



Isle of Man Marine Administration

A submission to the;
International Commission on Shipping;

Introduction

The Commission is tasked with:

- Investigating and appraising the current approach used by Governments, Industry and interested parties to achieve compliance with international minimum safety, environmental and social requirements.
- examining whether current approaches are in line with applicable international law, especially the UN Convention on the Law of the Sea.
- Recommending appropriate compliance / enforcement strategies encompassing both the regulatory and non-regulatory approaches.

Looking at this brief I would offer the following analysis of the background to the business of ship regulation, the derivation of applicable law, its application and enforcement, and the possibilities for future change.

Background.

Regulation of shipping has been in existence for some considerable time, and before looking at the present system, its faults, and the possible solutions, it is worth stepping back a little to look at the origins of the whole system.

A couple of centuries ago shipping was characterised by virtually total non-regulation and in consequence:

- lives and ships were lost at an alarming rate.
- incompetence was rife.
- piracy was rife

- over-insuring of overloaded ships was commonplace
- seafarers employment was casual and seafarers had no rights or security, could be dumped anywhere unpaid, could be pressed into service unwillingly and generally exploited, on poor food, appalling living conditions and a high risk of death from disease or accident.

Since then, and in response to these problems, there has been, amongst other things, the development of;

- A Load Line Convention and Load Line rules to tackle overloading, stability and strength.
- A Safety of Life at Sea Convention to tackle basic safety equipment provision and fundamental design elements.
- An STCW Convention to address incompetence.
- ILO Conventions to address basic seafarers social needs and employment conditions.

All of these are international treaties which, in the normal practice of public international law only gain force, (in virtually all jurisdictions), when enacted in municipal law. In other words, in themselves, they are ineffective and it lies with individual parties to the treaties to give them effect through municipal law.

That situation has been improved to a degree by the inclusion in SOLAS, of regulation 19 providing for control by port states and in UNCLOS and its predecessors of various provisions which give port states and coastal states a limited jurisdiction over non national ships. These concepts are now embedded in international law and have permitted port states to develop an intervention strategy which has become Port State Control. In essence, Port State Control allows individual coastal states to impose the requirements of the international treaties on visiting ships even if the flag state of the ship does not, or has not, effectively enacted or enforced the treaty provisions in its own municipal law.

It might seem that this development of a wide ranging corpus of international law governing all aspects of shipping would have addressed all the problems which once existed in shipping. Sadly, it remains the case that;

- piracy remains rife, and is possibly an increasing source of risk to seafarers.
- ships are still being lost through incompetence and structural failure.

- seafarers are still being exploited.

What must be remembered, (and what is often forgotten) is the fact that irrespective of the body of law that now exists, the formation and development of Maritime Administrations and the development of international law on ship safety, has its roots firmly in one overriding consideration. Protecting the lives and welfare of seafarers and no other reason, financial or otherwise. More recently it is true that protection of the environment has assumed a greater role, sometimes it appears, a greater role than the protection of seafarer's lives.

The current approach, some thoughts

Given that the enforcement of international standards and requirements for ships relies generally on the creation of municipal law to give effect to the treaty provisions, the nationality of ships is an area of critical concern. It is the nationality of a ship which in turn determines which state's municipal law applies to the ship. Outside of the Port State Control regime jurisdiction lies with the flag state which grants nationality to the ship¹.

Nationality is a key concept. Originally it was a means of securing national military protection to a state's own ships. Navies existed usually for the two prime purposes of projecting military power and protecting national trade. If a ship possessed the nationality of a particular country then that country's navy was available and bound to provide protection to ships of that nationality. From this precept of protection developed the idea that all ships shall have a nationality so that a ship cannot trade internationally and be stateless any more than can a person. The final form of this can be seen in, for example the Geneva Convention on the High seas 1958². Later developments up to the current Convention on the Law of the Sea 1982 (UNCLOS) have retained and strengthened this requirement.³

Article 5 of the Geneva Convention requires a "genuine link" between the State granting nationality and the ship. However, the exact requirements for a genuine link remain unclear. They are not clarified in any of the Conventions. The concept appears to have its beginnings in the leading case on the subject of nationality, the *Nottebohm* case⁴ in which the International Court of Justice considered the role and characteristics of nationality.

The case itself concerned a German born individual resident in Guatemala who sought and acquired Liechtenstein nationality. The question arose as to whether or not a genuine link existed

¹ Geneva Convention Art. 6

² Art 6. "*Ships shall sail under the flag of one state only.... and subject to its exclusive jurisdiction on the high seas.*"

Art. 4. "*Every state has the right to sail ships under its flag on the high seas.*"

³ Arts. 91 and 92, which are very similar to the corresponding Articles in the Geneva convention.

⁴ ICJ reports, 1955,

sufficient for Liechtenstein to claim restitution and compensation against Guatemala in respect of acts against Nottebohn by Guatemala.

Critical to the case was determination of the existence of a genuine link and the court identified a number of concepts which would presume a genuine link notably the need for the individual to be more closely connected with the state granting nationality than with any other.

The concept remains vague and there has been little case law on the subject since, but following the Nottebohn case the "genuine link" requirement made its appearance in international treaties in relation to ship's nationality and it must be presumed that the legal determination of what constitutes a genuine link has to be based on that judgement.

Taking this principle and applying it to ships it would seem that ships can be granted the nationality of the state to which they have a closer connection than they do to any other state, and it is the municipal law of the state of nationality which applies to the ship.

However, since the Geneva Convention the operation of international shipping has changed. At that time the almost universal pattern involved owners, whose ships flew the flag of their country of domicile and which were crewed by locally recruited seafarers. The ships traded from that same country to other parts of the world and back on a regular basis.

