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MASTER OF LAW PROGRAM
Programmet för Juris Kandidatexamen

THE LEGAL POSITION OF THE SHIP MASTER
Fartygsbefälhavarens rättsliga ställning

Master Thesis comprising 20 Academic Credit Points by:
Tillämpade studier omfattande 20 högskolepoäng av:

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Summary

The purpose of this thesis has been to examine the legal position of the master. Has he got the necessary independence to perform his duties according to the law? Are his authorities sufficient or perhaps even greater than necessary to perform his duties? The examination has generally been limited to Sweden and questions regarding safety, environment, the ISM-Code, the designated person and the issue of privity.

The status of the master has gradually diminished due to changes in society and technology. But this is no reason to diminish his authority. Many of the powers which the master has at his disposal are meant to be used only in a state of emergency. Therefore there is no need to remove these authorities. The position of the master is being adapted to a modern society, which under all circumstances must be a good thing in itself.

International regulations are of great importance and probably the most efficient way of creating legal development. The ISM-Code will not prevent a master from acting in accordance with his own good judgement. The technology of today has made it possible to monitor the master more than ever before.

The amount of time, money and attention spent on the safety of the vessel are of great importance and will influence the safety of the vessel. These factors are a source for conflict between the persons operating the vessel. The problem is that the master might be biting the hands which feeds him.

The authorities of the master are still sufficient enough for him to handle his duties. Certain improvements could however be made. The ISM-Code is a significant step in the right direction. The introduction of the designated person has improved the lines of communication within the company.

Sammanfattning på svenska
(Summary in Swedish)

Syftet med den här uppsatsen har varit att undersöka fartygsbefälhavarens rättsliga ställning. Har han den självständighet som krävs för att utföra sina uppgifter i enlighet med svensk lag? Är hans befogenheter tillräckliga eller kanske till och med större än nödvändigt för att han skall kunna utföra sina uppgifter? Undersökningen har i allmänhet begränsats till Sverige och frågor rörande säkerhet, miljö, ISM-koden, tilldelat ansvar och frågor rörande skuld och ansvar.

Befälhavarens status har gradvis minskat på grund av förändringar i samhället och ifråga om teknik. Men detta är inte en anledning till att skära ned på hans befogenheter. Många av befälhavarens befogenheter är avsedda att användas endast i nödfall. Därför finns ingen anledning att begränsa dem. Befälhavarens ställning håller på att anpassas till ett modernt samhälle, vilket måste vara positivt i sig.

Internationella regler är mycket betydelsefulla och antagligen den enda möjliga vägen om man vill ha en rättsutveckling. ISM-koden kommer inte att förhindra att befälhavaren fattar beslut i enlighet med sitt eget goda omdöme. Dagens teknologi har gjort det möjligt att följa upp befälhavarens handlande på ett helt nytt sätt. Mängden tid, pengar och uppmärksamhet som spenderas på fartyget är av stor betydelse och kommer att påverka dess säkerhet. Dessa faktorer är en källa till konflikt mellan de personer som driver fartyget. Det största problemet är att befälhavaren kanske biter den hand som föder honom.

Befälhavarens befogenheter är fortfarande tillräckliga för att han skall kunna utföra sina uppgifter. Vissa förbättringar kan dock göras. ISM-koden är ett steg i rätt riktning. Införandet av tilldelat ansvar förbättrat kommunikationerna inom företagen.

Preface

I would like to take the opportunity to thank a few people who have been helpful during the writing of this thesis. First of all I would like to sincerely thank my tutor Mr. Mats Tullberg

for his expertise and opinions. I would also like to thank him for having patience with me while I was trying to decide what to write about.

Mr. Andreas Hagberg has been kind enough to go through the suffering of having to read the manuscript of a thesis only half-completed. I am grateful for his opinions. I would also like to thank Mr. Lars Rhodin of Swedish Club for sharing his time and opinions. Maritime Forum invited me to the World Maritime Day in Gothenburg which was a great inspiration. The Scandinavian Shipping Gazette supplied me with tickets to the Nordic Shipping Party in Gothenburg. Mr. Max Petzold has been very helpful with computer support and discussions over lunch. Mr. Per A. Sjöberger was kind enough to inform me of the thesis written by Mr. Fredrik Sundgren. Special thanks to Mr. Christer Lindvall of SFBF.

I would like to thank Örjan Kihlström, The Coca-Cola Company, IFK Göteborg, Arla, Prince Hotel Hanoi, Simson, Frank Sinatra, Sharon & Sonny, August Strindberg, Arthur Guinness Son & Co. (Dublin) Ltd., and Marilyn Monroe among others for making life worthwhile.

Finally I would like to thank my family and my friends for support and feedback during the writing of this thesis as well as during the whole Master of Law Program.

Marcus Toremar
Alafors, January 2000

Abbreviations & Terminology

A note on the abbreviations. If there is an established English abbreviation then it has been used. In some cases the abbreviations have been made from the English translation. In yet other situations the established Swedish abbreviation has been used. Therefore there is no

principle behind the choice of abbreviation used other than that it shall be the most appropriate one and it shall be used consistently in the thesis.

AD	Arbetsdomstolen, The Swedish Labour Court
COM	Code on Marriage, SFS 1987:230 Äktenskapsbalk
DNV	Det Norske Veritas
DOC	Document of Compliance
ed./eds.	editor/editors
EPA	Employment Protection Act, SFS 1982:80 Lag om anställningsskydd
ISA	The Institute of Shipping Analysis, Sjöfartens Analys Institut
ISM	International Safety Management
ISO	International Organization of Standardisation
JFT	Tidskrift utgiven av Juridiska Föreningen i Finland (sometimes abbreviated FJFT), The Finnish Law Review
LR	Lloyd's Register of Shipping
MARPOL	Convention on Prevention of Pollution from Ships (1973, 1978)
ND	Nordiske Domme i Sjøfartsanliggender, Scandinavian Maritime Cases
NT	Nautisk Tidskrift, The Nautical Gazette
OIA	Ordinance on the Investigation of Accidents, SFS 1990:717 Förordning om undersökning av olyckor
OQM	Ordinance on the Qualifications of Mariners, SFS 1998: 965 Förordning om behörigheter för sjöpersonal
OSF	Ordinance on Seafaring, SFS 1986:300 Sjötrafikförordning
OVS	Ordinance on Vessel Safety, SFS 1988:594 Fartygssäkerhetsförordning
SFBF	Sveriges fartygsbefälhavares förening, The Swedish Masters' Association
SFS	Svensk författningssamling, Swedish Government's Statutes
SJÖFS	Sjöfartsverkets författningssamling, Swedish Maritime Agency's Statutes
SMA	Swedish Maritime Act, SFS 1994:1009 Sjölag
SMC	Safety Management Certificate
SMM	Safety Management Manual
SMS	Safety Management System
SOLAS	Convention for the Safety of Life at Sea (1974, 1978, 1994)
SOU	Statens offentliga utredningar, Swedish Committee Reports
SPC	Swedish Penal Code, Brottsbalken
SSA	Swedish Seaman Act, SFS 1973:282 Sjömanslag
SSG	The Scandinavian Shipping Gazette, Svensk Sjöfarts Tidning
STA	Swedish Torts Act, SFS 1972:207 Skadeståndslag
STCW	Convention on Standards of Training, Certification and Watchkeeping for Seafarers (1978, 1995)
SvJT	Svensk Juristtidning, The Swedish Law Review
VSC	Vessel Safety Code, SFS 1988:49 Fartygssäkerhetslag
VTI	Väg- och Transportforskningsinstitutet, The Road and Transport Research Institute

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PART I

1.1 Introduction

1.1.1 Purpose

The purpose of this thesis is to examine the legal position of the master today. This problem has to be divided into several minor questions. Not all of them will be answered in this thesis, but they are presented here in order to help the readers appreciate the subject and the difficulties associated with it.

Has the master got the necessary legal independence to perform his duties according to the law? Some academics even believe that today's masters in fact have to large authorities, and that these should be reconsidered. Another question is if the legislation is up to date regarding the recent technological development and a possibly increased demand for profit. Has the masters got the legal possibility to make the necessary independent decisions on board?

1.1.2 Delimitation

Other legal systems than the Swedish will only be examined when specifically necessary for the purpose of this thesis. One should however bear in mind that the Swedish system is virtually the same as in the rest of Scandinavia. Therefore one might just as well say that this thesis covers the Scandinavian perspective on the whole. Questions regarding safety and environment have priority before other issues. The goal has been to limit the thesis to legal aspects but this is not always easy. There are of course other limitations to this thesis and they will be discussed in the respective sections.

1.1.3 Method & Procedure

This thesis is not primarily written for readers without at least some basic knowledge of law and maritime questions. Since the extent of the thesis is limited basic conditions are only explained when necessary. A certain amount of previous knowledge is therefore recommended.

The purpose is as stated above to examine if today's masters have the independence which is required by the legislation, in order to perform their duties. Therefore the legal position of the master has to be examined. A thorough presentation of the master's legal duties today will therefore be made. Then other relevant factors such as the ISM-Code, privity and the designated person will be added to the analysis.

Italics, underlining and extra bold types are added by me if nothing else is stated, even in the quotations. Whether the definite article is used or not will depend on the situation and is not meant to have any special legal significance.

Direct quotations of a more extensive kind have been provided when necessary in order to enable the reader to make his own appreciation of the text in question. It could have been left to the reader to look up the text himself, but many people think this is disrupting. A thesis of this kind should in my opinion stand on its own, without it being necessary to consult other texts, except of course for verification. The need for the reader to consult other text in order for this thesis to make sense, has therefore been kept at a minimum.

A note on the language in the quotations. In some instances sources quoted were originally written in Swedish. The original language is in each case established by a footnote or among the sources in the end of the thesis. All these quotations have been translated from Swedish to English by me. In some instances the quotations are also included in Swedish. This in order to ensure that a wrongful impression of a difficult or important text is avoided.

This is of course of no help to readers only speaking English, but it can be of some value to Swedish academics. Other quotations are made in their original language.

One of the reasons that I chose the subject maritime law was because I wanted a subject with a stimulating environment and tradition. In my opinion law can easily become very abstract and sometimes quite dull if the circumstances of the subject also are theoretical. In order to make progress in this subject one has to widen the perspective to aspects other than strictly legal ones. This in turn means that I will be arguing a lot without always having support in some independent material. The starting-point is therefore that if nothing else is stated it is my own opinion which is being expressed. In think one sometimes have to launch an idea even though there is no traditional academic evidence. I believe this since the idea, whether it is proven or not, might trigger another more fruitful thought.

The analysis will be made concurrently in the text as well as in the final part of the thesis, where a will try to widen the perspective. It will be performed in the form of a critical evaluation and examination of the material. Both substantial law and more abstract theoretical ideas will be analysed. It is not always easy to separate the analysis from the conclusions, and sometimes they will blend with eachother.

Sources are presented in the language they were written in. The legislation does not always have an English title and the translations are mostly made by me. They are therefore not guaranteed to be accepted in general. Whenever a translation is used, the original title will be provided, either among the abbreviations, sources or in a footnote. This also goes for other terms, names and institutes. The main thing is that it is possible for the reader to figure out what the original is like and where to find it.

Footnotes refer to the text before the note and to the top of the paragraph or until a previous note in the same paragraph. If a note is placed immediately after a word and before a punctuation mark it refers to this word alone.

If anyone should have trouble finding any of the sources used in this thesis then please contact me. I will be happy to provide information on where they can be found.

1.1.4 Definitions

When the term ship master (or simply master) is used, it refers to the person on board the vessel who holds the highest legal position. It is not wise to use the terms sea captain or master mariner even though these are both correct legal terms. To hold a master mariner degree or sea captain degree is only a part of the qualifications necessary to become a ship master.

There are many differences between masters of different vessel. A master can be in charge of a rowing boat or a supertanker without his legal position being altered very much or at all.¹ Therefore one has to see the great differences in the working situation of today's masters. The master and other persons are generally referred to as "he" but I am well aware that there are women in all aspects of the shipping industry as well. This choice has been made simply for the sake of consistency.

The terms *shipowner* and *shipping company* are used frequently in this thesis. The definitions of the terms are a whole legal problem in itself and it is debated continuously in the academic world as well as within the shipping industry. I want to emphasize that it is not the main purpose of this thesis to discuss this issue. I am however aware of the problems and

¹ Hugo Tiberger has examined this question in *Befälhavarskap på nöjesbåtar*, SvJT 1989, p. 377-389.

in general I mean the same thing when I use the words as most academics and people in the shipping industry would mean.

A shipping company does not have to own a vessel to operate it, the vessel might just as well be chartered. When the term shipping company is used it refers to the actual operator of the vessel. Another shipping company might be the owner of the vessel and in this situation it will be referred to as the *shipowning* company.²

There are many differences in how shipping ventures are structured. Therefore there are also differences in how they are owned. Who the shipowner is therefore varies extensively. The shipowner might be a company but it can also be a physical person. In general you have to decide in each specific case who is to be viewed as the shipowner. The Swedish term "redare" has been translated to shipowner and "rederi" to shipping company. Usually of course the shipowner is not a person but a group of companies which have divided the management of the vessel among them, for instance finance, maintenance, booking and operation.

1.1.5 Motive

In the following part of this thesis I am going to give a description of why this issue interests me. Therefore I am presenting my own opinion and perception of the matter. This is not meant to have scientific foundation.

My interest in this issue was awoken when I read the following passage:

*"Traditionally the master was the one who had practical means to supervise and watch over the safe operation of the vessels. It was therefore natural to place a great deal of responsibility on him. The technical development has however meant that masters on board vessels has as good as daily contact with the shore-based organisation. The shipping companies have thereby acquired an increasing control over the operation of the vessels and the master's way of dealing with different situations. The technical development has in fact undermined the master's role as the only one with the ultimate responsibility on board."*³

Original in Swedish:

"Traditionellt var befälhavaren den som hade praktisk möjlighet att övervaka och bevaka fartygens säkra drift. Det framstod därför som naturligt att lägga ett stort ansvar på denne. Den tekniska utvecklingen har emellertid inneburit att befälhavare ombord på fartyg har så gott som daglig kontakt med landorganisationen. Rederierna har därmed fått en allt större kontroll över fartygsdriften och befälhavarens sätt att hantera olika situationer. Den tekniska utvecklingen har i praktiken lett till ett urholkande av befälhavarens roll som den ende med det yttersta ansvaret ombord."

The quote is from the final report of a committee which was assigned on the 22 of December 1994 by the Swedish Government to analyse how safety within the shipping industry could be improved.⁴ The main causes behind the appointment were the shipping disasters which had

² For a more extensive discussion on this topic see: Falkanger, Bull, Brautaset, p. 143-147, and SOU 1996:182, p. 429-432.

³ SOU 1996:182, p. 432. My translation.

⁴ The appointments of the members of Sjösäkerhetskommittén was made by the *Minister of Transportation*.

taken place with close connection to Sweden during the first half of the 90's. The disasters with the vessels *Scandinavian Star*, *Jan Heweliusz* and not least *Estonia* made the authorities aware that all was not well.

This was also illustrated in the *Herald of Free Enterprise* case. The master on board had received warnings from his employer because of 5-10 minute delays in the departure of the vessel. He had thus probably been forced to put the commercial aspects ahead of safety, with disaster as the result. *"The master's independence in the decision-making concerning the safety operations on board is vital."*⁵

Being a master is a very old profession and it might be facing great changes. What makes the subject interesting in my opinion is because it is a sign of the times we live in. Someone said that the twenty-first century began when the Berlin wall came down. I could not agree more. The changes we have seen and are about to see will probably be significant of the future. But I must also point out that these changes did not appear all of a sudden. *"The master is in many ways in a special position, but his status has gradually diminished."*⁶

Two of the factors which in my opinion can characterize the 90's are increased economic pressure and technological progress. Economics is today taking a larger part of our lives. At work in form of an emphasis on making a profit and steadily increasing it. And at home, where we have to take a larger responsibility than before of our private economy both as consumers and as citizens. For example regarding pension schemes, power supply and telephone services. Technological progress is also changing our lives. The Internet, interactive services, e-mail and cellular phones are a few examples of changes to the infrastructure which effect most of us on a daily basis. Both at work and at home.

