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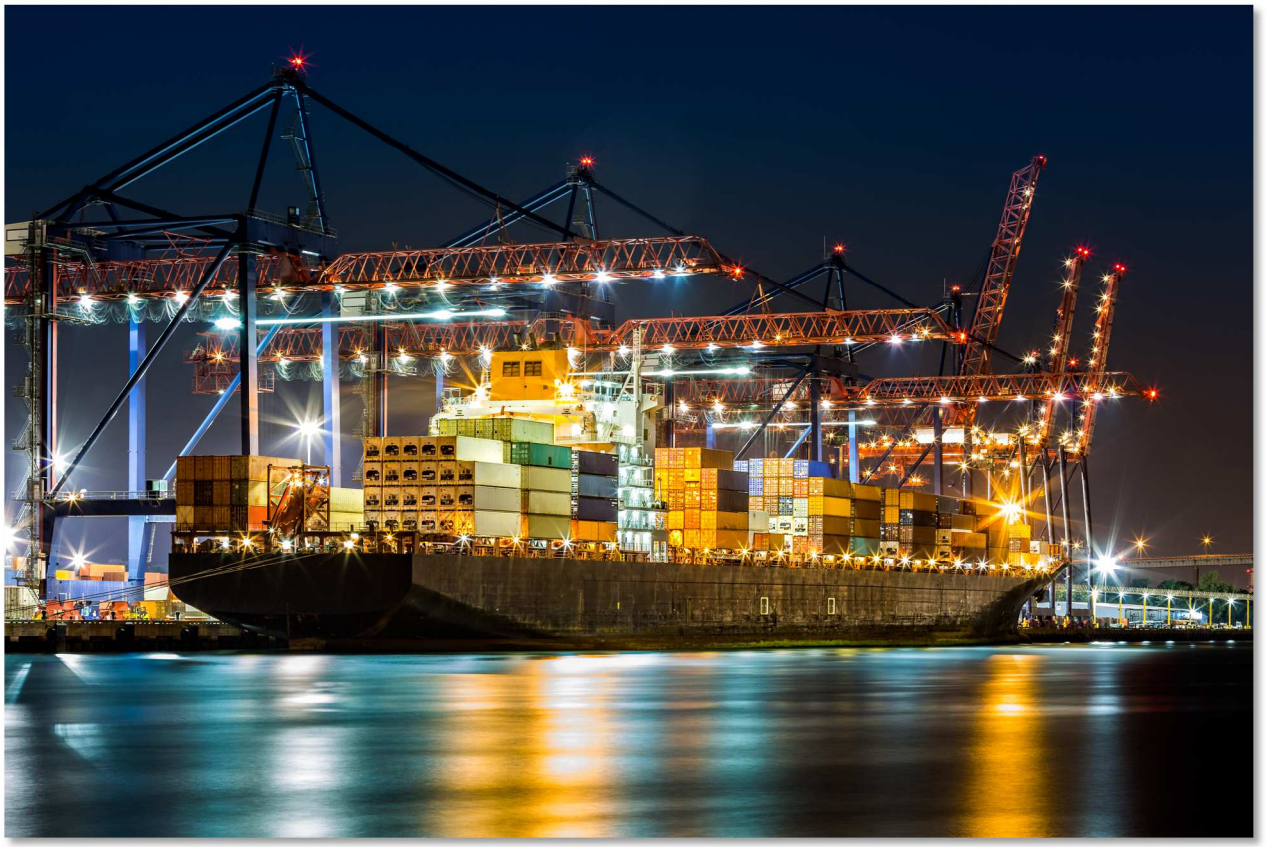
ISM: A POTENT TOOL FOR DEFENSE OF SHIP OWNERS



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I. WHAT IS ISM?

The International Safety Management Code seeks "… to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damages to the environment, in particular the marine environment and to property." IMO Resolution A.741 (18).