That pattern has disappeared, probably for ever. Today the pattern is much more international and very few ships operate in that manner. The vast majority of ships operate either "tramping" or in cross trades. The concept of regular voyages from the country of flag and back is rare. At the same time the nationality of the owner has become diluted. Ship finance has become equally international and it would be rare for all the ownership and financing arrangements for any ship to be found in one country. The genuine link factor is harder to identify and the concept of "beneficial ownership" as used by the International Transport Workers Federation" (ITF) in their campaign against Flag of Convenience ships has lost meaning. It has tended to bring their cause into disrepute and weakened it. Three typical examples from the Isle of Man illustrate the problem;

A local ferry operator.

This company has operated ferries to and from the Isle of Man for many years. The Company is based in the Island and operates and runs the ships from the Island.

The crews are recruited either locally or in the UK. Recently the Company's shares were bought out by a larger Company, which has its registered office in Bermuda although the Chairman and some Directors are resident in the Island.

Technically the beneficial ownership now lies in Bermuda and the ships, which are still flagged in the Isle of Man, are operating under a "Flag of Convenience" (FOC) in ITF terms. The ships should really transfer flag to Bermuda. Such a move would be a

nonsense, the ships are managed from the Isle and manned as before. There is no "link" with Bermuda. The genuine link, in reality (and in the "Nottebohn" sense) , lies firmly in the Isle of Man.

A Major Ship Management Company.

This company owns ships and manages on a third party basis a considerable number of other ships. The Company Headquarters is in the process of moving from its present location to the Isle of Man. The ultimate "beneficial owner" will therefore be based in the Isle of Man. At the same time the Company has major offices in the UK and in several other countries. The technical management of all the ships is handled from the various offices. The change of company headquarters from its present location to the Isle of Man does not change any aspect of the running of the ships, which will still be done as before, the ships are not flagged in the Isle of Man but the registered office of the beneficial owner will be located in the island. To expect these ships to change flag to the Isle of Man, while attractive to the Isle of Man Administration, is again a nonsense. Their "allegiance", or their genuine link, lies with the country of the office from where they are run.

A major oil company.

The major oil companies have a financial might and presence greater than many small countries. They are globally based and their shipping operations are but a small part of the overall company structure.

The operation of the ships is carried out from one or more sub-offices of the main company. These sub offices are, in themselves large concerns. While the "beneficial" owner in the form of the corporate headquarters may be located in one country, neither that headquarters or any part of the operation of the company in that country necessarily has any direct role in the operation of the ships. The company structures are often set up as individual "profit centres" so that any notion of the state wherein the headquarters is located having a closer link with the ship than any other in the "Nottebohn" sense is unsustainable.

All of these examples illustrate that in the present structure of ship operating, simplistic notions of the proper flag state being the state wherein the ultimate beneficial owner is located are no longer applicable. In each of these cases if the question is asked "Which country has a closer link with the ship than any other?", the answer is very clearly, the country from which the ships are run.

Thus, in another case which occurred recently, several Isle of Man registered ships owned by a Japanese car company were declared by the ITF to be operating as Flag of Convenience ships (FOC). Yet, although the ultimate ownership of the shares in the Isle of Man based owning company might be in Japan, no-one in Japan exercised any direct control over the ships. All the

day to day operating decisions, the decisions on crewing and employment of the ships and everything else affecting their operation and employment were taken locally. The ships were manned by UK seafarers. To declare that because the beneficial ownership lies in Japan, the ships are "FOC" in these circumstances is to fly in the face of "Nottebohm". Far closer links lie with the country from where the ships are operated than with Japan.

It is submitted that, in the case of Flag of Convenience shipping as defined by the ITF, the precepts of international law are not being followed. This leaves the two questions, how can they be followed? Or, alternatively, is the ITF definition flawed? I would submit that the ITF definition, however much it was once useful, is now outdated and flawed.

In the Isle of Man national legislation requires that each and every ship has a technically competent manager resident in the Isle of Man. Communications between the flag administration and the ship are through the Isle of Man based manager. Isle of Man legislation defines an "operator" in respect of the application of law and the imposition of judicial sanctions. The operator is subject to penalties for non compliance with legislation.

An operator is the person with day to day responsibility for the safe and effective operation of the ship. He is the person who makes the decisions which affect the crew and their safety and it must be remembered that the safety and security of the crew on board is the ultimate aim of shipping regulation. In so far as the ship is concerned, the operator is the nearest identity between the ship and a particular state. For an Isle of Man ship he is the island based manager. To those on board who deal daily with the operator, he is the closest identity. When the crew have a query they address it to a person in the Isle of Man. He is certainly a more identifiable entity than a disparate group of shareholders or a nominal owning company wherever it may be based.

I would submit that a proper and legal application of the genuine link requirement is the existence of an operator, in the Isle of Man sense, who is based in the flag state.

Rule making today.

As noted above the basic requirements for ships and their crews are determined by two bodies, the International Maritime Organization (IMO) and the International Labour Organisation. (ILO). The requirements emerge as treaties in the form of Conventions.

These Organisations are made up of all the States party to the appropriate Maritime Conventions plus a number of associated non-Governmental bodies who can often have a persuasive influence. Many of the "traditional" maritime states still have substantial marine administrations

mainly left over from the days when they also had large fleets of ships registered under their flags. Newer flag states have often not yet developed such large administrative infrastructures.

IMO operates as a number of main committees supported in turn by a range of specialist sub-committees and all the meetings are held at the Organization's headquarters in London. Participation in even a majority of these, in London, requires a substantial commitment in time, personnel and funds.

