TOWARDS A SAFETY CULTURE IN THE PHILIPPINE SHIPPING INDUSTRY: *RE-ALIGNING THE DOMESTIC MARITIME SAFETY REGIME WITH THE INTERNATIONAL SAFETY MANAGEMENT CODE*[*]

Gerard Joseph M. Jumamil[**]

"Vessels do not engage in conduct; they are merely the instruments of human actors."

– Brian D. Smith[1]

ABSTRACT

The Philippines is the second largest archipelagic state in the world. A vast number of Filipinos regularly utilize domestic passenger ships to traverse the waters in and around the 7,107 islands of the state. Despite the critical importance of the industry in mass transportation, innumerable losses and tragedies continually transpire. The current state of the domestic maritime safety regime undermines the critical role of the industry in the sphere of mass transportation, and degrades the nature of the industry as one imbued with public interest. In particular, various issues concerning ship management persistently plague the regime and significantly contribute to the savage deterioration of domestic maritime safety. These issues reveal a regulatory and enforcement framework marked by tolerance and condones an environment of 'absolute minimum maintenance' amongst shipowners. Notwithstanding the international movement towards a safety culture through enhanced ship management systems, the Maritime Industry Authority has implemented inadequate regulatory measures to comply with the Philippines' international obligations under the Convention for the Safety of Life at Sea 1974, particularly Chapter IX thereof on the International Safety Management (ISM) Code. The rules and regulations implementing the ISM Code and the enforcement thereof have proven to be

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[**] Member, PHILIPPINE LAW JOURNAL (2007; 2009); J.D., *Dean's Medal for Academic Excellence,* University of the Philippines College of Law (2010); B.S. Management Engineering, *Honorable Mention*, Ateneo de Manila University (2004).

[1] BRIAN SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION 147 (1988).

deficient and ineffective. As a result, the marked improvements in international maritime safety have not been translated to the domestic safety records. There is a need to re-align the regime with the international standards and best practices embodied in the ISM Code in order to cultivate a safety culture that will ensure the long-term safety and protection of Filipino lives at sea.

I. INTRODUCTION

The Philippines performs a significant role in the development of international maritime trade. It has placed its enduring mark in the sector of global seafaring through the steady influx of competent and hardworking Filipino seafarers in international commercial fleets. Furthermore, the Philippines serves as a strategic maritime gateway in Asia, as its geographic location and archipelagic contours facilitate expedient vessel transit. Efthimios Mitropoulos, the incumbent Secretary-General of the International Maritime Organization (IMO), affirmed the Philippines' status as "both a major port and a major centre of seafarer supply to the world's merchant fleet."[2] In recognition of the Philippines' vital role, the IMO has established its first Asian regional presence office in Manila on 9 September 2003.[3] The regional presence office is responsible for the East Asian sub-region, which covers fifteen countries including leading states in international commerce such as China, Japan, South Korea, and Singapore.[4] One of the primary objectives of the regional presence office is to harmonize national and regional maritime policies through intra-country and inter-country coordination.[5] Secretary-General Mitropoulos further underscores the function of the regional presence office in this wise:

> The implementation of IMO instruments, including those related to maritime security, and the development of regional partnerships are among the principal aims of the IMO regional co-ordination programme and the Office we inaugurate today here in Manila will play a key role in assisting countries in the region to meet their implementation obligations.[6]

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[2] *See* Speech by Efthimios Mitropoulos for the Hong Kong Shipowners' Association on 19 October 2004 in Hong Kong, *available at* http://www.imo.org/Newsroom/mainframe.asp?topic_id=847&doc_id=4401.

[3] IMO Opens Regional Presence Office in Philippines, *available at* http://www.imo.org/Newsroom/mainframe.asp?topic_id=758&doc_id=3128.

[4] The other countries included in the East Asian sub-region are the following: Brunei Darussalam, Cambodia, North Korea, Indonesia, Laos, Malaysia, Myanmar, Mongolia, Thailand, and Vietnam. *Available at* http://www.imo.org/TCD/mainframe.asp?topic_id=728.

[5] Regional Coordination, *available at* http://www.imo.org/TCD/mainframe.asp?topic_id=728#Philippinesoffice.

[6] *Supra* note 3.

The objectives and functions of the regional presence office highlight a divergence between the Philippines' role in international maritime trade and the state of domestic maritime safety regime. Notwithstanding its role of ensuring regional compliance with IMO instruments, the Philippines has not satisfactorily complied with several of its implementation obligations, particularly those under Chapter IX of the Convention for the Safety of Life at Sea (SOLAS Convention 1974) directing mandatory compliance with the International Safety Management Code (ISM) Code. Consequently, the progress in international maritime safety does not achieve realization domestically, and lives are continually lost at sea. Significant improvements in domestic maritime safety necessitate a proper re-alignment with international law. Only then will the domestic maritime safety regime serve as the appropriate catalyst to establish a safety culture in the domestic shipping industry.

II. THE CURRENT STATE OF DOMESTIC SHIPPING AS MODE OF MASS TRANSPORTATION

A. THE PHILIPPINE ARCHIPELAGO AND MARITIME TRANSPORTATION

The Philippines is the second largest archipelagic state in the world.[7] Situated in the eastern portion of the Southeast Asian region, it is surrounded by several major bodies of water and principally bounded by the South China Sea on the west and the Pacific Ocean on the east.[8] Approximately 88% of the total area of the archipelago is composed of water,[9] or an aggregate area of water equivalent to 2,200,000 square kilometers. The Philippine coastline spans an aggregate length of 17,460 kilometers, with 81% of the provinces having territories or communities located along a coast.[10]

Considered a major mode of mass transportation, a passenger ship provides a convenient and indispensable means of crossing the major bodies of water of the archipelago. Passenger vessels comprise approximately 32%

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[7] TEOTIMO BORJA, THE PHILIPPINE COAST GUARD: ITS ROLE AND IMPORTANCE IN THE MARITIME INDUSTRY 44 (Legal Liabilities for Maritime Disasters, Rommel J. Casis ed., 2009).

[8] Philippine Map with the Kalayaan Island Group (KIG), *available at* http://www.namria.gov.ph/.

[9] State of Water Environmental Issues, *available at* http://www.wepa-db.net/policies/state/philippines/seaareas.htm.

[10] Michael Garcia, *Progress in the Implementation of the Philippine National Marine Policy: Issues and Options* 20 (2005), *available at* http://www.un.org/Depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/garcia_0506_philippines.pdf.

of the domestic merchant fleet.[11] This translates to nearly 1,700 registered vessels providing inter-island transportation,[12] from short ferry crossing between neighboring islands to long-haul regional voyage. Numerous numbers of Filipinos regularly utilize passenger ships that ply domestic routes to traverse the waters in and around the 7,107 islands of the state. An annual average of 47,000,000 passengers avail of shipping services,[13] with the number of passengers increasing at a mean growth rate of 4.05% per year.[14]

It is critical to underscore that the domestic shipping industry provides the only affordable means of traveling across bodies of water, as domestic airline ticket prices remain beyond the reach of the less privileged in society.[15] With the archipelagic contours of the state and the cost of inter-island transportation as key determinants for the mode of travel, the less privileged is inescapably a captured market of the industry.

B. MARITIME DISASTERS IN THE PHILIPPINES

Despite the critical importance of the industry in mass transportation, countless lives are lost at sea. Decades of maritime disasters disclose the appalling realities under the safety regime, and at once reveal the abysmal state of Philippine maritime safety. The frequency of maritime incidents and the number of human casualties per maritime disaster evidence the state of the maritime safety regime.

1. Statistics on Maritime Incidents

From 1990 to 2002, the Maritime Industry Authority and the Philippine Coast Guard reported an average of 183 maritime incidents per year.[16] 456 incidents transpired in 1990 alone, the highest during the given period. The most frequent type involves capsizing of vessels, with an

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[11] Gloria Victoria-Bañas, National Measures Taken to Address Substandard Shipping, presented on behalf of the Maritime Industry Authority at the OECD Workshop on Maritime Transport on November 4-5, 2004, *available at* http://www.oecd.org/dataoecd/21/56/33958002.pdf.

[12] *Id.*

[13] EDUARDO HERNANDEZ, MARINE LIABILITIES FOR MARITIME DISASTERS 1, 11 (Legal Liabilities for Maritime Disasters, Rommel Casis ed., 2009).

[14] National Statistics Office, The Philippine Yearbook (1999).

[15] S. No. 842, 14th Cong. Explanatory Note of Senator Rodolfo G. Biazon.

[16] The figures consolidate statistical data from 1990 to 2002. For statistical data from 1990 to 1996, see Maritime Accident Report, *available at* htt://www.marina.gov.ph/report/mspDetails.aspx?qrytitle=Maritime%20Accidents%20Profile. For statistical data from 1997 to 1999, see Maritime Communication Project: Phase I, *available at* http://i-site.ph/philippineodatrail/wp-files/ibic/2002/Maritime_communication_project_Nov2002.pdf. For statistical data from 2000 to 2002, *see* Victoria-Bañas, *supra* note 11.

average of 51 incidents per year. This is followed by sinking of vessels, with an annual average of 39 incidents. Grounding of vessels, with an average of 34 incidents per year, is the third most frequent type. The following table provides a summary of the frequency of incidents according to type from 1990 to 2002.

Table 1: Annual Average Number of Incidents[17]

Type of Incident	Average Number per Year[18]
Capsized	51
Sank	39
Aground	34
Drifted/Engine Trouble	19
Fire	12
Collision	11
Missing	10
Rammed	2
Flooding	1
Others	4

2. Maritime Disasters in Recent Decades

The number of human casualties in maritime disasters in the last three decades further reveals the state of the current maritime safety regime. The safety regime has relegated human life to a mere statistic, and has further created an environment that condones an enterprise ethos that places profit above all other considerations. Ship owners and companies continue to generate significant profits at the expense of a captured passenger market.[19] More importantly, despite the harrowing realities of Filipinos at sea, those who are liable remain in the industry with virtual impunity.[20]

a. MV Doña Paz (1987)

[17] *Id.*
[18] Figures are rounded off to nearest integer.
[19] HERNANDEZ, *supra* note 13.
[20] *Id.* at 2.

