

# ISM COMPLIANCE FOR TANKER VESSELS



*Tankers anchored off Singapore (Source: Skuld)*

## THE ISM CODE

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The International Safety Management Code comes with a mandatory compliance requirement by virtue of its adoption in to SOLAS (Safety of Life at Sea) Chapter IX, and has come in to force since 1<sup>st</sup> July 1998. The background for the Code is certain tragic Shipping accidents including the Herald of Free Enterprise in 1987 and the loss of the Estonia in 1994.

Under the Code, effective for most vessels (including Tankers) of 500 gt and above from 1998 and for other cargo ships and mobile offshore drilling units of 500 gt and above from 2002, Companies needed to develop, implement and maintain a Safety Management Systems (SMS) for their vessels. Compliance requires both shore (Management) and ship side (Officers and Ratings) implementation.

The Code aims to ensure safety at sea, the prevention of injury and loss of life, and protection of the marine environment, in addition to ensuring safe practices on vessels and the creation of a safe working environment for crews. An unmentioned objective is the sustainability of the maritime industry.

While the Code requires that Companies develop such a SMS for their vessels, it was left broadly open as to the terms and was deliberately intended to be sufficiently flexible to allow adoption by companies of varying sizes and across different industry sectors.

Regrettably, at times, the Code has been treated as a form filling and check list exercise. It is seen by many

as an administrative burden on vessels, without the desired positive effect on safety. That is quite the wrong impression to form.

The Code not only provides the basis on which companies can develop essential Safety systems, along with the procedures to allow these to be checked and followed up, but compliance is typically required under Charterparties as well as insurance coverage.

One Shipping sector that has had particular reason to be keenly aware of the necessity of compliance as well as the consequences of a failure to comply is that of Tanker Owners.

## IMPORTANCE OF ISM COMPLIANCE FOR TANKERS

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Tankers operate in a particularly stringent environment when their employment is directly with, or otherwise requires, a so called "Oil Major approval".

Having had to deal with a historical legacy of highly publicized incidents dating back to the MT Torrey Canyon, MT Amoco Cadiz, MT Exxon Valdez as well as the MT Prestige and MT Erika, the Oil Majors know only too well of the dramatic financial and reputational impact of a major incident.

The Oil Companies International Marine Forum (OCIMF) developed the Ship Inspection Report Programme (SIRE), which was launched in 1994 as a way of creating a database about the condition (physical and otherwise) of Tankers, with an aim to improve quality and safety standards. The OCIMF states that since its introduction more than 180,000 inspections have been submitted to SIRE, with 22,500 reports reviewed on over 8,000 tankers in the last 12 months.

Tanker Owners who have worked with Oil Majors, or needed their approval for a Charterparty, will know only too well the stringent nature of these inspections and reporting.

It should be no surprise then that ISM Compliance is one of the matters a SIRE Inspector will look for when coming on board.

## SPECIFIC COMPLIANCE ISSUES IDENTIFIED

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One of the key issues that has repeatedly arisen is the Management's conflicting concern over addressing:

1. achieving ISM Compliance;
2. concern for creating documents that result in SIRE VIQ "observations";
3. legal advice that suggests limiting the creation of a paper trail (which may subsequently become subject to legal discovery or disclosure obligations).

These concerns, and a miss-understanding of how to address these appropriately, can lead to actual under-performance in critical ISM areas, only increasing the physical and legal risks.

To some extent it is not easy gaining a complete overview of Tanker ISM Issues as well as casualty data, as there is no central repository for collecting and analyzing Section 9 non-conformity (NC) reports. There is no

central or autonomous agency that collects, evaluates and disseminates Tanker incident information. In that regard Shipping does lag behind the airline industry for accident investigation as well as “lessons learned purposes”. Part of the reasons for this state of affair are set out by Jack Devanney in a paper called “Uses and Abuses of Ship Casualty Data”. Often the underlying reason will fall back on a fear of embarrassment as well as a concern over legal prejudice.