There is a tendency, readily evident in many of these IMO sub-committees, to actively look for agenda and work programme items in order to maintain their existence without always a clear demonstrable need for some of the work. Yet it is hard to argue against the work, to do so is to be seen as obstructive or opposed to the development of marine safety. The result is a continuous and seemingly unstoppable outpouring of changes and amendments, which grow ever more complex as the application of them is grandfathered in so that some apply to existing ships, some to new ships, some to all ships, some to ships meeting certain conditions, and some only to certain ship types.

The basic SOLAS Convention itself has metamorphosed several times from 1948, through 1960, to 1974 and the various subsequent amendments to the 1974 Convention. Within this morass anyone trying to apply the Conventions will find that, in the case of an older ship, parts of the 1960 Convention will apply, parts of the 1974 Convention apply, and some parts of the various amendments and Protocols adopted since 1974 will apply.

The pile of documents for SOLAS alone containing all the applicable requirements for a ship built in the 1970's is nearly 20 centimetres thick, and, to the uninitiated, almost impenetrable.

To this pile must be added a number of Codes applicable to certain ship types and certain cargoes, again in their various incarnations. Once the basic documents are assembled, any person seeking to apply the requirements will find that many technical requirements remain essentially vague. Expressions such as *"To the satisfaction of the Administration"* appear regularly. Even IMO recognises this problem. In 1998 the Maritime Safety Committee issued Circ. 847 entitled *"Interpretations of Vague Expressions and other Vague Wording in SOLAS Chapter II-2"*⁵. This document amounts to 62 A4 pages and still leaves some areas in doubt. It addresses only part of one chapter of a complex Convention. Similar interpretations are being developed for other Chapters but at the same time, some chapters are being re-written wholesale and will then need new interpretations.

This volume of change and the associated uncertainties make it difficult for smaller marine administrations to keep up. Even some major administrations have problems, particularly where national law making systems are incapable of acting quickly as a result of rigid procedures applicable to their national legislatures. In this sense while smaller maritime nations are

⁵ MSC/Circ.847 dated 12th June 1998 Maritime Safety Committee 69th Session

sometimes better placed to enact changes quickly, conversely, they are the ones with the limited size of maritime administrations which have difficulty in keeping abreast of the changes. Equally it is the smaller maritime administrations which do not have the funds to send technical delegations to IMO. At important meetings the work is split between the main committee and several working groups. Small delegations which may well have some worthwhile input cannot physically attend all the groups so that the main driving force in the Organization remains the larger traditional administrations which can attend with large delegations.

At the same time there is a tendency at IMO to avoid substantial retrospective requirements, which means that differing standards apply depending on a ship's age. For example, a new ship needs a rescue boat complete with foul weather recovery systems. An older ship does not even need a rescue boat. Again on lifeboats, a new tanker must have enclosed fire protected lifeboats, an older tanker can still sail with simple open lifeboats. It is illogical that key matters such as this continue and it would be my view that the cause of marine safety could be enhanced greatly by a moratorium on new technical requirements from IMO and a concentration instead on removing grandfather rights with the aim of developing a single unified document which sets out unified standards and requirements for all ships, irrespective of year of build.

I would argue that by changing the IMO focus away from new technical requirements and focusing it instead on the "grandfather" provisions for existing ships with a view to the development of a single unified requirement there would be a number of beneficial effects:

- the probable demise of a number of the world's oldest ships.
- a chance for all marine administrations to cease new law making in so far as technical requirements are concerned and concentrate on enforcing existing law. It is regularly argued in many fora that the problem today lies with enforcement, not with the rules. An opportunity to turn aside from new rules and turn attention to enforcement can only be beneficial.
- a unification of requirements applicable to "all" ships.
- an opportunity to simplify port state control efforts, applying a single standard.
- an opportunity to assess the causes of casualties against a common standard. Currently the acquisition of meaningful statistics is difficult given that any group of ships over an age range will have different damaged stability requirements, different equipment provision, and different equipment type approval standards etc. depending on age.

At the same time I would support the concentration of maritime standard setting at IMO. The present tendency to develop regional variations in standards is counterproductive and must have the potential for damaging efforts to protect seafarers world-wide. If a safety or anti-pollution measure is necessary in one region for safety or environmental protection reasons, then it must be equally valid in all places.

I remain very firmly of the view that seafarers lives and the environment are equally important everywhere in the world and not just in certain regions.

Enforcing the Rules.

It has often been stated that the key to improved standards lies, not in new rules, but in enforcement of existing rules. I would support this view but who enforces the rules?

Within the overall lawmaking framework there are a number of official and semi-official agencies involved in seeing that the requirements are met;

- Flag State Administrations. These are unquestionably the primary responsible bodies for the enforcement of standards in ships.
- Classification Societies. These have an international presence and have developed expertise in several technical areas. There are a large number of them but the standards they apply vary.
- Port State Control. A concept which is spreading over the world with very few major regions now uncovered.

Alongside the official agencies are a number of semi-official and non-governmental bodies with influence on the maintenance of international standards;

- Commercial groupings, OCIMF and similar.
- Major Charterers and Major oil companies.
- The International Transport Workers Federation. (ITF).

Each of these plays a role to some degree, however their effort is neither co-ordinated nor always effective. All of them must have their role assessed in the light of the simple fact, as stated by the courts in several countries, that the responsibility for the safe operation of a ship and the maintenance of a ship in seaworthy and safe condition lies firmly with the owner.

None of the bodies listed above can oversee the operation of a ship or the condition of a ship 24 hours a day. By the very nature of a ship and her operations these bodies can only see her in

port and only at intervals. Many problems develop quickly, some cargoes for example can initiate intense corrosion which can reach dangerous levels in a matter of months. Equipment failures which could threaten the safety of a ship and her crew can occur at any time. Even with a very regular inspection regime by a flag state, these failures are almost certain to arise between inspections whether they be class inspections or flag state inspections. The only person in every day contact with the ship, through his representatives on board, the crew, is the ships operator, whether he be the owner or the manager.

