THE LONDON SHIPPING LAW CENTRE

UNIVERSITY / BUSINESS FORUM

The ISM Code: The Road to Discovery?

by

Lord Donaldson of Lymington

Inaugural Memorial Lecture of
Professor Cadwallader
26th March 1998

Sponsored by:

|L|L|P|

LLP Limited

Shell International
Trading & Shipping Co. Ltd.

THE CADWALLADER MEMORIAL LECTURE

26 MARCH 1998

THE ISM CODE. THE ROAD TO DISCOVERY?

It is a great honour to be invited to give the first of an annual series of lectures in honour of the late Professor F.J.J. Cadwallader. Others have paid deserved tributes to his qualities as a teacher of maritime law, as one who broke down barriers between teacher and student and as one who had an outstanding ability to make and keep friends. I can only add that in the context in which I came to know him - the British Maritime Law Association and the international maritime conference circuit - his contributions were invaluable, displaying not only legal scholarship, but a complete grasp of the practicalities of the maritime industry.

In calling this talk "The ISM Code. The Road to Discovery?", I have put a question mark at the end, because it is too early for anyone to be certain. However I have little doubt that it will prove to be such a road.

But, you may ask, "what do you mean by discovery?". To the litigant "discovery" is, of course, the process by which you hope to get your opponent to prove your case from his own documentation. The Woolf reforms of the civil justice system are expressly designed to limit the process of discovery as being both expensive and time wasting. What price then the ISM Code as an engine of discovery?

The vice of the normal general order for discovery is that the party giving it is the sole judge of what needs to be disclosed.

Some will comply properly by disclosing all documents which assist their own or their opponents case or could put their opponent onto the track of evidence which might be relevant.

Others will take a much more limited view of their obligation. This may not involve deliberate dishonesty. It is a well known fact of judicial life that if you ask counsel to estimate the length of a case, he will make a very full estimate of the time which he requires, but will add little time for his opponent who, almost by definition, needs little time to elaborate a non-existent case. So too with discovery. Since the opponent has no case, there is little that need be disclosed on the footing that it may assist him.

Yet others, with a firm eye on the expense of their professional time, will make little effort towards deciding what is and is not truly discloseable. Instead they will list everything in sight and leave it to the other party to do what should have been their own work in the course of inspection.

In my day at least an application for specific discovery was a great rarity and usually only arose when one relevant document referred to another which had not been disclosed and whose contents were unknown. It was usually an unproductive exercise.

For reasons which I will try to indicate later, my belief is that whilst the Woolf reforms will rightly limit the scope of general discovery and, in

particular, will put paid to the tactics of presenting your opponent with a haystack and inviting him to look for the needle, it will, again rightly, open the doors to specific tightly focused orders. The ISM Code, although primarily not so intended, will I believe prove to be the lens which produces that accurate focusing.

But that is not the primary destination or justification for the ISM's road to discovery. In the short and medium term it 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.

In 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.

But first I want to go back a bit. Time was when ships put to sea with masters who were also owners or closely related to the owners. I know of no better incentive to safe navigation and proper maintenance. Indeed I have in the past suggested that the whole problem of sub-standard shipping could be solved overnight by an international convention requiring ship owning companies to nominate a supercargo to sail with the ship on all her voyages. Under the Donaldson convention the supercargo would have an uninsurable financial interest in the vessel and would be a member of the board, if not the Chairman. Unfortunately, if understandably, my suggestion has not been acted upon.

The passing of that age led in due course to two developments. They were the emergence of classification societies whose task was to give the insurance market some comfort as to the seaworthiness of vessels sought to be insured and the adoption of a number of international conventions laying down minimum standards.

The weakness of the classification societies as guardians of ship safety lay in the fact that they competed for business and were paid by the ship owners. Thus it was difficult for them to be more strict than their competitors, if they wanted to stay in business. This particular weakness has now to some extent been cured by the creation of the International Association of Classification Societies (IACS) which imposes and polices the quality of its members' work and prevents owners transferring from one member society to another simply in order to avoid having to take remedial action required by the first society. The remaining weakness lies in the fact that not all classification societies are members, although I believe that IACS members classify 90% of the world shipping.