This can lead to the following chain of information “suppression”:

- ratings do not report problems to their officers; and
- crews do not report problems to their owner/manager; and
- some owners/managers may “prefer” not to learn in writing about “minor” shipboard issues and are concerned should a paper trail be created that could be discovered during a SIRE inspection or investigation of an accident.

While most Tanker Owners and Managers would rightly say that this does not describe them or their operating style, regrettably this sort of approach still exists today in some areas.

A recent example of such issue being tested in Arbitration in New York led to a finding of neglect by the Management and an award in favour of the Claimant Cargo Owners. The vessel apparently had a SMS certificate for several years but there was no single fully completed NC report or any evidence of management review of such a report in the records of the Owner. That issue, combined with a seeming lack of proper planning and management oversight of voyages and repairs led the Arbitrators to reach their conclusion.

## REASONS FOR SHIP AND SHORE COMPLIANCE FAILURES

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A formal survey of ISM compliance was conducted in 2014 by David Corkish and presented in a dissertation submitted to the Liverpool John Moores University: “The effectiveness of ISM Implementation”. Findings from this survey are republished here with kind permission of the author.

The findings include the following reasons, explanations and examples:

- some vessels and organisations had a “culture of (avoiding) embarrassment” among management and crew
- official statements about embracing ISM were not followed through in practice, including a verified check on a particular company stating it was compliant but having been found to routinely violate SCTW work and rest hours and with no NC ever being filed
- using the “5 whys” technique of incident review often leads to issues of management practices being the root issue
- section 12 of ISM requires audits and annual reviews, but these may be neglected in practice

- less than half of respondents were able to state they had “buy-in” to ISM’s philosophy and practice
- over two thirds of respondents felt that the paperwork generated by ISM compliance requirements was excessive, distracting from other duties and contributed to fatigue on board
- some respondents felt that IT support was insufficient to assist with the administrative burden
- less than one third felt that an adequate confidential NC system was in place and a similar low number did not express confidence in their employers to respond to issues in a timely fashion
- less than half of respondents felt that accident and near miss reports were being taken seriously by their organization, and even more concerning was that 30% thought the reports are NOT taken seriously
- overall there was a perception that paperwork was being over-relied upon to achieve ISM “compliance” which led to frustration on the part of those who had to complete these tasks; with potential ship – shore management attitudes being a root cause

## PRACTICAL EXPERIENCE IN THE FIELD

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From 1996 to 2008 John Dudley, co-author of this Loss Prevention Bulletin - was the primary tanker vetting reviewer for a large international oil trading company. He reviewed between 400 and 500 OCIMF SIRE VIQ reports annually and in some 5000 reports, he saw:

- only an occasional statement that a VIQ observation “would be raised as a non-conformity and reviewed according to Owner’s ISM process”;
- only one company who responded to SIRE VIQ observations by raising a NC for every observation. The company submitted a copy of their management NC review status report as their response to the vessel’s SIRE VIQ observations; and
- only one example of a fully completed NC report form, with management-of-change follow-through and sign-off, as a VIQ observation response.

In one case, an Owner’s refusal to submit any kind of written report regarding an incident that occurred while their vessel was in employment resulted in that tanker not successfully completing vetting for two years until finally the situation was properly addressed.

One thing that John would particularly watch out for as a vetting manager was to read a SIRE inspector’s VIQ observation that “during the previous 6 months twelve non-conformities were raised by the crew or during management visits, and all were shown to have been suitably closed out by management review and SMS changes.” Such statements were considered to be evidence of a well working ISM process on board and ashore, with due reporting and follow up.

