THE ISM CODE AND THE LAW OF MARINE INSURANCE

by Dr S Hodges*

INTRODUCTION

The 1nternational Management Code for the Safe Operation of Ships and for Pollution Prevention (the ISM Code), incorporated as Chapter IX of the SOLAS Convention 1974, became law on 1 July 1998.[1] Even before its adoption, the industry had expressed its concern about the legal implications of the Code.[2] The consensus of opinion is that it is bound to affect several important areas of shipping law.[3] This paper will, however, examine only one aspects of the law, namely marine insurance where the impact of the Code can clearly be felt.

The Code has essentially from the legal point of view raised, *inter alia*, two main points: First, it has set an international standard for the safe management and operation of ships and, secondly, it has for the purpose of ensuring that this is achieved mandated that a "designated person"[4] as defined by the Code be appointed by "the Company".[5] That both these elements will have a bearing, directly or indirectly, on the rights of a shipowner to claim indemnity from his insurer is clear.

Before proceeding to discuss how the Code can affect a shipowner's claim for indemnity under a marine policy of insurance, and the legal niceties of the relevant law under the Marine Insurance Act 1906,[6] it is necessary to briefly outline the objectives of the ISM Code. As declared in its preamble, its main purpose is "to

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1 Adopted on 4 November 1993 by Resolution A. 74(18) and incorporated into SOLAS 1974 on 19 May 1994. See Resolution A. 988(1() adopted on 23 November 1995. Pursuant to the E.U. Communities Council Regulation No. 30051/95, adopted on 8 December 1995, the ISM Code was already applicable (from 1 July 1996) to roll-on/roll-off passengers operating between ports in the European Union.

2 See e.g. Mandaraka-Sheppard, *The International Safety Management Code in Perspective*, P&I International, June 1996, 107; and McBride, *The ISM CODE; legal aspects and practical difficulties*, Offshore Investment, July/August 1997, 22.

3 E.g. the law of limitation of liability and, as identified by Lord Donaldson, *The ISM Code: the road to discovery?* 1999 L.M.C.L.Q. 526 at 531, the criminal liability of a shipowner company for involuntary manslaughter.

4 The appointment of a "designated person" is provided in cl. 4 of the Code.

5 "Company" is defined in cl. 1.1.2. of the Code.

6 See s. 39(1) and 39(5) Marine Insurance Act 1906.

provide an international standard for the safe management and operation of ships and for pollution prevention." Clause 1.2.2 of the Code spells out the factors to be borne in mind when a company considers its "safety management objectives".[7] Though many of the requirements of the Code are laid down in general principles, in the form of broad guidelines, nonetheless, its basic aim is clear: It is to instill in shipowners a sense of safety consciousness and thereby promote a safety culture in the running of their ships.

INTERNATIONAL STANDARD OF SHIP MANAGEMENT

The brunt of the Code is felt by shipowners in two ways. First, it has, through the device of the "Safety Management System", provided the courts with a yardstick, a minimum standard, which has to be attained for each ship on matters relating to management and operation.[8] It has also established in relation to that particular ship a code of conduct on safe management and operation to be observed by the shipowner. The legal effect of this aspect of the Code is straightforward: it has supplied the courts with not only a measure or standard of safe management to be attained by a particular ship, but also the *modus operandi* of how that end may be achieved. To quote Lord Donaldson, the shipowners have "in effect to create their own regulatory regime and show that they are complying with it."[9] No shipowner should now be left in any doubt as to the bottom line which has to be accomplished on matters relating to the management and operations of his ship(s).

A shipowner who fails to comply with the terms of the Code will be visited with liability should any loss or damage result therefrom: failure to observe any of the provisions of the Code would constitute or support an action in negligence and/or breach of a statutory duty of care.[10] Once liability is established and a loss is incurred by a shipowner, he would naturally wish to seek indemnity from his insurer under the policy of insurance he has subscribed; and when such a claim is made under a *time* policy of insurance, the seaworthiness of the ship and the defence of privity afforded by section 39(5) are very likely to raised by the insurer.

