The ISM Code And Contractual Exclusions In Bills Of Lading And Charterparties

There is an increasing trend amongst charterers and cargo claimants to attempt to found claims upon alleged failures by shipowners to comply with their obligations under the ISM Code, and thereby to avoid Hague Rules and other defences, such as negligent navigation or perils of the sea. The effect, if successful, is to expose shipowners to liabilities which are traditionally avoided. This article sets out to examine the current legal position and to assess whether, in fact, breach of the ISM Code can compromise the usual defences afforded by the Hague and Hague-Visby rules, and by standard charterparty exception clauses.

The International Management Code for the Safe Operation of Ships and Pollution Prevention (the International Safety Management (ISM) Code), was created by the International Maritime Organisation in order to:

*Ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment, and to property.* *(Objectives - Article 1.2.1)*

As of 1 July 2002 compliance with the Code became mandatory for all vessels of 500 GRT and above. The Code has been adopted, and in some cases extended, by most flag states. Furthermore, many charterparties now contain the following clause:

*From the date of coming into force of the International Safety Management (ISM) Code in relation to the Vessel and thereafter during the currency of this Charterparty, the Owners shall procure that both the Vessel and "the Company" (as defined by the ISM Code) shall comply with the requirements of the ISM Code. Upon request the Owners shall provide a copy of the relevant Document of Compliance (DOC) and Safety Management Certificate (SMC) to the Charterers.*

Except as otherwise provided in this Charterparty, loss, damage, expense or delay caused by failure on the part of the Owners or "the Company" to comply with the ISM Code shall be for the Owners’ account.

The Code provides comprehensive guidelines with regard to vessel management, both onshore and at sea. It obliges shipowners and their management companies to put into place procedures and systems which govern and ensure the safety of the vessel, with further obligations to document and regularly audit those systems and procedures. The scope of these obligations, and the effect they have on existing principles of maritime law, are yet to be fully tested in the Courts.

The Legal Position Pre-ISM Code

Before the Code came into force the Courts treated most areas of vessel operation (to which the Code now applies) as relating to seaworthiness. Recently in the “Eurasion Dream” case, the English High Court considered whether a failure of the ship’s safety systems, and inadequacy of written instruction and training for the crew, were capable of rendering it unseaworthy. The incident in question took place before the Code came into force and involved the total loss of a car carrier and her cargo as a result of fire on board. The vessel's owners sought to rely on Article IV, Rule 2 (b) of the Hague-Visby Rules which states *"neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from … fire, unless caused by actual fault or privity of the carrier".*

The claimants (cargo interests) argued that the carrier could not rely on this exception because it had been in breach of its Article III obligation under the Rules, namely to exercise due diligence to make the vessel seaworthy, and that this breach had caused the fire.

In finding for the claimants, Mr. Justice Cresswell focused on several inadequacies in the vessel’s safety management systems and crew training. Although the incident took place before the ISM Code came into force, the hearing took place after the Code had become mandatory for Ro-Ro vessels.

Cresswell J. stressed the need for vessels to carry thorough and sufficient instructions on what is to be done in the event of an emergency. *"It was of fundamental importance that the vessel be provided with a ship specific manual dealing with fire prevention and control".* Furthermore, the crew should have been *"properly instructed and trained"* in such incidents.

Referring to existing case law, the Judge summed up the concept of seaworthiness, and its components, as follows:

1. The vessel must be in a suitable condition and suitably manned and equipped to meet the ordinary peril likely to be encountered while performing the services required of it. This aspect of the duty relates to the following matters:
   (a) The physical condition of the vessels and its equipment;
   (b) the competence/efficiency of the Master and crew;
   (c) the adequacy of stores and documentation.

2. When referring to the competence and efficiency of the Master and crew, the issue was not just of ability but also of training. In determining whether incompetence of the Master and crew (which in this case was found to be due to poor training) rendered the vessel unseaworthy, Cresswell J. applied the test set out by Mr. Justice Salmon in Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.:

   “Would a reasonably prudent owner, knowing the relevant facts, have allowed the vessel to put to sea with this Master and crew, with their state of knowledge, training and instruction?”

