

Background to the research

The ISM Code had been developed as a reaction to an alarming escalation of accidents and claims during the 1980's – many of which were high profile and were the subject of concern by the general public as well as the shipping and insurance industries. The purpose of the Code was to make ships safer and seas cleaner. Human factors had been identified as the major problem. Almost all ships and ship operating companies around the world had to comply with the ISM Code and had to be certified to prove that they were compliant – if they did not then they could not trade.

Introduction

In July 1998 almost all maritime nations around the world implemented a major change in their domestic law, with the intention of making ships safer and seas cleaner. Through a process of tacit acceptance, all members of the maritime section of the United Nations – the International Maritime Organisation (IMO) - had agreed to amend the Safety of Life at Sea Convention 1974 (SOLAS '74) to incorporate a new chapter IX - the 'International Management Code for the Safety of Ships and for Pollution Prevention' – the ISM Code. Most people involved in shipping, maritime law and marine insurance consider the ISM Code to be amongst the most significant and important pieces of international maritime legislation ever promulgated.

The ISM Code is a brief set of general guidelines describing what shipowners must undertake in order to implement a safety management system both on board their ships and in their organisations ashore. The need to legislate had arisen as a result of a general decline in safety standards on board ships during the late 1980's and early 1990's as well as a reaction to a number of major incidents such as the capsizing and loss of life of the passenger ferry Herald of Free Enterprise in 1987, the catastrophic oil pollution from the super tanker Exxon Valdez off the coast of Alaska in 1989 spilling 37,000 tonnes of oil, the fire which swept through the cruise ship Scandinavian Star in 1990 with extensive loss of life, the laden tanker Braer which was driven onto Shetland Islands in 1993 with widespread pollution, the sinking of another passenger ferry Estonia in the Baltic Sea in 1994 with enormous loss of life and yet a further major oil spill from the Sea Empress in Milford Haven in 1996.

Various investigations had been undertaken and reports issued attempting to explain the reasons behind the problems. Each report concluded that the main, underlying reason, for all the accidents and incidents was 'human error' in one form or another. Led by the British delegation, representatives of the world maritime nations met at the IMO and decided that if the maritime industry had lost the ability to self regulate on issues of safety and pollution prevention then legislation would be necessary to regulate the industry. The approach taken was to promote the idea of developing safety management systems (SMS) which would address directly the human error problem. The legislation would also require the flag state of each vessel to officially approve the SMS of each ship operator and the system on board each vessel and issue certificates confirming compliance. Without those certificates the vessels would not be allowed to trade and would lose their insurances.

Concurrently with the work being undertaken at IMO, developing the structure of the ISM Code, I was involved in the shipping and marine insurance industries in also looking at ways of overcoming the human error problem. This took the form of developing a whole range of education and training courses, books, videos, posters and a range of other tools which ship operators could use in their own accident and loss prevention programs. At that time the work I was doing was unique within the marine insurance industries and attracted considerable attention from the editors and journalists of shipping newspapers and magazines who were eager to promote and encourage that initiative. I was invited to speak at many seminars and conferences and myself personally, and my employers - the North of England P&I Club - were held out to be the market leaders in loss prevention – an accolade which is still generally bestowed upon us.

Controversy develops ahead of ISM implementation

As the final implementation date of the ISM Code - 1st July 1998 - started to appear on the horizon a commentary on the Code was published by the International Chamber of Shipping and the International Shipping Federation providing a brief, but point by point, guideline of what they understood to be the practical requirements of the Code. A number of articles also started to appear in various journals around the world, mainly written by lawyers, drawing attention to a number of potential legal problems which they could see arising directly from the implementation of the Code by ship operators. Indeed quite a debate developed on these issues and I was inevitably drawn in to that debate. I was often quoted, had a number of articles published both in shipping and legal journals and was invited to speak at many international seminar and conferences relating to the ISM Code.

Possibly the worlds leading publisher of books on maritime related subjects – Lloyds of London Press (LLP) recognised that there would be a need for an authoritative guide to the ISM Code and, in particular, the legal and insurance implications of the Code. Bearing in mind that almost every ship and every shipowner in the world would have to comply with the requirements of the Code the publishers no-doubt perceived an enormous potential market for such a book. At that time, and even now – two years after the initial

implementation date, no other commercial publisher, anywhere in the world – as far as I know - has attempted to publish a book on this most important and controversial aspect of the Code.

LLP approached me in 1997 to ask whether I would be prepared to accept a commission to write the book. Whilst being very flattered to be asked, my initial reaction was to decline since this would carry with it an enormous responsibility and what was being proposed was very much a 'legal' subject and I was not a qualified lawyer. Some of the legal issues involved, which had become the subject of such considerable debate in the journals, involved extremely complex legal issues upon which leading academic and professional lawyers could not agree. However, upon reflection, I recalled the whole rationale and philosophy behind the first book I had been involved with – 'The Masters Role in Collecting Evidence' when I took another legal topic – the collection of evidence for use in dealing with claims or subsequent litigation – and presented guidance in understandable terms for the ships masters and officers. It occurred to me that what was required was a guide to the insurance and legal implications of the Code – not written as a legal text book for lawyers but rather as an understandable guide for non-lawyers directly involved in the practical job of actual implementation of the Code – this would include not only the management and staff of the ship operators office ashore and the Master and officers on board ship – but also a whole range of others in the shipping, marine insurance and other related industries around the world.

