

**Original Article for Maritime Risk International**  
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**The ISM Designated Person - Keystone or Scapegoat?**

Although we are now well over seven years since the deadline for Phase One ISM implementation and rapidly moving towards the 10<sup>th</sup> anniversary of the mandatory compliance for RO-RO Passenger ferries in EU waters – there remains many grey areas when it comes to considering the role and responsibilities of the Designated Person.

I have visited some ship operating Companies where the Designated Person (D.P.), or Designated Person Ashore (DPA) as they have often become known, sits at the right hand of the Shipowner – holding a very senior position in the Company, with many years sea service as well as shore management experience, and the Shipowner consults the DPA before making any major decision. I have visited other Companies where the DPA is a young graduate who has never been to sea and who occupies a small room at the back of the office and who is wheeled out once a year when the R/O appears on behalf of the Flag State Administration to conduct an annual verification / review to maintain the Document of Compliance (DOC). I have visited other Companies where the DPA is also the Operations Manager or the Technical Manager – as well as being the Safety Manager, Security Manager and wearing a number of other hats. I have even visited Companies where the DPA is sub-contracted and totally external to the day-to-day operations of the Company – sometimes residing in a different city.

How, we might ask, can there be such a diversity of responses across the industry to not only the appointment but also the status of the DPA within a Company?

The idea of the Designated Person was actually something of an ‘after thought’ with regard to the ISM Code. In the original drafts there was no mention of such an entity – the idea was apparently introduced by the UK delegation to IMO who were concerned to learn the lessons from the *Herald of Free Enterprise* tragedy in March 1987.

What appears to have been behind the development of subsequent UK Regulations and the proposal to the IMO was the apparent lack of accountability at various levels of shore management of the *Herald of Free Enterprise*, even though concerns had been raised by the ferry Masters of the dangers of sailing with the bow doors open. It became apparent during the formal inquiry which followed that the individuals within the management did not assume any responsibility to deal with the problem or to see to it that remedial steps were taken.

Following the Formal Inquiry, the Merchant Shipping (Operations Book) Regulations 1988 were laid before Parliament and came into force in December that year. The Regulations were applicable to all UK passenger ships on short sea trade (Class II and IIA) and were developed around the two central tenets:

- All such ships should carry an ‘operations book’ containing instructions and information for safe and efficient operations, and

- Owners were required to nominate a person (known as the Designated Person) to oversee the operation of their ships and to ensure that proper provisions were made so that the requirements of the operations book were complied with.

There is certainly some clear guidance there as to what the DP was intended to achieve. However, by the time of the 18<sup>th</sup> session of the IMO Assembly on 4<sup>th</sup> November 1993, when the draft of the ISM Code – by way of Resolution A.741(18) was approved, a certain amount of restructuring and embellishment had taken place.

The role of the Designated Person, in the ISM Code is set out in Section 4:

#### 4 DESIGNATED PERSON(S)

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

This would clearly go far beyond what was envisaged by the UK Regulations – but exactly what was intended is far from clear. Indeed many practicing lawyers and academics spent much time debating the implications - even from those very early days of the development of the Code. As we approach the end of 2006 those debates are still with us and still without an agreed solution or conclusion.

Before I revisit the debate, or indeed any legal debate involving the ISM Code, I think it is crucial that we state loud and clear that the ISM Code was never intended to create new inter-party liabilities in the context of claims and disputes – it was formulated with the clear purpose of improving and extending standards of maritime safety and the protection of the environment.

If we break down Section 4 of the Code we can identify three distinct but related functions:

- To provide a link between the ship and the office ashore;
- To have access to the highest levels of management;
- To monitor the operation of the SMS and to ensure it is adequately resourced.

Linked to these express requirements there are many more ‘implied’ requirements. The problems which arise include what is actually intended by the ‘express’ requirements and the recognition that there is no uniform agreement across the industry as to what the implied requirements might be.

I was amazed to visit one ship operating company where the DPA had not actually been on board any of their 20 or so ships and had met barely a hand full of Masters and senior offices and had not met any junior officers or other crew members. He received communications from the ships, stamped them upon receipt, copied them, sent a copy back to the ship confirming receipt and filed the original. I have seen

other DPA's who are doubling up as Operations Managers or Technical Managers and who know the ships and the people intimately. What must have been intended by the original draftsmen of the Code was surely a conduit – a focal point for the communication flow on matters of safety to freely pass in both directions. Traditionally, the Marine Superintendent would often perform such a useful function. However, to facilitate such a communication flow I do believe that the DPA must be well known, trusted and respected by those on board the ship and in the office ashore. They must be seen to be effective, to deal with issues, to provide leadership and support and ensure that feedback loops are always closed.