Cresswell J. held that the vessel was unseaworthy because of inadequate training instructions and that the owner had failed to exercise due diligence in this respect. He had not acted as a reasonably prudent owner and was in breach of Article III of the Hague-Visby Rules.

It is well established, following the decision in Marine footwear Co. Ltd. v. Canadian Government Merchant Marine, *that compliance with the requirements of Article III r 1 (the exercise of “due diligence” in respect of seaworthiness at the commencement of the voyage) is to be treated as an “overriding obligation”* which, if not fulfilled, will deny an owner the right to invoke the defences set out under Article IV. Hence, the fire exception contained in Article IV Rule 2 could not be relied upon.
Article 1.4 of the Code, entitled "Functional Requirements for a Safety-Management System (SMS)", states:

"Every company should develop, implement and maintain a safety management system (SMS) 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 the 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;
6. procedures for internal audit and management reviews."

Cresswell J said in the "Eurasian Dream": "Seaworthiness must be judged by the standards and practices of the industry at the relevant time". The Code is now regarded as setting (or reflecting) proper industry standards of vessel safety management. It therefore has considerable impact, and while it does not substantially alter the three pillars on which seaworthiness rests, it does set out what an owner has to do to fulfill these obligations.

This is particularly so with regard to "the competence, efficiency of the Master and crew, and the adequacy of ... documentation", where it can be argued that the ISM Code defines an owner's obligation in respect of due diligence to make the vessel seaworthy.

In relation to these areas the Code makes specific requirements. Taking as an example the competence of the Master, Article 6.1 of the Code states:

"6.1 The Company should ensure that the master is:
1. properly qualified for command;
2. fully conversant with the Company's SMS, and
3. given the necessary support so that the master's duties can be safely performed."

By complying with this provision, i.e. exercising reasonable care and skill, to ensure that these requirements are fulfilled, an owner fulfills his obligation to exercise due diligence to ensure the vessel's seaworthiness so far as the Master's competence is concerned. Furthermore, an ISM-compliant owner is likely to have readily available the evidence required to show that he has complied with his obligations, given the requirements of the Code with regard to auditing and documenting procedures. Consequently an ISM-compliant owner should be able to defend more easily (than before the ISM came into force) an allegation he has failed to exercise due diligence properly to man the vessel (with a competent Master).

Similarly, in the "Eurasian Dream", where a claimant contends that a lack of training procedures amounted to a breach by the owner of his obligation to exercise due diligence to make the vessel seaworthy, an ISM-compliant owner should have little difficulty in defending this claim.

It is important, in order to avoid wasted litigation expenses, that claimants draw a distinction between breach of the Code by the company and breach of the Safety Management System (put in place by the company pursuant to the Code) by an individual crew member. The former, for the reasons discussed above, may support an allegation that the owner failed to exercise due diligence to make the vessel seaworthy, whereas in many cases the latter will not. Even if a breach by an individual crew member is so extreme as to carry with it a suggestion of incompetence, this is very unlikely, under normal circumstances, to result in a finding of breach of the due diligence obligation where the owner can show that he has complied with his ISM obligations.

Conclusion: The Role of Contractual Exceptions in the Post-ISM Era?

As already mentioned, under Article III of the Hague Rules, an owner has to exercise due diligence to make the vessel seaworthy. Most charters include this requirement, either through a Clause Paramount, incorporating the Hague or Hague-Visby Rules into the charterparty, or expressly. This has been held to be an "overriding obligation" and, breach will deprive an owner of certain defences under the Rules.

Recently the English High Court considered whether an alleged failure in respect of bridge procedures deprived an owner of his right to rely on a contractual exception in respect of negligent navigation. The "Torepo" had run aground while navigating the Patagonian Channel due to an error in navigation. The incident took place before the Code came into force. The cargo interests alleged that the error of navigation would never have occurred if the Owners had had proper bridge procedures in place. The Owners sought to rely on the negligent navigation exception. Mr Justice Steel ruled that the Owners could rely on the relevant exception because the claimants had failed to establish on the facts that the casualty was occasioned by unseaworthiness. The bridge procedures were not deficient and had not caused the loss. Furthermore the standards the Owners had applied in ensuring that proper procedures were in place were reasonable.