The worst peacetime maritime disaster occurred in Philippine waters. The incident marked the first of four major maritime disasters involving Sulpicio Lines, Inc., owner and operator of the passenger vessels which figured in the incidents. During the height of the Christmas season of 1987, particularly on the 20th of December, MV Doña Paz collided with the oil tanker MT Vector. The MV Doña Paz was on its way to Manila from Tacloban, the provincial capital of the island of Leyte.[21] The collision occurred in Tablas Strait, between the island provinces of Mindoro and Marinduque.[22]

The impact of the collision generated a massive explosion that set the two vessels on fire. There were only 26 survivors, comprising of 24 passengers of MV Doña Paz and 2 crewmembers of MT Vector.[23] The total number of casualties exceeded 4,300 passengers.[24] The victims "either drowned or were burned alive".[25]

The MV Doña Paz, a 93 meter long Philippine-registered ferry with a 2,324 gross register tonnage, had an authorized passenger capacity of 1,518 individuals.[26] The report of the Philippine Coast Guard stated that the passenger manifest of MV Doña Paz listed 1,493 individuals.[27] However, subsequent published reports stated that there were approximately 4,341 passengers and 58 members of the crew.[28] The enormous discrepancy indicated that over 2,800 individuals were not accounted for in the manifest, and that the vessel was carrying almost three times its authorized passenger capacity.

b. MV Doña Marilyn (1988)

The MV Doña Marilyn, sister ship of the ill-fated MV Doña Paz, sank during a typhoon on 23 October 1988. This is the second of four major maritime disasters involving Sulpicio Lines, Inc., which occurred only ten months after the infamous MV Doña Paz incident. The passenger vessel was

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[21] Det Norske Veritas, Report No. 97-2053, Annex I: Passenger Vessel Evacuation Descriptions, *available at* http://research.dnv.com/skj/Fsahla/Annex1.pdf.

[22] *Another Sea Tragedy*, PHIL. DAILY INQUIRER, Jun. 23, 2008. *available at* http://www.inquirer.net/specialfeatures/typhoonfrank/view.php?db=1&article=20080623-144357.

[23] Vector Shipping Corp. v. Macasa, G.R. No. 160219, 559 SCRA 97, 99, Jul. 21, 2008.

[24] Leila Salaverria, *Sulpicio Lines: Case Study in Poor Governance*, PHIL. DAILY INQUIRER, Jul. 26, 2008, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080726-150759/Sulpicio-Lines-Case-study-in-poor-governance.

[25] Vector Shipping Corp., 559 SCRA at 102.

[26] Det Norske Veritas, *supra* note 21.

[27] *Id.*

[28] *Id.*

on its way to Tacloban from Manila, plying the same inter-island route taken by MV Doña Paz but in the opposite direction.[29] Although the storm signal was raised to level 3 over the island of Leyte, the MV Doña Marilyn was nonetheless allowed to proceed with its regional voyage.[30] The passenger vessel capsized in the Visayan Sea as it was buffeted by violent waves due to Typhoon Unsang (International Codename: Ruby).[31] An estimated 250 individuals perished in the disaster.[32]

c. MV Cebu City (1994)

On 2 December 1994, the MV Cebu City sank after a massive collision with a container ship. The MV Cebu City, owned and operated by William Lines, Inc., was sailing from Manila to Tagbilaran, the capital of the island province of Bohol.[33] While traversing the Manila Bay, site of the largest and busiest port in the Philippines, the passenger vessel collided with the Singaporean freighter MV Kota Suria.[34] The total number of casualties was estimated at 140 individuals.[35]

d. MV Princess of the Orient (1998)

The MV Princess of the Orient sank on 18 September 1998, marking the third of four major maritime disasters involving Sulpicio Lines, Inc. The inter-island ferry was sailing from Manila to Cebu during a typhoon.[36] The MV Princess of the Orient sank near Fortune Island off the coast of Batangas, resulting in nearly 150 fatalities.[37]

e. MV Princess of the Stars (2008)

On 21 June 2008, the MV Princess of the Stars capsized off the coast of Sibuyan Island. This is considered the worst maritime disaster since

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[29] *Id.*

[30] *Supra* note 22.

[31] Det Norske Veritas, *supra* note 21.

[32] *Supra* note 22.

[33] Cher Jimenez, *Sunken Ship, M/V Cebu City, Will be Sold as Scrap Metal*, THE FILIPINO EXPRESS, Jan. 22, 1995, *available at* http://www.highbeam.com/doc/1P1-2304221.html.

[34] Brenda Barrientos, GMA News Research on Major Marine Mishaps, *available at* http://www.gmanews.tv/print/106879 (Jul. 14, 2008).

[35] *List of Deadliest Ferry Accidents in RP*, PHIL. DAILY INQUIRER, Sep. 7, 2009, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090907-223974/List-of-deadliest-ferry-accidents-in-RP.

[36] Salaverria, *supra* note 24.

[37] GMA News Research, *Sulpicio Lines Vessels in Major Marine Mishaps*, *available at* http://www.gmanews.tv/story/102786/Sulpicio-Lines-vessels-in-major-marine-mishaps (Jun. 24, 2008).

the collision involving MV Doña Paz in 1987.[38] The incident also marked the last of the four major maritime disasters involving Sulpicio Lines, Inc.

While plying the route from Manila to Cebu, the passenger vessel was battered by raging waters during the height of Typhoon Frank (International Codename: Fengshen).[39] The MV Princess of the Stars was given clearance to sail despite severe weather warnings, and advanced toward the direction of the port of Cebu amidst Storm Signal No. 3 placed over the nearby island provinces of Mindoro and Romblon.[40] The maritime disaster resulted in approximately 800 casualties.[41]

f. Maritime Disasters in 2009

Several maritime disasters resulting in fatalities occurred in the latter half of 2009 alone. One of these disasters transpired on the 6th of September, when the SuperFerry 9 capsized off the coast of Zamboanga Del Norte. The passenger vessel was carrying more than 900 passengers on a regional voyage from General Santos City to Iloilo City.[42] Despite fair weather conditions and calm seas in the Zamboanga peninsula, the SuperFerry 9 started listing to its starboard.[43] Passenger accounts disclose that a loud crash was heard from the hull prior to its departure, thereby causing the vessel to tilt.[44] Nevertheless, the SuperFerry 9 proceeded with the voyage and eventually resulted in the death of 10 passengers.[45] The SuperFerry 9 is owned and operated by Aboitiz Transport System Corporation, formerly William Lines, Inc. which owned and operated the ill-fated MV Cebu City.[46]

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[38] Jhunnex Napallacan & Norman Bordadora, *Sulpicio Owner, Ship Captain Face Raps*, PHIL. DAILY INQUIRER, June 23, 2009, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090623-211920/Sulpicio-owner-ship-captain-face-raps.

[39] *Ferry Sinks; 700 Missing*, PHIL. DAILY INQUIRER, Jun. 23, 2008, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080623-144207/Ferry-sinks-700-missing.

[40] Napallacan & Bordadora, *supra* note 38.

[41] *Id.*

[42] *SuperFerry Sinks Off Zambo Norte Coast*, PHIL. DAILY INQUIRER, Sep. 7, 2009, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090907-223968/SuperFerry-sinks-9-die.

[43] *Id.*

[44] *Id.*

[45] *BMI Hearing on SuperFerry 9 Sinking to Start on Friday, PCG Says*, *available at* http://balita.ph/2009/09/09/bmi-hearing-on-superferry-9-sinking-to-start-on-friday-pcg-says/ (Sep. 9, 2009).

[46] Aboitiz Transport System Corporation, Articles of Incorporation, *available at* http://www.atsc.com.ph/IR/Governance/ATS%20Articles%20of%20Incorporation_07%20Aug%202008.pdf.

The other two maritime disasters transpired during the Christmas season, with the MV Catalyn B colliding with the FB Anatalia, and the MV Baleno 9 sinking merely two days after the collision.

On the 24th of December, the wooden-hulled MV Catalyn B sank off the coast of Cavite when it crashed into the steel-hulled fishing boat FB Anatalia.[47] The fishing vessel was coming from Turtle Island in Palawan and destined for the fishport in Navotas City.[48] On the other hand, the passenger vessel was on its way from Manila to the island province of Mindoro.[49] According to initial investigations of the Philippine Coast Guard, the FB Anatalia did not properly communicate with the Vessel Traffic Monitoring System and that a possible violation in the nautical road right of way may have caused the collision.[50] At least 15 individuals perished in the incident.[51]

The maritime disaster involving the MV Baleno 9 occurred only two days after the aforesaid collision. The MV Baleno 9 sank off the coast of Verde Island due to enormous waves.[52] The inter-island ferry was leaving for Batangas City from Mindoro on the 26th of December, with purportedly 75 individuals listed in the passenger manifest.[53] However, the Philippine Coast Guard stated that there were 73 survivors, with 6 confirmed deaths and 44 individuals missing, thereby reaching an actual total of 123 individuals.[54]

III. DOMESTIC MARITIME SAFETY REGIME

A contextual understanding of the existing maritime safety regime requires a preliminary appreciation of its two component frameworks: (1) Liability and Compensation, and (2) Regulatory and Enforcement.

A. LIABILITY AND COMPENSATION FRAMEWORK

The framework for liability and compensation provides civil and penal relief to victims of maritime disasters against errant shipowners.

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[47] Evelyn Macairan & Pia Lee-Brago, *2 Bodies Recovered From Ferry*, PHIL. STAR 1, 6, Jan. 3, 2010.

[48] *Id.*

[49] *Id.*

[50] *Philippine Coast Guard Probers Looking at Human Factor*, PHIL. STAR 1, 9, Dec. 30, 2009.