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7 Clause 1.2.2 of the Code states: "Safety management objectives of the Company should *inter alia*:
.1 provide for safe practices in ship operation and a safe working environment;
.2 establish safeguards against all identified risks; and
.3 continuously improve safety management skills of personnel ashore and abroad ships, including preparing for emergencies related both to safety and environmental protection."

8 See art. 1.4 - Functional requirements for a Safety Management System.

9 Lord Donaldson, *op. cit.*, p. 531.

10 Indeed, a shipowner who fails to take all reasonable steps to ensure that the ship is operated in a safe manner may be prosecuted under s. 100 M. S. A. 1977 (previously s. 31 M.S.A. 1988); see also *Seaboard Offshore Ltd. v Secretary of State for Transport, The Safe Carrier* [1994] 1 Lloyd's Rep. 589, H.L.

THE "DESIGNATED PERSON(S)"

To implement and maintain the Safety Management System,[11] article 4 of the ISM Code declares that: "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." It is to be noted that the "company" could be either "the Owner of the ship or any other organisation or person such as the Manager, or the Bareboat Charterer".[12] This means that if a shipowner has delegated the responsibility of the management of his ships to a management company, that company may have to employ or nominate a person(s) to act as the "designated person(s)". Should the designated person(s) be found to be wanting in his duties, the shipowner could be made vicariously liable for any loss or damage resulting therefrom.

Consequently, the pertinent question is: Is the act of the "designated person(s)", whether employed by the shipowner or management company, to be deemed that of the shipowner? To answer the question effectively, the role and function of the designated person within either the shipowning or the management company would have to be examined. There are three ways of viewing his position. He could be regarded either as:

(1) a mere servant or employee of a company in which case his act is of no consequence in so far the question of indemnity is concerned; or
(2) a senior member of the company occupying a managerial position; or
(3) a member of the Board of Directors.

The fact that he is described as a person "having direct access to the highest level of management" suggests that he is *not* part of the upper echelon of management; otherwise, there would have been no need for the stipulation. Moreover, his job description does not seem to place him high on the corporate ladder, for his duties include the "monitoring and safety and pollution prevention aspects of the operation of each ship and to ensure that adequate resources and shore based support are applied, as required." He is the link between shore (office) and shipboard personnel. To all intents and purposes, he is the conduit pipe connecting the ship to the company. It is thus suggested that, unless he is also a director of the board or a senior manager of the company (which is highly unlikely), his act is not the act of the shipowner.

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[11] See arts. 1.2.3 and 1.4 of the ISM Code.

[12] See art. 1.1.2 of the ISM Code.

INDEMNITY UNDER A TIME POLICY OF MARINE INSURANCE

The connection between the ISM Code and the law of marine insurance may not, at first sight, appear to be obvious. The remit of this paper is to examine the effect the Code has on a *time* policy of insurance with particular reference to the defence of unseaworthiness and privity afforded to an insurer by section 39(5) of the Marine Insurance Act 1906 which states:

> "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

In marine insurance, the subject of seaworthiness is relevant in both time and voyage policies of insurance: in a voyage policy, the requirement of seaworthiness takes the form of an implied warranty - section 39(1) implies a warranty of seaworthiness at the commencement of the insured voyage - the breach of which *per se* would automatically discharge the insurer from liability as from the date of breach.[13] In a time policy, however, the position is more complex in that, though there is no implied warranty of seaworthiness at any stage of the adventure, "*the assured*" would forfeit his right to indemnity should he be found to be privy to such unseaworthiness to which the loss is attributable.

There are essentially two features in section 39(5) of the Marine Insurance Act 1906, namely "unseaworthiness" and "the assured" which are relevant to the present discussion.