My point is that it is not fruitful to elaborate on the situation of the master by only viewing the shipping industry. Whatever changes the masters might be facing are only a result of changes to the rest of our society. Therefore the situation of the master can perhaps tell us something about the state which we are in.

As an example regarding the master's authority to make a formal binding agreement in the shipowner's name some would even go as far as saying:

*"It appears that the master's authority as expressed in the Maritime Code is for general purposes much wider than is required and even reasonable in practice." "It would seem as, on the whole, the master's wide powers of position in Scandinavian law are ripe for reconsideration."*⁷

*"In practice, of course, this authority is now much less important than it used to be. When communications between the ship and the owner were difficult or impossible, in many instances the master had to act on his own."*⁸

⁵ Honka, p. 365-366.

⁶ Falkanger, Bull, Brautaset, p. 243.

⁷ Tiberg (ed.), *Ship Masters*, p. 48.

⁸ Falkanger, Bull, Brautaset, p. 244.

One can also say that despite all technical advances there will always be need for a master's judgement on board since you cannot foresee every possible situation which might occur:

*"Modern communications systems make it possible for the master to give extensive reports to the shipowner, and for the Shipowner to give frequent and detailed instructions to the master, almost from minute to minute. These possibilities are utilised in practice, but there are areas in which the master has independent responsibility, and even where the master, although in principle subject to the Shipowner's orders, has to act without instructions from the owner. This may be because of time factors or because it is not possible to give the owner a full picture of the situation. In such situations, responsibility and the authority to make decisions will rest with the master. Decisions at sea must be made on the basis of individual circumstances, and must therefore be made by the master. Aside from everyday situations, this is the case in emergencies, when decisions must be made, for example, about whether to accept assistance from a salvage vessel, jettison cargo, seek a port of refuge etc. In practice, the master must make these decisions."*⁹

1.2 Background

1.2.1 Introduction

A pilot fairly recently wrote:

*"Yesterdays master had authority to abuse. Today's master has hardly got any authority to use for the responsibility he has got."*¹⁰

The question is if this is a common opinion in the shipping industry and in that case if it has any foundation or if it is merely a cliché.

Economic and technological advances has meant that the master no longer holds the position we are used to.

*"Scandinavian Star, where the Shipowner put pressure upon the master to get the ship going as soon as possible and then - after the dreadful fire which killed one hundred and eighty persons - refused to give him support"*¹¹

*"The improvements in communications over the last century may have served to reduce the master's dilemma in that there is greater scope to take advice. But it might also serve to increase his anxieties, both where there is a breakdown in communications and also where he must decide the level of importance at which his [sic] should get in touch with his owners."*¹²

⁹ Falkanger, Bull, Brautaset, p. 244.

¹⁰ Cappelin, p. 12. My translation.

¹¹ Tiberger (ed.), *Ship Masters*, p. 69.

¹² Tiberger (ed.), *Ship Masters*, p. 64.

Improved communications are not only a negative thing since the master will not to the same extent have to make difficult decisions without consulting the shipowner.

1.2.2 Technological Development

First of all it must be emphasized that this is not a technical thesis and I am not proficient enough to give an overview of the technical aspects. I am therefore going to limit myself to presenting a picture. It should be viewed as an example and hopefully it will give you an idea of what is going on in the shipping industry regarding technological questions.

Someone said "IT is a revolution".¹³ When one considers technological development in the shipping industry it is important to have a very long perspective in mind. Even if the master's situation today does not have very much in common with the masters' situation of a couple of hundred years ago, it is still laden with tradition from those times. The swift changes we are experiencing today are therefore even more groundbreaking. They do not only require masters to handle the new technology itself, they must also change the perception of their own working role.

INMARSAT, GMDSS, Iridium, GlobalStar, ICO, VSAT, GPS, DGPS, STDMA, Teledesic, Orbcomm, NAVTEX and Mobitex. These are a few examples of technical systems in navigation, rescue and communication which are already here or which will be introduced in the near future. Most of these will not be explained, they are examples. In a historic perspective this is surely an incredible development. And one which will undoubtedly effect the masters role and position.

The shipping company Wallenius Lines has a reputation for being leading in the implementation of new technical systems. At the moment their vessels have equipment making it possible for them to download entire Swedish newspapers like *Dagens Nyheter* and *Svenska Dagbladet* as soon as the editions are ready for printing. This means that even if the vessel is on the other side of the world, the crew can read the papers hours before the public in Sweden.

B & N Nordsjöfrakt AB is a Swedish shipping company which has spent a lot of effort on making new technology economically viable. The company and the families of the crew can monitor a ship's position on the Internet. It is also possible to send e-mail and this is frequently used by families ashore to contact a shipboard family member. This is a very welcome way for families to keep in contact during long periods of being separated. The customers of the shipping company can also keep track of their cargo and this helps them estimate the time of arrival, which can be useful if the vessel might be delayed. This also help the department of commercial operations to schedule the use of the vessel. Aboard the vessel the master can pick up digital nautical charts. The cost of the whole system is said to be quite low and very worthwhile. It costs about \$500 a year per vessel to run the system.¹⁴

The advances in information technology has made it possible to review the actions of the master in a new fashion. Today for instance the management of the company keeps a close eye on the chief engineer and the master. How much money they spend on spare parts and whether or not the spare parts were necessary in the first place.¹⁵

¹³ Sjöfartsforum, *Dagens Sjöfart*, p. 3. I apologize for the fact that this word-play will probably only make sense to Swedish readers.

¹⁴ Information given by Mr. Anders Bergius of B & N at the *Nordic Shipping Party*, September 10th 1999, Eriksbergshallen, Gothenburg, Sweden. Main organizers: SSG and ISA.

¹⁵ According to verbal information given by Mr. Lars Rhodin of Swedish Club, Gothenburg, Sweden.

During a World Maritime Day seminar in Gothenburg, Sweden, a lot was said about the situation of today's mariners.¹⁶ Mr. Joakim Dahlman, a scientist at VTI with a background in behavioural science, pointed out that no matter how fantastic all the technology and equipment are, people will probably not be able to handle it all. My conclusion is that there is most likely a limit to the amount of equipment a master can learn how to operate and benefit from in practice. In my opinion it seems one has to find a balance between crew and technology. This balance will undoubtedly affect maritime law and the question is therefore if we can handle the situation today.

1.2.3 Increased Economic Incentives

During a World Maritime Day seminar one thing, if not many, became obvious. The view of the shipping industry has changed significantly in later years. Traditionally it has been regarded as a part of the transport sector primarily and as an industry second. Now however it is primarily regarded as an industry and secondly as a part of the transportation sector.

This became evident for example by the presence of the *Swedish Minister of Industry and Commerce* Mr. Björn Rosengren, who in fact emphasized the commercial aspects of today's shipping.¹⁷ Other years the *Minister of Transportation* has instead been present. But this ministry has been dissolved. The new *Ministry of Industry and Commerce* is three former ministries put into one. Namely the *Ministry of Industry and Commerce*, the *Ministry of Communications* and the *Ministry of Labour*. The rationale for this was that these questions were better served together, thereby creating better chances of economic growth. This is evidence that the Government regards these questions in a new light - a commercial approach instead of a functional approach used earlier. Though it has to be pointed out that this commercial approach is not unique to the maritime questions, it also applies to other areas.

This might not seem like much of a change, but it is significant. When you have an issue which is regarded as part of an industry a different approach is necessary. Any industry has as its primary target to make money. Investors will not stay in a business which is not oriented towards making a profit. And investors who are not making a profit on their investments will seek other ventures which are more profitable. This is of course basic principles of market economics as introduced by Adam Smith.

Generally the demands for profit have not increased, but it varies from shipping company to shipping company. New investors have however appeared on the market, bringing with them a new kind of business climate. These are people who buy vessel to make a profit selling them. Compared to an old shipping company like Broströms, this is a new approach which has a different emphasis on profit. Another aspect of this is that the pressure on the liner trade has increased. Charterers keep a great pressure on shipping companies in the liner trade because they want the cargo at the port of call on time. The shipping companies on their hand have to make sure that the seaworthiness is not jeopardized.¹⁸

People in shipping have always been interested in making a profit. But the change is that these people would not leave shipping in case they did not make a profit. People stayed in business and tried to make the best of it. Things would have to go very far before they had to

¹⁶ *Världssjöfartens Dag*, September 29th 1999, SAS Park Avenue Hotel, Gothenburg, Sweden. Organizer: Maritime Forum.

¹⁷ Rosengren, *Sverige - en sjöfartsnation*, *Världssjöfartens Dag*, September 29th 1999, SAS Park Avenue Hotel, Gothenburg, Sweden. Organizer: Maritime Forum. A transcript of the speech is available at www.maritimeforum.se/rosengrenstal

¹⁸ According to verbal information given by Mr. Lars Rhodin of Swedish Club, Gothenburg, Sweden.

leave the business since it was perceived as a way of life. Nowadays it is not enough to simply make a profit in itself. The profit also has to be higher than in other businesses with similar risks. The profit also has to increase over time in order for investors to remain in the business. Many investors in the shipping industry probably could not care less about the traditions of the company. They might never even have seen the vessels, they only see the financial reports. For these people it is not hard to leave the shipping industry in favour of more profitable investments since there is no emotional attachment or traditional bonds.

In a recently published thesis called "*The Master - a pawn in the financial game*" the conclusion is drawn that the master is under stress because of these factors.

*"The shipping trade is costintensive and just a few days delay can cause negative financial consequences. Therefore the owner and /or the charterer can pressure and persuade the master. That way the master becomes an important pawn in the financial game while he is responsible for the ship's safety."*¹⁹

This might jeopardize the master's ability to make independent decisions. It is also shown in the thesis that this problem vary depending on whether it is a timecharter or a voyagecharter. Three factors have been examined, unsafe berth, delay during seavoyage and unsafe cargo. The conclusion is that the conditions of a timecharter are more advantageous to the master. This is due to the nature of the timecharter. The charterer depends on the masters judgement and will let him have his way rather than breaking the contract himself. The paradox is that timecharters are more favourable to the master even though they typically contain many more conflict situations than voyagecharters.

In my opinion this is generally not a bad thing. Many of the investors are using ordinary peoples money. For example banks, insurance companies and pension trusts. They are commissioned by us to make sure our money is invested in a sensible way in order for us to have pensions and the like. Therefore it is ultimately You and I who demand a profit. This is not a bad thing in general, but one has to realize and appreciate the pressure these investors put on the shipping industry. A shipping industry with this type of incentives is bound to be different from an industry where the shipowner provided the capital himself. The emphasis on profit is however not completely new. It has always been there but it has also gradually increased over a long period of time. The new thing is instead the perception and recognition of this phenomenon. As a final note on this subject one has to bear in mind that there are huge variations in the size and the operation of shipping companies (more of this later). There are of course companies which will not fit this description.

1.2.4 A Research & Development Program

The Swedish Shipowners' Association has produced a paper called "*R & D-program for shipping*".²⁰ The paper presents an overview of today's R & D in the shipping industry. From this view a conclusion is drawn on what kinds of R & D that are neglected and should therefore be promoted. Several legal fields are cited as interesting and worth researching.

The question of liability of the different parties in the shipping industry and its effect on economy and safety is one example. Development of other kinds of rules is also mentioned. However there is no mentioning of the masters situation in particular. Questions regarding

¹⁹ Sundgren, p. 4. My translation.

²⁰ Sveriges Redareförening, *FoU-program för sjöfarten*.

management, behaviour, psychology, education, training, navigation, operation, maintenance and the human factor are pointed out as virtually unknown. The master must in my opinion be considered as an integral part of these sectors and I therefore draw the conclusion that his situation is also worth investigating.

1.3 Next to God Master of the Ship - The Master's Role Yesterday

1.3.1 Why Present a Historic Outline?

Historic outlines are as good as always included in reports of this kind. Personally I often get the feeling the writer is not quite sure, or at least does not motivate, why the historic perspective is relevant. It has simply become routine. In many cases this perspective might just as well have been left out since it does not effect the subject or the result of the report. Therefore I want to explain why a historic outline is relevant in this thesis.

Seafaring is an old phenomenon laden with tradition and custom. Maritime law is no exception. Changes are mostly slow and gradual. The way in which shipping was handled in earlier years is still influential on today's shipping industry and today's maritime law.²¹ It is therefore important to have the historic perspective in mind when studying legislation and other phenomena since they otherwise might come across as awkward. The international character of maritime law also slows down development.

A judge once told me that the three most conservative institutions in society are the church, the military and the judicial system. In my opinion he had a point. The master's role has historically contained elements of all these institutions. Bearing this in mind it is not hard to see why this role has a historic legacy. The outline which follows here is principally devoted to showing the various changes which the master's role has gone through in the past.

1.3.2 The Development of the Role of the Master

The master is mentioned in Babylonian legislation as early as the year 2000 BC. The rules concerned his payment and his liability for damage to the cargo and vessel. It is highly likely that there were also legislation concerning the master in ancient Greece, Egypt and in the Phoenician regions.²²

The earliest forms of commercial shipping were managed by merchants who needed to transport their own merchandise. It was a rare occurrence to transport other merchants goods.²³ The shipbuilder, the master and the owner were one and the same.²⁴ In ancient times the vessels in the Mediterranean were usually manned by slaves while vessels from Teutonic areas had crews who received compensation in the form of a part in the profit of the venture. During the Roman empire the merchant fleet had a heyday. When the empire collapsed, the trade declined.

²¹ Tiberg, *Sjömansrätten - en tradition med anpassningssvårigheter*, p. 185.

²² Beckman, p. 25-26.

²³ Rinman, Brodefors, p. 7.

²⁴ Beckman, p. 74.

The new trade which developed was very different from that during the Roman empire. From the Middle Ages crews were generally employed.²⁵ One can say that four equal parties performed the management of the vessel. The master, the crew and the shipowner, who was sometimes aboard to handle the sale of the goods at the destination, and the owner of the cargo together formed a management team.²⁶ All parties had a share in the profit instead of a salary and they all financed the venture. However the master did not have the status we are used to today. He was more like a first officer with the primary responsibility for navigation.²⁷

Venice was the first place where the shipping of other peoples goods became the main business rationale in itself instead of shipping goods only belonging to the shipowner. Early a system of inspectors at land and sea was introduced in order to ensure the owner of the cargo that the ship was handled safely.²⁸

By the end of the fifteenth century some shipowners had acquired more vessels and therefore had to stay ashore in order to manage their expanding businesses. A so-called supercargo was then employed to accompany the vessel and handle the commercial aspects. This was for instance the case in Sweden during the trade with the East Indies. The master took over tasks such as to provision, to make out bills of lading, hire the crew, to conclude charter parties and to represent the vessel in the absence of the owner.²⁹

The supercargo had great importance and high status. Aboard he was the commercial leader and in a position superior to that of the master. He represented the directors of the trading company and should therefore be met with proper respect. He had the right to make decisions for the master to follow, but usually he was not on board the vessel. Instead he was usually stationed at the trading station, for example in Canton, waiting for vessels from his trading house.³⁰ Therefore his influence on the master was probably limited. However in some instances the master also acted as supercargo. These were the first signs that the position of the master was about to be strengthened.³¹ Gradually the supercargoes were considered redundant by the shipowners and the masters began to take charge of their tasks.

1.3.3 Legal Development

The earliest forms of legislation directed specifically at mariners in Sweden appeared in the year 1617. In order to stimulate the increase in availability of masters and crew they were granted exemption from taxation. They were also exempt from being drafted into the navy.³²

As the shipping industry grew a need for regulations surfaced and in the year 1646 England adopted its Navigation Act.³³ The work on the first Swedish maritime act began in November of the year 1663.³⁴ A drafted proposal was ready in 1665 and in June of 1667 the first Swedish maritime act came into force. It was a quite extensive act with 237 articles.³⁵ It has by some been regarded as holding a unique position among the great seventeenth century

²⁵ Tiberg, *Sjömansrätten - en tradition md anpassningsvårigheter*, p. 185.

²⁶ Tiberg (ed.), *Ship Masters*, p. 11.