[51] *12 victims trapped in sunken MV Catalyn B*, MANILA BULL., Dec. 28, 2009, *available at* http://www.mb.com.ph/node/236049/12-victim.

[52] Arnell Ozaeta, *Death Toll From Ro-Ro Ferry Sinking May Reach 42*, ABS-CBN NEWS, Dec. 28, 2009, *available at* http://www.abs-cbnnews.com/nation/regions/12/28/09/death-toll-ro-ro-ferry-sinking-may-reach-42.

[53] *Supra* note 50.

[54] *Id.*

1. Hypothecary Nature of Maritime Transactions

As a general rule, the liability of the shipowner is limited by virtue of the real and hypothecary nature of maritime transactions. The liability of the shipowner or agent is deemed limited to the value of the vessel, equipment and freight, such that the total loss or abandonment of the vessel, equipment and freight results in the extinguishment of liability.[55] The limitation of liability doctrine originated from the perilous conditions attendant in maritime commerce during the medieval era.[56] It was established in order to foster the development of maritime trade by balancing the actual and perceived risks in sea voyages. The doctrine is expressly provided for in the Code of Commerce, thus:

> ARTICLE 587. The ship agent shall also be civilly liable for the indemnities in favor of third persons which may arise from the conduct of the captain in the care of the goods which he loaded on the vessel; but he may exempt himself therefrom by abandoning the vessel with all her equipments and the freight it may have earned during the voyage.

There are, however, two exceptions to the hypothecary nature of maritime transactions that are of relevance to the maritime safety regime. In the event that the shipowner is at fault or negligent, the consequent liability will not be limited to the value of the vessel, equipment and freight. Therefore, Article 587 of the Code of Commerce will not apply, and the relevant provisions of the Civil Code of the Philippines as regards common carriers will govern.[57] The second exception pertains to the existence of insurance. The shipowner will remain liable to the extent covered by the insurance, even if the vessel was abandoned or lost.[58]

2. Compulsory Insurance Coverage for Passengers

Shipowners are legally required to obtain compulsory insurance coverage under Republic Act No. 9295 or the Domestic Shipping Development Act of 2004. The insurance is mandated to cover "financial responsibility for any liability which a domestic ship operator may incur for any breach of the contract of carriage".[59] Adequate insurance coverage for every passenger is required to be submitted annually, and the total amount

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[55] Luzon Stevedoring Corp. v. Court of Appeals, G.R. No. 58897, 156 SCRA 169, 176, Dec. 3, 1987.
[56] Monarch Insurance v. Court of Appeals, G.R. No. 92735, 333 SCRA 71, 95, Jun. 8, 2000.
[57] CESAR L. VILLANUEVA, COMMERCIAL LAW REVIEW 77 (2009).
[58] Vasquez v. Court of Appeals, G.R. No. 42926, 138 SCRA 553, 559, Sep. 13, 1985.
[59] Rep. Act No. 9295, § 14.

of such coverage shall be equal to the aggregate number of passenger accommodations offered by the vessel.[60] In the event that both passenger and cargo services are offered by the same shipowner, the total insurance coverage shall be equal to the total sum of the entire passenger insurance coverage and the entire cargo insurance coverage.[61] The following rules qualify the provisions on compulsory insurance coverage:

> (1) if a domestic ship operator should operate more than one vessel, the amount of insurance coverage required, for purposes of providing financial capacity, shall be the amount equivalent to the total number of passenger accommodations, or total cargo capacity, or both, of the largest operating vessel which the domestic ship operator may have;
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> (2) the total insurance coverage which may be required of any domestic ship operator shall not exceed the value of such vessel;
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> (3) adequate insurance coverage shall be obtained from any duly licensed insurance company or international protection and indemnity association.[62]

Currently, shipowners are required to provide insurance coverage of two hundred thousand pesos (PHP 200,000) per passenger.[63] Shipowners are further required to obtain compulsory survivor insurance coverage in the amount of fifty thousand pesos (PHP 50,000) per passenger, over and above medical and hospitalization expenses or other reasonable incidental expenses.[64]

3. Shipowner as Common Carrier

The shipowner, as a common carrier, may be subject to three types of civil liability due to negligence: (1) *culpa contractual*, (2) *culpa aquiliana*, and (3) *culpa criminal*. The shipowner is deemed a common carrier if his regular business is to transport anyone who wish to engage his service and to pay the corresponding remuneration for such service.[65] Stated differently, a shipowner is considered a common carrier if he "holds himself out to the

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[60] § 14 (1).
[61] § 14 (3).
[62] § 14.
[63] Implementing Rules and Regulations of Rep. Act No. 9295, Rule IX, § 1.1. *See also* MARINA Circular 2009-18 reiterating the amount of insurance coverage. *See also* Revised Implementing Rules and Regulations of Rep. Act No. 9295, Rule V, § 14.
[64] MARINA Circular 2009-18.
[65] Caltex Phil., Inc. v. Court of Appeals, G.R. No. 131166, 315 SCRA 709, Sep. 30, 1999, *cited in* VILLANUEVA, *supra* note 57, at 126.

public as engaged in the business of transporting passengers or property from place to place, for compensation, offering his services to the public generally."[66] The Civil Code of the Philippines, in Article 1732 thereof, defines common carriers in this wise:

> Common carriers are persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods or both, by land, water, or air, for compensation, offering their services to the public.

a. Culpa Contractual

The breach of a contract of carriage of passengers due to the negligence of the shipowner is referred to as *culpa contractual*. The nature of the business of common carriers defines their duties and responsibilities. Given that the business of common carriers is imbued with public interest, the law imposes the highest degree of care to be exercised by such carriers.[67] A common carrier is enjoined to exercise extraordinary diligence in ensuring the safety of passengers, transporting them "as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all circumstances."[68] Furthermore, owing to the nature of the business, a presumption of negligence is statutorily imposed on the common carrier in the event of death of or injuries to passengers.[69] In order to raise the presumption of negligence, the plaintiff is merely required to prove the existence of the contract of carriage and the failure of the common carrier to safely transport the passenger to the agreed destination.[70] The common carrier has the onus of overcoming the presumption in the event that it is successfully raised.

It should be noted that in *culpa contractual*, the cause of action of the victim or his/her family is against the shipowner and not against the captain or any member of the crew. The contract of carriage is strictly between the victim passenger and the shipowner, thereby limiting privity between the two contracting parties.[71] This does not mean, however, that an express finding of fault or negligence on the part of the common carrier is necessary

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[66] First Phil. Industrial Corp. v. Court of Appeals, G.R. No. 125948, 300 SCRA 661, Dec. 29, 1998, *cited in* VILLANUEVA, *supra* note 57, at 126.

[67] CIVIL CODE, art. 1733. The Civil Code of the Philippines is Rep. Act No. 386 (1949).

[68] art. 1755.

[69] art. 1756.

[70] Japan Airlines v. Simangan, G.R. No. 170141, 552 SCRA 341, Apr. 22, 2008, *cited in* VILLANUEVA, *supra* note 57, at 133.

[71] VILLANUEVA, *supra* note 57, at 137.

in order to impose liability on such carrier.[72] A common carrier is bound by the acts or omissions of his employees, as clearly provided for in Article 1759 of the Civil Code of the Philippines:

> Common Carriers are liable for the death of or injuries to passengers through the negligence or willful acts of the former's employees, although such employees may have acted beyond the scope of their authority or in violation of the orders of the common carriers.
>
> This liability of the common carriers does not cease upon proof that they exercised all the diligence of a good father of a family in the selection and supervision of their employees.

b. Culpa Aquiliana

The negligence of the shipowner, which results in the death of or injury to a passenger, may be considered a quasi-delict. Civil liability arising from quasi-delict, otherwise referred to as *culpa aquiliana*, is a separate and distinct source of obligation independent of contract.[73] Article 2176 of the Civil Code of the Philippines, which provides the basis for *culpa aquiliana*, states:

> Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relations between the parties, is called quasi-delict and is governed by the provisions of this Chapter.

Although the language of the statute contemplates the absence of contractual relations, the existence of a contract of carriage does not necessarily bar an action based on quasi-delict. A cause of action arising from breach of contract may concur with a cause of action arising from quasi-delict. In Air France v. Carrascoso, the Philippine Supreme Court stated:

> A contract to transport passengers is quite different in kind and degree from any other contractual relation… [A]lthough the relation of passenger and carrier is 'contractual both in origin and nature' nevertheless '*the act that breaks the contract may be also a tort*.'[74] (Emphasis supplied)

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[72] *Id.* at 146.
[73] TIMOTEO AQUINO, TORTS AND DAMAGES 26 (2005).
[74] Air France v. Carrascoso, G.R. No. 21438, 18 SCRA 155, 167-68, Sep. 28, 1966.

The shipowner is furthermore presumptively responsible for the negligence of the ship captain or the members of the crew.[75] The liability of the shipowner is direct, primary, and solidary with the negligent employee.[76] The degree of diligence required of the shipowner is that of a good father of a family exercising due care in the selection and supervision of his employees.[77]

c. Culpa Criminal

Civil liability may also arise from the commission of criminal negligence. A shipowner who is convicted of criminal negligence under the Revised Penal Code is also civilly liable.[78] In addition, a shipowner may also incur civil liability in the event that a ship captain or member of the crew is convicted of criminal negligence. A shipowner is subsidiarily liable for the civil liability of his employee arising from criminal negligence. If the convicted ship captain or crewmember is insolvent, the private complainant may recover from the shipowner based on subsidiary liability.[79]

4. Penal Liability of Shipowner

In the event of death of or injury to a passenger, the shipowner may be convicted of criminal negligence under the Revised Penal Code. Article 365 of the Code forms the basis for criminal liability, and may subject the shipowner to conviction for simple imprudence or negligence, or reckless imprudence resulting in homicide or physical injuries.