The weakness of the international convention approach was, and is, two fold. First it can only work if the conventions are ratified by all or most of the maritime nations. Inevitably this can only be achieved by adopting the lowest common denominator of minimum standards. The second is that the responsibility for enforcement is that of the states whose flags are worn by individual vessels. To say that the seriousness with which flag states take this responsibility varies considerably is a gross understatement.

By and large the older maritime states do take it very seriously and this is expensive for the owners of their flagged vessels, although there can be competitive advantages. I am told that some cruise liners fly the British flag in one form or another, because they believe that it gives reassurance to passengers. After them come those who do try, but either lack the skill or resources necessary to succeed. At the bottom of the pile come states who regard having a ship's register as a nice little earner - which it is if you take fees, but spend nothing on enforcement - and a signal of national maritime virility.

Sadly there is almost complete freedom to transfer vessels from one register to another. If you want to make economies at the price of safety, there are a number of national registers which will welcome you. As a result of the intensely competitive nature of the international shipping industry and its over capacity, it is a fact that there is a steady departure from flag states which take their responsibilities more seriously to those which take them more lightly. This is provable not only statistically, but anecdotally.

Not many years ago I attended a shipping dinner. My neighbour told me that his occupation was the preparation of the necessary certificates of compliance with the international convention for ships transferring to a particular flag. I asked what inspections took place before the certificates were signed by or on behalf of the flag state concerned. His reply was that pressure to transfer was such that certificates had to be issued without verification. They did however try to inspect within five years after

transfer. I need hardly say that the state concerned has an unenviable record for casualties.

The IMO is trying to remedy this disparity between flag states, but it is an uphill, unrewarding and at present largely unsuccessful task. That is a fact of life and has given rise to a second line of defence, namely Port State Control. This is control by the maritime authorities at ports of call.

This would seem a simple solution, but it is not. The threat from sub-standard shipping is not only to ports of call, but to the whole coastline which they pass and indeed to the territorial waters and Extended Economic Zone of coastal states up to 200 miles to seaward. Ships have an internationally accepted right of innocent passage through these waters and, when exercising this right, they are only subject to control by the state whose flag they wear. Furthermore, even in the case of ships which enter ports, any coastal state which takes unilateral action in a region where there are alternative ports, places itself at a serious commercial disadvantage not only for its shipping related industries, but for its whole export and import activity.

Accordingly coastal states which do not have the advantage of relative isolation, as do Australasia, Canada and the USA, have to harmonise their approach to port state control by agreement with their neighbours. The United Kingdom achieves this by membership of the Paris Memorandum of Understanding (PMOU), the other members being Belgium, Denmark, Finland, France, Germany, Greece, The Republic of Ireland, Italy, The Netherlands, Norway, Portugal, Spain and Sweden. Canada is also a

member which provides a useful link with the newer Tokyo scheme, covering Asia and the Pacific. Two other schemes cover the Caribbean and Latin America (Acuerdo de Vina del Mar).[1]

The purpose of the PMOU is not only to harmonise levels of inspection - the agreed minimum rate is 25% of foreign ships entering PMOU ports[2] - but to pool information and to evolve common targeting policies. There are a number of factors which together dictate targeting in the PMOU area, all based upon past performance. One of those factors is the performance of vessels of particular flags. I was frankly astonished to find that there are currently no less than twenty-four targeted flags. Some I would have expected, but not so many and not Portugal and Greece which are, after all, PMOU countries. It should be added that the list does not include Liberia, which the public unfairly seems to regard as the "archetypal flag of convenience".[3] In 1997 its ships were below average in terms of detentions.

The detailed results of inspections leading to detention for serious deficiencies in terms of internationally agreed safety standards are held on a central PMOU database. This information should be, but is not, available to underwriters, charterers and others with a legitimate interest in the seaworthiness of ships with which they may consider becoming

---

1 The UK P&I Club have published two booklets on Port State Control under each of these schemes together with that under the USA. They are a mine of information which no one actively engaged in the industry should be without.