²⁷ Beckman, p. 92.

²⁸ Rinman, Brodefors, p. 7.

²⁹ Tiberg (ed.), *Ship Masters*, p. 11.

³⁰ Carlsson, Rosén (ed.), p. 46.

³¹ Rinman, Brodefors, p. 11.

³² Rinman, p. 34.

³³ Rinman, Brodefors, p. 10.

³⁴ Palmgren, p. 26.

³⁵ Holmbäck, p. 4-5.

maritime codes of Europe.³⁶ It is hard to deny this since it was not replaced until 1864 after being into force for almost two hundred years. Only the codes of 1864, 1891 and 1994 have superseded the act of 1667. Only four codes over a period of more than 300 years.

It is worth noting that the Roman empire, which has influenced a great deal of today's legislation, did not have a special maritime code. The reason for this being that the Roman civil code was applied at sea as well.³⁷

1.3.4 The Authority of the Master

As more and more European states became ruled by autocratic monarchs the position of the master was enhanced. This stemmed from the same philosophy which was the basis for the rationale that the monarch was responsible only before god. The master had the same position and authority on board as an autocratic monarch on land. He was considered responsible only before god in his relationship with the crew.³⁸

Life on board was tough on the mariners and constant work was a deliberate method of maintaining the discipline. The master had the role of driving the work along. *Next to God Master of the Ship* is an old saying which perhaps can illustrate the authority which the master possessed. The effect of this position was complete obedience and loyalty from the mariners towards the master. In spite of the fact that merchant ships were usually civilian, the order and discipline aboard was almost military. The master had the authority to administer justice and execute punishments on board. The rationale was to manage the vessel during the long times at sea by making the crew fear the master. The master's authority was not questioned but regarded as recognised practice.³⁹

In the nineteenth century this began to change. Instead of being Gods representative on board the master became more of a Father to the crew. As late as in § 44 of the Swedish maritime act of 1891 this is clearly evident:

"The master shall treat his subordinates as, befits a good head of family, and in organising the work, which is required, to an extent as great as possible, take consideration of each and everyone's position of service. He may not administer corporal punishment to anyone."

Original in Swedish:

"Befälhafvaren skall behandla sina underordnade så, som en god husfader anstår, och vid anordnande af det arbete, som erfordras, så vidt ske kan, taga hänsyn till en hvars ställning i tjensten. Kroppslig aga må han ej tilldela någon."

During the late nineteenth century social politics began to erode the masters patriarchal position. Germany was among the first states to reconsider his position. There the last traces of the masters status as being next to God disappeared in 1902.⁴⁰

³⁶ Selvig, p. 284. Also Holmbäck, p. 4.

³⁷ Beckman, p. 26-27.

³⁸ Tiberg (ed.), *Ship Masters*, p. 11-12.

³⁹ Tiberg, *Sjömansrätten - en tradition med anpassningssvårigheter*, p. 184-185, 189.

⁴⁰ Beckman, p. 93.

1.3.5 The Economic and Technical Conditions - The Golden Age of Shipping

The nineteenth century was the time of the fast American clippers. The vessels had large crews and tough masters were therefore a necessity. These men had often served on slave ships, pirate ships or on blockade violators. Bearing this in mind it is not hard to see why these masters had a reputation for being brutal.⁴¹

However, it was not without reason that the masters were treated with respect. Communications did not exist and since the voyages often lasted for several years it was usually the judgement, skill and sense for business which determined whether or not a voyage would be a success or a failure. The official salary of a master was £10 a month.⁴² But during the British trade with the East Indies some could make as much as £30 000 on a single voyage if you include smuggling, fares from passengers and the master's personal legitimate trading. The cargo owners had the master to thank for their profit and the crews had him to thank for the fact that they had returned safely. The masters were both businessmen, entrepreneurs and pioneers. The fact that their status was high is not strange if one considers that they took care of business at the same time as they were sailing on virtually unknown oceans.⁴³

Usually successful masters sooner or later became shipowners themselves. The swift technical development of the sailing ships meant the shipping companies rapidly needed to renew their fleets. Then the masters got the opportunity to acquire nice ships at a low price.⁴⁴

This development culminated during the so-called *Golden Age of Shipping*, the period between the year 1850 and the beginning of the First World War.⁴⁵ The master has neither before nor after had the same status as he had then. The importance and influence of the master began to decrease when communications improved.⁴⁶

1.3.6 Analysis

This outline is very brief but two things are evident. First of all the role of the master has over a long period been gradually changed. In the beginning he was more or less only the navigator of the vessel and on equal terms with the crew. Then his influence grew until he became the single most important person on board, with complete authority over the crew and the cargo. A role which during the late nineteenth century and most of the twentieth century changed from being next to God to being that of a commercial manager.

The second thing which is evident is that most of the changes has been a result of the changes in other parts of society. Once the master had taken over the responsibilities of the supercargo, the classic role of the master was established. And since then, the changes have been more or less a response to changes in the political or economic arena. The best examples being when the master was considered next-to-God during the time of the autocratic monarchies. Another good example was when his influence diminished during the late nineteenth century. The growth in political awareness of the working class resulted in a questioning of authority. Which in turn led to a reevaluation of the role of the master, among many other figures.

⁴¹ Rinman, Brodefors, p. 41.

⁴² Rinman, Brodefors, p. 15.

⁴³ Rinman, Brodefors, p. 40.

⁴⁴ Rinman, Brodefors, p. 55.

⁴⁵ Rinman, Brodefors, p. 38.

⁴⁶ Rinman, Brodefors, p. 11.

1.3.7 Conclusions

Based on the facts presented above and my analysis I think it is safe to say that we can expect the role of the master to change again. Simply because history has proven that the position of the master is a mirror of its time. Today management are among the most discussed subject in society, whether it be in politics or economics. I think it is safe to say that this discussion will lead to changes in society, which in turn will influence the master.

PART II

2.1 The Legal Role of the Master Today

2.1.1 The Legislation

In order to examine whether or not the position of the master is or has been changed one must first establish the legal position of the master today. Therefore I will now present my research into this area. In my opinion this material is quite extensive compared to the sources I have managed to find. I must say that I am surprised at the relative lack of academic material on this subject. Not every single statute which concerns the master will be commented, instead I have included those which in my opinion are the most relevant. Of the statutes which are included, not every single requirement is commented. For reasons of space the thesis has been limited to the requirements which are the most crucial.

I have tried to separate the various roles of the master, which is not always an easy thing to do. The reader will have to have indulgence with the fact that some areas blend with each other. It is however motivated for pedagogic reasons to separate the roles since it makes the picture a bit clearer. It also helps to understand the master's role if one sees him as mainly a supervisor.

The content of the Swedish Maritime Act (SMA) is materially the same as the maritime acts in Norway, Denmark and Finland. The numbering is on the other hand different. The codes were developed together and they can consequently be called the common Nordic maritime code. The rules governing the master are in other words joint for the Nordic countries. A common legislation of this type simplifies shipping and in my opinion it enhances the impact of Nordic maritime tradition in the world. According to the Swedish way

of structuring the SMA it is chapter six which deals with the master. There are also rules scattered in other laws which will be commented as well when it is relevant to the questions at hand.

One must however bear in mind that other laws than the act itself is not necessarily identical in the Nordic countries. As pointed out in the section "limitations" above, this thesis will be limited to Swedish legislation. The reader should therefore not draw any conclusions about the legislation of the other Nordic countries on the basis of this report. Even though the systems are similar, there might also be differences in practice and in national legislation supplementing the code, such as ordinances.

2.1.2 Education & Training

The formal requirements on the master are found in Ordinance on the Qualifications of Mariners (OQM). Pursuant to OQM § 2:2 the competence of the master is classified with the letter "K". In order to gain this classification a master mariner degree and work experience is required. The work experience has to be at least 18 months as an officer (class II-V) on a merchant vessel with a gross tonnage of 500. In addition to this one have served at least another 18 months as an officer (class II-V) on a merchant vessel operating outside of Swedish territory, OQM § 1:3. Of these 18 months at least nine shall have been as a master or first officer on a vessel with a gross tonnage of at least 3000 operating east of the Shetland Islands - Canary Islands meridian, OQM § 1:3 or as a first officer on the same kind of vessel operating areas outside of Europe, OQM § 1:3.

In addition to these requirements there are several others regarding physical abilities and special training. According to Ordinance on Vessel Safety (OVS) § 5:1 a master on most merchant vessels has to be a Swedish citizen and be at least 20 years old. Should the master be directly supervising the loading or discharging of an oil, gas or chemical transporter he is among other things required to have served aboard the relevant type of vessel for at least six months, OQM § 3:4. He must also have special training, OVS § 5:10. In order to serve aboard a passenger or passenger and ro-ro vessel he has to be trained in crisis management, OQM § 3:7. Fishing vessels over 12 m of length also require special training.

Pursuant to OQM § 1:4 it is the Swedish maritime administration, the *Swedish National Administration of Shipping and Navigation* (Sjöfartsverket), which is responsible for supervising that the requirements are met and they also issue certificates. It is pointed out in OQM § 1:5 that it is not possible to be granted an exemption from the rules to masters who serve outside of Swedish territory.⁴⁷

If the master deliberately or by gross negligence has sailed the vessel without the proper qualifications he can be fined according to the Vessel Safety Code (VSC) § 12:3 section 7. Many of the requirements posed on the master has its origins in the STCW convention of 1978. The convention has left it up to the respective national maritime administrations to implement and enforce it. In 1995 the convention was amended in several ways. At least every five years the master has to meet certain standards of fitness and competence. This in order to ensure that he is up to date in a rapidly changing industry.

⁴⁷ All the rules in OQM are very technical and I have not depicted them in detail. Therefore this account is not precise, but in my opinion it is sufficient enough to make the rules understandable. The different types of charters are for example defined by navigational statistics. I consider this to be unnecessary in this thesis and I have therefore translated them into common geographical names, which may not be as precise.

In September of 1999 a report was presented to the *Ministry of Finance* on the subsidization of Swedish shipping companies by professor Mr. Lars Hultkrantz.⁴⁸ One of the conclusions of the report was that Sweden should reconsider its education of officers for the merchant fleet in the direction of reducing it. The main reason for this being that this education was unprofitable for the political economy. The report therefore recommended that this idea be examined further.

Needless to say this report caused quite a stir in the shipping community. Mainly since it recommended that all subsidization of the shipping companies be scrapped as well. The managing director of the Swedish Shipowners' Association, Mr. Håkan Gezelius, called the report a result of someone stuck behind a writing-desk out of touch with the reality of the shipping industry. He also stated that it should be obvious to everyone that Sweden cannot give up this much knowledge without it having an impact on the country.⁴⁹ A union representative, Mr. Sven-Olof Arbestål, said that should these suggestions become reality it would render a deadly blow to the Swedish merchant fleet.⁵⁰

During the Nordic Shipping Party in Gothenburg, Sweden, a psychologist specializing in maritime psychology, Mr. Bengt Schager of the company Marine Profile made a couple of interesting statements.⁵¹ (He was later quoted as being something of a pessimist at a World Maritime Day seminar by professor Kent Lumsden from Chalmers.)

In his opinion the shipping industry is twenty years after the rest of the Swedish industry in terms of the working environment. No young man or woman with a functioning personal life and social skills will seek employment in the shipping industry today. The industry therefore mostly attracts misfits and people with questionable character. He came to this conclusion while he was at sea himself. There is too many individualist which in turn means that there is a macho-culture aboard the vessels. He is not at all impressed with today's masters and in his opinion there are few or no masters today who are proud of their profession.

Something has to be done about this if the Swedish shipping industry wants to remain competitive on a world-wide market. Mr. Schager suggested that the master should act as a manager of an affiliated company. Thereby he should be able to develop his company (namely the vessel) rather than being a simple driver of the vessel.⁵²

2.1.3 The Master as Employee

2.1.3.1 The Master - an Employee

The master is supposed to have an independent position and the opportunity to make decisions on his own, without having to consult the shipowner first. The question has been raised if international legislation should be used to strengthen the master's position in relation to the shipowner. If the master is supposed to make independent decisions, then he needs to be sure that he will not be given notice simply for not obeying the shipowner.⁵³

⁴⁸ Ds 1999:46

⁴⁹ Gezelius, *En märklig och onödig ESO-rapport om rederinäringen*.

⁵⁰ Lövgren, *Slopa allt stöd till sjöfarten*.

⁵¹ *Nordiskt Sjöfartsmöte*, September 9th and 10th 1999, Eriksbergshallen, Gothenburg, Sweden. Main organizers:

SSG and ISA.

⁵² Lövgren, *Självrannsakan bland sjöfolk*.

⁵³ Honka, p. 366.

Therefore it is in my opinion relevant to examine the relationship between the master and the shipowner in terms of employment protection. If the protection is weak, the independence of the master might be jeopardized. Usually the master is employed just as the rest of the crew. In some instances he is also the owner or part-owner of the vessel or shipping line. In those cases it is unlikely that he will be viewed as an employee unless his share of the vessel or the shipping company is minor.

2.1.3.2 Employment Protection

The Employment Protection Act (EPA) regulates employment protection in Sweden. In EPA § 2 paragraph one it is laid down that other acts with special statutes shall take precedence before the EPA. For mariners the relevant act is the Swedish Seaman Act (SSA) which according to § 1 applies to employees on Swedish vessels. The SSA supplements the EPA. The master is however not to be regarded as a mariner in the sense which the SSA means, which follows of §§ 3, 15 and 16 SSA. However the act also contains rules regarding the master. First and foremost § 16 of the SSA states that shipowner at any given time may dismiss the master from his position aboard. This does not however mean that he can give the master notice. In comparison one can say that this is like removing a managing director from his post only to give him another position in the company.

Since there are no rules in the SSA regarding the employment protection of the master, one has to return to the EPA for guidance. The EPA is generally regarded as providing decent protection from arbitrary notices on behalf of the employer since he required to have a "just cause" for giving notice.⁵⁴ However persons who are holding a "managerial or thereby comparable position" within the company are exempt from the EPA.⁵⁵ This is because the owner shall not be impeded in his right to make swift changes in the management of the company if he feels this is necessary. These persons are supposed to negotiate an employment protection with their employer on their own. For example in the form of severance pay.

The master has according to SMA § 3:36 paragraph one, part one, a maritime lien for claims of salary or other compensations from the shipowner. This lien can be enforced with sequestration of the vessel, SMA § 3:40 paragraph three.

2.1.3.3 The AD 1977:223 Case

Many people would probably say that the master indeed holds a leading position. This is unquestionably the case on board the vessel itself. But the EPA is aimed at the company on the whole. In AD 1977:223 the Swedish Labour Court (Arbetsdomstolen, AD) tried a case concerning this problem. A shipping company was taken to Court by the Shipmasters Union for giving a master notice without just cause. The essence of the case regarding our question here was that the master did *not* hold a leading position. This in turn meant that the employer needed a just cause to give the master notice since the master was found to be subject to the EPA.

The reason given by the Court was that the master is in charge of the day-to-day operation of the *vessel*. In this position he has got no influence on the management of the *shipping company on the whole*. The court did however emphasize that the master has a very special position on board and that the need for a just cause is influenced thereby. The Court said that the position of the master is so close to being a leading position that the need for just cause

⁵⁴ Sakligt grundad, EPA § 7. My translation.

⁵⁵ EPA § 1, paragraph two, section 1. My translation.

takes significant impression thereby.⁵⁶ My conclusion is that it is easier to give master notice than to give an ordinary mariner notice. Despite this however the bottom-line still today is that the master enjoys the protection of the EPA.

It is also possible to draw a few other conclusions from the case. Excessive consumption of alcohol on behalf of the master can be a just cause for giving him notice. The right of the shipowner to dismiss a master according to SSA § 16 (as commented on above) does not directly imply that the master can be given notice as well. Even though in my opinion it is likely that the same behaviour can be grounds for notice, these are two different matters.⁵⁷

2.1.3.4 Analysis

Usually the master is employed by the shipping company, and occasionally he is also owner or part owner of the vessel or the shipping company. His employment is legally protected from arbitrary notice, even if this protection is not as strong as that of the rest of the crew. He has certain measures at his disposal to force the company to pay him and his crew their salary.