Quite properly, it is his responsibility to ensure that the ship remains safe and that her crew are protected. That basic fact has been submerged recently with the attention focused on high profile accidents such as the "Erika" where Class and flag state have come under the spotlight.

Looking at the role of each of the involved parties it is possible to offer the following points:

1. Flag State Administrations.

The ultimate responsibility for the supervision and enforcement of standards in ships lies with the flag state. Flag States have a duty, in law and morally, to take appropriate steps to ensure that when a ship takes on that nationality, she meets international standards in all respects and subsequently, whenever inspected, continues to meet those standards. However, no flag state can be in the same position as an owner with the capability to monitor a ship's condition continuously.

As the situation is today, no flag state has the resources to station dedicated and technically competent personnel all over the world in order that they are available to inspect flag state ships wherever they may be. With the change in ship operating patterns that has occurred the opportunities for flag states to inspect ships flying their flag has in fact reduced.

Looking to the future it is unlikely that any flag state will ever have a sufficient fleet to justify the cost of personnel stationed around the world, or that any politician will authorise the expense of such an operation from public funds. Some flag states make an effort to achieve this. Some for example recruit "non-exclusive" surveyors around the world. These surveyors work full time in other fields either as self employed individuals or as employees of other companies engaged in, cargo surveying, P&I surveying, and similar work generally closely associated with shipping. At the same time they have the capability to put on a "flag state hat" on demand and make an inspection of a ship. They do not, however, work for the Administration directly and they have virtually no regular contact with the Administration. They are rarely trained in ship surveying or the interpretation and application of the Conventions.

Forty years ago, as already mentioned, the most common trading pattern saw ships making voyages from their home country and returning to the home base at the end of the voyage.

Inspections could be arranged on each home return, and invariably the operators of the ships were based in the home state. Today, very few ships operate in such a manner. The vast majority of ships operate in a world-wide market, cross trading or spot market chartering. In this climate very few ships have a "home base" and very rarely will it be in the flag state. Even if, for a time it is, chartering changes will soon move it elsewhere.

Thus the traditional concept of a flag state exercising control over its ships whenever they arrive back from a voyage, or before they depart on a voyage, is no longer valid. It follows therefore that the choice of flag state based on the ship's operations achieves no more than does the determination of flag state by location of the beneficial owner. Thus the nationality assigned to any particular ship has to be selected from some other criteria. In my view the only effective, legal and practical criteria is the location of the "operator".

When ships no longer make regular calls in the flag state there is a particular problem in accessing the ship for inspections. Flag state inspectors must travel to the ship which obviously increases costs. At the same time port calls are shorter and the pressures on crews in port rise inexorably.

Flag states are required, for example, to undertake an annual Cargo Ship Safety Equipment survey on cargo ships. This covers emergency equipment, life-saving appliances, emergency drills, navigation equipment, fire fighting equipment etc. Yet the reality is that in virtually all tanker berths now it is forbidden to launch lifeboats or run them in the harbour, it is forbidden to test deck fire fighting monitors, sound whistles etc. This seriously constrains the value of a survey. Coupled with this is the fact that crews are smaller, STCW95 has, quite properly, mandated hours of rest and the result, with short port calls, is that often very few crew are available to assist with a survey or to take part in an emergency drill for example.

It has become impossible for a flag state to meaningfully conduct a Cargo Ship Safety Equipment survey as laid down by SOLAS. Invariably many items are dealt with cursorily or left for the crew to "self certify" once at sea.

Arguably a flag state has the power and the authority to insist on the ship coming out of service for a few days to complete the survey and perhaps swinging round on the berth to test both lifeboats. This is obviously dependent on the support of the port authorities but is ruinously expensive. The charterer would immediately either cancel or take the ship "off-hire" with potentially huge cost penalties for the ship, the berth operator would demand that a lay by berth is found for the exercise and paid for, and the owner would change flag with alacrity. It is not a practical option. Similar arguments apply to virtually all other surveys mandated by SOLAS.

In this sense it might be argued that flag states are not meeting their international legal requirements. But those requirements are, at the same time, effectively impossible to meet. Most surveys, if conducted fully in accordance with the Convention require more than a few hours. If the ship is in port for a brief call the full scope of the survey cannot be completed in a

single port call which takes the flag state option further beyond the realms of economic sense if the surveyor has to part-complete the survey then travel to the next port to complete.

The Isle of Man, possibly alone amongst flag states, has recently recognised this problem and begun a programme of survey and inspection visits to be done at sea when Isle of Man surveyors will sail with the ships on a regular basis to undertake the work. While at sea the surveyor will be able to audit Safety Management Systems, audit work done by Classification Societies, assess operational practices, and undertake the sorts of testing of equipment that is impossible in port.

Flag states have a further role which is unique to them. They are the only part of the pattern wherein lies the jurisdiction and the power to impose judicial sanctions. International law makes it clear that a ship in a foreign jurisdiction must comply with local municipal law but conventionally the internal operation of the ship is susceptible only to flag state jurisdiction.

Thus if a ship spills oil in another state, or contravenes a traffic scheme, she can be prosecuted in the state where the offence is committed. These are external effects, but other than the intervention allowed by Regulation 19 Ch 1 SOLAS, which allows detention when a ship fails to comply with the Convention, until she does comply, there are few judicial sanctions available to port states which cover the condition of the ship. When it comes to judicial sanctions for failing to maintain the ship or to comply with the requirements of the Convention in terms of equipment or standards, generally only the flag state has the jurisdiction to impose sanctions, and on the high seas it is only the flag state, in all aspects, which has jurisdiction.