2 The UK in practice inspects about 35%.

3 The full list is Syria, Romania, Honduras, Belize, Turkey, Cuba, Morocco, Lebanon, Egypt, Algeria, St Vincent and the Grenadines, Malta, Iran, Portugal, Cyprus, Bulgaria, Estonia, Croatia, Barbados, Panama, China, Lithuania, Greece and the Ukraine.

involved. Yet greater selectivity on the part of users of shipping (including travel agents in the context of cruise ships) would make a major contribution towards taking the profit out of running sub-standard ships. The USA puts the equivalent information on the internet.

To its credit the United Kingdom government did take an initiative in 1995 by starting to publish monthly lists of UK detentions and an indication of the reasons for them. This information is now also on the internet. These figures make depressing reading. One might have thought that there would be startling improvements, but there are not. In the six months ending in December 1995 8% of the 1140 ships inspected in UK ports were detained, figures which the then Minister of Transport (Dr Mawhinney) described as "stark and disturbing". At the end of December 1997 the rolling twelve month average figure was 9.1%.

I can only point to two possible mitigating factors. The first is that targeting has undoubtedly been improved and, accordingly, the state of shipping may have been worse in 1995 than the figures suggest. The second is that there are ships which start their voyage in a completely seaworthy state, but later suffer damage. The "Sea Empress" is an example. When, very properly, they put into port for repairs, they should not be shown in the same category as those whose owners have ignored their responsibilities, thus distorting the message.

The UK's 1997 report on Port State Control has just been published. It lists the flag states 20 or more of whose ships were inspected during the year. Belize and Turkey head the list with respectively 42.9% and 22.6%

of ships inspected being detained. They are followed by Malta (21%), Cyprus (13.1%), Panama (11.5%), St Vincent & Grenadines (11.5%), Greece (10.2%) and Antigua & Barbuda (9.4%).

The booby prize must go to Malta. A small bulk carrier wearing her flag was detained at Newport in November 1997 with 27 separate deficiencies, 16 of which were detainable on their own. There were numerous cracks to the shell and deck plating from which water was leaking. There was extensive corrosion and wastage to the internal structure of the tanks and several bent and creased frames caused by contact damage. In addition the fire main was holed and the main and emergency radio transmitters were inoperative. The vessel had passed her flag state inspection the previous day without any mention of the structural, fire and radio deficiencies.

Need one say more of the reliance which can be placed on some countries' flag state control?

The Achilles heel of port state control is risk analysis. In this context it is the analysis by owners of sub-standard shipping of the risk of detention. Leaving aside the new situation which will be created by the advent of the ISM Code, I have long believed that probably the only, and certainly the most cost effective, solution is vastly to increase the resources devoted to port state control. Initially this would be very expensive, but once owners of sub-standard ships revised their risk analysis to conclude that the risk of detention was unacceptable, the problem would go away, at least so far as Northern European waters were concerned.

It was against this general background, not to mention the special problem of the appalling rate of loss of bulk carriers - 167 ships and 1,352 lives lost in the 18 years 1980-1997 - that thought was given to a change from a regulatory framework to one based upon a "safety culture". This was supported in 1992 in a report "Safety Aspects of Ship Design and Technology" by a House of Lords Committee under the Chairmanship of Field Marshall Lord Carver. The Committee hoped that a "safety case" regime for individual vessels, based upon primary safety goals set by the IMO, would largely eliminate the need for a regulatory system based upon compliance and evasion. The Committee accepted that this must be a very long term goal.

The elimination of a regulatory regime is not likely to be possible in the near future or, I think, at all. But what the ISM Code seeks to do is to superimpose a safety case regime which is regulatory in the sense that it is compulsory and is intended to be fully enforceable, whilst being specific only in its general requirements.

How will it work?

Flag states will continue to be responsible for ensuring that their ships comply, and continue to comply, with current international conventions. Some, such as the STCW convention have recently been updated and some, such as the loadline convention will almost certainly have to be revised in the near future not least in the context of the technical findings in the case of the "Derbyshire" which were published two weeks ago. In

addition flag states will be responsible for ensuring that their ships, both individually and collectively, adopt and comply with the ISM Safety Case Code.