It is however the right of the shipping company to dismiss the master from his position for whatever reason they may have. This does not however mean that they can terminate his employment. It is merely a right to place the master in another position within the shipping company. He is still entitled to his salary as a master. Should he be paid less after changing position, this could by a court be considered as if the company had given him notice, and the master could be awarded damages. To terminate the employment of a master the shipping company needs to have a just cause.

Should the shipping company not under any circumstances regard it possible to have the master as an employee anymore, then they can give him notice, even if they have no right to do so. The result will be that the master is awarded damages for being given notice without the shipping company having a just cause. The damages will be substantial, but the master will not regain his employment. One could say that the shipping company by paying up can buy themselves a right to break the law, all in accordance with Swedish labour law, EPA § 39.

2.1.3.5 Conclusions

The master has a reasonable employment protection. As long as a master performs his duties properly, he should have no legal reason to fear losing his employment or his salary. He is however not guaranteed the right to perform certain duties, for instance to command a certain vessel.

The conclusion must be that a master who performs his duties according to the law should have nothing to fear from a financial standpoint. He should be able to speak his mind and make the decisions which he feels are necessary. If he however is jealous of his prestige, then he could be in trouble since it is the right of the shipping company to dismiss him from his position if they for some reason are unsatisfied with his performance. A master who is keen on maintaining command over a prestigious vessel might therefore be in a more vulnerable position.

⁵⁶ AD 1977:223, p. 1424.

⁵⁷ Grönfors, *Sjörätt och annan transporträtt 1976-1980*, p. 298-299.

2.1.4 The Master's Authorization

2.1.4.1 Administrative Authorities

The master is first and foremost the shipowner's representative. The master shall be appointed by the shipowner or at least tolerated by him.⁵⁸ The legal relationship between the shipowner and the master is a power of attorney (ställningsfullmakt).⁵⁹ The master has by virtue of his position of the vessel a power of attorney to act on behalf of the shipowner. This power of attorney is limited to the single vessel he is commanding.⁶⁰ If it is possible to contact the shipowner or his deputy this is what shall be done when it comes to major decisions. If this is not possible the master has authority to take the measures necessary to carry out the voyage and maintain the vessel.

The relationship between the master and the owner of the cargo is similar. Pursuant to SMA § 6:9 the master is obliged to take good care of the cargo and see to the interest of the cargo owner. In order to fulfil this obligation he has the right to act on behalf of the owner, inter alia by representing the cargo in court.

Traditionally the master issues the bills of lading and can pursuant to SMA § 13:46 do this if he has the permission of the shipowner. This rule is however not really aimed at the master since he pursuant SMA § 6:8 can issue bills of lading as part of his authority. He may also delegate this act for example to an agent, which probably is common practice.⁶¹ A so-called "Master's bill of lading" is regulated in SMA § 13:45 and this means that a bill of lading which is signed by the master shall be viewed as if it had been signed on behalf of the transporter. This rule was introduced with the SMA of 1994 and has the same wording as Article 14, paragraph 2, of the United Nations Convention on the Carriage of Goods by Sea of 1978, the so-called Hamburg-rules.⁶² The significance of this rule is that the master can be presumed to issue bills of lading on behalf of the charterer and not of the shipowner.

Most people have heard that masters can perform marriage ceremonies on board. The SMA does not say anything about this. Instead one has to turn to the Code on Marriage (COM). In § 4:3 section 4 it is stated that a person appointed by the County Administrative Board (länsstyrelsen) has the right to perform marriage ceremonies. Masters who wish to have this right therefore have to apply and be appointed.

2.1.4.2 Economic Authorities

If the vessel is transporting goods or passengers the master has the right to enter agreements on the transportation of more goods or passengers. Pursuant to SMA § 6:8 the master may also sell or mortgage goods and cargo if this is necessary, for example in order to finance a repair of the vessel. He can also commission someone to salvage the vessel. He must however obtain these funds in the way most favourable to the shipowner. He must also keep the shipowner informed of matters concerning the vessel which might be useful to him.

The master also has the right to enter into salvage agreements according to SMA § 16:3 paragraph two. He can do this both on behalf of the shipowner and on behalf of the owner of the cargo. The master has the right to represent the vessel in court. It is however important to

⁵⁸ Tiberg, *Befälhavarskap på nöjesbåtar*, p. 382.

⁵⁹ Johan Franson in KARNOV 1996/97, p. 1886, note 150.

⁶⁰ Sandström, p. 98.

⁶¹ Gorton, p. 78.

⁶² Lars Gorton in KARNOV 1996/97, p. 1907, note 357.

emphasize that the master only has this authority when he is in command of a vessel. On the way to or from a command he does not have this authority.⁶³

Silja Line has structured the management control of its shipping company with every vessel as an independent company with the master responsible for the budget. This is a way of decentralising the shipping company and changing the trend of more and more tasks being transferred from the master to the head office and thereby diminishing his influence. A theory is that this is due to the management of the shipping companies becoming aware of that they are acting more as financiers than as traditional shipowners. The master then has to assume the responsibilities no longer desired by the management.⁶⁴

This development was foreseen and recommended as early as in 1987. The British master E W S Gill proclaimed he was tired of the master being treated as a simple *lorry driver at sea*. In his opinion the master was in practice already an area office manager within the shipping company. So why not make him responsible for the economic questions as well. This way the master could raise his status and improve the financial performance of the vessel. He also suggested a widely increased use of computers aboard and ashore for the management of the vessel. One hardly needs to point out how right he was when we listen to today's debate.⁶⁵

There is however a possible problem which has to be taken into consideration. One of the characteristics of a modern and highly developed society is the *division of labour*. People tend to specialize and thereby becoming experts in their field. The question is if it is desirable to have the master involved in even more aspects of the operation of the vessel. Does today's masters have the proper qualifications required for taking part in the financial operation of the vessel as well? I do not have the answer but it is a relevant question which deserves to be asked.

2.1.4.3 Analysis

The master has got wide authorities to act on behalf of the shipowner (and in practice the shipping company) as well as on behalf of the owner of the cargo. The master does not need wider authorities than he has today in order to perform his duties according to the law and in an independent fashion. The master has a power of attorney to act on behalf of the shipowner. He can make decisions on both administrative and economic issues of great importance. He has more or less got the same authorities as the shipowner himself. But he is obliged to contact the shipowner if possible, before making major decisions. The owner of the cargo might be even more difficult to contact and the authority of the master to act on his behalf is therefore also valuable.

Some people think the master's authorities are wider than necessary and that they should be reconsidered. I do not agree. The master is obliged to contact the shipowner before making major decisions, and he is also obliged to have his best interests at hand. Therefore the fact that his authorities are quite wide is not a problem. The master is only supposed to use these powers in situations when it is impossible to contact the shipowner. This will typically only be in emergencies, when the master would have to make these decisions anyway, regardless of his authorities.

A major change in the organisation of shipping companies in general might make it necessary to reconsider the authorities of the master, but not necessarily towards reducing them.

⁶³ Falkanger, Bull, Brautaset, p. 244.

⁶⁴ Tiberg (ed.), *Ship Masters*, p. 70.

⁶⁵ Gill, p. 11-12. Reprint from Fair Play, February 12th 1987.

2.1.4.4 Conclusions

The authorities of the master are wide enough for him to perform his duties according to the law and in an independent manner. They should not be reduced since they are mainly supposed to be used in emergencies, when they undoubtedly are needed.

2.1.5 The Chain of Command

Traditionally the master has held the highest position aboard the vessel. As early as in the Middle Ages he got this position since he usually could not contact the shipowner but had to make the decisions concerning the operation himself.⁶⁶ This however is not explicitly stated in today's legislation. Instead it is an indirect consequence.⁶⁷ Though there are advanced rules regarding the order of succession on board the vessel. According to SMA § 6:7 the starting point is that the master is in charge. Is he not aboard then the first officer shall make all decisions which cannot be postponed. The master shall leave the instructions necessary to run the vessel. Regarding the succession on board the vessel, for instance if the master should pass away or be unable to perform his duties because of an accident or intoxication, SMA § 6:7 states that the first officer shall step in until a new permanent replacement can be appointed or the master is able to perform again. There can never be two masters in charge of a vessel at the same time.⁶⁸ The master will still be responsible for the vessel during his incapacity.⁶⁹

An interesting question is what happens in case a master should turn out to be clearly unable to perform his duties for some other reason, such as incompetence. I have not managed to find anything written on this subject. The conclusion must be that it is up to the first officer to relieve the master of his command and then face the consequences ashore if this measure was uncalled for.

Pursuant to SMA § 5:18 anyone who owns more than half of the vessel shall have the right to become the master providing he has the necessary education and training.

2.1.6 The Assignments

2.1.6.1 Navigation

The first responsibility that comes to mind when one thinks of the master is usually the navigation of the vessel. There is however no statute in Swedish law which actually states that the master shall navigate the vessel. There is in fact not a single statute saying whose obligation it is to navigate the vessel. Many other duties of the master, for example supervision of loading and discharging are stated in law. This is however not the case when it comes to navigation. In practice other officers are performing the navigation under the supervision of the master. The reason for the lack of explicit navigation duties in law is probably because it is an old principle that the master is ultimately responsible for it.⁷⁰ In my opinion one should consider navigation a general responsibility of the master in terms of seaworthiness and safety. If navigation is not part of the term safety, what is?

⁶⁶ Tiberg (ed.), *Ship Masters*, p. 41.

⁶⁷ Falkanger, Bull, Brautaset, p. 243.

⁶⁸ Tiberg, *Befälhavarskap på nöjesbåtar*, p. 387.

⁶⁹ Tiberg, *Befälhavarskap på nöjesbåtar*, p. 386.

⁷⁰ Grönfors, *Sjörätt och annan transporträtt 1976-1980*, p. 298.

2.1.6.2 Seaworthiness

According to VSC § 5:2 paragraph two, it is the masters responsibility to make the vessel ready for sailing before the commencement of a voyage. This for example means that sufficient supplies of adequate food and water are brought on board, VSC § 7:7. The master can be fined if he deliberately or by gross negligence fails to perform this obligation, VSC § 12:3, section 3.

SMA § 6:1 states that the master is responsible for the seaworthiness of the vessel when the voyage commences and that the vessel continues to be seaworthy during the voyage.⁷¹ If the vessel is seaworthy or not is decided by the master. If there is a deficiency in the seaworthiness which cannot be taken care of, the shipowner or his deputy shall be contacted. (As far as I can see this could very well be the designated person.) This rule is the starting point when it comes to the liability of the master.⁷² The duty of the master to supervise the seaworthiness of the vessel also means that he is obligated to refuse to carry out the orders of the charterer or shipowner, in case their assessment of the seaworthiness is not compatible with his. If the charterer or the shipowner does not respect this it is possible to prosecute each of them as an instigator or accessory.⁷³

First of all I want to emphasize that I am not going to comment on questions regarding who is responsible for what in the Estonia-disaster. To the public it was undoubtedly one of the single most horrific and widely debated disasters in the Baltic region. Politicians, journalist, relatives and experts of all kinds have argued over the responsibilities of the shipping company, shipowner, shipyard, master and maritime administrations etc. I am not qualified and do not even feel inclined to become part of this discussion. I merely note that the debate is taking place.

In the report from the *Joint Estonian - Finnish - Swedish Commission of Inquiry* into the disaster the conclusion is drawn that MS Estonia was seaworthy when she departed from Tallinn.⁷⁴ The commission came to this conclusion since all the necessary certificates and documents were issued and in order. A Swedish member of the commission later admitted at a symposium that the report had its focus on seaworthiness in the legal sense and that the vessel clearly was not seaworthy in a technical sense.⁷⁵ The master, who was lost at sea, has not been blamed in the report.

Mr. Christer Lindvall, managing director of SFBF, the Swedish Masters' Association, has criticized this in a series of articles. In his opinion it is not reasonable for the commission only to focus on the paperwork. I completely agree with this for two reasons. First of all it is stated on page 14 in the report itself that the purpose of the commission is to "*find the cause of the disaster*"⁷⁶, not only to check if the vessel had the necessary documents. Secondly it is also stated in the SMA and the VSC that the term "seaworthy" also includes the actual operation of the vessel.

Whether the commission has done a good job or not will not be discussed here. The important consequence, pointed out by Lindvall, is instead another. If seaworthiness is defined in strictly legal terms, and if it is possible for a vessel, in whatever condition it may

⁷¹ According to SMA § 1:2 vessels with a hull over 12 m of length and 4 m of width shall be called ships. Vessels

with lesser measurements shall be called boats. Therefore both ships and boats are vessels in the legal sense.

⁷² Johan Franson in KARNOV 1996/97, p. 1885, note 143.

⁷³ Tiberg (ed.), *Ship Masters*, p. 26-27.

⁷⁴ *Slutrapport - Ro-ro passagerarfärjan MS ESTONIA:s förlisning i Östersjön den 28 september 1994*, p. 223.

⁷⁵ Lindvall, *Operationell/teknisk och juridisk sjövärdighet*, www.sfbf.a.se/info/ledsjov.html, p. 1.

⁷⁶ My translation.

be, to sail as long as the paperwork is in order, then the master will face great difficulty. His position will be undermined if it is enough to have the proper certificates, since it is his job to make sure that the vessel is seaworthy in reality. We might face a situation where a master who considers a vessel not seaworthy has to step aside since the authorities have classified the vessel as seaworthy.

One can of course raise the question if it was just a slip of the tongue on behalf of the member of the commission or if this is in fact the way that the authorities view these questions. Should this however become recognized practice, then the future does not look bright.

2.1.6.3 Good Seamanship

In SMA § 6:2 good seamanship is demanded when operating a vessel. The meaning of good seamanship is not all that clear. One thing is certain, the master shall know the rules which apply to the ship, the route and the ports they call. It is also the masters responsibility to see to that all aboard whose conduct affects the seaworthiness show good seamanship. Good seamanship is for example to use a pilot in waters which the master is unfamiliar with. This does however not render the pilot liable for the vessel, the master is ultimately responsible for the vessel.⁷⁷ The Ordinance on Seafaring (OSF) § 1:6 states that a master may not serve if he is sick, exhausted or under the influence of drugs and this has an effect on safety.

According to VSC § 5:10 the master can perform a voyage even though the crew does not fulfil minimum requirements, if a set of criteria are all met. First of all the failure to meet the requirements has to have its basis in an unforeseen event or similar circumstances. The voyage may commence only if it is not possible to rectify the problem before a scheduled departure and the crew on board the vessel is sufficient with regard to the safety of navigation and seaworthiness in general. The voyage may not continue for more than a week or the time necessary to reach the next port of call.

The master however has to consult with the safety committee or safety representative, VSC § 5:11. He also has to enter his decision and the reasons for it into the ship's log, OVS § 5:18. The master can be held criminally liable for sailing in spite of having an insufficient crew. If he has done so deliberately or by gross negligence he can be fined or sent to prison for up to six months according to VSC § 12:2 section 6.

SMA § 6:5 states that the master also shall supervise the loading and the discharging of the vessel. (The actual supervision is often carried out by the first officer.) It is also his responsibility to make sure the voyage is performed as swiftly as possible without time loss. In SMA § 14:61 paragraph two states that a time charterer can demand the kind of support which is common practice for the type of charter in question.

2.1.6.4 Documentation

One generally recognised obligation of the master is the keeping of the log. There are different types of logs and usually a ship's log and an engine room log are required, SMA § 18:1. Pursuant to SMA § 18:3 paragraph one, all logs are to be kept under the supervision of the master. Of SMA § 18:5 follows that all diaries kept on Swedish vessels shall be available to persons who might have a valid reason to view them, for instance the cargo owners, the classification societies and the shipowner. The master does not need to enter the data into the

⁷⁷ Johan Franson in KARNOV 1996/97, p. 1885, note 144.

logs himself, pursuant to SMA § 18:3 paragraphs two and three, the senior mate and the chief engineer respectively can keep the log.⁷⁸

SJÖFS 1996:12 stipulates what kind of information that shall be entered into the log. Regarding the master there are a few things worth mentioning. According to appendix 1, part IV, paragraph one, it shall be noted when a master assumes command of a vessel. Paragraph four states that it shall be noted when a master chooses to continue a voyage even though the crew does not fulfil the requirements.

