

Article originally written for Maritime Risk International
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‘Does size make a difference?’

In this article I would like to explore an issue which still seems to be far from clear – even eight years after Phase 1 - ISM compliance deadline – i.e. in order to comply with the requirements of the ISM Code what should be included within the documented procedures which support the Safety Management System (SMS) and what records should be maintained?

Although not exactly an ‘ISM Case’, the judgement in the ‘Eurasian Dream’¹ considered in quite some detail the content and size of the manuals which were onboard. The judge in the case, Mr Justice Cresswell, was very critical of the voluminous size of the system as well as the irrelevance of content of some of the volumes – which did not apply to that type of ship. Indeed, I have seen myself, on board ships, specially built book cases containing in excess of 50 files of documented procedures. Often they look very impressive – although collecting dust – they are still looking very new because they are never taken off the shelves and used in practice. At the IMO Maritime Safety Committee meeting in May this year, as I discussed in my last article in MRI, a report was presented on the effect the ISM Code was having since implementation². Amongst the conclusions coming out of the report was an unambiguous recommendation that there should be a reduction in the amount of paper work generated from burdensome Safety Management Systems. I think that will be music to the ears of many Captains and other seafarers as well as ship operators. However, to say ‘reduce the paperwork’ is easy and welcome news – but it may be quite a difficult task to achieve in practice!

To understand the nature of the problem it is perhaps worth standing back and asking ourselves why this paperwork is being produced in the first place. At one level we can say that the paperwork is being produced to satisfy the requirements of the ISM Code – but we must go one step further back, I would suggest, and recognise that it is being produced to make ships safer and seas cleaner. I suspect that some at the sharp end would question whether, in practice, the paperwork is helping to achieve that goal. The idea is surely that by having documented procedures it should be possible to ensure a type of quality control to ensure that specific tasks are uniformly carried out to a high standard. By recording what we are doing we have a means of checking and confirming that we have followed the correct procedure and also to provide data which can be used to measure our success such that we can learn from what we are doing within a cycle of continual improvement. I am sure it was not the intention of the original draftsmen of the Code at the IMO, although it was clearly inevitable, that the documented procedures and the records which would be required to be produced as evidence to confirm compliance to a whole range of individuals - from, Flag State Administration, Port State Control Inspectors, investigating lawyers and the courts.

¹ *Papera Traders Co Ltd & others v. Hyundai Merchant Marine Co & Another (The ‘Eurasian Dream’)*; [2002] 1 Lloyd’s Rep. 719

² MSC 81/17/1 – 21 December 2005 – ‘Role of Human Element – Assessment of the impact and effectiveness of the ISM Code.’

This secondary requirement should have been coincidental, a by-product, – but in practice has tended to dominate and determine how the documented system is structured and what records are maintained. Whilst the two goals may be coincidental – that does not necessarily mean that the end product will turn out to be the same.

There is nothing in the ISM Code which requires mountains of paper to be produced. It is perhaps worth reminding ourselves of what Section 11.3 of the Code actually says:

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

Interestingly the ‘Safety Management Manual’ (SMM) is referred to in the singular – although, in practice, there are invariably more than one manual. The functional requirements of the SMS are summarised in Section 1.4:

1.4 Functional requirements for a safety management system
Every Company should develop, implement and maintain a safety management system 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.

Although other Sections of the Code do expand a little on these functional requirements and add some further requirements of the Company – for example Section 7 requiring the Company to *establish procedures for the preparation of plans and instructions, including checklists as appropriate, for key shipboard operations....* There was in fact very little guidance provided by IMO on what the end product would look like – in fact it was quite the opposite – and deliberately so. On the very first page of the Code, at paragraph 4 of the Preamble, it is clearly pointed out that:

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.

The ship operating companies were, in principle at least, being given great latitude and freedom to do their own thing in creating a SMS which fitted their own individual company and the way they operated – provided it satisfied those general principles

and objectives. This should, perhaps, have been one of the greatest strengths of the Code but, I fear in some cases at least, became one of its greatest weaknesses.

The result has been that not only was each ship operating Company left to apply its own interpretation of what was required but each Flag State Administration was also left to make its own interpretation –although IMO did provide some guidance in Resolution A.788(19)³. Many of the Administrations delegated the task of verifying and certification to ‘Recognised Organisation’ – R/O’s – who were in the main the Classification Societies – and each of the R/O’s had their own interpretation of what must be included in the SMS manual(s). A ship may visit many different ports and countries during the course of its commercial trading ventures. Each of these countries, through their individual Port State Control organisation, will have made their own interpretation of what is required. There were also a number of ‘ISM Consultants’ who came on the scene in the early and mid 1990’s offering their services to the ship operating companies to help them set up their SMS – sometimes by way of a ready made ‘off-the-shelf’ set of manuals. But each of these ‘Consultants’ applied their own interpretation of what was required.

In an attempt to introduce some level of uniform international interpretation the Industry produced an excellent commentary through the International Chamber of Shipping (ICS) / International Shipping Federation (ISF) in the ‘Guidelines on the application of the IMO International Safety Management (ISM) Code’. The International Association of Classification Societies (IACS) produced – ‘Recommendation No 41 – Guidance for IACS Auditors to the ISM Code’ and a number of the MOU’s provided guidance to their respective Port State members.

What I have seen in practice, however, is an enormous spectrum of systems – ranging from the good through the bad to the ugly! I do not believe there is yet anything we could identify which could be said to define an internationally accepted standard of compliance. Indeed I am constantly being told anecdotal tales of not only inconsistencies between different organisations in what they require to satisfy their interpretation of compliance but even different individuals within the same organisation cannot agree.

At one very important level the ships and the ship operating companies are compliant with the ISM Code in that the Company holds a valid Document of Compliance (DOC) and the ship a valid Safety Management Certificate (SMC) – each confirming that the appropriate Administration or R/O was satisfied, according to its own interpretation of the Code, that the requirements had been met. At this level, legal compliance would appear to be satisfied. However, it is not at all unusual though for ships with such valid SMC’s to have non-conformities raised against them, or even detention notices by Port State Control – who are basically saying that, in their opinion, the ship is non-compliant.

What happens if the ship is involved in some accident or incident – possibly involving a considerable sum of money? Increasingly, potential claimants and insurers are looking closely at the way the SMS has been set up in practice – the scope and

³ – Guidelines on Implementation of the International Safety Management (ISM) Code by Administrations – which were replaced with Revised Guidelines which were adopted by Resolution A.913(22) in November 2001

practical usefulness of the SMM(s), whether the SMS had been brought alive in practice and whether there was objective evidence to prove that the Company and their people, in the office and on board, were doing what they were supposed to be doing. Such claims and disputes may be brought in the civil, commercial and possibly criminal courts in countries other than that of the Flag State Administration who issued the DOC and SMC.

That then introduces yet another level of interpretation of what constitutes compliance – which in turn will determine, at a practical level, whether the necessary level of due diligence had been exercised.

At this level the courts or arbitration tribunals may well apply their own interpretation and decide, for example, that very detailed procedures should be included in the SMM and detailed hard copy records maintained of everything that goes on onboard a ship. This would surely run counter to the suggestion that Companies should be looking to reduce the amount of paperwork.

My belief is that the legislators and the industry must find a way to change the present subjective interpretation of what constitutes compliance into an internationally understood objective interpretation by producing clear guidelines but, at the same time, preserving the intention behind Paragraph 4 of the Preamble and avoiding a return to prescriptive rules and regulations.