Port states will continue to be entitled and, in their own interests, bound to monitor compliance by visiting ships, with all the practical problems which that entails.

The ISM Code is already mandatory for cross channel ferries and in general comes into force for other passenger ships, tankers, chemical and gas carriers, bulk carriers and high speed cargo craft on 1 July of this year. Other cargo vessels and mobile off-shore drilling units are required to comply by 1 July 2002.

There is at present some problem with the definition of a bulk carrier which, it is thought, may enable some bulkers to masquerade as general cargo vessels, thus giving themselves an extra four years before they need accept the Code. This is being looked at as a matter of urgency. A practical solution is being adopted by the Isle of Man where, as I understand it, the master will be asked whether the ship has ever carried a bulk cargo. If it has, he will be told that his ship is a bulker!

However, the important point is that experience with enforcing the Code in respect of the limited, although large, class of ships which first become subject to its provisions will prove invaluable when, four years later, the remainder of shipping becomes subject to it.

The Code requires every ship owner, or other person who has assumed responsibility for the operation of the ship, to formulate and put into practice a policy in relation to that ship which will in fact achieve the following objectives:-

1. Provide for safe practices in ship operations and a safe working environment.

2. Establish safeguards against all identified risks, which itself involves a wide ranging obligation to undertake a risk assessment in order to identify them.

3. Continuously to improve safety-management skills of personnel both ashore and afloat, including preparing for emergencies related both to safety and environmental protection.

Ship owners cannot just claim that they have met the minimum standards provided by the existing regulatory framework. They have, in effect, to create their own regulatory regime and show that they are complying with it. The Code does not content itself only with general objectives. It requires that in achieving those objectives, the ship owner shall create for himself, and for each of his ships individually, a safety management system which will ensure compliance not only with the existing regulations but will also take full account of non-mandatory codes, guidelines and standards recommended by organisations, administrations, classification societies and maritime industry organisations. In other words he will be unable to turn a blind eye to "best practice" which itself will over time

become "better and better practice". If he does not follow suit, he will have to explain why.

The Code does not stop there. Too many ship masters and crews are let down by a shore based staff and the Code requires that the ship owners own safety management system shall extend to them as much as to the seafarers. It also requires the ship owner himself to define levels of authority and levels of communication both ashore and afloat and between ship and shore. It requires him to put in place procedures of his own devising for effectively reporting accidents and non-conformities with the Code within his organisation, whether ashore or afloat. This would include near misses. In other words he has to have a system which will record the failures within his own system and do so without the seal of the confessional. Not content with that, his safety management system has to provide for independent internal audits and management reviews.

If anyone thinks that evolving a company and ship specific safety management system complying with the Code can be achieved by buying an "off the shelf" system, let them think again. Experience, already acquired, shows that it involves months rather than weeks of work.

Of particular interest to litigators is a Code requirement that in order to enforce the safe operation of each ship, and I emphasise the word "each", and in order to provide a link between the owner and those on board, there shall be a "designated person" with direct access to the highest level of management. He has to have both the responsibility and the authority to monitor the safety and pollution prevention aspects of the operation of

each ship and the duty of ensuring that adequate resources and shore based support are applied as required.

I regard this as not only one of the central pillars of the code, but also as the errant ship owners Achilles heel. The "blind eye" ship owner is faced with a "catch 22" situation. If he hears nothing from the designated person, he will be bound to call for reports, for it is inconceivable there will be nothing to report. If the report is to the effect that all is well in a perfect world, the ship owner would be bound to enquire how that could be, as the safety management system is clearly intended to be a dynamic system which is subject to continuous change in the light not only of the experience of the individual ship, and of the company as a whole, but also of the experience of others in the industry. So there will always be something to report. Quite apart from this, the ship owner can at any time be called upon to produce documentary evidence of his internal audits of every area of his system including the work of the designated person.

I have stressed that safety-management policies have to be evolved on a ship by ship basis. Each such policy has to be certified by or on behalf of the Flag state as being in compliance with the ISM code. In addition, and this is a complete novelty, each shipowner has personally to obtain a certificate, called a 'Document of Compliance', certifying, in effect, that he is a fit and proper person to be a ship operator in the light of the safety-management policies which he has evolved and is enforcing in relation to himself and each of his ships.