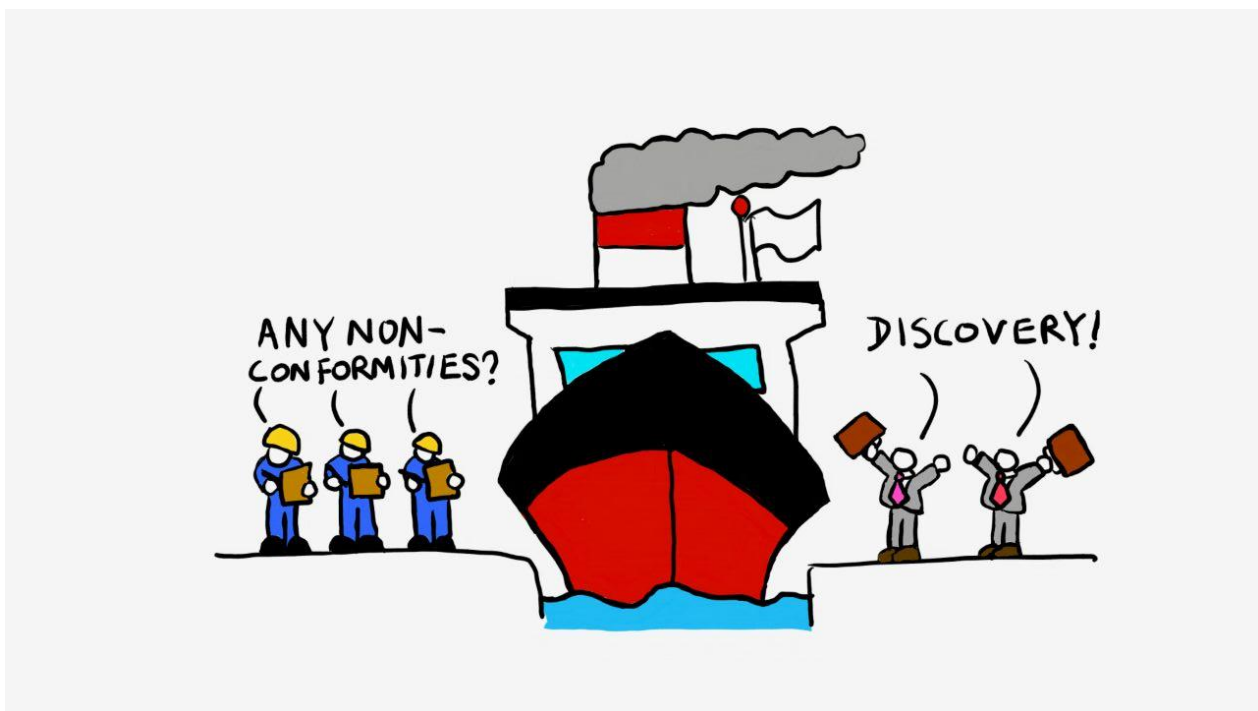
## THE REPORTING PARADOX?

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So the quandary for Owners and Managers is: “How can I create NC records of deficiencies in the operation of my vessels without ...”:

1. the NC records becoming uncorrected “observations” recorded by SIRE inspectors in their VIQ report leading to possible vetting rejections and loss of income; or
2. creating a documented history of apparent errors and omissions that will be used against me in an arbitration or court proceedings ?

The answer of course is that a diligent program of continuous improvement, including a vigorous non-conformity process, will significantly reduce the opportunity for an event that will produce a legal or arbitral consequence, and the ability to demonstrate thorough implementation of ISM is a strong defense against claims of negligence.



*Betwixt and between.* (Source: Skuld)

## RISK MANAGEMENT

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First and foremost, the most important step is for the Management of the Company to realize the importance of ISM compliance and then ensure this is translated into proper adoption as well as continued review and appraisal. Sounds simple to say, it will mean a lot of work in practice, but the consequence of failing to comply could lead to loss of Oil Major approval, prejudice of insurance coverage, as well as legal consequences (both civil litigation and authority led action).

One key area to check for is compliance with ISM Section 9, as that can be an easy target for critique when passed in to the hands of the Lawyers.