Unseaworthiness

Before an insurer can exonerate himself from liability under section 39(5), it has first to establish that the insured vessel is "unseaworthy" within the legal meaning of the term. Traditionally, the concept of "seaworthiness" has always concerned itself with matters relating primarily to the *physical* condition of the ship.[14] Separately, the competence of master and crew[15] and sufficiency and quality of

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13 Section 39(1): "In a voyage policy, there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured." The legal effect of a breach of a promissory warranty spelt out in s. 33(3) has now to be read with the decision of the House of Lords in *The Good Luck* [1991] 2 Lloyd's Rep. 191,H.L.

14 This restrictive view probably stems from the phrase "taught, staunch and strong" commonly found in charterparties. See, *e.g.* the comments of Kerr L.J. in *The Derby* [1985] 2 Lloyd's Rep. 325 C.A., and *The Aquacharm* [1982] 1 Lloyd's Rep. 7.

15 See, *e.g. Wedderburn & Others* v. *Bell* (1807) 1 Camp. 1; *The Makedonia* [1962] 1 Lloyd's Rep. 316; *Standard Oil Co. of New York* v. *The Clan Line Steamers Ltd* [1924] A.C. 100; and *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478.

fuel[16] have also long been recognised as matters invariably impinging upon the seaworthiness of a ship. Aside these accepted and well-known features pertaining to seaworthiness, British courts have always jealously guarded the parameters of the concept, employing in the main two criteria for the measurement of seaworthiness.

The first yardstick was proposed by Parke B. in *Dixon* v. *Sadler*[17] to the effect that to be seaworthy, "she shall be in a fit state as to repairs, equipment, and crew, and in all respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it". The gist of this is encapsulated in section 39(4) of the Act which reads simply as: "A ship is deemed to be seaworthy when she is reasonably fit in *all respects* to encounter the ordinary perils of the seas of the adventure insured." Any *physical* defect affecting the ship's ability or capability to combat the ordinary perils of the seas of the adventure insured would undoubtedly render her unseaworthy.

The second benchmark, more general in terms, can be found in the words of Mr Justice Channel in *McFadden* v. *Blue Star Line*.[18] The test is worded as follows: "To be seaworthy, a vessel must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it."

The question which now arises is, would a breach of any of the requirements of the ISM Code render a vessel unseaworthy? Before this question can be answered effectively, it is necessary to comment briefly on the spirit of the Code. Its aspirations are laid down in the opening line of the Preamble and in clause 1.2. Basically, the aim is to provide, *inter alia*, "an international standard for the safe management and operation of ships" and "to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage … in particular … to property."[19]

To ensure that these objectives are achieved, the Code has devised a system of certification[20] whereby certificates, namely the SMC (Safe Management Certificate) and the DOC (Document of Compliance) will only be issued to a

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16 See, e.g. *Louis Dreyfus & Co.* v. *Tempus Shipping Co.* [1931] A.C. 726, H.L.; *Fiumana Societa Di Navigazione* v. *Bunge & Co. Ltd* [1930] 2 K.B. 47; *Thin* v. *Richards* [1892] 2 Q.B. 141; *McIver & Co.* v. *Tate Steamers Ltd* [1903] 1 K.B. 362; and *Northumbrian Shipping Co.* v. *Timm & Son Ltd* [1939] A.C. 397.

17 (1839) 5 M. & W. 405 at 414.

18 [1905] 1 K.B. 697 at 706.

19 See cl. 1.2.1.

20 See cl. 13.

company when it has been proved that a safe system of management has been set up for the ship and that it is in operation on board that ship respectively. Only when a company can demonstrate that its shipboard management operates in accordance with the approved SMS (Ship Management System) which it has devised will an SMC be issued to each ship. That the ISM Code is not concerned with the *physical* attributes of a ship but with the formulation and implementation of a safe system of management and operation of ships is clear.

In the present discussion, we are not so much concerned with the documentary aspects of the Code as with the actual failure on the part of the shipowner to *operate* a safe ship. A company which has for whatever reason failed to obtain the necessary documents (DOC and SMC) would commit a breach of the Code and may be penalised by the relevant authority with whatever sanction the law of the flag State may deem fit to impose. The mere failure to obtain the necessary certificates, however, cannot by itself render a ship unseaworthy, for a ship may well be *in fact* safely managed and operated at the time of loss.