In furtherance of these objectives, the Code requires each vessel owner or operator to establish a safety management system which includes:

(1) a safety and environmental protection policy;
(2) instructions and procedures to ensure safe operations of ships and protection of the environment in compliance with relevant international and flag state legislation;
(3) define levels of authority and lines of communication between ships and amongst, shore and shipboard personnel;
(4) procedures for reporting non-conformities within provisions of the Code;
(5) procedures to prepare for and respond to emergency situations; and
(6) procedures for internal audits and management reviews.

An ISM program will thus cover every aspect of both the ship's and the company's operations including crew training, maintenance, navigation, cargo handling, and a myriad of other topics.

Of equal importance is the exchange of information between ship and shore and the system for remediating the inevitable issues which arise even in normal operations. A program without follow-up is no program at all.

Examination of the manner in which the company is implementing the foregoing six requirements will provide the evidence necessary to establish whether in a given case the owner's ISM program can form the foundation for a viable due diligence argument. Due diligence becomes the primary issue in matters such as charter party and COGSA disputes relating to clauses requiring the owner to exercise due diligence to make the ship seaworthy, COGSA clause Q defenses where the owner argues that a cargo loss occurred without its negligence, limitation cases concerning the privity and knowledge of owners, and a plethora of issues under general maritime law where due diligence is the standard of care.

The Code requires periodic external audits to assure continuing compliance; but the company is free to conduct periodic internal audits as well. Audits will consist of a review of documentation recording activities under the Code, inspection of the vessel and discussions with personnel. The audits then produce reports of their own.

II. JUDICIAL EXAMINATION OF ISM IN US COURTS

The United States has implemented the ISM Code in 46 U.S.C. §§ 3201-3205. Acting under this statutory authority, the Coast Guard has issued regulations found at 33 C. F.R. §§96-200-96-390. By and large, the regulations simply recite the Code's provisions.

Thus far the primary thrust of case law in which ISM has been raised is to determine whether the regulations (hence the Code) impose duties on owners beyond those set by other domestic regulation and general maritime law. To date, the universal answer has been no. Representative decisions are *Horton v. Maersk Line*, 603 Fed. Appx. 791, 795-96 (11th Cir. 2015); *Jones v. Sanko Steamship Corp.*, 148 F. Supp. 3d 374, 392 (D.N.J. 2015); *Johnson v. Horizon Lines, LLC,* 520 F. Supp. 2d 54, 532-533 (S.D.N.Y. 2007). Indeed, some courts have noted that the Code requires that owners' implementation ensures compliance with all mandatory rules, regulations "take into accounting" codes, guidelines and standards recommended by IMO, flag states, class, and even maritime industry associations. On the other hand, the Code's preamble explicitly recognizes that because owners are different and ships operate "under a wide range of different conditions" the Code "is based on general principles and objectives." Fortunately, US case law has recognized this generality when ruling on contentions that the Code is addressing owners' duties or setting new standards of care. The Code allows each company to tailor its program to its own specific needs.[2]

Claimants have varied the theme arguing that the Code represents custom and practice as a means of establishing the standard of care to which a shipowner should be held. See, *Holzhauer v. Golden Gate Bridge, Highway & Transportation District,* 2015 WL 12976923 at*3 (N.D. Cal. 2015). To be admissible, however, proof of custom and practice must include evidence that the custom is universal, that is all those affected follow the same procedures. Finding an expert who can offer such evidence should prove difficult both because of the sheer number of shipowners falling under the Code's requirements, and the fact that the Code itself, while requiring that owners address certain issues, leaves it to each owner to fashion his own response; it would seem then that universality will be a difficult to establish on this count as well, as each owner will have his own response to a given issue.

Accepting that the Code neither imposes new duties nor sets new standards of care, in any case where it used as a measuring rod for appraising whether an owner has met the required standard of care, the owner's implementation of the Code tailored to the circumstances of his particular operations provides ready, systematic guideposts for that effort.

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[2] The only English case that has come to our attention addressing these issues is *Papera Traders Co. Ltd v. Hyundai Merchant Marine Co. Ltd.* [2002] EWHC 118(Comm), 2002 WL 45386 (Feb. 7, 2002). But here too, the thrust was claimant's argument that the owner did not have an adequate ISM program either in scope or implementation, a contention the court upheld.