B. REGULATORY AND ENFORCEMENT FRAMEWORK

The regulatory and enforcement framework of the domestic shipping industry is principally outlined in Republic Act No. 9295 and Republic Act No. 9993. Republic Act No. 9295, or the Domestic Shipping Development Act of 2004, provides for the duties and responsibilities of the Maritime Industry Authority (MARINA) as the lead regulatory agency responsible for policy direction and coordination among the different key stakeholders in the industry. On the other hand, Republic Act No. 9993, or the Philippine Coast Guard Law of 2009, establishes the Philippine Coast

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[75] CIVIL CODE, art. 2180, *cited in* AQUINO, *supra* note 73.

[76] VILLANUEVA, *supra* note 57, at 138.

[77] CIVIL CODE, art. 2180.

[78] REVISED PENAL CODE, art. 100. The Revised Penal Code is Act No. 3815. *See also* CIVIL CODE, art. 1161.

[79] Carpio v. Doroja, G.R. No. 84516, 180 SCRA 1, Dec. 5, 1989.

Guard (PCG) as the primary enforcement agency in all matters concerning maritime safety. The Philippine Ports Authority (PPA) assists in and provides support to the regulatory initiatives of the MARINA and the enforcement functions of the PCG.

1. Maritime Industry Authority

The MARINA is the primary regulatory agency for the Philippine maritime industry. It was established on 1 June 1974 pursuant to Presidential Decree No. 474, and was thereby vested "general jurisdiction and control over all persons, corporations, firms or entities in the maritime industry of the Philippines and shall supervise, regulate in accordance with this Decree."[80] On 20 March 1985, the quasi-judicial functions of the Board of Transportation, particularly in franchising and route fixing for water-based transport services, was transferred to the MARINA by virtue of Executive Order No. 1011.[81] Pursuant to Executive Order No. 125, as amended by Executive Order No. 125-A, several key functions of the PCG relevant to the promotion of maritime safety were transferred to the MARINA. This included safety regulatory functions, vessel registration, licensing of harbor bay and river pilots, and issuance of seaman's book.[82] The enactment of the Domestic Shipping Development Act of 2004 expanded the regulatory and enforcement mechanisms under the control and supervision of the MARINA. The Act furthermore outlined the specific duties and responsibilities of the MARINA which were previously provided for in different statutes and executive issuances. However, the Philippine Coast Guard Law of 2009 impliedly repealed several enforcement provisions of the Domestic Shipping Development Act of 2004, thereby effectively transferring the vessel safety functions of the MARINA to the PCG.

a. Authority of the MARINA

The issuance of certificates of public convenience for "the carriage of cargo or passenger, or both in the domestic trade"[83] to qualified domestic ship operators is exclusively within the sphere of authority of the MARINA.[84] Furthermore, the MARINA has the power to issue regulations concerning the amount of compulsory passenger and cargo insurance coverage required for shipping operation under the Domestic Shipping

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[80] Pres. Dec. No. 474, § 4.

[81] The Maritime Industry Authority Profile, *available at* http://www.marina.gov.ph/about/profile.aspx.

[82] Exec. Orders No. 125 and 125 A, cited in The Maritime Industry Authority Profile, *available at* http://www.marina.gov.ph/about/profile.aspx.

[83] Rep. Act No. 9295, § 5.

[84] § 7.

Development Act of 2004.[85] Section 15 of the Act further vests in the MARINA the power to require other compulsory insurance coverage to effectively address claims for damages. The MARINA is also vested with the authority to set safety standards governing seaworthiness of vessels, life-saving devices, and safety and communication equipments of vessels.[86]

The powers, functions, and jurisdiction of the MARINA pertinent to maritime safety, as provided for under Section 10 of the Act, are summarized as follows:

> (1) Register vessels;
>
> (2) Issue certificates of public convenience or any extensions or amendments thereto, authorizing the operation of all kinds. Classes and types of vessels in domestic shipping: Provided, That no such certificate shall be valid for a period of more than twenty-five (25) years;
>
> (3) Modify, suspend or revoke at any time upon notice and hearing, any certificate, license or accreditation it may have issued to any domestic ship operator;
>
> …
>
> (6) Set safety standards for vessels in accordance with applicable conventions and regulations;
>
> (7) Require all domestic ship operators to comply with operational and safety standards for vessels set by applicable conventions and regulations, maintain its vessels in safe and serviceable conditions, meet the standards of safety of life at sea and safe manning requirements, and furnish safe, adequate, efficient, reliable and proper service at all times;
>
> …
>
> (9) Ensure that all domestic ship operators shall have the financial capacity to provide and sustain safe, reliable, efficient and economic passenger or cargo service, or both;
>
> …

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[85] § 14.
[86] § 9.

> (11) Adopt… such rules and regulations which will ensure compliance by every domestic ship operator with required safety standards and other rules and regulations on vessel safety;
>
> …
>
> (13) Hear and adjudicate any complaint made in writing involving any violation of this law or the rules and regulations of the Authority;
>
> (14) Impose such fines and penalties on, including the revocations of licenses of any domestic ship operator who shall fail to maintain its vessels in safe and serviceable condition, or who shall violate or fail to comply with safety regulations;
>
> …
>
> (17) Issue such rules and regulations necessary to implement the provisions of this Act: Provided, That such rules and regulations cannot change or in any way amend or be contrary to the intent and purposes of this Act.[87]

It is important to note that the Philippine Coast Guard Law of 2009, enacted on 12 February 2010, repealed by implication the vessel safety functions of the MARINA. The law thereby transformed the agency into a strictly regulatory body. In particular, the recently enacted statute abrogated the power of the MARINA "to inspect vessels and all equipment on board to ensure compliance with safety standards"[88] as previously provided under Section 9 of the Domestic Shipping Development Act of 2004. Furthermore, the Philippine Coast Guard Law of 2009 repealed the enforcement functions of the MARINA with respect to "compliance by every domestic ship operator with required safety standards and other rules and regulations on vessel safety."[89]

b. Sanctions Imposed by the MARINA

Under the Domestic Shipping Development Act of 2004, the MARINA has the power to impose fines and penalties against domestic ship operators who shall commit any of the following acts:

> (1) Operate without a valid certificate of public convenience, accreditation or other form of authority required by this Act;

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[87] § 10.
[88] § 9. *See also* Rep. Act No. 9993, § 3.b.
[89] § 10.11. *See also* Rep. Act No. 9993 § 3.a.

> (2) Refuse to accept or carry any passenger or cargo without just cause;
>
> (3) Fail to maintain its vessels in safe and serviceable condition, or violate safety rules and regulations;
>
> (4) Fail to obtain or maintain adequate insurance coverage;
>
> (5) Fail to meet or maintain safe manning requirements; and
>
> (6) Such other acts which the MARINA shall determine, after due notice and hearing, to be detrimental or prejudice to the safety, stability and integrity of domestic shipping.[90]

In addition, the MARINA has the authority to suspend or revoke any certificate of public convenience or any other form of authority issued to any domestic ship operator in case of contravention of any provision of the Act, or any rules and regulations issued by the MARINA, or any condition imposed on such certificate or any other form of authority.[91] The aforesaid Act also vests in the MARINA the power to fix and collect fees generally covering the cost of licensing, accreditation, and regulation.[92]

2. Philippine Coast Guard

The PCG was originally intended to progress as a civilian governmental agency, and was primarily tasked to administer and promote maritime safety.[93] However, Republic Act No. 5173 established the PCG as a major unit in the Philippine Navy, a major service of the Armed Forces of the Philippines.[94] In addition to its maritime safety functions, the PCG was tasked to participate in the national defense efforts of the government.[95]

There was, however, an apparent disjunct between the "humanitarian concerns" of the PCG and the combative nature of military operations.[96] While the Armed Forces of the Philippines was mandated to advance national security concerns, the PCG was responsible for search and rescue operations that did not entail elements of combat.[97] Recognizing the

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[90] § 16.
[91] § 18.
[92] § 17.
[93] BORJA, *supra* note 7, at 46.
[94] Rep. Act No. 5173, § 1.
[95] § 1.
[96] BORJA, *supra* note 7, at 47.
[97] *Id.*

necessity to align inter-agency functions, Executive Order No. 475 transferred the PCG from the Philippine Navy to the Office of the President on 30 March 1998.[98] A few days thereafter, Executive Order No. 477 transferred the PCG from the Office of the President to the Department of Transportation and Communications (DOTC).[99] The enactment of the Philippine Coast Guard Law of 2009 formally establishes the PCG as an armed and uniformed service under the DOTC.[100]

a. Mandate of the PCG

The mandate of the PCG, as provided for in Republic Act No. 5173 and Presidential Decree No. 601, is "to promote the safety of life and property at sea and to protect the marine environment"[101]. As regards the maritime safety aspect of its mandate, the PCG performs navigational safety functions, which includes the establishment and implementation of vessel traffic schemes,[102] the operation and maintenance of 563 light stations, beacons, and buoys across the archipelago,[103] and "the administration and removal of the derelicts and other hazards to navigation."[104] Moreover, the PCG is in charge of search and rescue operations and other disaster-related operations.[105]

The enactment of the Domestic Shipping Development Act of 2004, however, transferred the vessel safety functions of the PCG to the MARINA.[106] The Act effectively divested the PCG of its mandate of ensuring vessel seaworthiness in favor of the MARINA, thereby transforming the latter agency into a policy-making and enforcement body.[107] The MARINA, however, did not have sufficient personnel to adequately perform its enforcement function pertaining to ship safety inspection and other safety regulatory inspections.[108] Thus, a Memorandum of Agreement was forged between the two agencies, wherein the PCG will

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[98] Exec. Order No. 475, § 1.
[99] Exec. Order No. 477, § 1.
[100] Rep. Act No. 9993, § 2.
[101] Exec. Order No. 477.
[102] PCG Full Speed in Promoting Safety at Sea, *available at* http://www.coastguard.gov.ph/safety.html.
[103] *Id.*
[104] BORJA, *supra* note 7, at 48.
[105] *Id.* at 49.
[106] Rep. Act No. 9295, §§ 9-10.
[107] BORJA, *supra* note 7, at 47.
[108] Memorandum of Agreement between the PCG and the MARINA, Sep. 14, 2003, *available at* http://www.coastguard.gov.ph/MOA-MARINA.htm.

perform ship safety inspection services and other safety regulatory inspection services on behalf of the MARINA.[109]

It is essential to underscore, however, that the Philippine Coast Guard Law of 2009 was recently enacted in recognition of the operational inadequacies of the MARINA and the resource capabilities and historical responsibilities of the PCG.[110] The Philippine Coast Guard Law of 2009 presents significant statutory changes through specific and proper delineation of the powers and functions of the MARINA and the PCG.[111] The statute strengthens the role of the PCG in maritime safety through the restoration of its vessel safety and enforcement functions.[112] The law seeks to address the necessity "to optimize available resources of the government,"[113] and dispenses with the further implementation of the Memorandum of Agreement between the two governmental agencies.

