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UNIVERSITY OF SOUTHAMPTON

FACULTY OF LAW, ARTS & SOCIAL SCIENCES

School of Law

Enforcement of UK Merchant Shipping Legislation

in 2 Volumes

by

Ulrich Jurgens

Volume 1: Thesis

Thesis for the degree of Doctor of Philosophy

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Abstract

The basis of this thesis is an investigation of Maritime and Coastguard Agency (MCA) administrative and criminal enforcement files, relating to UK detentions and prosecutions. It would appear that this is the first time that such an analysis has been made.

The thesis is divided into four parts of which Part B and C form the heart of the work. These two consider administrative (Part B) and criminal (Part C) enforcement measures and discusses their legal basis. But before these subjects are dealt with in more detail, enforcement personnel and their roles are analysed (Part A), and their role is compared to inspectors of the Health and Safety Executive and the Marine Accident Investigation Branch (MAIB). Human rights and their impact on both enforcement process and inspectors of MCA and MAIB are addressed within the context of the Merchant Shipping Act 1995 and Regulations issued under the Act.

The thesis identifies inconsistencies of UK legislation when compared with European law and apparent lack of clarification within UK law. The analysis of administrative enforcement measures focuses on detentions of merchant ships whereas the discussion of criminal enforcement measures concentrates on the areas which the files suggested were the most affected by investigations and prosecutions, namely groundings, violations of the Collision Regulations and pollution incidents.

It becomes clear from the research that detentions by far outweigh prosecutions, that MCA policy supports this approach and that enforcement personnel indicate a preference for such administrative enforcement measures. However, a large number of Detention Notices were found non-compliant with legal requirements. Still only one case was identified, documented and discussed where the MCA was taken to arbitration by the owner affected by a detention.

The thesis offers suggestions as to how the work of MCA enforcement personnel can be improved and (Part D) what measures would seem to be appropriate for the lawmakers to take in the future. It is suggested that the approach taken in recent European oil pollution legislation to focus on serious negligence rather than on strict criminal liability could offer a suitable way forward.

Throughout this work I have endeavoured to state the law as at 31 October 2008.
In a number of cases it has been possible to take account of developments since that date as my *viva voce* only took place in June 2009. I have made reference to new European and UK pollution legislation (see Chapter 13, fn 1) which came into force or will come into force in the course of 2009. I also used the decision in *TS Lines Ltd v. Delphis NV (The TS Singapore),* [2009] EWHC B4 (Comm) in Chapter 8.6.2. to help clarify the discussion about the quantum of compensation in an arbitration over a detention. But I did not carry out a detailed analysis of the new legislation and that case. The decision in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm) of 18 November 2008, however, was fully analysed and relevant aspects found their way into the discussion in the thesis.

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Declaration of Authorship

I, Ulrich Jurgens,

declare that the thesis entitled

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and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research. I confirm that:

- this work was done wholly or mainly while in candidature for a research degree at this University;
- where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
- where I have consulted the published work of others, this is always clearly attributed;
- where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
- I have acknowledged all main sources of help;
- where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
- two paragraphs of page 322 of the thesis have been published in: U Jurgens, *Time and distance: the key to interpreting the Collision Regulations,* (2008) 14 JIML 19, p. 32.

Signed: ……..

Date: 5 January 2009

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Finally, I am personally very glad that I could at last prove to my mother that I can actually read and write.