It is one thing to have access to the highest levels of management – the question arises though as to exactly what use the DPA should make of that access? I think few would disagree that it must be implied that the DPA will use that access to advise the highest levels of management of how the SMS is running and particularly to bring to their attention any problems. So far so good! What is far from clear is just how much detail should be passed up to the highest levels of management and how frequently? To some extent the answer might depend upon the size of the Company. In a very small Company the Shipowner is probably personally aware of almost everything going on aboard each of his / her ships. In a large ship management company the CEO would be totally swamped and surely could not function if every near miss or hazardous occurrence was brought to his / her desk – the Company would grind to a halt. However, consider the situation of an incident occurring which has led to loss of life – it turns out that a numbers of similar incidents had occurred, without serious injuries on those occasions, or near miss reports had been received but no action had been taken by the Company and the CEO, perhaps genuinely, declares that he / she had not been made aware of these other incidents. Is that lack of knowledge going to help them if they are facing a manslaughter or Corporate Killing charge?

Lord Donaldson addressed a very similar scenario in 1998 when he described it as 'the errant shipowners' Achilles heel'. He explained the problem in the following terms:

*"...The 'blind eye' shipowner 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 shipowners 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..." (Lord Donaldson - The ISM Code: the road to discovery, [1998] LMCLQ 526)*

There had been many predictions in the lead up to the ISM implementation deadlines of Designated Persons – and indeed Shipowners and Chief Executives of ship operating Companies being prosecuted or called to task for failing to monitor the efficient running of their SMS. A belief developed that the DPA was going to be used as a 'scapegoat' if things went wrong. However, with the exception of one or two incidents in the United States there has been a noticeable absence of any cases proceeding through the Courts or otherwise reaching the public attention. There are at least three possible conclusions we could reach based upon this silence:

1. All the Safety Management Systems of all the ship operating Companies are working fairly close to perfection i.e. it never materialised as a problem;
2. The problems did arise, and continue to arise, but have not been identified by any of the parties or the parties have chosen not to pursue the matter;
3. The problems did arise, and continue to arise, but the cases have not yet reached the Courts – i.e. they have been settled / dealt with out of court or in private Arbitration / mediation.

However much I would like number 1 to be correct – unfortunately it is not. The answer is both number 2 and number 3. I think many people, including lawyers, claims handlers, insurers, recovery agents and the like, have still to wake up to the potential consequences flowing from the role of the DPA. It may be that they do not know what to look for or where to look. Having said that, I am very aware that there are lawyers and others, both as claimants and defendants, who have discovered the potential – indeed I am instructed as a consultant and expert witness in many cases both in civil and criminal actions where the focus of attention comes on how the Company managed safety and whether any failure in the management of safety contributed to the incident.

Often, in these cases, the role of the DPA is being examined very closely and what I am seeing, on a number of occasions, is a DPA who is ineffective and often not really knowing or understanding their actual role or what is expected of them as DPA. I have seen Safety Management Systems which are ineffective – mainly because of a reluctance by the DPA to recognise and accept that it is ineffective – usually because the SMS was the DPA’s own creation. I have seen too many examples of instances where the DPA is actually acting as a barrier to the efficient working of the SMS. Unfortunately, it is only when an incident happens that these barriers are being exposed and the understanding of the potential consequences starts to sink in.

The DPA, in my view, occupies a ‘keystone’ position within any Safety Management System but has often received little or no training or familiarisation in what is actually required to adequately and effectively perform the job of a DPA. This may partly arise from the fact that the role is so poorly defined in the first place.

In the UK a little more detail is provided in ‘*SI 1998 No. 1561 The Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998*’ which states, at Section 8:

**Designated Person**

8. (1) The company shall designate a person who shall be responsible for monitoring the safe and efficient operation of each ship with particular regard to the safety and pollution prevention aspects.

(2) In particular, the designated person shall-

- (a) take such steps as are necessary to ensure compliance with the company safety management system on the basis of which the Document of Compliance was issued; and
- (b) ensure that proper provision is made for each ship to be so manned, equipped and maintained that it is fit to operate in accordance with the safety management system and with statutory requirements.

(3) The company shall ensure that the designated person-

- (a) is provided with sufficient authority and resources; and

(b) has appropriate knowledge and sufficient experience of the operation of ships at sea and in port,  
to enable him to comply with paragraphs (1) and (2) above.

I understand that the IMO Maritime Safety Committee is about to undertake a review of the ISM Code in the near future. There are a number of issues I feel should be included in their deliberations and I believe that a clearer explanation of the role and responsibilities, as well as the appropriate qualifications and experience of DPA's should be high on the list. Such an opportunity to amend and improve the Code will not arise very often. I would urge everyone in the industry to give careful thought to this and consider submitting ideas and suggestions for possible amendment to your flag state Administration or an NGO with which you may be associated – e.g. International Chamber of Shipping, BIMCO, IACS, IFSMA etc. or write directly to the IMO.

At this time I have seen little evidence to suggest that DPA's are being, or have been used as scapegoats – although they are, potentially, very exposed. I do see them as 'keystones' to provide the structure and support for an efficient and effective SMS – but, all too often I fear they are not adequately performing their intended role. It should also be recognised though that there are Companies out there where the DPA's have been adequately trained and are functioning extremely well. These Companies and DPA's should be identified and persuaded to share with the rest of the industry what they have done and how they have done it – so that we all may learn for the general benefit of our industry and our planet.