LLP liked the idea and it was agreed that I would accept the commission and that the book would be published in their 'Practical Guide' series rather than their 'Maritime Law' series.

A Practical Guide to the Legal and Insurance Implications of the ISM Code

The plan had been to publish ahead of 1st July 1998 implementation date. However, the manuscript took longer to prepare than had been originally anticipated. There were a number of reasons for this but primarily I was waiting for sight of the final draft of the White Paper which would be used to enact the ISM Code into English domestic law. The final text of the ISM Code had been agreed by the IMO and had been widely disseminated and I had assumed that the White Paper would merely implement the Code seriatim as Chapter IX of SOLAS 74. Although dated 1st July 1998 – the white paper did not pass through Parliament until a few days later. When I saw what was contained in the Act I was quite staggered and had to return to the drawing board and rewrite a number of sections. What was so staggering was that law would now impose criminal sanctions against anyone who did not comply with the implementation of the Code and the SMS. I do not believe this had ever been anticipated by the original draftsmen of the Code nor had it figured as a possibility in the debates leading up to implementation. Indeed I still believe that the idea of criminal sanctions is quite contrary to the very spirit and philosophy of the Code which anticipates moving away from a blame and punishment culture into a culture of safety, continuous improvement and the adoption of personal responsibility for ones own safety and the safety of others.

The rewriting and restructuring meant that the final manuscript was not available until November 1998. The Secretary General of IMO - Mr. William A. O'Neil - very kindly provided a foreword. The book was published in December 1998 and was well received by the industry. Copies sold quickly and LLP had to go to a second print run by February 1999. I was advised by them that this was the fastest selling book they had ever published.

Research behind the book

My primary source of reference was the text of the ISM Code itself. The text had been formally adopted at the 18th session of the IMO Assembly on 4th November 1993. The Code itself was published by the IMO in an A5 size booklet - comprising of 13 brief articles set out on less than ten pages.

My main secondary sources of reference were:

- IMO Resolution A.788(19) adopted 23 November 1995 - 'Guidelines on Implementation of the International Safety Management (ISM) Code by Administrations'
- 'Guidelines on the application of the IMO International Safety Management (ISM) Code' - Published by the International Chamber of Shipping (ICS) and the International Shipping Federation (ISF).
- A wide range of articles and published papers from around the world which I had collected from various sources in which academic and professional lawyers set out their views on some of the potential legal and insurance implications of the ISM Code.
- Subsequently, Statutory Instrument 1998 No. 1561 - The Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998.

In addition to these secondary reference sources I also embarked upon extensive legal research into a significant number of reported court cases which addressed maritime safety and other issues which were starting to appear as being relevant to the ISM Code.

I also engaged in extensive discussions with individuals and organisations within the shipping and marine insurance industries as well as the legal profession.

Planning the research

The international shipping industry had never previously experienced anything quite like the ISM Code. The nearest experience was probably the development and adoption by some of the larger ship management companies and 'Oil Majors' of Quality Assurance (QA), Quality Management (QM) and Total Quality Management (TQM) Systems during the 1990's.. Many of the QA type systems included safety related, and pollution prevention issues. One of the most significant differences though was the fact that the QA systems were voluntary and the ISM Code was to be mandatory. I decided that one of my initial tasks was to look at some of the QA type systems which had been set up and to discuss with the individuals involved in the implementation how the systems operated, problems which had been experienced, benefits which had been experienced and problems which they could envisage - particularly problems of a legal and insurance nature.

The external auditors who had developed skills and were offering their services to the shipping industry as accrediting bodies for the QA type systems were the Classification Societies. This was a strange phenomena because many in the industry lay the blame for the decline in the standards of shipping, at least partially, at the feet of the Classification Societies. The Classification Societies, such as Lloyds Register, had been established well over a hundred years ago to inspect and monitor the condition of merchant ships and basically to confirm to the Underwriters that the ships were being maintained in a good seaworthy condition and thus a good insurance risk. In order to better understand the role of the Auditor and indeed to understand how 'management systems' worked I enrolled on a one week intensive training course at Southampton University - Warsash Maritime Centre to qualify as a Maritime Assessor / Lead Assessor for both ISO QA type systems and also the ISM Code Safety Management Systems. With this practical knowledge I was then better equipped to enter into debate with the Classification Societies and understand what they had been doing. Not only were the Societies offering their services to the industry to help Shipowners devise and implement their Safety Management Systems but were also being commissioned by the Governments of many of the maritime nations (as flag states) to issue the ISM Certification on their behalf. There seemed to me to be a potentially serious conflict of interest situation in that dual role but it became clear that they would continue regardless. However, the point was that the Societies, more than anyone else in the industry, could provide me with the most up-to-date thinking on the interpretation and implementation of the Code. I therefore engaged in extensive discussions with a number of the Societies to deepen my general grounding. I also entered into dialogue with the International Chamber of Shipping (ICS) and the International Shipping Federation (ISF) who had published the definitive commentary on the Code and in particular with the authors of that commentary.