List of Abbreviations

A/C	Air Condition
AB	Able Bodied Seaman
AIS	Automatic Identification System
BA	Breathing Apparatus
BIMCO	The Baltic and International Maritime Council
BP	British Petroleum
BSU	Bundesstelle für Seeunfalluntersuchung
CA	Court of Appeal
CJPOA	Criminal Justice and Public Order Act
CNIS	Channel Navigation Information System
CO2	Carbondioxide
Colregs	International Regulations for Preventing Collisions at Sea, 1972
CPS	Crown Prosecution Service
DP	Designated Person
DPP	Director of Public Prosecutions
DSC	Digital Selective Calling
DTI	Department for Trade and Industry
EC	European Community
ECJ	Court of Justice of the European Communities
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEZ	Exclusive Economic Zone
EMSA	European Maritime Safety Agency
ENG1	UK Seafarer Medical Fitness Certificate
EnU	Enforcement Unit
EPIRB	Emergency Position Indicating Radio Beacon
fn	Footnote
FOI 2000	Freedom of Information Act 2000
GT	Gross Tonnage
HF	High Frequency (also H/F)
HFO	Heavy Fuel Oil
HL	House of Lords
HM	Her Majesty
HRA	Human Rights Act
HRU	Hydrostatic Release Unit
HSE	Health and Safety Executive
HSWA	Health and Safety at Work Act
ICS	International Commission on Shipping
ILO	International Labour Organisation
IMO	International Maritime Organisation
IOPP	International Oil Pollution Prevention
ISM Code	International Safety Management Code
LL	Load Line
LSA	Life Saving Appliances
MAIB	Marine Accident Investigation Branch
MARPOL	International Convention for the Prevention of Pollution from Ships (also Marpol)
MCA	Maritime and Coastguard Agency
MEM	Marine Enforcement Manual
MF	Medium High Frequency (also M/F)
MGN	Marine Guidance Note
MNC	Major Non-Conformity
MOB	Man over Board
MOU	Memorandum of Understanding (also MoU)
MRN	Movement Restriction Notice
MS	Merchant Shipping

MSA	Merchant Shipping Act
MSF	Merchant Shipping Form
MSI	Maritime Safety Information (broadcast)
MSN	Merchant Shipping Notice
NOC	Notice of Concern (also NoC)
NtoM	Notice to Mariners
NUMAST	National Union of Marine, Aviation and Shipping Transport Officers
OOW	Officer in Charge of a Watch
P&I Club	Protection and Indemnity Club
PACE	Police and Criminal Evidence Act
PASP	Practical Approach to Successful Prosecutions
PM	Planned Maintenance
PSC	Port State Control
PSCO	Port State Control Officer
QCV	Quick Closing Valve
SAR	Search and Rescue
SCA	Supreme Court Act
SCABA	Self Contained Automatic Breathing Apparatus
SI	Statutory Instrument
SIC	Surveyor-in-Charge (also SiC)
SIRC	Seafarers International Research Centre
SMS	Safety Management System
SOLAS	International Convention for the Safety of Life at Sea
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended
TSE	Transmissible Spongiform Encephalopathy
TSS	Traffic Separation System
TUC	Trade Union Congress
UK	United Kingdom
UNCLOS	United Nations Convention on the Law of the Sea
VDR	Voyage Data Recorder
VHF	Very High Frequency

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Part A General introduction

Chapter [1] – Introduction

1.1. Introduction
1.2. Objective
1.3. Contents of the thesis
1.4. Contents of the annexes
1.5. Methodology
1.6. Enforcement triggers

1.1. Introduction

There appears to have been to date no study of law enforcement with regard to merchant shipping in the United Kingdom (UK). Law enforcement in merchant shipping covers both administrative and criminal measures. This thesis will discuss both subjects on the basis of recorded incidents in the files and on the website of the Maritime and Coastguard Agency (MCA).[1]

The responsibility of the owner and master is constituted by the requirement to comply with modern merchant shipping health and safety law, both on threat of detention of the vessel, or on threat of being prosecuted. The aim of this thesis is to consider how obligations of masters and owners are subject to enforcement measures in the UK. I will also analyse how the Human Rights Act 1998 affects enforcement legislation and administrative and criminal enforcement measures.

Throughout this work I have endeavoured to state the law as at 31 October 2008.[2]

In the following section I will address the objective of this work.