The safety representative has the authority to prohibit a certain task from being performed by the crew for safety reasons. Paragraph seven states that if the master overrules the decision of the safety representative then this shall be noted in the log. The master has this authority during certain conditions according to VSC § 9:8 paragraph two. Though he can be fined, if it later turns out that the required conditions were not present, VSC § 12:3 section 12. He must also notify the *Swedish National Administration of Shipping and Navigation* if he overrules the safety representative, OVS § 6:7.

It is also the master's responsibility to keep documents on board concerning the vessel as well as legislation (SSA § 58) and collective agreements effecting the crew.⁷⁹ These documents are stipulated in SJÖFS 1977:17 and they vary from vessel to vessel. The documents are inter alia logs, certificates and the drawings of the vessel. The master is according to SMA § 6:6 obliged in an emergency to protect the documents as best he can. It is worth pointing out that in the end quite a lot of documents are required (perhaps as many as 40-50), and the number will probably increase as well. In my opinion it is very likely that many documents in the future will be available only via computers since this is more efficient and cheaper while maintaining the same degree of safety and efficiency.

2.1.6.5 Attendance

Pursuant to SMA § 6:7 the master may not be absent from the vessel if it is in danger and he may not leave the vessel when it is at sea or without safe anchorage unless this is necessary.

The old saying that the master shall abandon the ship last of all can be traced in SMA § 6:6. The master is obligated to do his utmost to save the passengers, the crew, the cargo and the vessel. If there is a plausible chance of saving the vessel the master may not abandon it unless his life is threatened. He is also obligated to assist other vessels in distress as long as this does not pose a grave danger to his own vessel.⁸⁰ Even though one would think it is evident through this rule that people on vessels which has collided shall assist each other, this is pointed out specially in SMA § 8:4 (and § 6:15). If the master does not carry out this obligation he can be punished pursuant to SMA § 20:7.

2.1.6.6 The Duty to Report

Should the vessel be sequestered by a foreign authority, the master shall according to SMA § 6:13 contact the nearest Swedish authority. He is also bound to report all major incidents and accidents to Swedish authorities. This in order for them to evaluate whether or not an investigation in accordance with SMA § 6:14 is demanded in order to ensure safety at sea in general.⁸¹ In Ordinance on the Investigation of Accidents (OIA) § 20 a master has an extensive obligation when requested by the authorities to report other incidents which might

⁷⁸ Johan Franson in KARNOV 1996/97, p. 1938, note 539.

⁷⁹ Johan Franson in KARNOV 1996/97, p. 1885, note 146.

⁸⁰ Johan Franson in KARNOV 1996/97, p. 1885, note 148.

⁸¹ Johan Franson in KARNOV 1996/97, p. 1886, note 156.

have an impact on the safety at sea. According to VSC § 13:5 the authorities can prescribe the master to report incidents that are not stipulated in the SMA.

A similar rule is found in SMA § 18:11 which states that it is principally the master who shall call for a maritime declaration. During which he is obliged to testify and present objects and documents needed for the investigation, SMA § 18:12. He also has the right to demand surveyors pursuant to SMA § 18:22.

2.1.6.7 Personnel Management

A great deal of the tasks of the master are also those of an employer even though the shipowner or the shipping company usually is the formal employer. The master shall pursuant to OQM § 5:1-4 make sure the crew has the education and training necessary to perform their tasks. This is inter alia the case regarding rules on safety and environment, acquaintance with the vessel, survival and rescue, and relevant language skills in order to pass on information, for example in emergency situations. According to VSC § 5:2 paragraph three the master is obligated to give a new member of the crew a relevant orientation of the vessel and inform him of basic safety regulations and measures in the event of an accident. Pursuant to paragraph one of the same provision it is also his responsibility to make sure that he himself is familiar enough with the vessel to be able to perform his duties in the event of an accident. For example he has to acquaint himself with the vessels manoeuvring capabilities. According to VSC § 12:3 section 4, the master can be fined if he deliberately or by gross negligence fails to perform these obligations.

The master also handles the contracts of the individual mariners, SSA § 15. The master can be fined if someone is working on board the vessel before the year the person turns sixteen, which follows of SSA § 45 and § 62. The formal employer is also responsible for this, SSA § 63. A rule to the same effect is found in VSC § 6:10a and it is also possible to be fined for breach of this rule according to VSC § 12:3 section 8 if it has been done deliberately or by gross negligence. There are however certain exceptions in the second paragraph. Even if a mariner has turned sixteen he may not perform certain kinds of labour on board. The master is obliged to make especially sure that no one under the age of eighteen performs labour which might jeopardize his health or development, VSC § 7:3.

The master can dismiss a mariner from his service for a number of reasons. SSA § 18 mentions among other, refusal to obey orders, striking an officer, assault and battery, late arrival, incompetence, drunkenness, drug abuse, theft, smuggling of goods or people or other breaches of duties as grounds for dismissal. Pursuant to SSA § 19 the master is obliged to hear the opinion of the Ship's Council or other shipboard officers and keeping a record of this, as well as entering a note about it into the ship's log. The shipowner, and the nearest Swedish overseas authority are also to be informed, and the master has to make sure the mariner is reasonably accommodated on land.

2.1.6.8 The Working Conditions

According to VSC § 7:2 the master shall together with the shipowner take all necessary precautions to prevent that anyone working on board the vessel is exposed to unhealthy conditions or accidents. This applies to the working environment on the whole as well. The master shall also make sure that the living quarters and the state of the health on board is satisfactory, VSC § 7:7. If the master deliberately or by gross negligence fails to do so he can be fined according to VSC § 12:3 section 9. Usually the master is also a member of the safety committee, OVS § 6:8 paragraph one.

The master has the right to dismiss a mariner if he due to injury or sickness is unable to perform his service during a longer period of time or if he has become a safety hazard, SSA § 17. The master has at his disposal the right to order an examination by a doctor of the mariner in question. Pregnancy is compared with sickness if it will impede the execution of the service. However, according to SSA § 19 this does not mean the mariner will lose his employment. It is also the responsibility of the master to make sure that an injured or sick mariner receives proper medical care on board or ashore, SSA § 37. If the mariner should pass away the master is responsible for the funeral, the recording of his belongings and accounting for it to the family of the deceased, SSA § 42. The master is also bound to bring the remains of a cremated Swedish master or mariner back to Sweden, SMA § 22:2.

2.1.6.9 The Ship's Council

Pursuant to SSA § 20 it is the responsibility of the master that a Ship's Council is appointed on board if the vessel has a crew of more than five people. The master shall be chairman and according to SSA § 21 he is also the convenor of the meetings, and there shall be another three members. One of these shall be an officer and the other two preferably representatives of the rest of the crew. The Ship's Council shall according to SSA § 22 investigate circumstances which are cited as reasons for dismissing a mariner from his service. When it is a question of injury or sickness the Ship's Council only has to perform an investigation if the mariner demands it. During the investigation the decision of the master cannot be executed. Regarding this type of dismissal, the master has the final saying since he only has to *hear* the opinion of the Ship's Council.

When it comes to notices the master is not allowed to make the decisions all by himself. Moreover it is made clear in SSA § 19 paragraph one that a notice has not been given simply because a mariner has been dismissed from service. Notices are mentioned for the first time in SSA § 22 and one has to draw the conclusion that it is only the Ship's Council which can make these decisions.

The Ship's Council also has a number of other obligations. Pursuant to SSA § 23 it shall investigate what has happened if a mariner has failed to report for duty. This is not only a way of keeping the discipline on board but also a way of being concerned about the well-being of the crew. For example if a mariner is late returning from leave, he might have been involved in an accident. The Ship's Council is also supposed to investigate possible crimes, negligence of a mariner in service and other suspicions as well as warn a mariner if this is called for, SSA §§ 24-25. If there is any reason to believe that a crime has been committed on board this shall be reported to the Swedish police, or if the vessel is abroad, to the nearest Swedish authority. Pursuant to SSA § 26 the master shall make the report and supply the authority in question with the findings of the Ship's Council.

In SSA § 27 there are rules governing the work of the Ship's Council. In the performance of its duties, the Ship's Council may question anyone onboard who might possess information. The mariner in question has also got this right. There has to be a record kept of the investigation and all findings are to be entered in the ship's log. The master is responsible for supplying the mariner and the employer with all the relevant documents. The master may search the compartment of a mariner aboard pursuant to SSA § 51. The Ship's Council must however be impartial and the members of the Council are bound by professional secrecy, SSA § 64.

2.1.6.10 The Master and the Charterer

The relationship between the master and the charterer is interesting since the charterer can have a great influence on the circumstances surrounding the voyage. And the master is the person who is primarily responsible for the performance of the voyage. The scope of this thesis is however limited and it is not possible to make an extensive examination of this relationship here.

A few thoughts on the matter worth discussing were presented by Mr. Michael Collins some years ago.

”(1) The Master need not obey orders given by Charterers of his vessel if:

(a) It is, or at the material time he reasonably believes that it is, unsafe for him to obey them; or

(b) they call upon him to perpetrate or to facilitate a fraud upon, or commit a tort in relation to, or break a contract with, a third party; or

(c) they are manifestly inconsistent with the express or implied terms of the charterparty.

(2) In all other cases the Master is under the orders of the Charterers and must obey those orders or take the consequences.”⁸²

Even if the paper is a few years old I think it is relevant. Because the outline presented above is not centred around legislation, it is more timeless. In my opinion this guidance is valid during any legal regime and it is also a fine example of how the master should use his common sense in making these decisions.

2.1.6.11 Analysis

The master has got several assignments on board. He is principally responsible for the seaworthiness of the vessel, both at the time of the departure and during the voyage. He has to show good seamanship and also make sure that the rest of the crew exercises it. This can cause problems if the master and the shipowner are not of the same opinion. The idea is that the shipowner should listen to the master since he is the representative of the shipowner on board. This is a fine concept in theory. But what if the master makes a decision with which the shipowner does not agree? The master has got the legal right to refuse to obey orders that will jeopardize the seaworthiness and sometimes he is even obligated to refuse to obey such orders. A power which is similar to that of an inspector from a classification society. At the same time the master is directly dependent on the shipowner for his employment. This is one of the main problems in this thesis.

There will usually not be a problem if the vessel is clearly not seaworthy. The shipowner will then let the master have his way. The crucial thing is instead when it is a borderline case. Usually it must be a question of where to draw the line. When exactly is a vessel unseaworthy? No matter what the legislator might think, the master and the shipowner has to agree on this. Typically the master will have higher demands than the shipowner who is probably more interested in having his vessel in traffic rather than in a shipyard.

⁸² Collins, p. 17.

The master is also responsible for a large number of wide-ranging tasks on board. He has to be present on board almost all of the time. He is responsible for documentation both concerning the vessel, the voyage and the crew. He is responsible for the working conditions of those on board as well as performing most of the duties of an employer regarding personnel management. He is the supervisor of most of the duties performed on board, in particular those which affect safety. The amount of documentation necessary to operate a vessel will probably increase in the future, but hopefully information technology will ease the burden.

For comparison one should try to imagine a pilot on a commercial airline performing all these duties. Regarding safety the situation is similar, but try to imagine a pilot doing all the paperwork that a master has to do. I think it deserves to be asked whether safety at sea will benefit from a master who has to sit behind his desk. Today it is even being considered placing the commercial responsibility on the master.

2.1.6.12 Conclusions

The workload which a master seems to have to deal with is very heavy, even if it only is a question of supervising the rest of the crew. The legislator should consider placing the legal responsibility for several of these tasks on other persons on board, who might already be performing the duty in the first place. The superintendent might already be dealing with working conditions, and if so, he might as well be legally responsible as well. The less tasks the master has to perform, the easier it will be for him to supervise safety, since he does not have to take other aspects into consideration.

2.2 The Liability of the Master

2.2.1 Criminal Liability

2.2.1.1 Legislation

When it comes to the criminal liability of the master the rules are scattered in many places. Usually one will find the rules in the same act as the material law is found, for instance the SMA. It is also important to remember that the master is subject also to the general penal statutes found in the SPC. In other words, the master is not always the only addressee.

2.2.1.2 Seaworthiness & Seamanship

As stated above the master can also be held responsible under criminal law. SMA § 20:1 states that he can be fined or sent to prison if he neglects the seaworthiness of the vessel. He can also be punished for lack of seamanship, being intoxicated, abandoning his post or ship, disturbance, etc. In ND 1975:129 a master was held responsible for lack of seamanship. The interesting thing is that there was no accident involved, it was enough that there had been risk that an accident might occur.⁸³ Today the statute is found in SMA § 20:2 and I can see no reason why this case should not still be valid. The SMA of today is almost identical with the one in 1975 in this respect.

More or less all of the responsibilities placed on the master, inter alia keeping the ship's log, are subject to criminal liability. Regarding the consumption of alcohol one can say that

⁸³ Grönfors, *Sjörätt och annan transporträtt 1971-1975*, p. 604.

the master does not have to be absolutely sober during the entire voyage. If he has handed over the actual navigation to another officer, he can have a drink, as long as he is able to make the decisions which are within his responsibility.⁸⁴ The master can be fined if he deliberately or by gross negligence fails to keep a passenger list, according to VSC § 12:3 section 2.

2.2.1.3 The Use of Force

The master is responsible for the order on board the vessel and he has certain capacities at his disposal to help him. SSA § 53 governs the use of force aboard. The master may use the force considered necessary with regard to the circumstances in a particular situation. This also goes for anyone ordered by the master to assist him or who on his own initiative comes to aid the master. Technically the master is the addressee and it is from him the right to use force stems. In the second paragraph there is a provision regarding excessive use of force; if someone has used more force than necessary, he will not be held responsible if the circumstances were such as the person in question scarcely could have been expected to control himself.

The burden of proof for showing that the master has used excessive force is placed on the person who made the allegation. This is the same principle that governs the burden of proof in other cases of excessive use of force, for instance among civilians.⁸⁵

These regulations have to be put in relation to the Swedish Penal Code (SPC) §§ 24:1, 5, 8, where the rules on acts in self-defence are found. Since Swedish law in general is applicable on vessels flying the Swedish flag this also goes for the SPC. The rules in the SSA and the SPC are similar and therefore one can wonder why the SSA mentions them. (Why the SPC mentions them is obvious.)

My answer is that the master traditionally has had a very wide authority aboard. Had the rules not also been found in the legislation relevant for mariners but only in the SPC this might have diminished the authority of the master severely. My assessment is that it helps the master in his position if he can invoke rules where he is the direct addressee instead of relying on the general rules on self-defence in the SPC. The Police would not have liked to rely on the SPC instead of having a specific authority, which is the case today.

Possibly one can also say that the right to use force is somewhat wider in the SSA since it only speaks of "maintaining order" while the situations when force can be used in the SPC are much more strictly defined. Such as self-defence. According to SSA § 54 the master also has the right to prevent a mariner from leaving the vessel and in some cases even the right to lock him up. Abuse of force or other measures can result in fines or up to six months imprisonment.

The rules in the SPC § 17:1 and § 17:5 on violence against an officer or public official do not apply to masters since they are not mentioned in any of the legislation supplementing the SPC. Rules corresponding to those of the use of violence against an officer in SPC are instead found in SSA § 67. If a mariner threatens to use or uses force, extorts or takes revenge on the master it can result in up to two years imprisonment. This requires that the master was attacked while on duty but this is probably not much of a limitation since a master on board a vessel more or less is on duty all the time. It is the master's job to be available 24 hours a day.⁸⁶

Regarding rules on the situation between the master and the crew, mutiny is probably one of the first situations which comes to mind for historic reasons. There are of course still rules

⁸⁴ Tiberg, *Befälhavarskap på nöjesbåtar*, p. 383.

⁸⁵ Tiberg, *Sjömansrätten - en tradition med anpassningssvårigheter*, p. 190.

⁸⁶ Tiberg, *Befälhavarskap på nöjesbåtar*, p. 379.

on mutiny and in SSA § 68 it is stated that an instigator of a mutiny can be imprisoned for up to six years and a mere participant in a mutiny for up to two years.