In this light, the Philippine Coast Guard Law of 2009 establishes the PCG as the primary enforcement agency for maritime safety, with the principal duty "to enforce regulations in accordance with all relevant maritime international conventions, treaties or instruments and national laws for the promotion of safety of life and property at sea"[114]. Concomitantly, the PCG is vested with the following powers:

> (1) to conduct inspections on all merchant ships and vessels, including but shall not be limited to inspections prior to departure, to ensure and enforce compliance with safety standards, rules and regulations
>
> (2) to detain, stop or prevent a ship or vessel which does not comply with safety standards, rules and regulations from sailing or leaving port
>
> (3) to conduct emergency readiness evaluation on merchant marine vessels[115]

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[109] *Id.* at Chapters 1 and 4.

[110] Gilbert Rueras, The PCG Law of 2009, *available at* http://www.coastguard.gov.ph/news/pcg-law-2009.pdf.

[111] Christine Avendaño, *Arroyo Urged to Enact Coast Guard Law*, PHIL. DAILY INQUIRER, Dec. 28, 2009, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20091228-244366/Arroyo-urged-to-enact-Coast-Guard-law.

[112] Rep. Act No. 9993, § 3.

[113] *Supra* note 108.

[114] Rep. Act No. 9993, § 3.a.

[115] § 3.b-3.d.

b. Administrative Investigations under the PCG

The PCG also performs administrative investigations through three specific hearing bodies: (1) Board of Marine Inquiry, (2) Special Board of Marine Inquiry, and (3) Hearing Officer.

b.1. Board of Marine Inquiry (BMI)

The BMI is composed of five members, each appointed by the Secretary of National Defense upon the recommendation of the Commandant of the PCG.[116] Unless otherwise directed by the Secretary, the BMI shall be composed of one PCG line officer of Captain's rank as chairman, two master mariners, one chief engineer of the Philippine merchant marine, and one member of the Philippine Bar.[117]

It has investigatory jurisdiction over maritime accidents or casualties in relation to the liability of shipowners and officers.[118] The BMI also has exclusive jurisdiction to investigate complaints against and cases involving maritime officers. [119] Moreover, it is vested with the jurisdiction to review all proceedings or investigation conducted by the SBMI.[120]

b.2. Special Board of Marine Inquiry (SBMI)

The SBMI shall be composed of one PCG line officer as chairman, one licensed master, and one licensed chief engineer chosen from PCG personnel or qualified civilians.[121] The Commandant of the PCG shall establish an SBMI in each Coast Guard District and in specific areas as the necessity of public service may demand.[122]

It has original investigatory jurisdiction over maritime casualties and disasters that transpire within the limits of the Coast Guard District concerned or those specifically referred to by the Commandant of the PCG.[123]

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[116] Philippine Merchant Marine Rules and Regulations, Ch. XVI, § 1604 a.1, *available at* http://www.coastguard.gov.ph/CHAPTER16.htm.
[117] § 1604 a.1.
[118] § 1604 b.1.
[119] § 1604 b.1.
[120] § 1604 b.1.
[121] § 1604 a.2.
[122] § 1604 a.2.
[123] § 1604 b.2.

b.3. Hearing Officer

The Commandant of the PCG appoints the hearing officer from among the military officers or civilian employees of the PCG.[124] The officer should preferably be the Legal Officer of the Coast Guard District or civilian lawyers of the PCG.[125]

A hearing officer has investigatory jurisdiction over cases involving violations of maritime rules and regulations committed within the limits of the respective district and for which administrative fines are provided for.[126] The officer also has jurisdiction over cases involving and complaints against holders of seamen's certificates not otherwise licensed as maritime officers.[127]

3. Philippine Ports Authority

The PPA was created by virtue of Presidential Decree No. 505. The Decree, promulgated in 11 July 1974, envisioned an integrated port administration system that will stimulate the growth and development of maritime transportation and trade in the Philippines. Presidential Decree No. 857 provided further amendments to the previous Decree, wherein the scope and functions of the PPA was expanded "to facilitate the implementation of an integrated program for the planning, development, financing, operation and maintenance of ports or port districts for the entire country."[128] Further amendments were introduced by Executive Order No. 513, one of which pertained to the granting of police authority to the PPA.[129] Although a governmental agency under the DOTC, the PPA possesses corporate autonomy, and is "responsible for the planning, detailed engineering, construction, expansion, rehabilitation and capital dredging of all ports under its port system."[130]

The regulatory initiatives of the MARINA and the enforcement functions of the PCG are necessarily supported by the integrated port administration system. The PPA is expressly mandated to ensure the safety of vessels that utilize port facilities, including those "entering and leaving

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[124] § 1604 a.3.
[125] § 1604 a.3.
[126] § 1604 b.3.
[127] § 1604 b.3.
[128] *Available at* http://www.ppa.com.ph/about%20us/history.htm.
[129] *Id.*
[130] Exec. Order No. 159, §§ 1, 3.

port environs and adjacent sealanes."[131] In line with this, the PPA and the PCG have entered into a Memorandum of Agreement for the joint manning and operation of Vessel Traffic Management Systems (VTMS) control centers. The PPA is responsible for the over-all supervision of the VTMS control centers, while the PCG provides personnel support to the various workstations in the control centers.[132] The primary objectives of the VTMS are to facilitate vessel traffic and navigation, and to transmit material information for ship operations.[133]

IV. VIEWING THE CURRENT MARITIME SAFETY REGIME THROUGH THE LENS OF INTERNATIONAL LAW

A. MAJOR ISSUES CONCERNING SHIP MANAGEMENT IN THE DOMESTIC INDUSTRY

The current maritime safety regime is marked by tolerance and condones an environment of 'absolute minimum maintenance' among shipowners. There has been a consistent proliferation of unsound management practices affecting maritime safety across the domestic shipping industry. These practices bring to light the lack of full management commitment in fulfilling the duty of common carriers to exercise the highest degree of care imposed by law owing to the "the nature of their business and for reasons of public policy"[134]. Shipping operations appear to function under a paradigm that regards safety measures as antithetical to profitability.

1. Seaworthiness of Passenger Vessels

Guaranteeing the seaworthiness of vessels is an essential component of the legal obligation of shipowners to observe extraordinary diligence in transporting passengers. Shipowners, as common carriers, must exercise the requisite degree of diligence in ensuring seaworthiness "at the commencement of each voyage."[135] However, several management practices disregard the statutory duty of common carriers "to carry the passengers safely as far as human care and foresight can provide."[136]

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[131] Memorandum of Agreement between the PPA and the PCG, Feb. 26, 2009, *available at* http://coastguard.gov.ph/MOA/MOA-PPA-PCG.pdf.

[132] *Id.*; *See also* Joint PPA-PCG Manning of VTMS Centers, *available at* www.coastguard.gov.ph/safety.html.

[133] *Supra* note 131.

[134] CIVIL CODE, art. 1733.

[135] INS. CODE OF THE PHILS., § 115, *cited in* HERNANDEZ, *supra* note 13, at 15. The Insurance Code of the Philippines is Pres. Dec. No. 612 (1974).

[136] CIVIL CODE, art. 1755.

One of the key issues affecting seaworthiness pertains to ship alteration. The recent maritime disasters involving the MV Princess of the Stars and the SuperFerry 9 yet again highlighted the industry practice of altering passenger ships purchased overseas.[137] Substantial changes in the structural design of vessels are at times introduced to augment passenger capacity.[138] The modification of a ship's structure may significantly affect its center of gravity, and has proved to be a contributory factor in accidents involving vessels that have undergone alteration without adequate governmental regulation.[139]

The average age of inter-island passenger ships in the domestic fleet is another key issue as regards seaworthiness of passenger vessels. The average age of these vessels ranges from 28 years to 34 years,[140] and is comprised of secondhand ships purchased chiefly from Japan.[141] It should be noted that the Japanese government phases out vessels upon reaching the statutory limit of 10 years, and are subsequently sold internationally to companies operating in jurisdictions with a higher limit on operational age of vessels.[142] According to Primo V. Rivera, Deputy Administrator for Operations of the MARINA, passenger vessels that should have been phased out by reason of age have been granted franchise extensions due to the lobbying efforts of their respective owners.[143] Furthermore, Thompson C. Lantion, Undersecretary for Maritime Transport of the Department of Transportation and Communications, underscored the environment of 'absolute minimum maintenance' wherein "shipping companies repair their vessels only enough to pass safety regulations."[144]

Another issue concerning seaworthiness of vessels pertains to maritime travel during severe weather conditions. The maritime disasters involving the MV Doña Marilyn[145], the MV Princess of the Orient[146], and the MV Princess of the Stars[147] underscore the clear danger of allowing passenger vessels to proceed with their voyage during typhoons. It should be

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[137] *Probe on Charge SuperFerry 9 was Altered Sought*, SUN STAR, Sep. 9, 2009, *available at* http://67.225.139.201/network/probe-charge-superferry-9-was-altered-sought.

[138] *Perfect Formula for Maritime Disaster*, *available at* http://www.ufs.ph/2009-10/node/2224 (Jan. 6, 2010).

[139] *Id.*

[140] Evelyn Macairan, *DOTC to Phase Out Aging Sea Vessels*, PHIL. STAR 10, Dec. 31, 2009.

