

International Conventions and Maritime Law
With Emphasis on How the ISM Code Will
Shape Liability

Peter J. Cullen
Senior Partner, Stikeman Elliott
Montreal
(CMLA Executive Member)

Ottawa

CMLA/Federal Court of Canada

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I Introduction

International Conventions have long shaped the development of modern shipping law. By "modern", I refer to the last one hundred years or so. A prime example is the 1924 *International Convention for the Unification of Certain Rules relating to Bills of Lading* (known generally as the "Hague Rules") which formed the basis for *Carriage of Goods by Water Act*. For many years, Canadian law (under the *Canada Shipping Act*) allowed, *inter alia*, a shipowner to limit liability pursuant to the 1957 *Convention on the Liability of Owners of Seagoing Ships* (the old "actual fault or privity" test). In more recent years (1996) Canada adopted legislation including the principal provisions of the *International Convention on Limitation of Liability for Marine Claims* (1976) (the new "intent to cause loss - or recklessness with knowledge that such loss would probably result" test).

This morning we heard about the *Athens Convention governing the Carriage of Passengers by Sea*, which is now part of the *Marine Liability Act*. Other examples of International Conventions which have helped shape current Canadian Maritime Law are the *International Convention of Safety of Life at Sea 1974* ("SOLAS"), the *International Convention on Civil Liability for Oil Pollution Damage* and the *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships* (MARPOL).

Generally speaking, the development of such conventions has been influenced by the Comité Maritime Internationale, an umbrella group (formed in 1896) made up of representatives of many maritime law associations, including the CMLA. In more recent years, the influence of the United Nations has been felt through the London based International Maritime Organization ("IMO"), the United Nations Conference on Trade and Development (UNCTAD) and United Nations Commission on International Trade Law (UNCITRAL).

Among the many concerns of the CMI and IMO has been the safety of ships at sea, and by this I mean the safety of the vessel, her passengers and crew. It was the 1912 loss of the "TITANIC" that led to the original SOLAS (which has since been updated several times and rewritten in 1974). MARPOL resulted from the "TORREY CANYON" pollution incident in 1967. The gravity of the tragedy that was the "Herald of Free Enterprise" was underscored by Mr. Justice Sheen in his formal inquiry report. He stated:

"... at first sight, the faults which led to this disaster were the ... errors of omission on the part of the Master, the Chief Officer and the assistant Bosum, 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 by 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."

Mr. Justice Sheen's conclusions lead the United Kingdom to propose that IMO develop guidelines with respect to the safe operation/management of ships and pollution prevention. This then led to the *International Safety Management Code*, or simply the ISM Code as it is better known. The Code was incorporated into the SOLAS Convention via Chapter IX in May 1994.

In his introduction to Philip Anderson's leading text on the subject - *ISM Code, A Practical Guide to the Legal and Insurance Implications* - William O'Neil, Secretary General to IMO (and former President of the St. Lawrence Seaway Authority) stated:

"The adoption of the International Safety Management Code is one of the most important developments in maritime safety of the last decade. Previously, IMO's attempts to improve shipping safety and to prevent pollution from ships had been largely directed at improving the hardware of shipping - for example, the construction of ships and their equipment. The ISM Code, by comparison, concentrates on the way shipping companies are run.

This is important, because we know that human factors account for most accidents at sea - and that many of them can ultimately be traced to management. The Code will undoubtedly help to raise management standards and practices and thereby reduce accidents and save lives."

Much as the International Organization for Standardization (ISO) has been shaping quality management standards IMO, through the ISM Code, has been shaping quality safety standards. The ISO does it based on customer focus, leadership, the involvement of people, a process approach, a system approach to management, continual improvement, a factual approach to decision making and a mutually beneficial supplier relationship. IMO has done it through advocating safe practices in ship operation and a safe working environment, establishing safeguards against all identifiable risks, continuous improvement to safety - management skills, preparing for emergencies, ensuring compliance with mandatory rules and regulations and taking into account applicable Codes, guidelines and standards. However, while the ISO system is voluntary, the ISM Code is not. Failure to comply with the ISM Code

will lead to more than simply bruised customer relationships, lack of inventory or human resources issues. Legal and insurance risks will be entailed. In fact, the very business itself may be at risk if ships are detained or Companies are forced to be idle.

Implementation of the ISM Code via the SOLAS Convention has been gradual but widespread. As of July 1, 1998 it applied to most commercial ships, including passenger ships, oil tankers, chemical tankers, gas carriers, bulk carriers and high speed vessels over 500 gross tones. By July 1st of this year the ISM Code will apply to all other cargo vessels and mobile offshore drill rigs.

The *Canada Shipping Act* has enacted portions of SOLAS, and has empowered the Governor in Council to make regulations to implement provisions of the ISM Code. While it does apply to certain Canadian flag ships involved in foreign trade, it does not apply to Canadian ships which do not trade internationally. As such, it is not applicable to Canada's domestic ships. Nevertheless, a number of Canada's domestic shipowners are implementing provisions of the ISM Code.