III. A PROPERLY FUNCTIONING ISM SYSTEM CAN ESTABLISH A ROBUST DEFENSE FOR SHIP OWNERS

As the cases discussed above demonstrate claimants have made determined efforts to use ship owners' ISM programs against them. The reported decisions discussed above do not indicate whether the ship owners attempted to defend against the purported violations by arguing that because of the efforts undertaken pursuant to ISM, they should not be deemed negligent. However, courts and counsel are only now beginning to see that ISM also provides the foundation for defense above company's operators.

Most importantly, the efforts thus far to use ISM as a vehicle for establishing standards of care overlooks the fundamental role of ISM as set out in the Code's statement of its objectives. The Code states under the heading "Objectives" that:

> " ….
> 1.2.2 Safety management objectives of the Company [owner/operator] inter alia:
> …..
> .3 continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection."
> (Resolution A.741 (18)

It is this aspirational, continuing self-improvement aspect which provides the statutory vehicle allowing the contention that the Code (a) does not establish any standards of care and, most importantly (b) justifies evidence of the Code's implementation to rebut charges of negligence.

In furtherance of this objective the Code also states that:

> "9.1 9.1 The safety management system should 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.[3]
> 9.2 The Company should establish procedures for the implementation of corrective action." (emphasis added)

[3] Non conformity is defined as: an observed situation where objective evidence indicates non fulfillment of a specified requirement." (§1.1.9).
"Major non conformity" means an identifiable deviation that poses a serious risk of to the safety of personnel on ships or a serious risk to the environment that requires immediate corrective action and includes the lack of effective and systematic implementation of a requirement of this Code." (§1.1.10)
Finally, owners are instructed to "periodically evaluate the efficiency of, and when needed, review the safety management system." (§12.2)

Two cases have, however, utilized the owners' ISM program to establish the companies' exercise of due diligence.

The first case in which ISM compliance was used as a shield is Delta Towing LLC v. Basic Energy Services, 2011 WL 102717 at *4 (W.D. La. 2011). There, the master failed to fill out a pre tow questionnaire including undertaking the required voyage planning relating to clearance under bridges through which the tug and tow would pass, one of which was struck. But the many checks on operations under the company's ISM program were held sufficient to preclude a finding that management should have known that the master was not filling out these forms and hence claimants were denied a finding that owners had the privity and knowledge needed to defeat the owner's limitation of liability.

The second decision is the 2016 opinion in the Athos I, 2016 WL 4035994 (E.D. Pa. July 25, 2016) which provides a prime example of how an owner's robust ISM program can be used to defend the company against charges of negligence both with respect to operations and the vessel's seaworthiness.

As a defense to the owners claim that charterers had breached a safe port warranty, charterers argued that owners were negligent in the operation of the vessel and had failed to exercise due diligence as required under the charter in making her seaworthy. The attack culminated with the contention that owners failed to maintain a proper ISM system. The specifics of this attack included claims relating to certain equipment, maintenance, navigational instructions, and crew competency. However, the court found explicitly that owner's "had an established and comprehensive safety management system" (F/F 192). The court in the course of finding that the vessel interests were not negligent in any respect produced detailed and extensive findings regarding the company's and crew's activities with respect to the each of charterer's allegations. But, unfortunately, in terms of this decision as precedent, the court did not tie its findings to specific provisions of the owner's ISM program. As a consequence, despite the foregoing finding that the program was "established and comprehensive", the decision ultimately fails to provide strong authority in support of the proposition that compliance with ISM is persuasive proof of due diligence. A missed opportunity for the court to provide guidance to industry and the bar.

However, examination of the court's findings on the issues identified above provides a roadmap for examination of an owner's ISM program. By looking at each issue, the ISM program can be reviewed to see how a given owner has dealt with those questions.