On the other hand, it has also to be pointed out that even if the documentary demands of the Code are complied with, in that the ship has been issued with the necessary certificates, certification alone is not in itself proof that the ship is in *actual fact* safely managed and operated. We have been told often enough that the mere fact that a company has been issued with certificates is not conclusive proof of seaworthiness.[21] Seaworthiness is a question of fact and no court would allow any outside force to usurp its power and authority to investigate and determine for itself whether a particular vessel is or is not seaworthy.

Any shipowner would, of course, wish to cling onto the narrow and traditional point of view, that seaworthiness refers only to the *physical* qualities of the ship *vis-a-vis* her capacity to encounter the ordinary perils of the sea. But the word "*in all respects*" appearing in section 39(5) are clearly wide enough to embrace within the realm of seaworthiness (or unseaworthines) a ship which is not safely managed. Moreover, such a ship would also fall foul of the second criterion, for no ordinary, careful and prudent shipowner would send a ship to sea without ensuring that she is not only physically fit but also safely managed - all the more so now that there is an accepted international standard of safe management and operation for ships. Further, an insight of future trend can be found in a recent

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[21] See, *e.g. Studebaker Distributors, Ltd* v. *Charlton Steam Shipping Co. Ltd* (1937) 59 Ll.L.Rep. 22, *The Australia Star* (1940) 67 Ll.L.Rep. 110 and, in particular, *Asbestos Corp. Ltd* v. *Compagnie de Navigation Fraissinet et Cyprien Fabre* 480 F. 2d 669 (2d Cir. 1973). In *The Star Sea* [1995] 1 Lloyd's Rep 65; [1997] 1 Lloyd's Rep 360, CA, the ship was issued with a cargo ship safety certificate covering, *inter alia*, fire safety. Tuckey J. (at p. 664) was clear that "no owner does or should rely on this as a substitute for his own responsibility for the safety of his ship".

case, *The Toledo*,[22] where Mr Justice Clarke placed much emphasis on the standard of "the reasonable shipowner". He said: "… the reasonable shipowner would have appreciated the risk and would have set up a proper system for the inspection, ascertainment and repair" of the frames and brackets supporting the shell plating in the holds.[23] The pertinent parts of his judgment read as follows:[24]

> "It can only have been because of a failure on the part of the defendants and their masters to lay down and implement a proper system of maintenance and repair …. [T]he system on board *Toledo* and her sister ships for the ascertainment and repair of their internals was defective because it did not ensure that the damage was properly inspected, monitored and repaired …. [I]f the defendants had had and operated a proper system *Toledo* would not have been in the condition in which she was at St. John and *Florenz* and *William Shakespeare* would not have been in the condition in which they were found when surveyed." [25]

Perhaps the time is now ripe to give another dimension to the notion of seaworthiness. A ship which is not safely managed or operated can be as unsafe and as dangerous as one which is not physically fit to encounter the ordinary perils of the seas. It is thus submitted that if a procedure is unsafe, the ship will be unseaworthy.

A ship which is not safely managed or operated in accordance with the terms of the approved Safety Management System is, it is contended,[26] "not reasonably unfit to encounter the ordinary perils of the seas" and, therefore, unseaworthy.[27] There is no reason why unseaworthiness cannot take the form of a weakness in a system of management or operation[28] which is in breach of the terms of the ISM

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22 [1995] 1 Lloyd's Rep. 40. Earlier, in *The Garden City* [1982] 2 Lloyd's Rep. 382 at 389, a case interpreting the term "actual fault or privity" under limitation of liability law in the Merchant Shipping Act 1894, s. 503, Staughton J., citing *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335 as authority, emphasised that "the top management of every shipowner corporation ought to institute a system for the … detection of faults". A system of checklists, written instructions, and written reports of inspections was suggested.

23 The casualty leading to the loss of the entire cargo was caused by the fracture of the shell plating on the port side of the hold which fracture was caused by the damaged condition of the frames and brackets supporting the internal structure of the hold.