This is a vital role, but it must be understood that judicial sanctions can only be applied if the law breaking is identified in the first place. Once that is done further problems arise in most states with the requirements of municipal legal systems for the appearance of witnesses, possible extradition of witnesses, and the presentation of evidence acceptable to the tribunal. While the Lockerbie bombing case might be a precedent for holding proceedings out of jurisdiction, it remains the case that national judicial proceedings can generally only be undertaken within the national jurisdiction. When the offence is committed elsewhere the tribunal will often have difficulty in proceeding without evidence and witnesses. It is a general convention that in criminal cases the burden of proof is higher than in civil cases, typically "beyond reasonable doubt", and conventionally in criminal cases there is first a presumption of innocence and secondly a need to interpret in favour of the defendant where there is doubt. In the Isle of Man, the mandatory presence of a manager located within jurisdiction is extremely useful in this sense, but it is not the complete answer.

All of these factors militate against the effective use of judicial sanctions by flag states to deal with unsafe ships and ships which fail to meet acceptable standards. Often the time period inherent in initiating such measures means that the crew and others are dispersed before the case comes up. However, it does remain the case, however ineffective, that the flag state currently is the only player with the jurisdiction to use judicial sanctions in most cases, but it must be questioned if this right is worth anything given the practical difficulties that exist in virtually all cases.

It must also be questioned if judicial sanctions are the most effective enforcement option in any case. Rarely does the penalty go past a fine. Imprisonment as a punishment is often harshly used in respect of ship's crews by port states, but against the operator responsible for the condition of the ship which will invariably be a company it is a generally inapplicable remedy.

Commercial sanctions, however, have a much greater impact, an operator who gains a reputation in the market for non delivery of cargo, or late delivery, will be quickly penalised in terms of employment for his ships and it may be better to look to commercial sanctions as a more effective way forward.

The other remedy available to most flag states is the cancellation of the ship's registry. This leaves the ship stateless and unable to trade. However the remedy is "double edged". If the ship simply re-registers elsewhere, the problem is effectively exported, not solved. The supposed beneficiaries of the efforts of the Marine Administration, the crew, are exported with her. They are in fact abandoned by the very organisation which is supposed to exist in their interests. Cancellation of registry is therefore a totally ineffective remedy although it is one which a number of flag states have resorted to recently in a public relations exercise to "clean up their acts".

This is another aspect which works in a counterproductive sense. To give an example, the Isle of Man was recently faced with two small ships which were found to be unsatisfactory. The main reason lay with a downturn in the market the owner was trading in and his subsequent bankruptcy. It would have been easy to de-register the ships, but to do so meant abandoning all jurisdiction to assist the crews. The Isle of Man chose not to do this and instead to work towards what was an eventually successful outcome for the crew. Yet the press coverage concentrated on pictures of "Isle of Man registered ships with unpaid crews"; all seriously negative publicity. The lesson is clear, de-register and make the problem go elsewhere. It is not, I am pleased to say, a lesson the Isle of Man intends to follow for now.

2. Classification Societies.

The Classification Societies in recent years have begun to play a greater role in all aspects of the monitoring of ship standards. There are a vast number of them (in excess of 50) and their own standards and capabilities vary. The largest, Lloyds Register, ClassNK, DNV etc. have a world-wide presence, a huge technical and research capability, and vast experience. Their surveyors are employed and highly trained. The smallest have virtually no experienced or trained staff and no technical or research capability. Many of the smaller ones rely totally on "non-exclusive" surveyors who are individuals engaged in other businesses such as cargo surveying and pilotage but who can wear a "classification society hat" as the occasional need arises.

Because of the world-wide presence of many of the large Societies, they hold delegated rights to undertake surveys and inspections on behalf of many flag states.

They can do what the flag state cannot do - be available in most ports of the world economically when a ship arrives. They can also part hold a survey so that a colleague in the next port can complete it.

The inherent problem with the classification societies is their contractual relationship with the ship owner. It is the owner who chooses his classification society and who pays for the Society services. Even when undertaking a flag state survey on behalf of a flag state the class surveyor is in a contractual relationship with the owner and is being paid by the owner. This works in practice, but is often perceived as a major clash of interest. Occasionally the clash of interest is real and when this has happened unfit ships have been allowed to proceed to sea with occasionally disastrous results.

Classification is not a statutory requirement in any of the Conventions but is a practical requirement in terms of obtaining insurance and employment for the ship. Effectively every ship is classed with one of the societies. Because it is not a statutory requirement internationally, and because there is no international standard for the societies, the owner is free to choose a society which provides the service he desires. Classification therefore does not provide a uniform body capable of enforcing standards. Equally, while classification societies commonly act "on behalf of" flag states they can only enforce their own Classification Society standards. The standards of the flag state can only be enforced by the flag state because only the flag state knows, sets and thoroughly understands those standards.

3. Port State Control.

The concept of Port State Control has arisen, based on Regulation 19 (Chapter 1) of SOLAS 1974 since that Convention. Presently co-ordinated Port State Control regimes exist in most of the world divided into regions.

The original concept was the detection and detention of unsafe and substandard ships with the intention of preventing them from sailing. Today that original concept has developed considerably and the criteria for what constitutes a ship to be detained seems to be blurred. The number of detentions remains fairly constant yet the number of ships detained for obviously serious substandard conditions has fallen. A few recent examples, all of which occurred within the European "Paris Memorandum" Port State Control area illustrate the current practice, and the problems associated with it:

- *Case 1.*
A large crude oil tanker operated by a major oil company with a high quality reputation suffered heavy weather damage forward en-route to a European port. There was some minor flooding forward which did not threaten the safety of the ship but which damaged the forward located emergency fire pump.
The ship notified her owners and her flag state and sent a message to the next port describing the problem. The owners arranged a replacement emergency fire pump and sent

it and a team of engineers to meet the ship on arrival so that the replacement pump could be fitted immediately. On arrival the ship was detained for having "an inoperative emergency fire pump".