Whilst discussions with the Societies and the ICS / ISF were very useful and interesting they both made it quite clear that they had not given much attention to the potential legal and insurance implications of the Code but rather had concentrated on the practical issues of actually constructing and implementing the SMS. What they gave me, however, in the absence of any empirical experience or evidence, was some flesh to put upon the bare bones of the Code itself - even though it was of a subjective nature.

From the position of having analysed the Code itself from the existing and available knowledge - I then set about analysing the legal debates which had developed in the shipping press and journals. I cannot recall now whether I ever believed I would find answers and solutions to the issues being debated but I was soon to conclude that I would have to leave a number of questions unanswered. Arguments were being put forward by both academic as well as professional, practicing, layers and each side of the arguments carried considerable force and credulity. In the end I decided that in the book I would set out and explain each side of the argument and its significance and, where appropriate, put forward my own views. Although frustrating I had to concede that we must wait for the courts and arbitration tribunals to interpret the Code in specific cases to settle the disputes.

A typical example of the sort of issues being debated involved Section 4 of the Code and the implications of the role of an individual called the Designated Person (DP) who was to '...provide a link between the company and those on board (ship) ... having direct access to the highest levels of management...' The significance was that if it could be demonstrated that a Shipowner actually knew about a particular state of affairs, for example some unseaworthiness of his ship, and an incident occurred then he would lose his legal right to limit his financial liability and his insurance cover would be void - it is an issue of fault and privity. Provided the Shipowner could argue that he was unaware of the unseaworthiness then he would be safe. However, the situation post ISM was that the DP should be aware of most deficiencies and problems being reported from the ships as a part of the working SMS - since the DP has this direct access to the highest levels of management then, some argue, the knowledge of the DP should be implied to be the knowledge of the Shipowner or alter-ego of the company. The potential consequences for the Shipowner are very serious indeed.

Preparing the manuscript

The conclusions I reached were to a large extent subjective and speculative and sometimes inconclusive. Indeed there is an emphasis throughout the book that there are many questions still awaiting a satisfactory answer. What I found satisfying in some respects but disconcerting in others was comments from a number of people, including those who had been involved in the legal debates, to the effect that they were grateful someone had the courage to take this step into the unknown. It seemed to be the case of '...rather me than them!!...'

I set out my conclusions in the book by firstly describing the underlying philosophy of the Code and identifying the key issues. I then described the key players in the implementation of the SMS and described their respective legal roles and responsibilities. The middle section of the book explored a range of shipboard related incidents, such as collisions, pollution, personal injuries etc. and considered each from the perspective of the Code and the relevant legal and insurance implications. Because there was no empirical data on how the Code would actually be applied or interpreted I introduced into the book a series of detailed case studies on well reported legal cases. In each case I explored actual issues of that case and then speculated what effect the ISM Code might have had, had it been in place at the time of the particular incident. This approach allowed me to suggest ways in which the procedures of the SMS would have acted as a safeguard and should have prevented the incident occurring in the first place. I would then consider, even if the incident did still occur, what evidence should have been available from the documentation created from within the working SMS which would come to the assistance of the Shipowner or would condemn him - depending whether or not he had properly implemented the SMS. The legal position of individuals was also explored. In this way I was able to bring alive the legal and insurance implications of the Code in a way in which people in the industry could relate and understand.

Unanswered questions

At the time of commencing the research it had been over two years since the implementation of the first phase of the ISM Code - which applied to Passenger Ships, Ferries, Bulk Carriers, Oil Tankers and Gas Tankers. The final deadline for the second phase making the requirements of the Code mandatory for all other merchant vessels was set at 1st July 2002 and was looming on the horizon. Opinions on the success, or otherwise, of the first phase are mixed. Some companies were claiming that they had experienced significant reductions in accidents and claims many more claimed that the ISM Code was a failure and nothing more than an additional burden. Incidents such as the sinking and major pollution from the tanker Erika earlier that year may appeared to have been self evident. Having discussed the matter with individuals both seagoing and shore based it appeared that few were even prepared to try and implement the SMS because of fear of the issues I had highlighted in my book - in particular the creation of documentary evidence which people fear would be used against them personally or against the company.

The time had come to establish to what extent that fear really did exist. If it did exist then there was a need to consider the implications on the working of the SMS. If it did go to the root of the SMS then it would be necessary to consider why the fear exists and whether the ISM Code can survive. If radical changes were necessary for the survival of the Code - what form would these changes need to take: changes in the law or changes in the working culture or both? That is the challenge on which I based my D.Prof. research.