24 [1995] 1 Lloyd's Rep. 40 at 53.

25 It is interesting to note that, as in *The Star Sea* [1997] 1 Lloyd's Rep. 360, CA, two sister ships of *The Toledo* also suffered from similar defects.

26 See Hodges, *Seaworthiness and safe ship management* [1998] I.J.I.L. 162 where this contention is discussed in depth.

27 See s. 39(4): "A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas or the adventure insured."

28 See *The Toledo* [1995] 1 Lloyd's Rep. 40. In *The Garden City* [1982] 2 Lloyd's Rep. 382 at 389, Staughton J advised that "the top management of every shipowner corporation ought to institute a system for the … detention of faults." It was suggested that a system of checklists, written instructions and written reports of inspections ought to be implemented.

Code. Thus, it is suggested that the ISM Code may be usefully employed to serve as another criterion for the measurement of the seaworthiness of a ship.

The Assured

Once it has been established that the ship is unseaworthy, the next line of inquiry is to ascertain whose conduct is deemed that of "the assured" for the purpose of stripping the company of its right to indemnity under the policy. It is to be noted that under section 39(5), the insurer is not liable for the loss only if "the assured" is privy to such unseaworthiness to which the loss is attributable.

In the case of an individual shipowner, there is less difficulty in identifying whose conduct should be called for examination. But when the shipowner is a company, the perennial problem - whose act is to be regarded the act of the company - invariably rears its ugly head. The general principles to be applied for the resolution of this issue are generally referred to as the law of attribution.

In *The Star Sea*, Lord Justice Leggatt in a methodical manner enumerated the variables as follows:[29]

> (1) If one had an individual assured who ran his own affairs, the section would not be trying to except unseaworthiness to which that individual was not privy. The fact that an employee (e.g. the master) had knowledge would not for example be to the point.
> (2) If the assured were one corporation and if that one corporation alone were responsible for putting ships to sea, the search would be to draw the circle round the natural person which fairly reflected the equivalent position to that which would prevail where a natural person was the assured.
> (3) The position is obviously more complex where one corporation owns the ship and may be "the assured" technically, but where the management and responsibility has been placed in the hands of other corporation, even than the aim of the exercise must be the same.

Little need be said about the first situation as it does not pose any difficulty. But as regards the second and third, the task at hand is to identify which natural person (or persons) possess, in relation to the unseaworthiness, the relevant state of mind. In other words, in whom, in the ranks of the assured company or management company, must the necessary privity reside.

On the subject of corporate ownership, the case that immediately springs to mind is the recent Privy Council decision in *Meridian Global Funds Management*

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[29] [1997] 1 Lloyd's Rep. 360 at 375, C.A.

Asia Ltd. v Securities Commission,[30] where all the various principles of the law of attribution which may be applied were canvassed. Though not an insurance case, the points of law raised are nonetheless relevant to the present subject. But before proceeding to discuss the legal principles, it may be helpful to start by examining the precise nature of the problem relating to corporations. Adopting the words of Lord Hoffman, the issue may be framed thus:[31] "Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company?" For the present discussion, the phrase "for this purpose" has to mean for the purpose of indemnity in insurance. Lord Hoffman then answered his own question as follows:[32] "One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy." The "rule" here must mean the rule (or statute) which has engendered the problems concerning attribution, namely the Marine Insurance Act 1906 read with the ISM Code.

In this regard, it would appear that the approach taken by the Court of Appeal in the celebrated case of *The Eurysthenes*[33] and *The Star Sea*[34] is in tune with that (the rules of attribution) advocated by Lord Hoffman in the recent decision of the House of Lords in the *Meridian* case. Lord Denning in *The Eurysthenes* remarked:[35] "The knowledge must also be the knowledge of the shipowner personally, or of his *alter ego*, or in the case of a company, of its head men or whoever may be considered their ego."