That section provides in particular that:

## **9 REPORTS AND ANALYSIS OF NON-CONFORMITIES, ACCIDENTS AND HAZARDOUS OCCURRENCES**

*9.1 The safety management system should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the Company, investigated and analysed with the objective of improving safety and pollution prevention.*

*9.2 The Company should establish procedures for the implementation of corrective action, including measures intended to prevent recurrence.*

If a company has not a single NC and has no records following incidents on board or otherwise involving their vessels, then this will likely prove detrimental and lead to negative inferences if not an outright finding of a failure to comply with the ISM Code. The consequences of that situation are clearly set out in the ISM Code:

*1.1.10 "Major non-conformity" means an identifiable deviation that poses a serious threat to the safety of personnel or the ship 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.*

*13.5 The Document of Compliance should be withdrawn by the Administration or, at its request, by the Contracting Government which issued the Document when the annual verification required in paragraph 13.4 is not requested or if there is evidence of major non-conformities with this Code.*

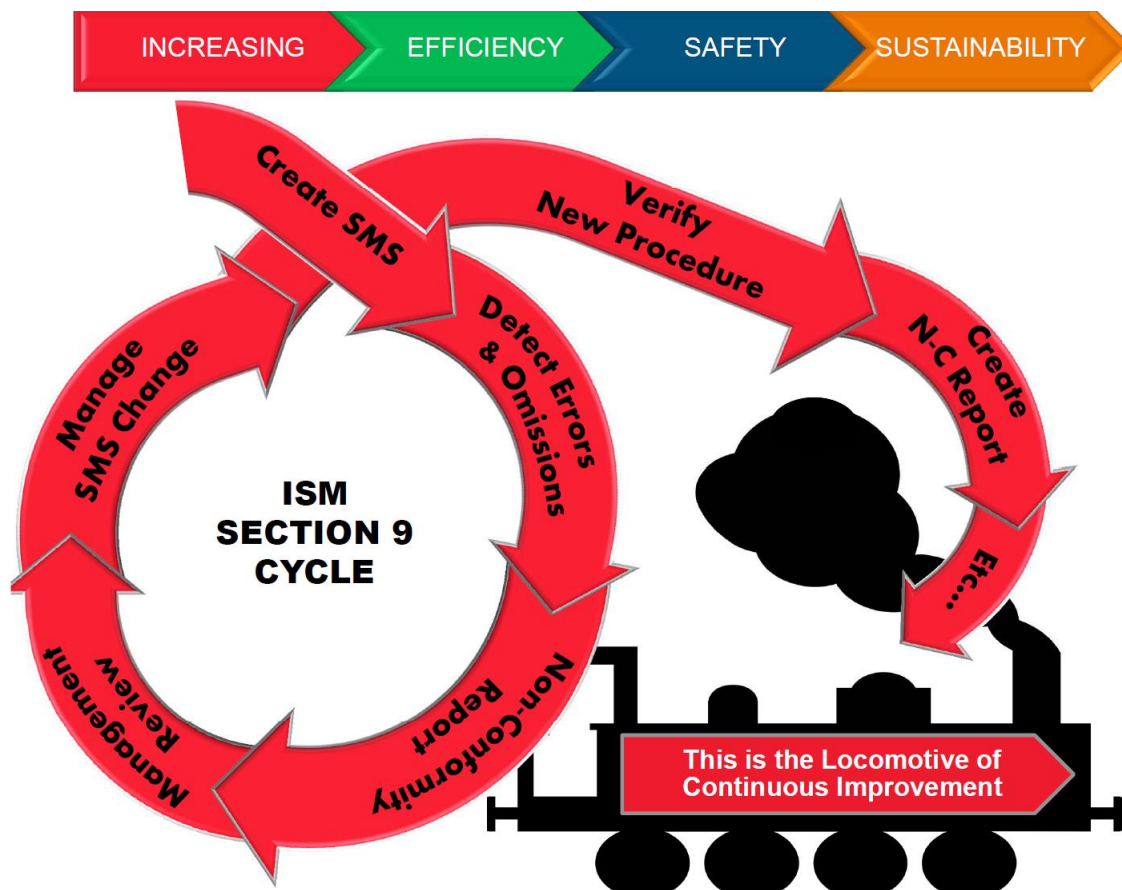
*13.9 In addition to the requirements of paragraph 13.5.1, the Safety Management Certificate should be withdrawn by the Administration or, at the request of the Administration, by the Contracting Government which has issued it when the intermediate verification required in paragraph 13.8 is not requested or if there is evidence of major non-conformity with this Code.*

The question of what constitutes an adequate number of NCs so that compliance in practice is demonstrated is a contentious one. The response from some Owners differs greatly from others when presented with such a question. It is suggested that there should be a basic expectation of at least some issues being reported periodically.