The ISM Code will thus become the benchmark by which international ship operators are bound to operate. While it has been welcomed for the principles it espouses and for the poor safety records it purports to eliminate, the shipping industry believes its effects will be far reaching from an administrative, management and legal point of view. This remains to be seen of course, as it has only recently been implemented and has yet to be fully tested by the Courts. Nevertheless, there are some obvious conclusions which can be drawn from its language, when compared to the safety, training and management practices of the shipowners the Code wishes to discourage.

II *The ISM Code*

The preamble to the Code makes it clear that the Code is expressed in broad terms "so that it can have a wide-spread application". It stipulates that "in matters of safety ... it is the commitment, competence, attitudes and motivation of individuals at all levels that determines the end result". It purports to be a minimum, not a maximum, standard.

The stated 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 (particularly to the marine environment and to property). In this regard every Company (the shipowner, manager or bareboat charterer who has assumed responsibility for the operation of the ship) operating a SOLAS Convention ship is bound to develop, implement and maintain a documented Safety-Management System ("SMS"). This is to consist of:

1. a safety and environmental-protection policy;
2. instruction and procedures to ensure the 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 the Code;
5. procedures to prepare for and respond to emergency situations; and
6. procedures for internal audits and management reviews.

Under the Code, the Company is to 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. To ensure the safe operation of each ship and to provide a link between the Company and those on board, every Company is to designate a person ashore (the "Designated Person") having access to the highest level of management. The Company is responsible for ensuring that adequate resources and shore-based support are

provided to enable the Designated Person to carry out his/her functions. The responsibility of the Designated Person is to monitor the safety and pollution aspects of the operation of each ship and ensure that adequate resources and shore-based support are applied. Also, the Company is to report the full name and details of the entity responsible for the operation of the ship, if other than the Owner, to the Government of the State whose flag the ship is entitled to fly. Moreover, the Company is to 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.

and is to ensure that the Master is properly qualified for command, fully conversant with the Company's SMS and has the necessary support so that his duties can be safely performed.

The SMS must 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. In addition, the Company must establish procedures for the implementation of corrective action.

With respect to maintenance, the Company is bound to establish procedures to ensure that the ship is properly maintained. In meeting such requirements the Company must ensure that inspections are held at regular intervals, that any non-conformity is reported (with its possible cause, if known), that appropriate corrective action is taken and that records of such activities are maintained. The Company must also establish procedures in its SMS to identify equipment and technical systems the sudden operational failure of which may result in hazardous situations.

The Company must also carry out internal safety audits to verify that safety and pollution - prevention activities comply with the SMS. The audits and possible corrective actions should be carried out in accordance with documented procedures.

SOLAS Convention ships can only be operated by a Company which is issued a Document of Compliance ("DOC").

Every Company which complies with the ISM Code's requirements may obtain a DOC from the Government of the State whose flag the ship is entitled to fly, or an entity to whom such Government has entrusted such issuance (e.g. a recognized Classification Society). Such a DOC is to be accepted as "evidence that the Company is capable of complying with the requirements of the Code". In addition, a SOLAS Convention ship must carry a Safety Management Certificate ("SMC"). To qualify, the Company and its shipbound management must demonstrate that they operate in accordance with an approved SMS. The SMS is to be periodically verified. Under the *Canada Shipping Act*, Port State Control type regulations permit the detention of ships that are not in compliance, and non-conformities are reported to the flag state (and provided to other Port State Control authorities). Transport Canada regularly carries out inspections on SOLAS Convention ships and detains those which are not in compliance. Transport Canada also shares information with other flag states regarding deficiencies and detentions, and an "international record" of sorts is built up on non compliant ships as a result thereof.

Under the IMO Guidelines, the DOC will have a validity of five years, subject to annual verification. The annual verification is to ensure that the SMS is functioning correctly. A more detailed study of the SMS is to be carried out on the fifth anniversary before the DOC is renewed.

As we can see, under the Code there is little "wobble room" for rogue owners to operate SOLAS Convention ships.

III Shaping Liability

i) Discovery

One can well imagine the delight of opposing counsel in pouring over the Affidavit of Documents - where is the DOC, was the SMC valid and up to date, had the ship been detained by any Port State Control authorities? What about the SMS, was it aboard the ship, were the crew and officers acting in compliance? Were they receiving adequate support from the shore office? Had the Designated Person performed? Did he have support from senior management? Had he challenged them?

What about the security audits? Where are the non-compliances? How and when were they corrected? Where are the records evidencing that machinery was tested regularly?