The position of a shipowning company

The fact that a corporation is an "abstraction" and has "no mind of its own any more than it has a body of its own" renders it much more difficult to apply the substantive laws. A company has to conduct itself through various persons, and the question remains, which person (or persons) is "the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."[36]

The law is, however, settled at least on two points. First, it is clear that neither the employment of a competent master nor the engagement of a reputable firm of ship managers will divest a shipowner of certain aspects of his/its responsibility.[37] Secondly, in the well-known limitation case of *Lennard Carrying Company Ltd v.*

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30 [1995] 3 All ER 918. Henceforth referred to as the "*Meridian* case".

31 *Ibid*. at 924. [Emphasis in original text].

32 *Ibid*.

33 [1977] 1 Q.B. 49 at 67, C.A.

34 [1997] 1 Lloyd's Rep. 360 at 374, C.A.

35 [1977] 1 Q.B. 49 at 68, C.A.

36 *Ibid*.

37 See e.g. *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335.

Asiatic Petroleum Company Ltd, Viscount Haldane, the Lord Chancellor, clarified that:[38] "It is not enough that the fault should be the fault of a servant in order to exonerate the shipowner, that the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy…"

Guided by the language and purpose of the section, the House in the *Lennard* case looked for the person whose functions in the company, in relation to the cause of the casualty, were the same as those to be expected of the individual shipowner to whom the language primarily applied. The precise test applied was:[39] "Who in the company was responsible for monitoring the condition of the ship, receiving the reports of the master and ship's agents, authorising repairs etc?" This person is the directing mind and will of the company and, therefore, his act is to be attributed to the company.

The general law seems to be clear that if the directing mind and will of the company, for the particular matter at hand, is not to be found in the board of directors or a member of the board of director, it can be found in the body of a high ranking officer of the company, a person holding a managerial position, but not a mere employee or servant of the company. His position is on the higher rung of the corporate ladder or hierarchy, and the rationale for this is based on the assumption that decisions on important matters are not normally placed in the hands of a clerk or junior member of staff.

Ships managed by a management company

In relation to a ship which is managed by a management company, reference need only be made to *The Charlotte*,[40] the *Lennard* case,[41] *The Marion*[42] and *The Ert Stephanie*,[43] albeit cases on limitation of liability, which have all established that a shipowning company cannot wash its hands of its legal responsibility simply by delegating the task of management to a third party. The question is, are the acts

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38 [1914-15] All E.R. Rep. 280 at 283, henceforth referred to simply as the '*Lennard* case'.

39 Per Lord Hoffman in the *Meridian* case [1995] 3 All E.R. 918 at 925. P.C.

40 (1921) 9 Ll. L. Rep. 341 In this case, though the petitioners for limitation were the shipowners, nevertheless, the spotlight was focused on the conduct of two partners of the firm engaged to manage the *Charlotte.*

41 [1914-5] All E.R. Rep. 280. In this case, the ship was managed by Lennard & Sons, in which a Mr. J. Lennard, who was the active director of the company was also a director of another company, Lennard's Carrying Co. Ltd., which owned the ship.

42 [1984] 2 Lloyd's Rep. l.

43 [1989] 1 Lloyd's Rep. 349, C.A. *The Ert Stefanie* was managed by Sorek Shipping Ltd., and the personal fault of a Mr. Baker, the operational and technical director of Sorek, deprived the shipowners of its right to limitation. Mustill L.J. (at 352) said: 'Mr Baker was the director in charge of the aspects of the company's business which went wrong. He was personally at fault. It seems to me plain that in such circumstances the owners have no right to limit their liability.'

committed by a senior member of a management company to be deemed that of the shipowner? Just as an individual shipowner or a shipowning company can now no longer divest himself/itself of responsibility by the appointment of a competent master, the same cannot be achieved with the engagement of a ship management company however reputable.

The succinct judgment of Sheen J. in the court of first instance in *The Marion*,[44] citing *The Charlotte* and the *Lennard* case as authority, vividly makes the point as follows:

> "When a ship is owned by a limited liability company and managed by another limited liability company the first question which arises is: To which of those companies should one look to see whether the owners are guilty of "actual fault"? It is not disputed, nor can it be disputed in this Court, that the answer to that question is that one looks to the managing company."