- *Case 2.*

A medium sized bulk carrier 24 hours out from her next European port suffered minor shell damage in heavy weather when one anchor worked slightly loose and a fluke penetrated the shell. The ship advised owners, flag state and next port. The ship's classification society, superintendent and a repair team were ready to meet her on arrival and make repairs. Repairs were underway supervised by Class when port State control attended and detained the ship for "hull damage impairing seaworthiness."

- *Case 3.*

A modern car carrier arrived in a European port. The Chief Engineer suspected a small crack in one main engine cylinder liner. The ship was required to wait for two days pending cargo readiness and the Master requested permission from the port to immobilise the main engine so that the Chief Engineer could use the unexpected opportunity to change the liner as a precautionary measure. While work was in progress Port State control attended and detained the ship for "inoperative main engine".

- *Case 4.*

A small tanker was entering a European canal. Shore personnel spotted what appeared to be an oil sheen in the water near the stern of the ship and called Port State Control. The ship was immediately detained for "oil leakage". The Classification Society attended with the owner's superintendent. A thorough examination of the ship with particular emphasis on her stern tube seals revealed no fault and no leakage of oil. She was released from detention without further action.

Each case, and these are just 4 examples from a growing file of doubtful detentions that have occurred in the European Port State Control area in recent months, has involved a reputable owner and a good ship. All have been challenged but the detentions remain logged in the system. Owners who initially supported the concept of Port State Control now openly laugh at it.

However Port State Control has an impact, the publicity is very unwelcome, and the reflection on the ship and the owners is undesirable. In some cases good ships have failed to secure charters because of recorded detentions. In each of these sample cases there was nothing wrong with the ship.

Some had suffered the normal accidents of any marine adventure and had taken proper and effective steps to rectify the problem. In Case 3, the ship had taken seamanlike steps to prevent a problem from developing. Yet in each case the ship now has a detention recorded against her. The system does not allow for these records to be expunged and there seems to be no effective appeals mechanism.

With the balance being weighed firmly in favour of Port State Control it is very hard for owners to challenge dubious detentions. Most are concerned that the nature of regional memorandums means that they risk being "blacklisted" or targeted for making trouble. Owners are well aware that in the European system there is a semi-secret communications facility between Port State Control officers, similar to an e-mail system which allows alerts to be posted for particular ships. There is, at the same time, usually no obvious appeals mechanism available for an owner who disputes the correctness of a detention, and even in cases where it has been possible to obtain an admission from Port State Control that the detention is unwarranted, it has never yet proven possible to have the record amended.

The owners in the cases cited above are striving to maintain high standards and to improve their own standards and they are competing against other ships which are, at times, operating to lower standards. There is clearly an element of luck involved in the Port state Control system. These good ships have detentions recorded against them while some of their competitors with possibly less well run ships which have escaped the net have gained a commercial advantage. In this sense Port State Control as it exists at present is in danger of being counterproductive. Certainly within the seagoing community it has fallen into disrepute and there is a feeling that with a forthcoming African MOU on Port State Control it can only fall further into disrepute.

One problem with the structure of the system seems to be that while it was initially created to detect and stop substandard ships it remains a cost burden on the Port State. Experienced inspectors are required plus an administrative staff. In the early days there were sufficient readily visible "rustbuckets" to be found and stopped, it was politically attractive, budgets were readily available, and dramatic pictures could be published. The cynic might say that there are votes in being seen to be doing something to prevent seagulls from getting oily. Since then as the number of photogenic "rustbuckets" has reduced, the organisations involved have needed to demonstrate a continuing record of detentions to maintain credibility and budgets, with the result that perfectly good ships are detained often for nothing more than paperwork faults.

The resulting statistics please the politicians, the budgets are maintained but the effect on ship safety has reversed and it can be argued that it is now a factor reducing ship safety. The crew of the car carrier in case 3 above might well decide that the next time they need to undertake routine engine maintenance, they will do it at sea which is a less safe option, but one which has no risk of a second detention and a possible loss of a charter. This cannot be good.

Port State Control is a factor in the overall picture which will not go away and which remains necessary. However the emphasis needs to be changed and the penalties and sanctions need to be changed. There needs to be an effective appeals mechanism to address the sorts of nonsense discussed earlier. The appeal mechanism needs to be open, as public as the detention system and accessible to any owner immediately.

Yet in spite of the failings of the present European system, it is noted that the Commission have recently produced a proposal for a Directive⁶ which will have the effect of refusing access to all Community ports to ships which have been detained more than twice in the preceding 24 months. I would argue that the basis behind any detention needs careful examination before such drastic action is taken, given the examples quoted above.

These three groups, flag states, classification societies and Port State Control are responsible for the oversight of standards in ships. None of them is currently able to individually exercise real control. Flag states are physically unable to monitor ship standards closely enough, classification societies are contractually bound to the owner and in any case cannot "know" flag state standards, and Port State Control is politically hampered and arguably incompetent.

The net result is an oversight system with holes in it through which substandard operators are able to drive dangerous ships.

There are three other bodies with influence on ship standards and it is worth looking briefly at their role.

(a) Commercial groupings such as OCIMF, INTERTANKO, etc.