So we are to have approved and certificated shipowners, approved and certificated safety-management systems for his shore-based organisation and approved and certificated safety-management systems for his ships coupled with independent auditing of the whole.

So what can go wrong? On the face of it, full compliance would at a stroke eliminate all shipping accidents and pollution, save only those brought on by unforeseen perils of the seas and unforseeable defects in safety-management policies.

Sadly the answer is that quite a lot can and will go wrong. We live in a wicked world and the greater the financial pressures, the wickeder some of us will become. Shipowners are no more wicked than others, but overcapacity (which hopefully the ISM Code will help to eliminate), the international nature of competition within the industry and low or negative margins of profit will lead many shipowners into temptation. A few, it has to be said, need no temptation. It just comes naturally.

In practical terms, some flag states will undoubtedly ignore their responsibilities and will be prepared to certify compliance in the teeth of the evidence or in spite of it. Furthermore they are entitled to delegate the duty of issuing Documents of Compliance and Safety Management Certificates to non-governmental organisations. I have no doubt that many flag states, although not the UK, will adopt the delegation route and some flag states will not be too concerned with whether the delegate is completely scupulous or has sufficient expertise.

I have already been asked 'what is new? Is this not this the same old scheme with 10 times the paper involved?' I do not believe this to be the case.

Of course there is a lot of paper involved. Owners will have to provide very detailed operational manuals, both for each of their ships and for their shore-based staff and these will have to address in detail not only normal operation, but varying degrees of abnormal and emergency situations. Furthermore there will have to be far more record keeping and written communications between ship and shore. All this is, of course, accepted practice in the aviation industry. No commercial aircraft takes off without even the most experienced pilots going meticulously through a detailed checklist. And all defects, however small, have to be recorded at the end of the flight. Of how many ships can this be said?

Accepting, as I do, that until some form of discipline can be introduced in relation to Flag states by, for example, an IMO resolution withdrawing the right of offenders to issue internationally accepted certificates, the real burden of making this system work will fall upon port state control. However I hope that classification societies , underwriters, charterers and shippers will provide powerful assistance in their own interests, by withdrawing class, by loading premiums or declining to insure and, in the case of shippers and charterers, by becoming much more selective in the shipping which they use.

Where the comment that this is the same old paper chase is particularly wide of the mark is the assumption that under the present system port state

inspectors simply inspect certificates, unless they can see through holes in the hull or the lifeboat falls have clearly rusted up. This is quite untrue. Port state inspectors are already entitled, and do, look behind the certificates if there is clear evidence that the certificates may not reflect the true position. Surveyors before boarding a vessel will often have a lot of information about her previous port state inspections and the record of her flag state, owners and manager and classification society. On boarding, an experienced surveyor will, when appropriate, take what has been described as the 'scenic route' to the bridge or engineroom. This will either tend to allay or confirm his suspicions. In the latter case he is fully justified in making an in-depth inspection, although he cannot undertake as extensive an inspection as could a Flag state or classification society, because he cannot require the vessel to enter a dry dock for this purpose.

The ISM code, because of its all-embracing character, will give vastly greater scope for enquiry. The port state inspector may not be able to set fire to the ship in order to see whether the crew is familiar with the laid-down drill for dealing with such an emergency. But surgeons are not examined on the basis of operations performed in front of the examiners. They are subject to viva voce examinations which reveal whether, without the book, they know what to do and how to do it. The scope for such examinations by port state inspectors will be almost limitless. In 'failing' candidates which may or may not involve immediate detention they will not, as now, be limited to physical deficiencies which they consider dangerous. They will also be able to prove and record that the manual was inadequate or was misunderstood by or unknown to the crew. This will, at

the very least, influence the extent and outcome of any subsequent inspection.

Initially it may be that detention will only follow if the vessel was in such a condition that she would have been detained irrespective of the ISM code or if she is not properly certified under that code. Many shipowners have done little or nothing about complying with the code, believing that if enough of them ignore it, it will go away or that there will be extensions of time for compliance. Compliance levels are expected to be only 70% by July of this year. IACS has established a useful database which is intended to disclose which ships have and have not achieved ISM certification, although this cannot at first be comprehensive.