Thus, it seems clear that the *alter* ego of the management company (its directors and senior managers) is the *alter ego* of the shipowning company.[45]

Returning to the case of *The Star Sea* referred to earlier,[46] the Court of Appeal was clear that the Kollakis brothers,[47] both of whom were directors of the company (Kappa), which managed the ship, were the natural persons within the circle. To this list, the Court of Appeal included a Mr Nicholaidis, the technical director of Kappa and, a Mr Faraklas, a director of Charterwell, the company listed as the registered manager of the ship.[48] All four were held to be the "relevant persons" whose privity or knowledge was to be considered that of the assured.[49] As can be seen, the relevant natural persons have all come from high rank, of director and technical director of the company. The decisive consideration stems from the fact that they were all involved, one way or another, in the decision making processes required for the sending of *The Star Sea* to sea.

As was seen, it is the conduct of senior managers of the ship management company which is to come under scrutiny. To all intents and purposes, any fault committed by the director or senior managers of the management company is to

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44 [1982] 2 Lloyd's Rep. 52 at 54.

45 For the purpose of limitation, Mr Baker was treated as the *alter ego* of the shipowners.

46 *Star Sea* was insured under a time policy. She and her two sisters, *Centaurus* and *Kastora*s, were all beneficially owned by the Kollakis family. All three ships were lost because of defective fire dampers.

47 Who were also the owners of *Star Sea*.

48 Mr Nicholaidis was originally excluded from the list of relevant persons by Tuckey J, the trial Judge.

49 The assured was a one-ship company managed by another company, Kappa. However, another company, Chartererwell, was listed as the registered manager of the ship.

be considered the fault of the shipowner. The shipowning company, instead of having its own management and operational division within the company, has effectively in engaging a management company to take care of its affairs adopted the *alter ego* of that company as its own. This makes sense, for if the law were otherwise, all shipowners (individuals and corporations) would simply delegate managerial and operational matters to a third party.

On the above premise, any fault committed by the "designated person", whether employed by the shipowner or their ship management company, is unlikely to be attributed to "the assured". It is contended that his actions cannot affect the right of the shipowner, for his position within a corporate structure is not high enough to constitute its *alter ego*. This, however, does not necessarily mean that a company can never be denied of its right to indemnity should the designated person(s) be in any way at fault.

Though the primary function of the designated person is to relay relevant information from ship to shore (and shore to ship), nevertheless, the ultimate responsibility of ensuring that such relevant information is *in fact* efficiently, properly and regularly transmitted still rests with the company. To absolve itself of fault or privty, the company has to show that it (its *alter ego*) has established a line of communication which is effective and reliable, and that any repeated acts of a failure to communicate are remedied. The company has to be kept informed (and ought to be kept informed) and if there is any slack or breakdown in the system of communication, it could well be held to have, if not actual, constructive knowledge of the fault in the management of the ship.

Once the identity of the relevant person is known, the next stage of the inquiry is to determine whether he is "privy" to such unseaworthiness (the fault in the ship management system) to which the loss is attributable? And on this subject, reference need only be made to the remarks of Lord Denning M.R in *The Eurysthenes*, who after conducting a comprehensive historical survey of the origin of this "old-fashioned word'" had no doubt that it refers to both actual and constructive (turning a blind eye) knowledge.

CONCLUSION

The very backbone of the ISM Code is to ensure that matters relating to safe management and operations of ships are monitored, defects and shortcomings rectified, and, more significant, that lessons are learnt. By expanding the concept of seaworthiness, much can be done by the courts to promote safety in the shipping industry. The law in this regard is of course yet to be tried and tested. But bearing in mind that safe management and operations of ships, the very ethos of the Code, is now the order of the day, it is not too difficult to hazard a guess,

that in the event of a catastrophe the court will be looking closely not only to the physical condition of the ship but also the manner in which she is managed and operated.