Had the Code applied, either mandatorily or through contractual incorporation, the same result would almost certainly have been achieved. Provided the Owners could show there had been no causative breach of the Code, their right to rely on the exception could not be questioned.

On the basis that the Code reflects industry standards of vessel management, any breach of it, provided it is causative of the loss suffered, is capable of putting an owner in breach of his obligation to exercise due diligence to make the vessel seaworthy. The Code does not, however, alter the concept of what makes a vessel seaworthy, rather it codifies many of the requirements an owner has to fulfill in order to have exercised due diligence.

Arguably, the greatest impact which the Code has on the position of the shipowner is procedural. Before the Code came into force, the burden of proof was on the Claimant to show that the vessel was unseaworthy (and if the claimant successfully discharged this burden it would fall on the owner to show he had exercised due diligence). Now, it is open for a claimant to allege causative breach of the ISM Code. Perhaps understandably, given the requirements for documentation under the Code, English Courts and arbitrators expect an owner to show compliance, without requiring the claimant to establish first that the vessel was unseaworthy.

In London Proceedings owners are regularly asked for early disclosure of all Code documentation by claimants aiming to deprive owners of their defences. An ISM-compliant owner should have no trouble in defending such claims, since he will already have the documentation required to refute the claimants' allegations. This serves to underline the importance of the ISM Code and the need for shipowners to devote adequate time and resources to ensure compliance with it.
1. The statutory instrument which introduced the ISM Code to United Kingdom law imposes a duty on the Master to "Operate the ship in accordance with the safety management system on the basis of which the Safety Management Certificate was issued." Failure to do so carries criminal sanction, including a maximum jail term of 2 years. On its wording the Master's obligation appears to be absolute. Merchant Shipping Regulations (1988), No. 1561.

2. BIMCO Standard ISM Clause for Voyage and Time Charterparties.


4. Ibid. at p. 743.

5. Ibid. at p. 744.

6. Cf. ISM Code Article 6 - "Resources and Personnel" and Article 11 - "Documentation".

7. Ibid. at p. 736.

8. "There cannot be a difference in principle, I think, between disabling want of skill and disabling want of knowledge". Ibid. at p. 736.


10. The "Eurasian Dream", as above at p. 737.


12. Ibid. at p. 113, and affirmed in the "Eurasian Dream", at p. 738.

13. Ibid. at 736.

14. "The physical condition of the vessel and its equipment, the competence, efficiency of the Master and crew, and, the adequacy of stores and documentation", per Cresswell J.

15. At this point it should be noted that while it has not been tested by the courts, the obligations under the ISM Code do not appear to be absolute. Unlike for example, ISO 50002, which states that a company "will" carry out the relevant procedural obligations, the ISM Code states that the company "should" fulfill the relevant obligations. One would assume therefore that the ISM requires reasonable care and skill to be applied in ensuring that its provisions are complied with.

16. Or, in other words, take reasonable care and skill, as "the lack of due diligence is negligence". The "Amstelslot" [1969] 2 Lloyd's Rep. 223 at p. 235, per Lord Devlin.


18. In Article 6, entitled "Resources and personnel", the Code states: "6.4 The company should ensure that all personnel involved in the Company's SMS have an adequate understanding of the relevant rules, regulations, codes and guidelines. 6.5 The Company should establish and maintain procedures for identifying any training which may be required in support of the SMS and ensure that such training is provided for all personnel concerned". In Article 11, entitled "Documentation", the Code states: "11.1 The Company should establish and maintain procedures to control all documents and data which are relevant to the SMS. 11.2 The Company should ensure that all valid documents are available at all relevant locations, and changes to documents are reviewed and approved by authorized personnel; and obsolete documents are promptly removed. 11.3 The documents used to describe and implement the SMS 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."


22. Under the New Civil Procedure Rules, claimants are able to apply to Court for pre-action disclosure. Therefore, provided their request is reasonable, they can now gain access to an owner's ISM Documentation before commencing proceedings. Cf. Black v. Sumitomo [2002] 1 Lloyd's Rep. 693.