These groups, most usually associated with the oil trades have grown up to try and establish standards for ships in their respective areas. They publish minimum requirements and they make inspections of ships. Commonly, for example, a tanker will find it difficult to attract charters unless she complies with the applicable industry standards and she will often be rejected from some terminals. These groupings have no direct sanctions available other than the commercial ones, which are nevertheless powerful, but an owner can still trade in many parts of the world where these standards are not applied. The inspectors who assess ships for compliance are assessing the ship from the industry standard not from a Convention standard, they are usually "non-exclusive", and it is true to say that the interpretation and application of the standards is variable. In many cases the inspections are a "check list" exercise filling in the boxes without looking at the underlying systems.

(b) Charterers, oil majors and port terminals.

Like group (a) this group applies standards which are their own. Chartered tonnage is inspected for compliance with the set standard and accepted or rejected. Some apply high standards and some are variable. Like group (a) they have no direct locus for judicial sanctions and similarly the exercise is often a "check list" one.

As an example of the problems with this there is the case of a gas tanker alongside a loading berth operated by one of the oil majors. She had been assessed by the charterer and had gone

⁶ (2000/C 212 E/06) amending 95/21/EC

through the terminal vetting inspection prior to loading. The outboard lifeboat was hanging off on its falls and according to the master this was at the request of the terminal as an emergency escape. Unfortunately the ship had lifeboats designed to be boarded in the stowed position and launched using internal controls from that position. Hung off, the lifeboat was 2 metres from the ship's side and totally inaccessible. Yet the terminal refused to allow a change. In their view the check list demanded that the boat be turned out and that was a safety measure and hence mandatory and non negotiable, even if it effectively disabled the boat.

This sort of blind adherence to lists from personnel without the seniority or experience to really understand ship operations is unhelpful and it must be questioned if it really contributes to safety and standards. In shipboard personnel it engenders a fairly low regard for such apparent "safety systems" and the documentation which accompanies them.

An attitude in seafarers that it is all "yard arm clearing" ashore can lead to an attitude that it is all worthless and from that viewpoint it is a small step to a breakdown in vital safety procedures just at a time when it is generally agreed that the development of a "safety culture" is essential.

(c) *The ITF (International Transportworkers Federation)*

This is a federation of seafaring and dock workers unions world-wide with its secretariat based in London. The organisation represents its constituent members and has for many years been running a campaign against what it describes as "flags of convenience".

In the eyes of the ITF a ship is flag of convenience if the beneficial ownership lies outside the flag state. There are other criteria but this is the main one. They seek to improve seafarers conditions and argue that unless seafarers are sailing in ships flagged in the same state as the owners and the domicile of the seafarers the seafarers are beyond effective employment protection. This is often true but looking at the arguments on nationality addressed earlier in this paper their solution is will not solve the problem. To most shipowners they are "nuisance value". To flag states declared to be flags of convenience ("FOC's") they are fairly unimportant.

To flag states threatened by a declaration of FOC status they increase in importance given the successful public projection of the term FOC as a pejorative term denoting substandard and dubious.

Unquestionably the ITF achieve much that is desirable in their field. They have supported seafarers who have been abandoned by poor owners and they have done much to recover wages due to seafarers who have not been paid. In this sense they play a vital role internationally in the overall need to ensure that seafarers are not exploited.

Their agenda is a narrow one however and their actual impact on substandard ships and the improvement in shipping standards is minimal. The positive impact that they have in some areas is often cancelled out by the negative impact. ITF involvement in a ship costs the owner money, not least the annual subscription to the welfare fund in respect of each man. It might be naive to

suggest that shipowners would spend this money on safety measures but, nevertheless, it is a cost which is trimmed from somewhere else in the overall operating costs of ships. One result of this shows in the requests of owners who have recently sought to have the crew numbers on their Safe Manning certificates reduced. The explanation is that although they plan to maintain the same numbers on board, they do not have to pay a levy to the ITF for men who do not appear on the certificate. In most cases these are genuine owners who will indeed maintain the numbers on board but the overall effect is counterproductive to safety and high standards. Once a certificate is issued at one manning level it is very difficult to raise it again. The ITF is a generally unaccountable body which exerts a large influence but its influence is occasionally counterproductive.

The Future

The foregoing sets out the current position as I see it from the Isle of Man. It is clear that there are several overlapping areas of responsibility and assessment for ships. It is equally clear that international requirements are not always followed nor can they be in many cases. At the same time the system of control is ineffective and it remains possible for poor quality ships to operate and to threaten their crews and the environment.

More usefully it is worth considering what steps are possible to rectify the system.

As argued earlier, the prime responsibility for a safe ship lies with her owners. No other body has the opportunity for day to day management and control which allows this. In the field of enforcement, where an owner declines to operate a ship properly, then the other bodies have a role.

Prime amongst these is the flag state. Many flag states operate as profit making organisations. They are run "on behalf of a Government" by commercial organisations. These flags self evidently are motivated by making a profit first and foremost.

Although individuals within these organisations may seek to impose high standards the organisation as a whole exists to make a profit. It is characteristic of them that all the inspection functions are delegated to Class and they employ few, if any, dedicated staff. Recently advertisements have appeared suggesting "on-line" ship registry.

IMO through the FSI⁷ sub-committee of the Maritime Safety Committee is looking at the role of flag states and I would support this activity. The Isle of Man has certain immutable criteria which I would submit are vital. Amongst these is a requirement for a close examination of each ship by a

⁷ FSI, Flag State Implementation.

dedicated Isle of Man surveyor before registry is even considered. "On-line" registry is totally rejected as a concept.

An Isle of Man surveyor also sees each ship again at regular intervals. Isle of Man nationality will not be granted to any ship until she has been assessed and found suitable by an Isle of Man surveyor. This is something which should be the norm in all registry cases. Indeed it is hard to see how a "genuine link" can be established when the administration has not seen the ship at all, only reports from Class.

Another fundamental Isle of Man requirement is classification of the ship by a small range of major classification societies. The Island will not accept any other than the limited range which is recognised audited, monitored and trusted.