It is now clear that the code will not go away and that there will be no extension of time. The PMOU authorities consider it a real probability that so many ships will have to be detained for absence of certification, that there will be a major problem of congestion. It has therefore been agreed that, in circumstances in which the condition of the ship is not such that it would have to be detained anyway, she may be allowed to proceed on terms that she will not again be allowed to enter any PMOU port until she has been fully certified.

The next stage will involve inspections which go behind the ISM certificates to varying, but progressively more aggressive, degrees where targeting considerations and prima-facie evidence of non-compliance make this necessary.

As to the final stage, I would hope that there would be a need for far fewer inspectors who will need to conduct relatively infrequent spot-checks, but I do not expect to live to see that day.

Thus far I have been going on about maritime rather than legal matters, because, in the context of the wider picture, I think that they are more important and much more interesting. But it would be wrong for me to ignore possible legal developments which are being widely discussed.

First let me say a word about the problem of whether it is illegal for United Kingdom underwriters to insure a ship which does not have ISM certification. Surely this must depend at least in part upon whether to trade such a ship is unlawful by the law of its flag. It might also depend upon whether underwriters knew that it was intended to trade it in waters in which, by local law, to do so was a criminal offence. Surely a much more sensible approach is to refuse to insure such a ship, not on the basis of possible illegality, but upon the basis that it poses an unacceptable risk.

Second, there is the vastly important question of whose acts or omissions are to be attributed to the shipowner personally, as contrasted with those for which he has only vicarious, if any, liability. This, of course, arises in the context of the privity of the assured under Section 39(5) of the Marine Insurance Act, 1906, the criminal liability of a shipowning company for involuntary manslaughter and limitation of liability under the 1976 Convention.

On none of these topics have I any concluded view and I am heartened to notice that neither has Dr Aleka Mandaraka-Sheppard in her paper 'The International Safety Management Code In Perspective'[4] which should be required reading.

I have, however, two tentative thoughts which I would like to air. The first is based upon the fact that, as she points out, the attitude of the courts towards attribution can be influenced by context. That context would not only be Section 39(5), a charge of involuntary manslaughter or a claim to limitation, but also the ISM code and the policy underlying it. That policy, enshrined directly in international law and indirectly in national laws is, quite clearly that the shipowning company has a personal responsibility for the system at all levels.

This is not to say that it has a personal responsibility for each and every negligent act or omission by its servants or agents. Far from it. But I should be surprised if in many cases it was not possible to contend successfully that there were two concurrent causes of the loss the subject matter of the claim. One was the negligent act and the other was the defect in the safety management system, for which the shipowning company would be personally liable. I have a clear recollection of being told by a specialist in industrial injury work of the difficulty of successfully contending that the employer had discharged his personal duty to establish a safe system of work. Either he had not done so or, contrary to the evidence, the accident never happened. The only escape was to show that the accident was not foreseeable, and that defence very rarely succeeded.

---

4 P&I International Volume 10 (June 1996 and Lloyd's List 17 April 1996).

There is a special problem where the shipowning company has formally transferred responsibility for the operation of the ship to another organisation or person, such as a manager or bare boat charterer and has registered that transfer with the flag state. I would suggest, tentatively, that this amounts to the formal creation of an alter ego, of the ship owner with all the consequences that that would imply.

I firmly believe that in due course it will be found that the introduction of the ISM code will indeed be the road to discovery in both senses of the word - documentary discovery and, which is far more important, the discovery and identification of substandard shipowners leading to their departure from the scene. Whether I shall be around at that latter stage is a more moot point.

Lord Donaldson of Lymington

March 1998

THE LONDON SHIPPING LAW CENTRE
Faculty of Laws ~ University College London
Bentham House ~ Endsleigh Gardens ~ London WC1H 0EG
Tel: 0171 391 1512 ~ Fax: 0171 387 9597 ~ E-mail: l.fretton@ucl.ac.uk