Such a view would allow for an easy follow up on vessels that report nothing at all to see whether indeed all is well or whether there may be an issue with under-reporting that needs to be addressed.

There are some Owners and Managers that continue to resist full implementation of the continuous improvement mandate and ISM NC mechanism out of a possible concern over the creation of documentary evidence that could adversely affect vetting, arbitration or court outcomes.

This concern should, however, be replaced by an even greater concern of being found to have **NOT** initiated and maintained a vigorous flow of ISM "issue" reports from the fleet and a return flow of change management actions for continuous improvement.



*Improvement is a never ending journey. (Source: Skuld)*

## LEGAL AND INSURANCE

As a starting point, the ISM is a mandatory Code which must be followed and should Port State Control or Flag State Inspectors attend a vessel and find deficiencies then significant consequences can follow. For instance AMSA in Australia has a strong track record of highlighting deficiencies and a demonstrated willingness to take robust action including the banning of vessels found to be in non-compliance with Codes and regulations.

Aside from bans, there is also the risk of detention, fines and prosecution along with significant negative media publicity.

Furthermore, should a significant accident occur and subsequent investigations reveal that there was a systematic ISM compliance failure on board, ashore or both, it may lead to dramatic consequences with respect to potential legal action by authorities for criminal prosecutions. On the civil liability side, such failures could lead to a loss of limitations and defences that could otherwise be available under contract or law.

In addition it has already been mentioned that a vessel may be taking on a contractual obligation under a Charterparty to ensure she has Oil Major Approval, and ISM failings can lead to failed SIRE inspections. The knock on effect could be a loss of Approval with resulting financial consequences that could be quite significant, and repeat failures may lead to further stringent requirements before Approval is regained.



In addition, it must be remembered that insurance coverage for vessels is dependent on the vessel being fully ISM compliant. Skuld changed its rules in 1998 to expressly make ISM Code compliance a condition for cover from the Club. This rule is expressed as follows in the 2015 / 2016 policy year rule book:

#### *28.4 Classification & certification*

*It shall be a condition precedent of the insurance cover,*

...

*28.4.3 that the member shall maintain the validity of all statutory certificates issued by or on behalf of the state of the vessel's flag in relation to the ISM Code and ISPS Code.*

*28.4.4 In the event of any failure to comply with any of the above requirements, the member shall not be entitled to any recovery from the Association in respect of any event occurring during the period of non-compliance.*

Hull Cover may also be dependent on such regulatory compliance, and the following is an excerpt from the International Hull Clauses (01/11/03) by way of illustration:

#### *13. CLASSIFICATION AND ISM*

*13.1 At the inception of and throughout the period of this insurance and any extension thereof*

...

*13.1.4 the Owners or the party assuming responsibility for operation of the vessel from the Owners shall hold a valid Document of Compliance in respect of the vessel as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof*

*13.1.5 the vessel shall have in force a valid Safety Management Certificate as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof.*

*13.2 Unless the Underwriters agree to the contrary in writing, in the event of any breach of any of the provisions of Clause 13.1, this insurance shall terminate automatically at the time of such breach, provided [...specific further terms in 13.2.1 and 13.2.2].*

Altogether the cost and labour of compliance is easily dwarfed by the risk and consequence of a failure to comply.

#### **SOURCE MATERIAL:**

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David Corkish "The effectiveness of ISM Implementation"

Jack Devanney "Uses and Abuses of Ship Casualty Data" <http://www.c4tx.org/ctx/pub/casdata.pdf>



## CREDITS

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