Refusal to obey orders can be grounds for notice according to SSA § 47 but can also result in fines or imprisonment, SSA § 70.

2.2.2 The Master's Personal Vicarious Liability

In SMA § 6:9 it is expressly stated that the master is not personally liable for his undertakings on behalf of the owners of the vessel or the cargo. He may though be liable according to SMA § 6:11 for damage caused to the shipowner, the owner of the cargo or other person if he has acted wrongfully or with negligence. However this is largely a theoretic liability since there are special rules on adjustment.

In SMA § 6:11 paragraph two it is stated that the master's liability can be adjusted according to what is reasonable. This in turn depends on the amount of negligence, fault and other circumstances attributed to the master. In the same statute it is also pointed out that if the master is employed he is in reality exempt from personal liability. This since the Swedish Torts Act (STA) § 4:1 demands extraordinary grounds for liability from the employees personally.⁸⁷ He is however still obliged to account for the funds on board according to SMA § 6:12 and this is important since vessels usually have large sums of money on board necessary to perform the voyage.⁸⁸

According to SMA § 7:1 the shipowner is liable for damage caused by the master or someone the master has hired to perform work in connection with the vessel. SMA § 7:1 paragraph two states that the shipowner has the right to take recourse against the person who caused the damage. The shipowner has on the basis of this provision the right to take recourse against a master for damage caused by the master. Usually though the contract between the shipping company and the servants greatly limit the possibility for recourse.

Another interesting question is whether the shipowner can take recourse against a master for damage caused by a servant hired by the master. For example in case it was impossible to take recourse against the servant directly due to a contractual limitation on the servants liability. The answer is that STA § 4:1 is applicable in this situation as well.

2.2.3 Analysis

The master is under intense legislative control. More or less all of his obligations are sanctioned if he should fail or neglect to perform them. This should result in a strong incentive on the part of the master to perform his duties. Therefore I can see no reason to demand more severe sanctions. It is indeed worth discussing if it is effective to have sanctions at all.

The master also has a special right to use force in order to maintain order on board the vessel. This right has probably a traditional foundation, but is nevertheless called for since he is the direct addressee.

In theory the master can become liable for damages, but in practice this is out of the question.

⁸⁷ Johan Franson in KARNOV 1996/97, p. 1886, note 152.

⁸⁸ Johan Franson in KARNOV 1996/97, p. 1886, note 154.

2.2.4 Conclusions

The legislation regarding the liability of the master in both the criminal and the economic sense is sufficient. There is no need for more sanctions in order to make sure that the master performs his duties properly. The legislation is also sufficient from the point of view of the independence of the master. The penal statutes are legally strong enough for the master to put his responsibility towards safety ahead of his responsibility towards the shipowner. If it is at all effective to enforce this responsibility with penal statutes is another question.

Besides the criminal liability, the master is virtually untouchable, at least in theory. Therefore he should rarely, if ever, have any legal reason to feel compelled to perform any action against his own interest in the safety of the vessel. But it is doubtful if these regulations will be efficient when it comes down to applying them in practice.

2.3 The ISM-code

2.3.1 Background

2.3.1.1 *The International Maritime Organization*⁸⁹

In order to understand the ISM-Code one needs some knowledge about its origins. Therefore a short introduction will be given to the International Maritime Organization (IMO) and its purpose.

Since shipping is such an international industry there has for along time been a consensus that international regulations are the best way to improve safety at sea. As early as in the mid nineteenth century such treaties were adopted, and many nations also wanted a permanent international organization to deal with these questions.

It was not until the 6th of March 1948 that this became possible. The United Nations Maritime Conference then adopted a convention establishing the Inter-Governmental Maritime Consultative Organization (IMCO). The convention entered into force in 1958 and in 1959 the assembly held its first session. In 1982 the name was changed to the International Maritime Organization (IMO).

2.3.1.2 *The IMO Today*

Today IMO has 157 member states and two associate members states. It is a inter-governmental⁹⁰ organization and its purpose is to provide governments with tools for co-operation on maritime matters. Such as safety, pollution, technical questions, regulations, practices, administration and other legal issues. IMO shall strive for a level of safety as high as possible. In order to help less-developed countries to build a shipping industry, IMO has set up the World Maritime University in Malmö, Sweden.

The organization is one of the smallest of the UN branches with a staff of about 300. In my opinion this might prove to be an advantage since the UN has severe financial and administrative difficulties at the moment. Members pay a contribution based on the tonnage of its merchant fleet. Therefore Panama and Liberia are by far contributing the most.

⁸⁹ The text is based on: IMO, *An introduction to IMO*, and IMO, *Structure and purpose*. See sources for further details.

⁹⁰ There are some minor supranational authorities in STCW 95, See SOU 1996:182, p. 107.

2.3.1.3 The Structure of the IMO

The IMO has five committees: the *Maritime Safety Committee*, *Marine Environment Protection Committee*, *Legal Committee*, *Technical Co-operation Committee* and the *Facilitation Committee* which is devoted to reducing the maritime bureaucracy. There is also an assembly consisting of representatives from all member states and a council which currently has 32 members.⁹¹ Vital decisions in the *Maritime Safety Committee* and the *Marine Environment Protection Committee* are taken unanimously in accordance with the so-called "IMO Spirit of Co-operation".⁹²

MARPOL and SOLAS are among the 40 conventions and protocols supervised by IMO. But it is the responsibility of the respective Governments to put into effect and enforce the conventions. This however is done with great variation from state to state. Some have pointed out that port state control is a powerful tool to ensure that the ISM-Code is enforced at least on similar terms throughout the world.⁹³ This is inter alia the case in Singapore, one of the world's largest ports, where vessels without ISM-certification are detained or denied entry.⁹⁴ There has also been great improvements to safety with the establishments of the International Mobile Satellite Organisation (INMARSAT) and the Global Maritime Distress Safety System (GMDSS). These systems greatly improved communications and emergency rescue at sea.

2.3.1.4 Acknowledgement of the Human Factor

The work to improve safety standards in the shipping industry has by tradition been concentrated on technical aspects rather than on the actual handling of the vessels. This is the so-called *hardware vs. software* debate. The hardware being things as the vessel, its equipment, other materials and the cargo. The software being the crew, their experience, their working methods and the management.

During the late 1980's there was however growing concern in the industry that despite technical improvements there were still too many accidents. The shipping industry then came to the conclusion that management standards needed to be improved since they in many cases were quite poor.⁹⁵

During this period up to 70% of all accidents and disasters in the shipping industry were attributed to the human factor, inter alia in the form of poor guidelines and training as well as negligence.⁹⁶ Some people claimed the number was as high as 75-90 %⁹⁷ or even that the human factor played at least a part in *all*⁹⁸ shipping accidents. Something had to be done in order to attend to this matter.

⁹¹ An amendment of the original IMO Convention has been approved, increasing the members to 40 on its entry into force. See: IMO, Structure and purpose.

⁹² Jahnke, *Vad är och hur fungerar IMO ?*, p. 118.

⁹³ Alan Cubbin of the United Kingdom's Maritime and Coastguard Agency, in an article in *Safety at Sea*, May 1998. My second source: www.imo.org/imo/ismcode/news.html

⁹⁴ Fairplay, May 21st 1998, *Non-ISM ships banned*. My second source: www.imo.org/imo/ismcode/news.html

⁹⁵ IMO, *Background to the International Safety Management (ISM) Code*, p. 1.

⁹⁶ Tigerstedt, p. 15.

⁹⁷ Chauvel, p. 20.

⁹⁸ Olofsson, p. 70.

2.3.1.5 The Introduction of the ISM-Code

It was a relatively new idea to place the human factor at the heart of a risk prevention system in the maritime industry. The bulk of the new safety efforts were now concentrated on shaping a safety-conscious environment instead of just focusing on technical improvements as before. This meant changes both in the daily work of the mariners and an improvement in the public's perception of the maritime industry.⁹⁹

In 1989 IMO adopted "Guidelines on management for the safe operation of ships and for pollution prevention" in order to help the responsible parties to develop, assess and implement frameworks for safety management.¹⁰⁰ These were however only guidelines and as such not mandatory. They were revised in November 1991¹⁰¹ and in November 1993 they had grown into the International Safety Management Code (ISM-code) which was adopted in the form of a recommendation by IMO Assembly Resolution A.741(18).¹⁰² The full name being the *International Management Code for the Safe Operation of Ships and for Pollution Prevention*.

By this time the general opinion in the international shipping industry was that the code was so important that it should be mandatory. On the 24th of May 1994 it was made mandatory by IMO through the amendment of the new Chapter IX of the International Convention for the Safety of Life at Sea, 1974 (SOLAS). The Chapter is called "Management for the Safe Operation of Ships" but the actual ISM-Code is not a part of the chapter, instead there is a reference to it.¹⁰³

The code entered into force on July 1st 1998 and now applies to passenger ships, chemical and oil tankers, bulk carriers, gas carriers and cargo high speed craft with a gross tonnage of 500 or more. Other cargo ships and mobile offshore drilling units with a gross tonnage of 500 or more have to comply by July 1st 2002.¹⁰⁴

By September 1999 139 states had accepted SOLAS (and thereby the ISM-code) representing 98,46% of the world tonnage.¹⁰⁵ This is however not the same thing as meeting the requirements set in the ISM-Code itself.

The fact that the ISM-Code is mandatory has a few consequences. This will ensure implementation in the contracting states and hopefully compliance from the shipping industry. It will most likely also render efficient enforcement.¹⁰⁶ What can happen to a vessel without certification has been discussed earlier. If a state should neglect to implement the code it will most likely be subject to sanctions from other states since the competition in the international shipping industry will be distorted.

2.3.1.6 Analysis

There is a consensus in the shipping industry that international and mandatory conventions are the most efficient way of improving and enforcing maritime safety. The IMO has long and wide experience in the administration of international conventions. As far as international organizations go, it is fairly old, and has a large number of members, and it is therefore safe to say that it is the accepted organization regarding the administration of international maritime conventions.

⁹⁹ Chauvel, p. 21.

¹⁰⁰ IMO, *Background to the International Safety Management (ISM) Code*, p. 1.

¹⁰¹ IMO, *Background to the International Safety Management (ISM) Code*, p. 1.

¹⁰² Lindvall, *Is the ISM-Code a Friend to the Shipmaster?*, p. 4.

¹⁰³ IMO, *Background to the International Safety Management (ISM) Code*, p. 1.

¹⁰⁴ IMO, *Background to the International Safety Management (ISM) Code*, p. 2.

¹⁰⁵ IMO, www.imo.org.

¹⁰⁶ Knudsen, p. 16.

The conventions should also set the standards in technical and management questions as high as possible. Making the ISM-Code mandatory and having efficient port state control is also necessary if the ISM-Code is supposed to function properly. The growing awareness that the human factor played a part in many accidents was pivotal in the development of new safety regulations.

2.3.1.7 Conclusions

My conclusion is that IMO has the necessary resources to ensure an effective administration of the ISM-Code. Making the code mandatory and having port state control are necessary prerequisites.

2.3.2 The Objectives of the ISM-Code

2.3.2.1 Understanding the ISM-Code

”The cornerstone of good safety management is commitment from the top.”

This quote is from the preamble of the ISM-Code and one should bear it in mind when studying the ISM-Code. The preamble is not supposed to be a material part of the convention. One should not scrutinize it letter for letter. Instead it is meant to be a kind of guideline in interpreting the intentions of the convention. Therefore one can say that it is just as important, or some might say even more important, than the actual provisions.

The idea behind the ISM-Code is somewhat different to other conventions. Probably the most common way for a convention to work is by setting a minimum standard. The problem though is that the minimum standard will in fact become a maximum standard. Whoever has to abide by the convention will usually only do exactly what is required of them and nothing more. This is perhaps not so strange when it comes to technical questions since these are often costly and the shipping companies do not want to spend money when they know they are not required to do so.

The problem with these types of conventions is that once the requirements in the convention have been met, there will be no more improvements even though it might be necessary. The conventions therefore become obsolete after a while and then you have to start all over again with a revised convention. The problem is not that new conventions have to be introduced but that there will be no or little progress at all in the meantime on a voluntary basis.

2.3.2.2 Safety-Culture

The ISM-Code has therefore been established partly in order to solve these problems. It has a broad framework which will allow shipping companies to reach the objectives and general principles in a way most suitable for them.¹⁰⁷ On one hand the code is designed to improve certain standards but on the other hand it will let the shipping companies themselves decide how to achieve these goals. The rationale is that the companies have different needs and prerequisites and that a plan to improve management therefore will be more efficient if it is

¹⁰⁷ Knudsen, p. 16.

designed for the individual company. This is emphasized already in the preamble to the convention, where it says:

”Recognizing that no two shipping companies or shipowners are the same, and that ships operate under a wide range of different conditions, the code is based on general principles and objectives.”

In order to avoid the usual problem with minimum requirements becoming maximum requirements in practice, the idea is that companies shall set their own goals, or rather intermediate goals, since improvements are meant to be continuous. Hopefully a so-called *safety-culture* will develop. This would mean constant improvements in safety and other issues rather than occasional ones. The master is an important part in this implementation since it usually takes a long time to get the system up and running.¹⁰⁸

The ISM-Code is a means to an end, not an end in itself. To exemplify what a safety-culture is one can say that it means being *proactive* rather than *reactive*. Instead of waiting for a survey or an accident risks will sought-out.¹⁰⁹ Some people might think this is something of a revolution in the maritime sector, but others have pointed out that it represents nothing but a normal evolution. It is perfectly natural to expect this kind of development since it follows the pattern of how most technological systems improve.¹¹⁰

According to the ISM-Code section 1.2.1 the objectives of the code are:

”to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular, to the marine environment, and to property.”

In section 1.2.2 the objectives are among others:

- ”.1 provide for safe practices in ship operation and safe working environment;*
- .2 establish safeguards against all identified risks; and*
- .3 continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.”*

The SMS should pursuant to section 1.2.3 of the ISM-Code ensure:

- ”.1 compliance with mandatory rules and and regulations; and*
- .2 that applicable codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken into account.”*

What this means in practice and which tools are to be used will be reviewed in the next section of the thesis.

¹⁰⁸ Lindvall, *Is the ISM-Code a Friend to the Shipmaster?*, p. 5-6.

¹⁰⁹ Knudsen, p. 16.

¹¹⁰ Chauvel, p. 20.

2.3.2.3 The Context of the ISM-Code

Quality and safety management are two popular catch-phrases of the 90's. The management of most companies usually have goals expressed in terms of quality and safety management. This helps the management or board control the development of the company. The idea is to be in command of the interaction between *man - technology - organization* (MTO).¹¹¹ Some shipping companies had introduced systems to this effect on their own even before the ISM-Code existed. This is the light in which the ISM-Code should be viewed. It is the shipping industry's answer to the quality and safety awareness in other industries.

A couple of new conceptions have also surfaced in the 80's and 90's. Substandard ships, substandard flagstates, substandard shipowners and substandard crews became part of the maritime vocabulary. Many people are of the opinion that the ISM-Code will put pressure on substandard parts of the industry in order to make them improve their standards or leave the industry. Therefore one can say that the ISM-Code has had a positive effect on the competition in the industry. Since the ISM-Code is mandatory it is no longer an option to keep a substandard operation. This in turn means the shipping companies will be competing on more similar terms. This also apply to companies using flags of convenience since most of these states are members of IMO and therefore bound by the ISM-Code.¹¹²

So far it has been showed that most companies would have preferred exhaustive descriptions of how the ISM-Code should be implemented instead of a framework. The reason for this is simply that it is easier to pass the certification in this way. It would however have been counterproductive since it would have meant that the ISM-Code was handled like any other convention. Nothing new, except for certain specific regulations, would have been the result and a new safety-culture would not have had a chance to develop.¹¹³ It is a fine balance to enforce compliance with mandatory requirements on one hand and not reducing the flexibility which is at the core of the ISM-Code on the other hand.¹¹⁴

2.3.2.4 Other Quality Control Systems

It deserves to be said that there are a number of other quality schemes in the shipping industry. They will not be examined here. A very brief description of them will however be provided. The main difference is of course that only the ISM-Code is mandatory.