Crew Competence. This point often becomes the ruptured Achilles heel in owners' defense of many sorts of cases. U. S. case law is replete with decisions in all too many cases owners have lost because of their crews' incompetence. A thorough ISM program can address this issue.

Since ISM requires compliance with applicable law, the defense begins by proof that all officers and crew members have met STCW requirements. In addition, has the company also provided ongoing training courses, perhaps at headquarters and onboard? How has the company kept track of each employee's ongoing training? As an aside, this latter question bears on the all-important questions under the ISM requiring systematic follow up on all aspects of the program and the requirement for periodic internal review and assessment of the program's strengths and weaknesses coupled with efforts to improve the observed structural weaknesses.

One of the industry's endemic problems relating to crew competence lies in the lack of attention a company often gives assuring that officers are thoroughly familiar with the vessel on which they will be serving and establishment of protocols to be followed as the officers join their respective vessels. As the vessels and their equipment become ever more complex, the need to address and allow time for personnel to acquire comprehensive knowledge and understanding of their vessel before assuming responsibility for her operation becomes ever more critical.

Some companies may opt to cycle at least the senior officers through briefing programs at company headquarters before they are dispatched to their vessels. The company may then require the master and chief engineer being relieved conduct a detailed turnover protocol with their reliefs before the relieving officers formally assume their respective positions. Finally, the new officers once they are on board will need to familiarize themselves with the vessel.

Presumably, personnel will be subject to annual performance evaluations.

Negligent Operation. The principal issue concerning vessel operations centered on the charterer's contention that the vessel, in proceeding as ordered by charterer with a low water docking, had nevertheless violated Coast Guard regulations relating particularly to passage planning, calculation of under keel clearance, and the master-pilot exchange. Notwithstanding their own orders and the ship's compliance with all local advices regarding such a transit, charterers argued that prudent navigation required the vessel to await a higher tide before docking.

Again, the court's substantive and detailed determination that in each instance the Athos' crew had properly complied with the regulations leads back to questions as to what the ISM program required and how the company was monitoring the navigators' performance.

In a similar vein, and while not regarded as conclusive proof of due diligence. evidence that the vessel had successfully negotiated class inspections, vetting by independent organizations such as SIRE, CDI, and Rightship, and for tankers, obtaining suitable ratings pursuant to class supervised the Tanker Management Self-Assessment program may likewise be used as further evidence of owner's due diligence.

IV. HOW OWNERS CAN USE ISM TO DEFEND AGAINST NEGLIGENCE CLAIMS

We would argue that owners, their counsel, and hence the courts, have not appreciated ISM's true intent. The purpose is not to set the standard of care, but rather as pointed out above, to establish a systematic and systemic self-improvement regime. Owners can use ISM's mandate to establish (1) policies and procedures for safe operations and protection of the environment; (2) an inspection system to determine if the policies and procedures are being followed; (3) a program for corrective action; (4) a periodic assessment as to whether the overall program is functioning satisfactorily; and (5) how it can be improved '

The mere fact that a company has in place an ISM program provides the first step in establishing due diligence. We would caution, though, that while each vessel receives a "safety management certificate" from the flag state certifying that the vessel has in place a program complying with the Code's requirements and the company receives a "document of compliance" certifying that it has a compliant program, these certificates by themselves in a U. S. court are not likely to be regarded as conclusive proof of due diligence. [4]

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[4] ISM, however, can also demonstrate an owner's negligence, even, as under the thesis of this article that the Code is aspirational and not merely a vehicle for measuring a ship-owners negligence. An example comes out of the recent report of the U. S. Coast Guard into the sinking of the SS El Faro during Hurricane Joaquin in October 2015.

The ship was a ro-ro vessel, with vents for the cargo holds on both the port and starboard sides used to expel gasoline fumes from the motor vehicle cargo. These remained open at all times. During the storm, seawater entered the vessel through these vents causing a substantial list. The list in turn caused the lube oil suction for the main engines to come clear of the oil's surface shutting down the propulsion machinery. The ship then broached in the seas and was lost.

