrier as defined in regulation VII/11.2

6 *Bulk carrier* means a ship which is constructed generally with single deck, top-side tanks and hopper side tanks in cargo spaces, and is intended primarily to carry dry cargo in bulk, and includes such types ashore carriers and combination carriers.

7 *Mobile offshore drilling unit (MODU)* means a vessel capable of engaging in drilling operations for the exploration for exploitation of resources beneath the sea-bed such as liquid or gaseous hydrocarbons, sulphur or salt.

8 *High-speed craft* means a craft as defined in regulation X/1.2.

Regulation 2 *Application*

1 This chapter applies to ships, regardless of the date of construction, as follows:

1. passenger ship including passenger high-speed craft, not later than 1 July 1998;

2. oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high-speed craft of 500 gross tonnage and upwards, not later than 1 July 1998;and

3. other cargo ships and mobile offshore drilling units of 500 gross tonnage and upwards, not later than 1 July 2002.

1 This chapter does not apply to government-operated ships used for non-commercial purposes.

Regulation 3 *Safety Management Requirements*

1 The Company and the ship shall comply with the requirements of the International Safety Management Code.

2 The ship shall be operated by a company holding a Document of Compliance referred to in regulation 4.

Regulation 4 ***Certification***

1 A document of Compliance shall be issued to every company which complies with the requirements of the International Safety Management Code. This document shall be issued by the Administration, by an organization recognized by the Administration, or at the request of the Administration by another Contracting Government.

1 A copy of the Document of Compliance shall be kept on board the ship in order that the master can produce it on request for verification.

2 A certificate, called a Safety Management Certificate, shall be issued to every ship by the Administration or an organization recognized by the Administration. The Administration or organization recognized by it shall , before issuing the Safety Management Certificate, verify that the Company and its shipboard management operate in accordance with the approved safety-management system.

Regulation 5 ***Maintenance of Conditions***

The Safety system shall be maintained in accordance with the provisions of the International Safety Management Code.

Regulation 6 ***Verification and Control***

1 The Administration, another Contracting Government at the request of the Administration or an organization recognized by the Administration shall periodically verify the proper functioning of the ship's safety-management system.

2 Subject to the provisions of paragraph 3 of this regulation, a ship is required to hold a certificate pursuant to the provisions of regulation 4.3 shall be subject to control in accordance with the provisions of regulation XI/4. For this purpose such certificate shall be treated as a certificate issued under regulation I/12 or I/13.

3 In cases of change of flag State or company, special transitional arrangements shall be made in accordance with the guidelines developed by the Organization.

APPENDIX 3

FORMS OF DOC, SMC, AND INTERIM DOC AND SMC

IMO Resolution A.788(19) Guidelines on Implementation of the ISM Code by Administrations

DOCUMENT OF COMPLIANCE

(Official seal) (State)

Issued under the provisions of the
INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1974, as amended

Under the authority of the Government of: .....
Name of the State

by .....
person or organization authorized

Name and address of the Company .....

.....
see paragraph 1.1.2 of the ISM Code

THIS IS TO CERTIFY THAT the safety management system of the Company has been audited and that it complies with the requirements of the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code)* for the types of ships listed below (delete as appropriate):

Passenger ship
Passenger high-speed craft
Cargo high-speed craft
Bulk carrier
Oil tanker
Chemical tanker
Gas carrier
Mobile offshore drilling unit
Other cargo ship

This Document of Compliance is valid until ....., subject to periodical verification.
Issued at .....
place of issue of the document

Date of issue .....

.....
Signature of the duly authorized official issuing the document
(Seal or stamp of issuing authority, as appropriate)

*Adopted by the Organization by Resolution A.741(18).

ENDORSEMENT FOR ANNUAL VERIFICATION

THIS IS TO CERTIFY THAT, at the periodical verification in accordance with regulation 6 of chapter IX of the Convention, the safety management system was found to comply with the requirements of the ISM Code.

1st ANNUAL VERIFICATION

Signed:.....

(Signature of authorized official)

Place: .....

Date: .....

2nd ANNUAL VERIFICATION

Signed:.....

(Signature of authorized official)

Place: .....

Date: .....

3rd ANNUAL VERIFICATION

Signed:.....

(Signature of authorized official)

Place: .....

Date: .....

4th ANNUAL VERIFICATION

Signed:.....