A cursory view of the ISM-Code might lead one to think that it is more or less the ISO 9000 standard applied to the shipping industry. The systems are of course similar in terms of functions, but not in purposes. ISO 9000 deals with the relationship between a client and a supplier, the ISM-Code on the other hand focuses only on the shipping company itself.¹¹⁵ Another difference is that the ISO 9000 certification does not really say whether or not the level of quality is high or low, just that is consistent over time. Whereas the whole idea behind the ISM-Code is to raise the standards in the shipping industry.

The International Ship Managers' Association (ISMA) has introduced a standard called the Code of Ship Management Standards. The difference between this code and the ISM-Code is that it is concentrated on already existing rules and not on creating a new safety-culture as such. The goals of the code are very specific and include the usual national and

¹¹¹ Prop. 1994/95:186, p. 23.

¹¹² See the opinions of Mr. Christer Lindvall and Mr. Folke Patriksson in *Tema: Framtid*, SSG 1999, 36-37, p. 20, 23.

¹¹³ Knudsen, p. 16.

¹¹⁴ Knudsen, p. 17.

¹¹⁵ Chauvel, p. 21.

international requirements. It is also more oriented towards supplying the clients of the shipping company in question with information.¹¹⁶

DNV has a scheme called Safety Environmental Protection certification (SEP). It includes all mandatory requirements found in the ISM-Code. It is also possible to combine it with ISO 9000 certification.¹¹⁷

2.3.2.5 Analysis

The problem with minimum standards becoming maximum standards is not new. It is merely the result of an industry under intense competition which therefore has become very conscious of costs. But it is unquestionably a problem when an industry ceases to look at the big picture and instead only looks at the fine print. Now however the problem of minimum standards becoming maximum standards has been identified both by the industry and by the politicians. Creating a proactive safety-culture via the ISM-Code has become a key priority in the work to improve maritime safety.

One can discuss whether or not this is an evolution or a revolution. I agree with the people who regard it as an evolution. One could have foreseen that something like the ISM-Code would come along eventually, simply because this has been the case in other sectors, such as international air traffic. But whether or not it has been an evolution or a revolution is of only theoretical interest. To the people working in the maritime industry it must have *felt* like a revolution anyway. There are other quality control systems, but the ISM-Code seems to be the one which is the most suited for the maritime industry, because it is up to date with current management trends, such as independent decision-making.

2.3.2.6 Conclusions

My conclusion is that one cannot blame the shipping industry for becoming short-sighted, it has merely been the result of the political and economic circumstances surrounding the industry. The problem has however been identified enough to be solved. And the solution, in the shape of the ISM-Code, is a fairly new concept.

2.3.3 An Outline of the ISM-Code

2.3.3.1 Document of Compliance

An overview of how the ISM-Code functions will now be given. This review is focused on what the mechanisms of the ISM-Code are supposed to achieve, though I want to emphasize that I am not saying it actually does achieve these objectives.

A so-called *Safety Management System* (SMS) is to be developed, established and maintained by the company. The following functional requirements are made on the SMS in section 1.4 of the ISM-Code:

- ”.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;*

¹¹⁶ Sydsjö Norlin, p. 13-14.

¹¹⁷ Sydsjö Norlin, p. 14-15.

- .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.”

This system is supposed to ensure a safer operation of the vessel and a safer working environment. By analyzing hazardous situations in order to avoid them in the future and by continuously training the crew for emergencies the safety of the vessel and its operation are supposed to improve. The SMS shall include a plan for the obedience of regulations and recommendations of both authorities and classification societies. The shipping company shall also have a safety policy in the SMS. The system is also supposed to be subject to recurring periodic revisions performed by the company itself.

According to the ISM-Code a so-called *designated person* shall be appointed by the shipping company. The designated person shall supervise the SMS is implemented and maintained. This is the source of a few problems and they will be discussed further below. The SMS shall also be reviewed by the authorities or by a body who has been delegated this competence by them. If the SMS fulfils the requirements of the ISM-Code a *Document of Compliance* (DOC) is issued to the company.¹¹⁸

2.3.3.2 Safety Management Certificate

After this the process continues on the vessels. Each vessel is reviewed in terms of documentation and manuals regarding safety. The knowledge and ability of the crew in handling emergencies are also scrutinized. If the standards set in the SMS are met in practice by both the vessel and the crew a *Safety Management Certificate* (SMC) is issued for the vessel. This is a separate process for each vessel and revisions will be performed regularly.¹¹⁹ For example Det Norske Veritas (DNV) will audit a DOC annually, and the SMC after two and a half years. After five years a complete renewal audit is required.¹²⁰

Copies or originals of DOC's and SMC's shall be available on board the vessels according to Chapter IX, regulation 4, paragraphs 2 and 3 of SOLAS. A Safety Management Manual (SMM) should be compiled of the procedures required by the code. This shall be kept on board to ensure that the SMS is enforced and it will also serve as a checklist.¹²¹

It is a crime to intentionally provide incorrect information in order to gain or maintain a DOC, SMC or other certification. According to VSC § 12:2 this can result in fines or up to six months imprisonment.

¹¹⁸ Prop. 1994/95:186, p. 23.

¹¹⁹ Prop. 1994/95:186, p. 23.

¹²⁰ DNV, *The ISM Code*.

¹²¹ IMO, *Background to the International Safety Management (ISM) Code*, p. 2.

2.3.3.3 Analysis

The SMS is the core of the ISM-Code. In this system the hazards and the safeguards are to be documented. By doing so a sort of memory is created which will help the crew in performing their duties safely. It will also help other crews on board the same vessel as well as on board other vessels. The designated person is the necessary link between the vessel and the shipping company.

When the SMS is approved a DOC will be issued. If the standards set in the SMS are met in practice on board the vessel, then a SMC will be issued. By doing periodic revisions the system is kept up to date. The risk with all this paperwork is that it becomes an end instead of a means to an end. If the problem before was that minimum standards became maximum standards then a similar problem might occur now. The system will have to work very well in order to avoid that the issuing of certificates becomes the main objective instead of safety.

2.3.3.4 Conclusions

The problem before was that minimum standards became maximum standards because the parties did not consider the idea behind the regulations, but instead focused on details. The problem which might occur now is similar. The issuing of certificates might become the objective in the minds of the crew and the designated person, instead of continuously improving safety. The ISM-Code will have to work very well in order to avoid this problem. The idea of having strict control over the process via certificates might become the downfall of the whole system. It might seem as it is working, but it might just as well turn out to be a new version of the old minimum standard problem. The only way to avoid this problem is to ensure that the demand for continued improvement is kept at a high level.

2.3.4 The Master and the ISM-Code

Section five of the ISM-Code has the following wording relevant to the master:

”5 MASTER’S RESPONSIBILITY AND AUTHORITY

5.1 The Company should clearly define and document the master’s responsibility with regard to:

- .1 implementing the safety and environmental protection policy of the Company;*
- .2 motivating the crew in the observation of that policy;*
- .3 issuing appropriate orders and instructions in a clear and simple manner;*
- .4 verifying that specified requirements are observed; and*
- .5 reviewing the SMS and reporting its deficiencies to the shore based management.*

5.2 The Company should ensure that the SMS operating on board the ship contains a clear statement emphasizing the Master’s authority. The Company should establish in the SMS that the master has the overriding authority and the responsibility to make decisions

with respect to safety and pollution prevention and to request the Company's assistance as may be necessary."

This provision makes the master one of two persons specifically addressed in the ISM-Code. The other being the designated person. It is obvious from this provision that maritime safety and the prevention of pollution are the main tasks of the master as far as the ISM-Code is concerned.

It is a step in the right direction to ensure that the master is independent and that he has the primary responsibility regarding safety and pollution prevention on board the vessel. But it is another question what this will mean in practice. And since there are so few preparatory acts one cannot really draw any conclusion of the thoughts behind the convention on the basis of them. This makes the convention difficult to implement and enforce and it is unsure what will develop in practice.¹²²

Section six of the ISM-Code is also directly relevant to the master:

"6 RESOURCES AND PERSONNEL

6.1 The Company should ensure that the master is:

- .1 properly qualified for command;*
- .2 fully conversant with the Company's SMS; and*
- .3 given the necessary support so that the Master's duties can be safely performed."*

Regarding the *Document of Compliance (DOC)*:

"13.3 A copy of such a document should be placed on board in order that the Master, if so asked, may produce it for the verification of the Administration or organizations recognised by it."

This is also an obligation according to the SMA, see the section on the responsibilities of the master for comments. A similar regulation is found in SOLAS Chapter IX, Regulation 4:

"2 A copy of the Document of Compliance shall be kept on board the ship in order that the master can produce it on request for verification."

2.3.5 The Implementation

2.3.5.1 How to Apply the ISM-Code on a National Basis

How the ISM-Code is applied is a question for each state to decide. Since the IMO does not have an executive branch the responsibility that it is applied rests on the states themselves. There are several ways of doing this and as pointed out above the variations from state to state are great. Some have chosen to view international conventions as a directly integral part of their judicial system, the so-called *monistic* school. Other states view international conventions and national legislation as two separate systems. They therefore need to

¹²² Honka, p. 366.

implement international conventions into the national system in some way. This is the *dualistic* school.¹²³

2.3.5.2 Sweden - the Dualistic Approach

Sweden has taken the dualistic approach, therefore making it necessary to implement international conventions in some way. How this is done will usually vary depending on the convention and national legislation in question. Usually it is presumed by the Government that the goals of the convention already are satisfied through national legislation, this is *inter alia* the case with the European Convention for Human Rights. Other conventions might necessitate adjustments of existing legislation.

This is the case with the ISM-Code. The VSC existed before the ISM-Code and several adjustments have also been made by the Swedish Government. These changes are however more of a way of ensuring that there will not be a conflict between the ISM-Code and the national legislation.¹²⁴ In the Government bill they used the word "incorporate" ("införlivas") though the entire ISM-Code is not found in the VSC.¹²⁵ The ISM-Code itself is instead found in SJÖFS 1996:2.

Regarding the ISM-Code and the master the Swedish Government has in my opinion made a quite bold statement:

*"The master's responsibility and authority are laid down foremost in ch. 6 of the maritime act (1994:1009). The Government can see no reason to change the master's responsibility as a consequence of the incorporation of the ISM-Code into Swedish law."*¹²⁶

In this statement the Government declares that it can see no possible consequences on existing legislation from the implementation of the ISM-Code. In my opinion it was perhaps true that the Government could see no reason to change the master's responsibility at that time. The interesting question is if this have been evaluated since then by the Government. The answer is no.

The master can according to VSC § 12:2 section 2 and 3 be fined or sent to prison for up to six months if he deliberately or by gross negligence uses a vessel without DOC, SMC or other certificates.

2.3.5.3 The ISM-Code and the European Union

As stated above, the ISM-Code was made mandatory by IMO on the 24th of May 1994. The dates for it to enter into force were set to July 1st 1998 and July 1st 2002 respectively, depending on the type of vessel in question. In section 2 of IMO Assembly Resolution A.741(18) of November 4th 1993, the IMO however strongly urged the member states to implement the ISM-Code before these dates, preferably as soon as possible.

The Council of the European Union adopted *Council Regulation (EC) No 3051/95* on December 8th 1995. The purpose of the regulation was to speed up the implementation process in the member states of the European Union. This was possible due to the legal framework of the European Union. By adopting a regulation the ISM-Code was made into

¹²³ Wallace, p. 36-37.

¹²⁴ 1994/95:TU27, p. 3, section 1.2.

¹²⁵ Prop. 1994/95:186, p. 1.

¹²⁶ Prop. 1994/95:186, p. 26, section 4.2.1. My translation.

European law instantly. This in turn eliminated the need for individual ratification and implementation by each member state.

The date for the ISM-Codes entering into force was set to July 1st 1996, instead of 1998. There were however some limits to the impact of this regulation, inter alia ro-ro vessels trafficking European ports. Some other changes were also made in European *Commission Regulation (EC) No 179/98* of January 23rd 1998 regarding the certification process.

2.3.5.4 Analysis

There are different ways of implementing a convention. And the ISM-Code will be implemented in a variety of ways. Sweden has chosen the dualistic approach. Member states of the European Union will have a common ground in the implementation process since the ISM-Code has been made into a Council Regulation.

Since the ISM-code has been accepted by Sweden and in practice will be supervised by an independent organization, in my opinion it is not really necessary to implement the complete ISM-Code. There is no reason why the classification societies cannot just as easily enforce the original convention the Swedish legislators interpretation of it. Even though a legislator probably will hold the position that Swedish legislation is sufficient. The classification societies already enforce rules and regulations that are not national law, for instance their own classification requirements.

2.3.5.5 Conclusions

My conclusion is that even though the ISM-Code is not implemented in the same way in every state, it will nevertheless have the same effect, as far as the implementation goes.

2.3.6 The Certification

2.3.6.1 The Administration of the Flagstate

The responsibility for certifying the shipping companies in terms of the ISM-Code falls on the administration of the flagstate according to section 13.2 and 1.1.3 of the ISM-Code. In Sweden this would be *the Swedish National Administration of Shipping and Navigation* through the *Maritime Inspection*.¹²⁷ In section 13.2 it is also stated that the administration in question can delegate this task to an organization it has recognized. This in most cases will result in a classification society performing the certification.

ISM-certification is separated from the regular technical certification of the vessel itself. The ISM-certification concern the organization and working methods of the shipping line, and therefore only indirectly technical questions. If the shipping company passes the certification a DOC is issued for it and a so-called SMC for the vessels.¹²⁸

2.3.6.2 The Classification Societies

The classification societies perform inspections to ensure that both their own and the rules of the administration are followed. Safety, quality, design, construction and maintenance are subject to the inspection. A vessel needs to be classified and inspected in order to be insured.

¹²⁷ In Swedish *Sjöfartsverket* and *Sjöfartsinspektionen*.

¹²⁸ DNV, *The ISM Code*.

Today nobody will associate themselves with a shipping company if its vessels are not classified. Ships without ISM-Code certification will probably not be insured in the future.¹²⁹

The classification societies are independent and emerged during the nineteenth century when the need for impartial assessment of a vessels insured value grew.¹³⁰ Usually the societies are non profit distributing companies. This means they will operate commercially like most other companies, but they will keep the profit themselves, in order to develop and consolidate the society. This is possible because most of them are foundations or jointly owned by operators on all sides of the maritime industry.¹³¹

In all there are about 50 classification societies in the world. Of these five are internationally acknowledged by all maritime nations. These are, in alphabetical order, *American Bureau of Shipping* (ABS), *Bureau Veritas* (BV), *Det Norske Veritas* (DNV), *Germanischer Lloyd* (GL) and *Lloyd's Register of Shipping* (LR). The main part of the Nordic merchant fleet is classified with LR and DNV. Other societies are mainly acting in one nation.¹³²

In Sweden the VSC § 1:6 paragraph one states that the Government or an agency appointed by the Government can authorize organizations to perform and control certification of vessels. In order to ensure that the classification societies perform their duties professionally, they will in turn be controlled by the Government. In Sweden DNV and LR perform most of the certifications, both in terms of ISM-certification and the usual standard certifications.

The master as well as all other officers on board shall leave the Swedish National Administration of Shipping and Navigation or the organization recognized and acting on behalf of it, all assistance and information requested at the surveys, VSC § 10:12. According to VSC § 10:19 the master shall also make sure that the DOC, SMC and all other certificates and documents relating to the vessel are available to the surveyors.

One problem in association with this has been pointed out. The shipping industry does not have the same tradition of reporting incidents as for instance the air industry. They are used to reporting incidents, even if the one who made the report also caused the incident. It will probably take a while before masters feel inclined to report their own mistakes and near-misses. And the duty to report is of vital importance to the ISM-Code.¹³³

2.3.6.3 *LRMariner*¹³⁴

Now an example of the technical development in safety management will be given. The British classification society LR has developed a certification scheme which has a computer program at its core. The scheme is called *LRMariner* and the computer program runs on most PC's. The system is paperless and is run through terminals aboard, ashore and at LR. The scheme can help shipping companies both gaining and maintaining ISM-Code certification. It is promoted as "*A risk-based tool for operational safety on ships*". Since LR is not selling the software separately, but instead leasing it as a part of certification scheme, they can make sure both the staff and crew are using the program properly.