With respect the owner's ISM program the Coast Guard found that the following factors contributed to the loss of the vessel with all hands: (1) No procedures for shoreside management. This finding means that the owner had no systemic way of implementing such matters as ongoing training, insuring that the ship's officers were thoroughly familiar with the vessel, and following up on reports from the vessel regarding onboard issues requiring the company's attention; (2) The master and chief engineer's lack of understanding about the ventilation system. The Coast Guard thought that open vents were the most likely means by which seawater entered the ship, leading to her losing power and broaching before being lost; (3) Incompleteness of the shipboard manuals with respect to identifying heavy weather as a risk and failure to provide procedures and drills for this risk. (4) The lack of periodic review and appraisal of the whole ISM program as required under the Code. In other words, the company never undertook a comprehensive review of its program, its strengths and weaknesses in its operation, nor made any effort to address those areas that it might have deemed deficient.

The gravitas emanates from the evidence to be extracted from each of the six steps outlined above setting out how the objectives of the program are to be achieved.

The initial step in gathering the evidence is of course to review the company's program and identify both the shipboard and office procedures addressing the point in issue. Then, was the procedure followed? Have there been previous instances where the procedure was not followed, and if so, what follow-up has there been by way of remediation. Has the issue turned up on internal audits and other internal programs for monitoring compliance? Is the company periodically stepping back to examine whether the program is functioning properly and whether it can be improved? Once the problem was identified, what remedial steps have been taken? Also, although not part of the ISM program, identification of issues by third-party inspectors such as class, SIRE, CDI, and Rightship and the owners' response to issues these inspections raise may also furnish evidence of due diligence.

A proper investigation into an owner's ISM program will require a review of the relevant policies and procedures, the process for their implementation, and overall monitoring of the program.

The NTSB reported: "The NTSB's accident investigation, [echoing and expanding the Coast Guard's findings] identified the following safety issues: captain's action, the use of non-current weather information, late decision to muster the crew, ineffective bridge resource management, inadequate company oversight, company safety management system, flooding in cargo holds, loss of propulsion, down flooding through ventilation closures, need for damage control plan; and lack of appropriate survival craft." (Report – Abstract.)

With respect specifically to the safety management system, the NTSB found:

"The company's safety management system was inadequate and did not provide the officers and crew with the necessary procedures to ensure safe passage, water tight integrity, heavy weather preparations, and emergency response during heavy weather conditions." (Report p. 244.)

The report also stated:

"The NTSB has concluded that the company had an inadequate SMS and an ineffective process for assessing officer performance; that it did not provide effective training for on-board equipment and programs; that it did not ensure that the El Faro had a functioning anemometer; that it failed to ensure that the risk posed by Hurricane Joaquin was adequately addressed; and that it failed to track the vessel's position relative to the storm and support the captain during the accident voyage. Had the company addressed some of the safety issues identified in this report, the casualty might not have occurred. Thus, the NTSB concludes that the company's lack of oversight in critical aspects of safety management, including gaps in training for ship board operations in severe weather, denoted a weak safety culture in the company and contributed to the sinking of the El Faro." (Report p. 220.)

The effort will require review of not only significant number of documents, but also interviews of the master and the appropriate shipboard personnel, but also the Designated Person Ashore and at least the shore side management department heads responsible for the particular subjects at issue such as crewing, engineering, and operations. Because the Code requires copious documentation, investigators, and ultimately the courts and arbitrators will have much objective evidence upon which they can rely.

Because the subject matter is detailed and sophisticated, it often will be advisable to engage a well-qualified consultant to assist in developing the evidence. A consultant can add great value when by virtue of his experience with a multitude of programs can express views as to whether a particular owner's program even if compliant with the Code, represents minimal adherence or exceeds what is required. The latter opinion should prove helpful at least in a qualitative sense.

ISM evidence can provide powerful evidence rebutting contentions of negligence. But it is also useful in confronting cases where the overall evidence shows a defect in the vessel or the conduct of her personnel where the proof can support the argument that despite the owner's best efforts, a defect occurred. While the difficulty of succeeding in such cases is not to be understated, there are cases where courts and arbitrators have exonerated owners on just such evidence.