(Signature of authorized official)

Place: .....

Date: .....

SAFETY MANAGEMENT CERTIFICATE

(Official seal) (State)

Issued under the provisions of the
INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1974, as amended

Under the authority of the Government of: .....
Name of the State

by .....
person or organization authorized

Name of ship: .....

Distinctive numbers or letters: .....

Port of registry: .....

Type of ship*: .....

Gross tonnage: .....

IMO Number: .....

Name of ship: .....

Name and address of Company: .....

.....
see paragraph 1.1.2 of the ISM Code

THIS IS TO CERTIFY THAT the safety management system of the ship has been audited and that it complies with the requirements of the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code),** following verification that the Document of Compliance for the Company is applicable to this type of ship.

This Safety Management Certificate is valid until ....., subject to periodical verification and the validity of the Document of Compliance.
Issued at .....(place of issue of the document)

Date of issue .....

.....

Signature of the duly authorized official issuing the certificate)
(Seal or stamp of issuing authority, as appropriate)

* Insert the type of ship from among the following: passenger ship; passenger high-speed craft; cargo high speed craft; bulk carrier; oil tanker; chemical tanker; gas carrier; mobile offshore drilling unit; other cargo ship.
** Adopted by the Organization by resolution A.741(18).

ENDORSEMENT FOR PERIODICAL VERIFICATION AND ADDITIONAL VERIFICATION (IF REQUIRED)

THIS IS TO CERTIFY THAT, at the periodical verification in accordance with regulation 6 of chapter IX of the Convention, the safety management system was found to comply with the requirements of the ISM Code.

INTERMEDIATE VERIFICATION

To be completed between the 2nd and 3rd Anniversary Date

Signed:.....

(Signature of authorized official)

Place: .....

Date: .....

ADDITIONAL VERIFICATION*

Signed:.....

(Signature of authorized official)

Place: .....

Date: .....

ADDITIONAL VERIFICATION*

Signed:.....

(Signature of authorized official)

Place: .....

Date: .....

ADDITIONAL VERIFICATION*

Signed:.....

(Signature of authorized official)

Place: .....

Date: .....

* If Applicable

INTERIM DOCUMENT OF COMPLIANCE

(Official seal) (State)

Issued under the provisions of the
INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1974, as amended

Under the authority of the Government of: .....
Name of the State

by .....
person or organization authorized

Name and address of the Company .....

.....
see paragraph 1.1.2 of the ISM Code

THIS IS TO CERTIFY THAT the safety management system of the Company has been audited and that it complies with the requirements of the International Management Code for the Safe Operation of Ships and for the Pollution Prevention (ISM Code)* for the type(s) of ships listed below (delete as appropriate):

Passenger ship
Passenger high-speed craft
Cargo high-speed craft
Bulk carrier
Oil tanker
Chemical tanker
Gas carrier
Mobile offshore drilling unit
Other cargo ship

This Document is valid until ..... Issued at
.....(place of issue of the document)

Date of issue .....

.....

(Signature of the duly authorized official issuing the certificate)

(Seal or stamp of issuing authority, as appropriate)

*Adopted by the Organization by resolution A.741(18).

INTERIM SAFETY MANAGEMENT CERTIFICATE

(Official seal) (State)

Issued under the provisions of the
INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1974, as amended

Under the authority of the Government of: .....
Name of the State

by .....
person or organization authorized

Name of ship: .....

Distinctive numbers or letters: .....

Port of registry: .....

Type of ship*: .....

Gross tonnage: .....

IMO Number: .....

Name of ship: .....

Name and address of Company: .....

.....
see paragraph 1.1.2 of the ISM Code

THIS IS TO CERTIFY THAT the safety management system of the ship has been audited and that it complies with the requirements of the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code),** following verification that the Document of Compliance for the Company is applicable to this type of ship.

This Safety Management Certificate is valid until .....

Issued at .....(place of issue of the document)

Date of issue .....
.....

(Signature of the duly authorized official issuing the certificate)

(Seal or stamp of issuing authority, as appropriate)

* Insert the type of ship from among the following: passenger ship; passenger high-speed craft; cargo high speed craft; bulk carrier; oil tanker; chemical tanker; gas carrier; mobile offshore drilling unit; other cargo ship.

** Adopted by the Organization by resolution A.741(18).

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