¹²⁹ IMO, *IMO Fax 06/98, 78% of fleet set to meet ISM target, says IMO*, p. 1.

¹³⁰ SOU 1996:182, p. 56, 203-204.

¹³¹ SOU 1996:182, p. 204.

¹³² Jahnke, *Säkerhetskontroller och klassificeringssällskap*, p. 119.

¹³³ Lindvall, *Is the ISM-Code a Friend to the Shipmaster?*, p. 6.

¹³⁴ Based on: LRS, *LRMariner - A risk-based tool for operational safety on ships*, and a presentation by Mr. Per Winter Christensen of LR Copenhagen, held at the *Nordic Shipping Party*, September 10th 1999, Eriksbergshallen, Gothenburg, Sweden. Main organizers: SSG and ISA.

The idea behind the computer program is to perform continuous risk assessment of key shipboard operations by analysing them. Risks are identified, evaluated and stored in the program, hopefully before an accident has happened. Then different ways of controlling and reducing the risks are worked out. The rationale is that the staff and crew shall store potential risks as they come across them, thereby creating a memory within the shipping company. Since the experience of the staff and crew is stored in the program one can quickly get an overview of different risks when a certain task is to be performed, for instance discharging. This way the experience is kept within the shipping company even when an employee leaves his employment. Training his successor will then be easier since he has access to his predecessors' experiences.

The system is also used for reporting incidents. Since LR has access to the system a world-wide databank of hazards will be created. This will help LR give feedback to shipping companies so they can avoid problems that other companies have had. The software is tailor-made for each type of vessel and there will be one certification scheme for each vessel. The program is not mandatory and there are other ways of gaining ISM-Code certification. It is expected to take from 9 to 15 months to get the system up and running at the individual shipping company. When the system is fully operational intermediate goals are set on how to reduce the risks which were identified.

2.3.6.4 Analysis

It is good to have independent institutions performing the certification. In practice the states will leave it up to the classification societies to perform the certification. The classification societies are all independent and do not have any connections with the respective governments. Had the certification been done by governmental agencies, then the picture might be distorted. We have seen that states today are competing for registration of vessels. Had the certification been performed by the state itself, then we might have seen a downward spiral in the demands, instead of improvements. The classification societies are free of political influence which is just as important as economic independence.

Another advantage of having classification societies perform the certification is that they will do it in a more uniform way. If the respective states had performed the certification, then we might have had several hundred different interpretations of the ISM-Code. This would probably be the case even if the code was not interpreted as a maximum standard. Since there are fewer classification societies than states, the number of possible interpretations will also be less. The five major classification societies will probably handle the bulk of the certifications, and thereby ensuring that the interpretations will be as uniform as possible.

Tools like LRMariner would probably not have been developed by a government agency. Therefore it is an advantage to have classification societies performing the certification. But there are risks with systems like LRMariner. In my opinion one has to be aware of the risk that the system might become reserved for experts only. It might take more of an effort than expected to implement all the technology and teach non-experts on computers to use the system efficiently.

2.3.6.5 Conclusions

My conclusion is that it is not strictly necessary, but a great advantage to maritime safety if the certification is performed by independent classification societies instead of governmental agencies.

2.4 The Liability of the Shipowner

2.4.1 Background

The liability of the shipowner is a major question in maritime law. Therefore this thesis has to be limited to the areas which directly concern the liability of the master.

The principle of the shipowner's liability is ancient. As early as during the Middle Ages this liability was already established. The master became responsible for the vessel as a consequence of the fact that the shipowner usually could not be contacted. In order to ensure that the shipowner did not try to cover himself behind the master, they became liable for his actions.¹³⁵ Since then it has been emphasized that the master shall have the right to act on his own accord regarding safety. The master is responsible for the day-to-day operation of the vessel while the shipping company has the ultimate responsibility.¹³⁶

In SMA § 7:1 the fundamental rule regarding the shipowner's liability for his employees is found.¹³⁷ The shipowner is liable for negligence or errors committed in the service by anyone aboard the vessel. Since this liability might become very extensive there are certain limitations which will be discussed below. There are also special rules on the shipowner's recourse against his employees in SMA § 7:1 paragraph two. SMA § 13:26 states that the shipowner is not liable for damage caused due to fire or navigational error as long as the vessel was seaworthy when the voyage commenced.

2.4.2 Identification

2.4.2.1 Privity

The shipowner, somebody operating one of his vessel for him, charterers, salvagers and the sender of the cargo are all entitled to limit their liability pursuant to SMA § 9:1 paragraph one. From the second paragraph follows that any person for which somebody in the first paragraph is responsible also has the right to limit his liability.

If the owner himself, or somebody acting for him, for instance someone in the management, has caused the error which has resulted in liability, it might not seem just that he should have the right to limit his liability. This is however the case pursuant to SMA § 9:1 if there is only a minor degree of culpability.¹³⁸ The liability cannot be limited if the person has "caused the loss by personal intent or his personal gross negligence committed with the knowledge that such loss would probably result.", SMA § 9:4.¹³⁹ If the culpability has not been minor, then the shipowner cannot limit his own liability. How the limitation is handled in practice will not be discussed in this thesis.

It is in connection with these issues that the designated person can cause problems. If the designated person can be linked to the management, then his faults could be attributed to the shipowner. This question is of great importance in connection with marine insurance and limitation cases. The knowledge of the designated person could trigger the liability of the shipowner.¹⁴⁰ We have yet to see a case which will enlighten this debate.

¹³⁵ Tiberg (ed.), *Ship Masters*, p. 41.

¹³⁶ Tigerstedt, p. 15.

¹³⁷ Per Kjellström in KARNOV 1996/97, p. 1886 note 157.

¹³⁸ Falkanger, Bull, Brautaset, p. 191.

¹³⁹ Translation from: Beijer, Tiberg.

¹⁴⁰ Sydsjö Norlin, p. 19. I greatly recommend this master thesis which is very thorough.

2.4.2.2 The Designated Person(s)

Section four of the ISM-Code has the following wording:

”DESIGNATED PERSON(S)

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 to ensure that adequate resources and shore based support are applied, as required.”

Section three, paragraph three is also relevant to the designated person.

”3.3 The Company is responsible for ensuring that adequate resources and shore based support are provided to enable the designated person or persons to carry out their functions.”

2.4.2.3 If the Master is also the Shipowner

In some cases the master is also the shipowner. This is sometimes the case when it comes to smaller vessels, such as fishing boats. He might be part owner of the vessel or the shipping company or he might be the sole owner. In either case awkward legal situations can occur.

The most typical question is if the shipowning company can limit the liability if the master at the time of the incident is also a major owner or member of the board of the company. Questions of this kind are often solved by the courts or by an average adjuster, and this is no exception. There are a number of cases, of which some are obsolete. The general rule seems to be that one has to separate the two roles - master and owner, then one has to decide in which role the master/owner was acting. If the error was committed in the position of the master, then it can be limited according to the usual rules. But if the error was committed in the position of owner, then the right to limit liability is lost.¹⁴¹

In a case concerning the vessel Nordica the problem was similar. In this case the vessel had collided with a pier. The insurance company did not want to pay since the master of the vessel was also part owner of it. The average adjuster however came to the conclusion that the insurance company had to pay since all the actions on board by the master were performed in his capacity as master and not as part owner of the vessel.¹⁴²

In ND 1958:122 NSC POLLY, the situation was similar. A steersman had fallen asleep while on watch resulting in a collision with another vessel which was anchored. The steersman was also part owner of the vessel on which he was on watch. The owner, in this case the steersman, did not lose his right to limit liability, even if he was not the master of the vessel, but a subordinate.¹⁴³ The conclusion is that a navigational error committed by a master who is also the owner or part owner of the vessel, will not bar limitation of liability.

¹⁴¹ Falkanger, Bull, Brautaset, p. 192.

¹⁴² Rederiets och befälhavarens ansvarsfördelning - Vad sker när befälhavaren är delägare?, SSG 1985, 44, p. 11-14.

¹⁴³ Falkanger, Bull, Brautaset, p. 192.

2.4.3 Analysis

The SMS shall include a written definition of the authorities and responsibilities in the company of every person on board and ashore. A designated person within¹⁴⁴ the shore based organization with "direct access" and accountability before the highest management of the company shall then supervise that this plan is implemented and maintained.¹⁴⁵ The designated person is the link between the shipping company and the ships.

It is a widely debated issue what the term "direct access" stands for. Some people mean that the designated person should be *under the control* of the management. Others mean that he should be *part of* the management, inter alia a member of the board of directors. One thing is certain, the ISM-Code offers no other information than the one quoted above, which is certainly not a lot to go on. It is highly unlikely that the master could ever be appointed designated person since the master already has special functions in the ISM-Code.

2.4.4 Conclusions

A primary conclusion regarding the question of the designated person is that the master cannot be appointed this position. Another question is if the master's situation in any way has been effected by the concept of a designated person. Since the division of tasks between the designated person and the master is clear I do not believe that there are any legal reasons for concern of the master's independence. It is in fact likely that the position of the master has been strengthened because he has been appointed head of safety at sea in the ISM-Code.

Despite the lack of preparatory works and the consequent difficulty to ascertain the intention of the contracting states I feel that I understand the rationale behind the designated person. Since today's shipping industry is complicated and the organisation of the shipping companies is very complex. Previously the shipowner was a real person, but today it is usually a number of companies. The designated person has been created as a response to the need for a person within the shipping company with an overall picture of the safety aspects. This proves that the traditional structure of a shipping company is still valid. There is still a need for a person ashore who is a counterpart to the master on board.

PART III

3.1 Conclusions

3.1.1 Final Analysis

The purpose of this thesis is to examine the legal position of the master. Has he got the necessary independence to perform his duties according to the law? Are his authorities sufficient or perhaps even greater than necessary to perform his duties? The examination has

¹⁴⁴ Lindvall, *Is the ISM-Code a Friend to the Shipmaster?*, p. 5.

¹⁴⁵ Chauvel, p. 21-22.

generally been limited to Sweden and questions regarding safety and environment. The ISM-Code with the designated person and the issue of privity have also been examined.

The role of the master has changed historically and it will most likely change again in the future. At the same time not many people seem to be interested in this development. The politicians and the shipping industry is taking for granted that they have control over the situation. The Government for example seem to have a very unconcerned view of these questions. International regulations are of great importance and probably the most efficient way of creating legal development. But this is no excuse for the national legislator to be passive.

The ISM-Code might seem like something of a bureaucratic invention. I firmly believe that you can never substitute common sense and good judgement for codes and regulations. But codes and regulations can hardly cause any harm either. The ISM-Code will not prevent a master from acting in accordance with his own good judgement. And it can perhaps serve as a checklist for the masters when they perform their duties. But one has also to be aware of the problems associated with technology. There is a limit to the amount of technology which a person can handle. And the technology of today has made it possible to monitor the master more than ever before.

On the one hand the master is the representative of the shipowner and on the other hand he is in charge of safety on board the vessel. In theory this might not be a conflict since the shipowner reasonably should have an interest in maintaining the vessel. However, there is a conflict in practice, because it is not a question of objectives, but of means. Both the master and the shipowner have an interest in the safety of the vessel. But they do not have to agree on the measures necessary to achieve this objective. The amount of time, money and attention spent on the safety of the vessel are of great importance and will influence the safety of the vessel. These factors are a source for conflict between the persons operating the vessel.

The problem is that the master might be biting the hands which feeds him. In most any other walk of life this would be considered a problem, but within the shipping industry this is not the case. A shipping company will of course never argue with a master when for instance a vessel is clearly unseaworthy. It is instead the borderline cases which are interesting.

The importance of the master has gradually diminished during the twentieth century. But if one has the standpoint that a master has a power of attorney it is completely in order that his authorities are diminishing. As long as communications are good there is no point in the master making decisions that might as well be made by the shipowner himself. It is not an end in itself to have a master.

When everything within the shipping industry is running smooth the master is not very interesting, but when something goes wrong he is right in the middle of attention and alone with his problems. An analysis of the master's role in practice and theory in interplay with legislation, technology and economics would give an improved understanding of the master's situation. I believe that the authority which the master has been given in the legislation is sufficient for him to perform his duties, but the division of power within the shipping industry could be improved. But only an examination of the whole of the master's situation can give a certain answer.

3.1.2 Final Conclusions

First of all it is not easy to draw conclusions about this subject. Yet people within the shipping industry, the legislators and others are all very sure of themselves. They give a picture of the situation of the master which is very uncomplicated. It is either this way or that way, it is

either black or white. On the contrary I believe that it is a very complicated issue which has been neglected over a number of years.

My primary conclusion is that very few people associated with the shipping industry have taken questions regarding the position of the master seriously. There are many factors which influence the situation of the master, but most people have only considered a few or maybe just one of those before drawing their own conclusions. It seems to me that no matter how many aspects there are on the master's situation, the conclusion is always more or less the same - he can handle it! The expression that the master is nothing more than a lorry driver at sea is true in at least one respect. He is given the same amount of attention from the industry as a lorry driver, which is not much. The fact that most people are so sure of themselves is the best indication of that they have not taken these questions seriously enough.

The reason for this is probably that nobody has viewed the whole situation of the master. Naturally most experts only focus on their field of expertise. What makes matters worse is that they generally *feel* that they have a grip on the whole situation, and therefore express themselves with great certainty. Most parties have not understood the difficulties that other parties are facing. The legislators, the shipping companies, the lawyers and the various institutions have not appreciated or do not care about other aspects than their own, in spite of the fact that these aspects might influence their respective fields. A good example is the fact that very few people are familiar with the legislation concerning the master. Even some lawyers have not familiarized themselves with fundamental regulations, which in some instances are quite complicated.

The authorities of the master are still sufficient enough for him to handle his duties. Certain improvements could however be made. The ISM-Code is a significant step in the right direction. The introduction of the designated person has improved the lines of communication within the company. Time will however tell if the ISM-Code will be effective in practice. The greatest risk is that nothing more than an elaborate bureaucracy has been created.

The status of the master has gradually diminished due to changes in society and technology. But this is no reason to diminish his authority. Many of the powers which the master has at his disposal are meant to be used only in a state of emergency. Therefore there is no need to remove these authorities. The position of the master is being adapted to a modern society, which under all circumstances must be a good thing in itself.

Here are my four main conclusions regarding the legal position of the master:

- It is a question which is lot more complicated than it might appear to be.
- It is a neglected question within the shipping industry and among politicians.
- His authorities and independence are still sufficient but could be improved.
- His status has gradually diminished as a result of changes in his surroundings.

3.1.3 Proposals & Consequences

Now I am going to give a couple of suggestions of how these potential problems might be solved or at least made less difficult. Maybe these ideas should be viewed as experiments and I do not believe that they are in any way easy to implement. But they might trigger another fruitful thought or at least make the basic problem more obvious.

One idea is to make the master's position similar to that of a maritime inspector at a classification society or an authority. Nobody would even suggest that such an inspector be employed by the company which he is inspecting, yet it is taken for granted that the master, who has at least some similar functions, should be employed by the shipping company. The master could be employed by a classification society or an authority and then leased to a shipping company, much in the same way as a consultant or someone employed by a company like *Manpower*, *Proffice* or *Poolia*. This would strengthen the independence of the master with only a minor increase in costs. In this way the employer would have control over the assignments of the master and could support him in his decisions. There would of course have to be certain ways for a shipping company to have a master replaced if he is not performing his duties, but this would be supervised by the authority in question.

The main reason for this proposal is not that the employment protection of the master needs to be improved. It is instead a question of division of power. A principle which is often applied when it comes to the exercise of power.

Another suggestion is to remove the responsibility of the master for certain tasks which he has no real influence or which could just as well be performed by someone else. For example personnel management questions. This would considerably ease the master's workload.

3.1.4 Suggestions for Further Research

For further research I would suggest a thorough examination of the situation of the master in practice. Conducted in the form of a series of in-depth interviews and study visits. This will hopefully generate a picture of how the masters themselves appreciate the situation.

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