The documentation that will be engendered by the Code has been referred to by the authors as a clear "road map" to the conduct and attitude of the shipowner. Depending upon which side of the table the party sits, the oral discovery will be either refreshing or painful. The shipowner will no longer be able to assert that the instructions were given verbally, as per custom, or that whatever written notices, instructions or manuals that were provided are no longer available, either through inadvertent loss, disappearance or destruction due to the passage of time. There is now to be a well documented trail which will contain the steps taken to identify and correct deficiencies.

There are of course two sides of this coin. One the one hand cargo interests, armed with their road map, will have an easier time learning of the shipowners' conduct together with respect to management, maintenance and caring for their cargo. On the other hand, the compliant and prudent shipowner, armed as well with the road map, will be able to point out to the very steps taken to comply with the SMC, to update procedures and to act professionally and with prudence.

ii) Unseaworthiness/due diligence

An important element to shipowners in the contract of carriage is their ability to shield themselves from liability via the defences available under the Hague and Hague Visby Rules. You will recall that under Article 4, Rule 1 the carrier is not responsible for loss or damage

arising 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, etc. The burden is on the carrier to prove its due diligence should unseaworthiness be established.

As the standard of care called for in the Code is higher than before, meeting the test of due diligence should be somewhat more onerous than before. The results should be in the documentation of course, and a compliant Company should have no difficulty in establishing its due diligence, assuming its SMS is rigorously followed and adhered to. On the other hand, should there be lapses in the documentation or failure to follow the SMS, or should the Designated Person's reasonable recommendations or suggestions not be followed, the Company may have difficulty.

iii) Privity/Intent - Recklessness

Mention has been made earlier with respect to the "tests" called for in the 1957 and 1976 *Limitation Conventions*. The current test calls for the application of a test of intent, that to break limitation the Court must find an "intent to cause loss - or recklessness with knowledge that such loss would probably result".

The ISM Code will ease the task in seeking out and evaluating the intent of the shipowner, and determining whether its behaviour was reckless. Hence the road map will be of immense assistance in tracking the link between ship and shore based operations and learning whether a blind eye was turned to recorded deficiencies, failures to adhere to the SMS or to the cries for assistance, support or corrective action from the Designated Person. The role, scope of authority and conduct of the Designated Person will be scrutinized as well.

As for "privity", the Hague/Hague Visby Rules permit the carrier to escape liability for loss or damage caused by fire, unless caused by its "actual fault or privity". The Rules go on to refer to other causes (in addition to the exceptions noted therein) which arise without the "actual fault or privity of the carrier". Here again the road map will be assistance, for the reasons mentioned above.

iv) Insurance

The contract of marine insurance has long been a contract of the utmost good faith. The shipowner must advise the underwriters of any material risks when the cover is bound and amended. Under certain policy terms and conditions, to benefit from the cover the ship must be seaworthy before she departs on her voyage.

The ISM Code, with its requirements for a Designated Person with access to management and an approved SMS, will render the managers and senior shore side personnel more aware of the current condition of the ship. In theory there will be greater, or more complete, disclosure of information to the insurers when assessing the risk or investigating a claim. Bad risks which may have been earlier accepted, albeit inadvertently or through ignorance, should now be declined. In a similar vein, claims which were otherwise considered covered and paid may now be refused. This will go a long way to eliminating rogue ships and owners who otherwise counted on insurance to finance in part their operations.

v) Criminal Liability

Again, building up the paper trail, and having an international record, particularly through Port State Control authorities, will assist prosecutors aiming to convict wayward owners who commit pollution offences or are otherwise in breach of regulations and risk danger to life and limb.

IV Conclusion

The limits of the ISM Code, with respect to how they will shape the operators' liability, have yet to be truly tested, let alone reached. We are still in the early phase and its implementation, evaluation and enforcement is being observed with interest, and partly with scepticism, throughout the shipping community. Nevertheless, there is a growing realization and level of acceptance that in the long run compliant ships ensure a more stable shipping industry, in terms of crewing, operations, insurance, finance and liability. Insurers, mortgages and charterers are coming to expect ISM Code compliance.

One may argue that the need for the ISM Code arose out of the industry's failure to ensure a minimum level of safety, its tolerance of flags of convenience and under paid (read poorly trained) crews. If this is true, then the industry may be getting what it deserves in terms of the tightening up of its practices, allowing such in depth monitoring of safety regimes and facing the potential for increased liabilities. On the other hand, the pragmatist will state that this is simply a function of evolution - that conventions change over time as they respond to today's advances in technology, as larger ships carry heavier and denser cargoes (both dry bulk and liquid bulk), and to economic factors, such as those which originally lead to flags of convenience to shield shipowners from liability and reduce voyage expenses (vis-à-vis crew costs and maintenance).

The ISM Code, which will push the pendulum in the direction of more professional crews, professional managers and better maintained vessels is the natural outcome of this evolution, as it will ensure the industry's long term survival, and meet the public's growing demand to ensure ship safety and limit catastrophic pollution incidents and tragic loss of life.

In the end the Code will either operate to the benefit or detriment of shipowners, and the choice will rest with them.

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