[141] Garcia, *supra* note 10, at 31.

[142] Macairan, *supra* note 140.

[143] Kristine Alave, *RP Ships Average Age: 34 Yrs*, PHIL. DAILY INQUIRER A1, A11, Dec. 31, 2009.

[144] *Id.*

[145] *Supra* note 22.

[146] *Princess of the Orient*, *available at* http://triton-oceanic.com/projects/detail/princess_of_the_orient/.

[147] Napallacan & Bordadora, *supra* note 38.

noted that the determination of seaworthiness is within the context of a contemplated voyage, and the common carrier is duty-bound to assess all the circumstances.[148] The power and responsibility of prohibiting the master mariner from proceeding with the voyage due to severe weather conditions ultimately rest with the shipowner.

2. Other Shipping Practices

There are several other unscrupulous practices implemented in the domestic shipping industry that greatly contribute to the savage deterioration of maritime safety. The exclusion of passengers in the official manifest is arguably the most notorious of such practices. In order to increase profit, shipping companies allow unsuspecting passengers to board without being included in the official manifest, thereby concealing the fact of overloading.[149] This practice provides an opportunity for shipowners to generate undeclared revenues at the expense of the government.[150] Furthermore, excluded passengers or their heirs have greater difficulty in proving their claims in the event of injury or death, notwithstanding the fact that shipowners are mandated to provide financial coverage to excluded passengers.[151] More importantly, the practice of excluding passengers in the official manifest precludes effective search and rescue operations by the PCG in the event of a disaster.[152] The maritime disaster involving the MV Doña Paz is a poignant example of exclusion in the official manifest, wherein more than 2,800 individuals were not listed to veil the fact that the ship carried almost three times its authorized capacity. There were also substantial numbers of passengers excluded in the official manifest in the more recent maritime accidents involving the MV Princess of the Stars[153] and the MV Baleno 9[154].

Another practice pertains to the maintenance of passenger vessels with inadequate life-saving gears, in terms of number and quality. According to Rear Admiral Benjamin Mata, Vice Chairman of the BMI that investigated the MV Princess of the Stars, the life jackets utilized in most of the vessels in the domestic fleet are obsolete and pose a threat to the safety

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[148] CIVIL CODE, art. 1755.

[149] Leila Salaverria, *30-Minute Pre-departure Inspection of Ship a 'Joke'*, PHIL. DAILY INQUIRER, July 24, 2008, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080724-150334/30-minute-pre-departure-inspection-of-ship-a-joke.

[150] *Id.*

[151] MARINA Circular 2009-18.

[152] Salaverria, *supra* note 149.

[153] *Supra* note 39.

[154] *Supra* note 50.

of passengers.[155] Mata further stated that cost-savings is the primary reason for the refusal of shipowners to upgrade the existing life jackets to the advanced types used in other maritime jurisdictions.[156] Shipowners have successfully lobbied for the non-implementation of MARINA regulations that would have directed the compulsory utilization of modern and safer life jackets.[157] Legislative investigations also reveal the numerous accounts of survivors of maritime disasters as regards the shortage of life jackets and rafts, and the improper storage of life vests that prevented passengers from promptly securing them during emergencies.[158]

Proprietary standards utilized for manning qualifications have also remained questionable. Individuals that have not received formal training in accredited maritime institutions at times staff passenger vessels.[159] In point of fact, the ship captains of the MV Catalyn B and the MV Baleno 9 were not certified master mariners, but were rather major patrons who have not received institutional training and have acquired maritime skills through experience.[160]

B. PROMOTION OF A SAFETY CULTURE IN THE INTERNATIONAL SHIPPING INDUSTRY THROUGH THE ISM CODE

1. International Maritime Disasters and the Human Error

For the period of 1987 to 1994, the number of maritime disasters significantly increased across the globe and numerous lives were lost at sea.[161] Several reports conducted by public and private institutions in the United Kingdom (UK) reveal that the fundamental cause of maritime disasters is human error. The research conducted by Tavistock Institute, and funded by the UK Department of Transport, reported that over 90% of groundings and collisions are due to human error, while over 75% of explosions and contacts are also caused by human error.[162] The report of the

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[155] Leila Salaverria, Tarra Quismundo, & Margaux Ortiz, *Most Life Jackets Used in RP Vessels a 'Hangman's Noose'*, PHIL. DAILY INQUIRER, Jul. 25, 2008, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080725-150521/Most-life-jackets-used-in-RP-vessels-a-hangmans-noose.

[156] *Id.*

[157] *Id.*

[158] *Senate Sets Tuesday Probe Into Recent Sea Tragedies*, *available at* http://www.gmanews.tv/story/180379/senate-sets-tuesday-probe-into-recent-sea-tragedies (Dec. 28, 2009).

[159] Alave, *supra* note 143.

[160] Christine Avendaño, *More Ferry Deaths Feared*, PHIL. DAILY INQUIRER A1, A11, Dec. 30, 2009. *See also* Alave, *supra* note 143.

[161] PHIL ANDERSON, ISM CODE: A PRACTICAL GUIDE TO THE LEGAL AND INSURANCE IMPLICATIONS 15 (2005).

[162] *Id.* at 17.

House of Lords Select Committee on Science and Technology stated that, in general, "four out of five ship casualties – 80% – are due to human error".[163] Phil Anderson expounded on the aforesaid statistical data in this wise:

> [I]t is suggested that "human error" or "human factors", or whatever other title one wishes to give the phenomenon, have been responsible for most maritime accidents throughout history, and that the figure is probably closer to 100 per cent. Just how close you came to 100 per cent would depend where the investigator/researcher stopped in tracing the particular causal chain for any particular accident… The problem needed to be tackled and the problem to be tackled was a human problem.[164]

2. The Principles Underlying the ISM Code

The International Safety Management (ISM) Code was the response of the international maritime community to the human problem primarily causing maritime disasters and the consequent losses at sea. In recognizing "that safety violations, collisions, groundings, and pollution incidents were caused in part by poor management standards, which could be corrected through international standardization and enforcement," the IMO initiated the development of the ISM Code.[165] There was an express recognition that "the existing rules and regulations were not in themselves sufficient to ensure a real diminution in the number of shipping casualties", and that "there was a need to reduce the scope of human error by imposing an industry standard of good management".[166]

The fundamental philosophical precept of the ISM Code is a safety culture grounded on shared responsibility, accountability, and proactive stance.[167] This gives meaning to the avowed purpose of the ISM Code in establishing an international standard for safe management and operation.[168] The Preamble of the ISM Code specifically acknowledges the commitment of ship executives as the cornerstone of good safety management.[169]

This commitment finds embodiment in the safety management system (SMS) which shipowners are mandated to develop and implement.

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[163] *Id.*

[164] *Id.*

[165] Paul Hofmann, *The ISM Code's Applicability to, and Benefits for, Injured Maritime Claimants*, 1 ANN.2008 AAJ-CLE 59 (2008).

[166] ANDERSON, *supra* note 161, at 21.

[167] *Id.* at xiii.

[168] International Safety Management (hereinafter "ISM") Code, preamble, ¶ 1.

[169] ISM Code, preamble, ¶ 6.

Through an SMS, the shipowner is empowered to create a unique safety framework that will respond to the specific enterprise context and at the same time comply with international safety standards.[170] An SMS is defined under Section 1.1.4 of the ISM Code as "a structured and documented system enabling Company personnel to implement effectively the Company safety and environmental protection policy." An SMS has the following functional requirements:

> 1) A safety and environmental-protection policy;
>
> 2) Instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;
>
> 3) Defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel;
>
> 4) Procedures for reporting accidents and non-conformities with the provisions of this Code;
>
> 5) Procedures to prepare for and respond to emergency situations; and
>
> 6) Procedures for internal audits and management reviews.[171]

The SMS provides a distinct opportunity for the shipowner to achieve a meaningful sense of ownership with respect to maritime safety by sharing the responsibility with traditional industry stakeholders, particularly the regulatory institution of the government. The principles underlying the SMS seek to transform the conventional contours of the profitability paradigm by instilling the perspective that "an effective safety policy is considered to be a major contributing factor to the organisation's overall productivity, vitality, and profitability"[172].

3. The Nature of the ISM Code

The ISM Code envisions a proactive and transparent ship management that is imbued with a renewed sense of commitment to

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[170] Antonio Rodriguez & Mary Campbell Hubbard, *The International Safety Management (ISM) Code: A New Level of Uniformity*, 73 TUL. L. REV. 1585, 1592 (1999).

[171] ISM Code, § 1.4.

[172] William O'Neil, *IMO – Safer Shipping Demands a Safety Culture*, message on the occasion of the World Maritime Day 2002 on Sep. 26, 2002, *available at* http://www.imo.org/includes/blastdata.asp?doc_id=2407.

maritime safety.[173] It specifically mandates the creation and maintenance of an SMS, a documented system that establishes "procedures whereby the safety and pollution prevention aspects of a ship are managed, both ashore and on board."[174]

As opposed to traditional international legislations on maritime safety, the ISM Code does not outline rules and regulations pertaining to technical aspects of ship operations.[175] The purpose of the ISM Code is not to provide a universal legislation that incorporates all the relevant rules and regulations.[176] On the contrary, the ISM Code seeks to enhance ship management by enjoining every shipowner to develop and implement a system of integrated processes "by which a company can check that it does comply with the various rules and regulations."[177] Antonio Rodriguez and Mary Hubbard succinctly describe the nature of the ISM Code in this wise:

> The Code does not create specific operating rules and regulations, but provides a broad framework for vessel owners and operators to ensure compliance with existing regulations and codes, to improve safety practices and to establish safeguards against all identifiable risks.[178]

4. Development of the ISM Code under the Auspices of the IMO

During the 16th Session of the IMO Assembly in October 1989, Resolution A.647 (16) entitled "Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention" was adopted in order to provide a framework for safety and pollution prevention management.[179] The guidelines contained in the said resolution served as the foundation for the ISM Code.[180] Resolution A.680 (17), which was subsequently adopted at the 17th Session of the IMO Assembly, provided revisions to the guidelines set in Resolution A.647 (16).[181] During the 18th Session of the IMO Assembly in November 1993, Resolution A.741 (18) was adopted wherein the ISM Code was incorporated as part of the annex to the resolution.[182]

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[173] Rodriguez & Hubbard, *supra* note 170, at 1587.
[174] ANDERSON, *supra* note 161, at 21.
[175] *Id.*
[176] *Id.* at 22.
[177] *Id.*
[178] Rodriguez & Hubbard, *supra* note 170, at 1592-93.
[179] *Id.* at 1590.
[180] Hofmann, *supra* note 165.
[181] Rodriguez & Hubbard, *supra* note 170, at 1590-91.
[182] *Id.* at 1591.