These policies mean that every ship is visited prior to registry by the flag state and is classed by a reputable organisation whose work is audited by the flag state. Regular audits are carried out by the Administration on the head offices of the classification societies which are recognised. Provisional registry is not permitted.

I would suggest that, as a first step towards ensuring that flag states face up to their own responsibilities, all flag states should be required to adopt a similar approach. If such requirements were adopted internationally then there could no longer be the "buck passing" which happens at present. If there is a problem with a ship or if international requirements have not been enforced, and if the flag state has had to see the ship for itself then it cannot avoid responsibility for the ship subsequently.

Obviously this would mean the recruitment of staff in many administrations and it may affect their profitability. However, I would be strongly of the view that ship registry should not be a profit motivated business. It is necessary to keep sight of the real roots of ship safety legislation and the growth of marine administrations to see that the underlying purpose was never profit, it was seafarer's safety.

That initial *raison d'être* needs to be recreated and maintained and I would submit that the starting point for that is a requirement that no ship can be lawfully registered and issued with certificates unless a competent dedicated flag state surveyor has seen the ship, examined her and confirmed that she is indeed entitled to be issued with International Safety Certificates.

It is also a requirement that flag states investigate and analyse casualties when they occur. It is an inevitable result of the risks inherent in shipping that accidents and casualties will occur from time to time. Flag states have a moral duty and a legal duty arising from SOLAS⁸ to investigate

⁸ SOLAS Chapter 1 Part C, Regulation 21(a)

casualties. That process can be expensive and a Governmental commitment to provide funds is essential. This sort of open ended expenditure commitment is not compatible with a profit motivated organisation.

The growth of classification societies is something which probably cannot be controlled, they are commercial businesses, but the obvious variations in capability and standards suggests that a degree of control over their activities is needed. One solution may be to adopt the approach used by IMO for the 1995 amendments to the STCW78 Convention. In this convention, for the first time, IMO gave itself powers to assess and either accept or reject administrations in a published "white list" which will list those giving full and complete effect to the STCW convention. Certificates issued by countries not on the list will be unacceptable internationally.

The conventions allow administrations to delegate functions to recognised organisations. There is, however, no reason why the recognised organisations should not have to be on a "white list". Acceptance on the "white list" could be a condition for issuing acceptable international convention certificates on behalf of any administration and the criteria for acceptance could be set. One presumes that the criteria might include a minimum number of exclusive staff, quality standards accreditation, and a minimum technical capability. Such a control would not preclude the development and growth of classification societies as businesses, but it would limit the issue of international safety certificates to those approved internationally for the purpose.

This is something IMO would need to do but is the sort of control that could be developed. It does not impinge seriously on sensitive areas such as national sovereignty.

Port State Control also needs attention. The maximum penalty currently available is detention. This stops the ship from sailing until the identified defects are repaired but nothing more. As noted in the examples earlier the penalty is occasionally imposed today for spurious reasons with the result that the system is falling into disrepute.

There is need to develop a lesser penalty and, at the same time, a greater penalty plus an appeals mechanism in order to restore credibility and effectiveness to the whole system. The aim is not, and should not be, to maintain detention statistics, but to effectively prevent unsafe ships from going to sea, simply that and nothing more.

Clearly looking at the examples quoted, any ship can fall foul of the system despite making the best possible efforts to comply with everything. This suggests a possible staged approach possibly along the lines of;

- Stage 1.
Detainable defects are identified at an inspection. The ship is not detained officially but is required to rectify the defects before sailing. The records show only a stage 1 defect, a warning. Only if the ship makes no attempt to rectify the problems before sailing is a

detention raised and recorded.

- If no further stage 1 interventions are identified in the next 12 months the record is clean again.
- Stage 2.
If within 12 months of a stage 1 warning further detainable defects are discovered then the ship is detained as at present and the detention is recorded. The ship is required to make good the defect before sailing. The records show a detention.
- Stage 3.
If within 12 months of a detention further detainable defects are found, the ship is stopped from loading or discharging. The ship's owners, classification society and flag state are required to attend at the owners cost. Subject to three of the four parties, (Class, Owners, Port State Control, and Flag) being in agreement on the scale of the defect the ship is directed to make repairs and depart without working cargo.
- If after stage 3 the ship returns to the area again, the same procedure is required before she is allowed to resume operations, (attendance of flag state, class, owners and Port State Control) If all are agreed that the ship is now in a suitable condition the record is wiped clean and she can work. If not in a suitable condition she must depart again without working cargo.

The main thrust behind this sort of staged approach is twofold, it allows an opportunity for good owners who are caught in the sorts of circumstance described earlier to "clean the slate" without penalty and in the case of actual substandard ships there is a penalty through to owners and Charterers. It is the effective imposition of the commercial penalty. If the ship cannot work cargo then the charterer suffers and can proceed against the owners while the owners will suffer in the charter markets in future as known "non performers".

I would feel that these simple changes would have a profound impact on safety generally. The requirement for flag states to take an active role for themselves would tend to force out the pure profit makers leaving those with a real commitment to safety.

The restrictions on issuing international Convention certificates to classification societies on a "white list" would curb the growth of smaller less competent societies and ensure a minimum standard of ability before a commercial organisation is able to issue international trading certificates on behalf of any Government.

The changes to Port State Control procedures might help mitigate the worst of the "nonsense" detentions which happen now. At the same time they may place a burden on owners,

Charterers, class, and flag state when a ship is unsatisfactory with a worthwhile sanction in the form of a real restriction on trade for unsatisfactory ships.

Capt. W. D. Howell
Principal Surveyor,
Isle of Man Marine Administration. Sept. 2000