The Code can also produce helpful evidence in latent defect cases-again, despite the owner's diligence, a defect went undetected. With respect particularly to the latter two types of cases, the foregoing should not be read to minimize the difficulty inherent in persuading the trier of fact to exonerate the owner in the face of a defect that cannot be denied; but equally, the systemization of the Code process with its requirement of documentation at every step should provide evidence carrying some weight that the owner was doing everything he could.

In short, the ability to paint a picture of a comprehensive program designed to detect discrepancies — "non-conformities" in the parlance of the Code — followed again by a system for addressing and correcting "non-conformities" can produce a strong defense to negligence claims.

Strategic Evidentiary Issues for the Owner in the Litigation Context

Finally, with respect to casualties, ISM presents two vexing evidentiary issues:

First, can a claimant force into evidence the post conduct remedial steps which the company took? The answer under the explicit Federal Rules of Evidence is that such evidence is not admissible for purposes of proving negligence; that is, the claimant cannot use such evidence to argue that the fix sets the standard of care the defendant must meet, i.e. what was done after the accident could have been done before; therefore the defendant was negligence. The fix, may, however, be admissible to demonstrate the feasibility of steps taken and thus, if feasible,

could have been taken before the casualty. Of course this issue arises without any reference to the owner's ISM program even if the remedy grows out of the internal procedures ISM dictates.

But in this contest, from the standpoint of ISM, the question of remediation is the less important issue. If the ISM program is viewed as a self-improvement program, a process designed to detect weaknesses in operations, and then strengthen them, the issue, then really is whether the defendant took all reasonable steps to find flaws, and once found, were they addressed in a timely and effective way? Looking at ISM in the foregoing manner, circumstances may suggest that the defendant will want to put on evidence of remedial steps. Often the fact pattern boils down to "we looked, we found something, we fixed it, and it still failed," and as matter of litigation tactics, owners will need to make a decision whether they wish to use evidence of ISM process. If the owner is affirmative, then evidence of the corrective steps will in all probability be necessary.

Secondly, the Code requires that accidents and near misses be analyzed to determine course and implement preventive measure. The question is whether such efforts can be protected from discovery. While the courts in some instances have recognized a "self-critical analysis" privilege, which would preclude disclosure and use at trial of internal post-accident analyses, the existence of that privilege in federal, much less maritime law is uncertain at best.

The principle behind this privilege is "based upon the concern that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigation and evaluations or compliance with law or professional standards." *The Petition of McAllister Towing and Transportation Co., Inc.,* 2004 WL 1240667 (E.D. Pa. May 7, 2004); certainly the Code's requirement of self-examination looking to corrective measure can be seen as just such a socially useful undertaking.

In the maritime context, some cases simply refuse to recognize the privilege. See, *Dowling v. American Hawaii Cruise*s, 971 F.2d 923 (9th Cir. 1992). Others recognize the privilege if at the proponent can prove (a) the analysis was carried out under a government mandate or a critical self-analysis; (b) involves only subjective, evaluative materials; and (c) the public policy favoring exclusion outweighs the parties' need for material. *The Petition of McAllister Towing and Transportation Co. Inc.*, 2004 WL 1240667 (E.D. Pa. May 7, 2004).[5]

In the context of foreign flag shipping engaged in litigation in U.S. courts, it may be possible to argue, where appropriate, that privilege under flag state law applies, but at least in other contexts, our courts have not always accepted privilege accorded under foreign law.

[5] A lengthy and useful discussion of the background to the debate even the existence of the privilege may be found in *Slaughter v. National RR Passenger Corp.,* 2011 WL 780754 (E.D. Pa. March 4, 2011).

CONCLUSION

Despite the fact that operation under the Code has matured in the nearly twenty years that have elapsed since its effective date, its use as a shield to liability remains in its infancy. Until the parties begin to argue that the Code serves as a defense, it will lie dormant in the forums for dispute resolution.