Recognizing the advantage of mandatorily implementing the ISM Code, the IMO Assembly resolved to amend the SOLAS Convention 1974.[183] In May 1994, the SOLAS Convention 1974 was amended to include Chapter IX entitled "Management for the Safe Operation of Ships".[184] Chapter IX, particularly Regulation 3 thereof, provides for the mandatory compliance of shipping companies and their ships to the ISM Code. It should be noted that Chapter IX entered into force by virtue of the tacit acceptance procedure in the SOLAS Convention 1974, wherein amendments enter into force at a designated date unless a particular number of contracting states object thereto.[185] Regulation 2 of Chapter IX provides for the coverage of the ISM Code as follows:

> 1) Passenger ships including passenger high-speed craft (mandatory compliance not later than 1 July 1998)
>
> 2) Oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high-speed craft of 500 gross tonnage and upwards (mandatory compliance not later than 1 July 1998)
>
> 3) Other cargo ships and mobile offshore drilling units of 500 gross tonnage and upwards (mandatory compliance not later than 1 July 2002)

5. Effects of the Implementation of the ISM Code in the International Shipping Industry

There has been considerable progress in international maritime safety since the conception and implementation of the ISM Code.[186] Then IMO Secretary-General William A. O'Neil, in a message delivered on World Maritime Day 2002, confirmed that "there have been marked improvements in the casualty records and that fewer ships and fewer lives are being lost at sea".[187] O'Neil validated the continued progress in maritime safety during the 77th Session of the Maritime Safety Committee in 2003, and attributed the improvements to the standards implemented by the IMO through notable initiatives such as the amendments to SOLAS Convention 1974.[188]

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[183] *Id.*

[184] Hofmann, *supra* note 165.

[185] Amendment to Conventions, *available at* http://www.imo.org/Home.asp?topic_id=161.

[186] *Secretary-General Highlights Shipping's Improving Safety Record as Key Meeting Gets Underway*, *available at* http://www.imo.org/Newsroom/mainframe.asp?topic_id=758&doc_id=2960.

[187] O'Neil, *supra* note 172.

[188] *Supra* note 186.

The statistical data provided by the IMO on 23 February 2005, as verified by its Sub-Committee on Flag State Implementation, disclose a marked improvement in maritime safety record. From 1989 to 1997, the period preceding the Phase I Implementation of the ISM Code (1 July 1998), the average number of lives lost per year is 663 individuals.[189] The average decreased to 536 individuals for the period of 1998 to 2004.[190] As regards the total number of ships lost (100 gross tonnage and above), the IMO statistical data confirm a decline from an annual average of 258 ships lost from 1989 to 1997, to an average of 179 ships lost for the period of 1998 to 2004.[191]

C. THE GAP BETWEEN THE DOMESTIC MARITIME SAFETY REGIME AND THE INTERNATIONAL SAFETY CULTURE

The Philippines is one of the 159 contracting states to the SOLAS Convention 1974.[192] The Philippine government deposited the instrument of accession on 15 December 1981, and the convention entered into force with respect to the state on 15 March 1982.[193] By virtue of the tacit acceptance procedure in the SOLAS Convention 1974, the Philippines was legally bound by the terms of Chapter IX and the ISM Code.

Published reports state that the Philippines is 95% compliant with the various international conventions pertaining to maritime trade and transport.[194] According to the report presented by the MARINA in the 2004 OECD Workshop on Maritime Transport, the domestic shipping industry has already attained 100% compliance with the ISM Code.[195]

Compliance, however, remains specious. The improvements experienced in the international shipping industry do not translate to domestic safety records. The regulatory and enforcement framework remains reactive and tolerant, allowing ship management to continually operate in an environment of 'absolute minimum maintenance'. There is,

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[189] The figure is derived from the statistical data provided by the IMO in Casualty Statistics and Investigations: Very Serious and Serious Casualties, FSI Circular FSI.3/Circ.6, Feb. 23, 2005, *available at* http://www.imo.org/includes/blastData.asp/doc_id=4771/6.pdf.

[190] *Id.*

[191] *Id.*

[192] Summary of Status of Convention, *available at* http://www.imo.org/Home.asp?topic_id=161.

[193] IMO Documentation: SOLAS 1974, *available at* https://imo.amsa.gov.au/public/parties/solas74.html.

[194] Fidel Ramos, *Philippines: The Maritime Industry*, MANILA BULL., Jul. 18, 2009, *available at* http://www.mb.com.ph/articles/211570/the-maritime-industry.

[195] Victoria-Bañas, *supra* note 11.

therefore, a critical gap between the domestic maritime safety regime and the international safety culture.

In this light, two key components of the regulatory and enforcement framework deserve particular attention: (1) the rules and regulations implementing the ISM Code, and (2) the enforcement of the implementing rules and regulations.

1. Memorandum Circular No. 143 and the ISM Code

The ISM Code was formally made part of Philippine domestic law not through legislative enactment but through administrative issuance. In particular, Memorandum Circular No. 143 (M.C. 143), issued and approved by the MARINA on 3 June 1999, provides for the rules and regulations implementing the ISM Code in Philippine domestic shipping. The rules and regulations in M.C. 143 are severely limited in scope, and only incorporate several provisions of the ISM Code. The circular merely includes two aspects of the ISM Code, namely (1) the SMS, and (2) certification and verification. M.C. 143 failed to integrate the other vital sections of the ISM Code pertaining to the following:

1) Company responsibilities and authority (Sec. 3, ISM Code)
2) Designated person/s (Sec 4, ISM Code)
3) Master's responsibility and authority (Sec. 5, ISM Code)
4) Resources and personnel (Sec. 6, ISM Code)
5) Development of plans for shipboard operations (Sec 7, ISM Code)
6) Emergency preparedness (Sec. 8, ISM Code)
7) Reports and analysis of non-conformities, accidents and hazardous occurrences (Sec. 9, ISM Code)
8) Maintenance of the ship and equipment (Sec. 10, ISM Code)
9) Documentation (Sec. 11, ISM Code)
10) Company verification, review, and evaluation (Sec. 12, ISM Code)

The restricted coverage of M.C. 143 unduly divides the ISM Code, thus defeating the purpose of the ISM Code to serve as "a blueprint for an effective management structure"[196]. The circular omits most of the relevant sections of the ISM Code, especially the mandatory requirement of designating a person that will serve as a link between the highest level of management and the crew on board a ship.[197]

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[196] O'Neil, *supra* note 172.
[197] ISM Code, § 4.

It is critical to underscore that M.C. 143 is not only limited in scope, but is also deficient in substance. The two aspects of the ISM Code incorporated in M.C. 143 do not include certain key provisions that would otherwise provide regulatory force.

Before a shipping company can operate, it has to secure a Document of Compliance (DOC) from the regulatory agency.[198] The DOC is a certification issued to a company that has complied with the requirements of the ISM Code.[199] In order to ensure continued compliance with the ISM Code, Section 13.4 thereof mandates the conduct of annual verification. In addition, Section 13.5 states that the DOC should be withdrawn if the company fails to request for the conduct of annual verification. Sections 13.4 and 13.5 are not incorporated in M.C. 143. The circular merely obligates the shipping company to secure a DOC without any fixed measures to ensure constant compliance. M.C. 143 simply provides for discretionary verification by the MARINA "whenever the circumstances so warrant".[200] The provisions of M.C. 143 on DOC certification and verification effectively amounts to the mere issuance of the document that simply indicates compliance at a single point in time for the entire duration of the validity of the DOC.

The ISM Code further requires every ship to obtain a Safety Management Certificate (SMC) as a condition for its operation.[201] The SMC is a certification issued to a ship indicating that the company and its shipboard management are observing the approved SMS in the operation of the particular ship.[202] Section 13.8 of the ISM Code mandates the conduct of at least one intermediate verification. Furthermore, Section 13.9 provides that the SMC should be withdrawn if the company fails to request for the conduct of intermediate verification. In relation to Section 13.9, the ISM Code in Section 13.5.1 directs the withdrawal of all associated SMC in the event that the DOC issued to a shipping company is withdrawn. These provisions of the ISM Code are not included in M.C. 143. The circular simply requires the company to obtain for each of its ships the necessary SMC, subject only to discretionary verification.[203] The certification and verification of the SMC effectively amounts to the mere issuance of the

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[198] § 13.1.
[199] § 1.1.5.
[200] Memo. Circ. No. 143, § V.5.
[201] ISM Code, § 13.7.
[202] § 1.1.6.
[203] Memo. Circ. No. 143, § V.5.

certificate without any fixed measure to assess consistent compliance with the company's approved SMS.

It should be further noted that Sections 13.5 and 13.9 of the ISM Code direct the withdrawal of the DOC and/or the SMC if there is evidence of major non-conformities with the ISM Code. These provisions are also not incorporated in M.C. 143. The sanctions and penalties in M.C. 143 are simply limited to the non-possession/non-renewal of the DOC or SMC, and, in cases where another entity has assumed responsibility of complying with the ISM Code, the failure to provide the MARINA the name and details of the said entity.[204]

The simple conclusion is that M.C. 143 is merely an administrative issuance on certification. It does not sufficiently apprise the stakeholders of the domestic shipping industry, particularly shipowners, of the true intent and scope of the ISM Code. Furthermore, M.C. 143 does not possess a sufficient degree of regulatory force to implement the ISM Code, especially the mandatory requirements thereof.

2. Enforcement of Memorandum Circular No. 143

The failure of M.C. 143 to incorporate the vital provisions of the ISM Code allows the regime to remain tolerant and reactive. The circular does not provide measures to ensure continuing compliance with the ISM Code and the SMS. There is therefore no regulatory basis to conduct periodic verification and impose sanctions for major-nonconformities that could have been discovered during verification. Verifications and audits are often carried out or commissioned by the MARINA after the fact – after the occurrence of a maritime disaster with numerous human casualties.[205] Published reports reveal a surge in the number of verifications conducted when a maritime disaster occurs.[206] This illustrates the lack of regulatory commitment to the principles of the ISM Code. More importantly, inadequate enforcement serves as a significant hurdle to the cultivation of a safety culture.

V. RE-ALIGNMENT OF THE DOMESTIC MARITIME SAFETY REGIME TO THE ISM CODE

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[204] § VII.

[205] Rainer Allan Ronda, *Marina to Audit 86 Shipping Firms*, PHIL. STAR 7, Jan. 1, 2010.

[206] *Id*; *See also* Evelyn Macairan, *Marina Lifts Suspension on 5 Aboitiz Vessels*, PHIL. STAR, Sep. 19, 2009, *available at* http://www.philstar.com/Article.aspx?articleid=506629.

Translating the progress in the international shipping industry to domestic safety records necessitates a renewed sense of compliance. Bridging the gap between the domestic maritime safety regime and the international safety culture requires a complete re-alignment of the regulatory and enforcement framework to the ISM Code. The re-alignment will create a robust regulatory and enforcement framework that conforms to international standards and best practices. Former IMO Secretary-General William A. O'Neil underlines the significance of a robust regulatory and enforcement framework in this wise:

> [A] strong regulatory framework does not in itself make for a viable safety or security culture. *It does, however, provide the necessary platform from which such a culture can evolve – if it is properly cultivated.* Only then will IMO's extensive regulatory regime, along with its internationally accepted standards and regulations, become enshrined in a culture that will ensure that their full potential is realized.[207] (Emphasis supplied)

In other words, a robust regulatory and enforcement framework will ultimately serve as the impetus to the cultivation of a domestic safety culture characterized by an enlightened management.[208]

A. COMPLETE RE-ALIGNMENT OF THE RULES AND REGULATIONS WITH THE ISM CODE

The rules and regulations implementing the ISM Code in domestic shipping, as embodied in M.C. 143, must be revised by the MARINA to provide regulatory force to the process of certification and verification. The rules and regulations must also integrate the vital sections of the ISM Code.

1. Certification and Verification

The process of certification and verification for both the DOC and SMC, as provided for in M.C. 143, must include the key provisions of the ISM Code as regards periodic verification and the sanctions imposed in relation thereto.

With respect to the DOC, the conduct of annual verification provided for in Section 13.4 of the ISM Code must be incorporated in the rules and regulations. Furthermore, as mandated in Section 13.5, the

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[207] O'Neil, *supra* note 172.
[208] Donald Greenman, *Limitation of Liability Unlimited*, 32 J. MAR. L. & COM. 279, 312 (2001).

sanction of withdrawal of the DOC for failure to request the annual verification must also be included. These two provisions will ensure that the company continuously complies with the requirements of the ISM Code.

As regards the SMC, the conduct of at least one intermediate verification stated in Section 13.8 should be integrated in the rules and regulations. In addition, Sections 13.9 and 13.5.1 of the ISM Code must be incorporated, thereby providing for the sanction of withdrawal of the SMC for failure to request the intermediate verification and the sanction of withdrawal of all associated SMC in the event that the DOC is withdrawn. These provisions provide fixed measures that will ensure that the ship is consistently operated in accordance with the approved SMS of the shipping company.

Sections 13.5 and 13.9 of the ISM Code should further be integrated, thus providing for the sanction of withdrawal of the DOC and/or the SMC if there is evidence of major non-conformities with the ISM Code.

2. Integrating the Vital Sections of the ISM Code

The ISM Code is a unitary framework for safety management. It is therefore imperative that the vital sections of the ISM Code be completely incorporated in the rules and regulations. The omitted sections of the ISM Code are enumerated in Part IV, Subpart C.1 (Memorandum Circular No. 143 and the ISM Code) of this paper.

It is important to emphasize two sections of the ISM Code that have not been included in the rules and regulation: (1) Designated Person/s, and (2) Company Verification, Review, and Evaluation. These two sections may potentially introduce new legal dimensions to the limitation of liability doctrine and the requisite degree of diligence required of a shipowner.

a. Designated Person/s

The ISM Code mandates the appointment of a person who will function as "a conduit between the company ashore and the specific ship on all matters relevant to the SMS"[209]. Section 4 of the ISM Code states:

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[209] ANDERSON, *supra* note 161, at 79.

> 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. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution-prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required.

The requirement of having direct access to the highest level of management will inevitably augment the privity of the shipowner with respect to the matters within the domain of the designated person.[210] A new aspect is therefore introduced to the obligation of the shipowner to exercise extraordinary diligence and the shipowner's capacity to limit liability. With respect to the responsibility and authority of the designated person, the ISM Code establishes a positive duty on the part of the shipowner to inspect and inquire.[211]

b. Company Verification, Review, and Evaluation

The measures to ensure continuing compliance with the requirements of the ISM Code and the SMS are not limited to verifications and sanctions conducted or imposed by the regulatory agency. The ISM Code directs shipping companies to conduct internal audit and assessment. Section 12 of the ISM Code provides:

> 12.1 The Company should carry out internal safety audits to verify whether safety and pollution-prevention activities comply with the safety management system.
>
> 12.2 The Company should periodically evaluate the efficiency of and, when needed, review the safety management system in accordance with procedures established by the Company.
>
> 12.3 The audits and possible corrective actions should be carried out in accordance with documented procedures.
>
> 12.4 Personnel carrying out audits should be independent of the areas being audited unless this is impracticable due to the size and the nature of the Company.

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[210] Dennis Stone, *The Limitation of Liability Act: Time to Abandon Ship?*, 32 J. MAR. L. & COM. 317, 329 (2001).

[211] Craig Allen, *Limitation of Liability*, 31 J. MAR. L. & COM. 263, 271-272 (2000).

> 12.5 The results of the audits and reviews should be brought to the attention of all personnel having responsibility in the area involved.
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> 12.6 The management personnel responsible for the area involved should take timely corrective action on deficiencies found.

This section highlights the objective of the ISM Code to gear away from the system of pure governmental regulation and move towards a broader framework of inclusive governance. The ISM Code mandates the shipowner and the company to establish a system of 'self-check' wherein the enterprise actively shares in the responsibility of evaluation and corrective action.[212] Section 12 of the ISM Code is therefore an essential component of the duty to inspect and inquire.[213] In this light, it is incumbent upon the shipowner and management to adequately perform such duty in order to comply with the requisite degree of diligence, a violation of which affects the shipowner's liability.

B. ENFORCEMENT OF THE RULES AND REGULATIONS IMPLEMENTING THE ISM CODE

The re-alignment of the rules and regulations implementing the ISM Code should be sustained by an enforcement agency committed to the principles of the ISM Code. This commitment entails a proper appreciation of the international standards and best practices embodied in the Code. Re-alignment without concomitant agency commitment will not properly cultivate the safety culture envisaged by the ISM Code, and amounts merely to paying "lip-service to safety".[214] It is therefore incumbent upon the PCG, as the primary enforcement agency, to adequately enforce the regulatory initiatives of the MARINA. More importantly, it is imperative that the PCG embrace this commitment in order to effectively collaborate with the MARINA in strengthening the regulatory and enforcement framework. In the final analysis, it is the duty of the two governmental agencies to instill in shipowners and their companies the fundamental precept of the ISM Code – a safety culture grounded on shared responsibility, accountability, and proactive stance. The recent enactment of the Philippine Coast Guard Law of 2009 may prove to be a significant step towards the creation of a robust regulatory and enforcement framework. The statute capitalizes on the inherent competencies of the PCG and the MARINA, whereby their

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[212] Rodriguez & Hubbard, *supra* note 170, at 1606.

[213] Mitchell Stoller, *The International Safety Management (ISM) Code: An Expert Witness's Perspective*, 1 ANN. 2006 ATLA-CLE 69 (2006).

[214] O'Neil, *supra note* 172.

respective agency capabilities are appropriately matched to their roles and functions.[215]

VI. CONCLUSION

The conventional emphasis of traditional solutions to the human problem focuses strictly on safety. The emphasis does not provide novel theoretical insight, nor does it enhance existing operational templates. The emphasis simply boils down to proposing safety to address the lack of safety. This might very well explain the continued pursuit of shortsighted regulatory initiatives that amount to nothing more than a 'quick fix'.

The ISM Code presents a major shift in emphasis, and at once recognizes the necessity of providing a long-term solution to the continuing human problem.[216] A safety culture is at the heart of the ISM Code. This signifies a way of life that endures, and a system of values that respects the sanctity of human life. In this light, re-aligning the domestic maritime safety regime with the international standards and best practices embodied in the ISM Code indicates a commitment to its way of life and system of values.

The critical first step in the cultivation of a safety culture is the creation of a robust regulatory and enforcement framework that will serve as the "necessary platform".[217] The framework does not guarantee a safety culture; it does however initiate the process of instilling the way of life and the system of values envisaged by the ISM Code.[218] The responsibility of maintaining a safety culture eventually rests on the shipowner. This underscores the wisdom of the ISM Code – the long-term safety and protection of lives at sea should be ensured by the entity in whose hands such lives are entrusted.

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[215] Rueras, *supra* note 110.
[216] ANDERSON, *supra* note 161, at 17-19.
[217] O'Neil, *supra* note 172.
[218] *Id.*