1.2. Objective

The overall objective is to analyse merchant shipping enforcement law and its impact in the UK on the owner and master, because it appears that so far no research has been done into this subject. Complaints about criminalisation by industry organisations and trade unions, seemingly supported by the IMO General Secretary,[3] would appear to highlight the importance and timeliness of the subject. However, criminal aspects only seem to form a comparatively small part of the applied enforcement measures.[4]

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[1] I would like to disclose at this early stage that I work for the MCA as a Surveyor. Most of the activities (surveys and inspections) addressed in this thesis have been carried out by me on various occasions. I hasten to add that any criticism the findings of this thesis may convey on work of colleagues and the MCA is probably directed at me to the same or an even larger extent (see particularly below Chapter 8.5). Studying a subject in detail usually reveals aspects which have not been previously identified.

[2] However, the decision in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm), published on 18 November 2008, has been taken into account in the thesis because it appeared to have a wide ranging impact on the discussion of detentions. This delayed the final draft of the work by several weeks. In a number of cases it has been possible to take account of developments since that date as my *viva voce* only took place in June 2009. I have made reference to new European and UK pollution legislation (see Chapter 13, fn 1) which came into force or will come into force in the course of 2009. I also used the decision in *TS Lines Ltd v. Delphis NV (The TS Singapore),* [2009] EWHC B4 (Comm) in Chapter 8.6.2. to help clarify the discussion about the quantum of compensation in an arbitration over a detention. But I did not carry out a detailed analysis of the new legislation and the case.

[3] See below, introduction to Part C.

[4] See Table 15 in Chapter 15.

The thesis will establish how the enforcement system works, who it affects and what measures are applied.

As part of that overall general objective, there are a number of specific aims. First, I will examine the legal effect of enforcement procedures under port state control (PSC) and other merchant shipping legislation. Secondly, in this context I will identify whether or not there are particular patterns as to the application of the health, safety and environmental regulations. Thirdly, I will attempt to establish whether or not there are gaps or other shortcomings in the legislation, and, fourthly, I will investigate whether or not there are indications about the effect of the enforcement measures during the relevant investigated period in the UK (essentially 2001-2005).

I will not discuss in detail the socio-legal impact of my research,[5] but will mainly focus on the legal framework for the enforcement measures and also the practices used. To a limited extent, and only with regard to the data collected, this will therefore allow some qualitative conclusions to be drawn as to the effectiveness of the enforcement procedures.

Although the research is based on English law, judgments of both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), where applicable, will be used for clarification of the law. Some issues which occur throughout the thesis, e.g. discretion or possible human rights violations, will be dealt with both in a general section and in the relevant Chapter. After much consideration I have decided to leave the specifics of the discussion of Articles 6 and 8 of the Human Rights Convention[6] in the chapters where specific issues arise, rather than in the general Chapter 3.[7] I believe, this makes for easier reading and helps to reduce cross-referencing. The different angle of each discussion would also rather seem to favour the de-centralised approach in these cases.

In the following two sections I will introduce the contents of the thesis and its annexes.

1.3. Contents of the thesis

The whole work consists of two volumes. Volume one contains all the chapters of the thesis whereas volume two holds the annexes.

The thesis consists of four parts. Part A lays some of the groundwork for the discussion of administrative (Part B), and criminal (Part C), enforcement measures and the work concludes with Part D. The 15 chapters usually begin with an, albeit short, introduction mainly on methodology referring to particular aspects of the subjects of the relevant chapter. Parts B and C are largely based upon the analysis of relevant MCA files. Where it appears to be appropriate I use case studies as recorded in the files, convictions published by the MCA,[8] but also Marine Accident Investigation Branch (MAIB) reports.[9]

In Part A, Chapters 2 to 4, I discuss general aspects of enforcement and human rights legislation and how the MCA relates to the MAIB and also to other enforcement bodies. In Chapter 2 I focus on the powers of the enforcement officers, the definition of their work in the MSA 1995 as well as the relevant Regulations, and on the legal relationship between

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[5] Cf. the extensive and detailed work by K Hawkins, *Law As Last Resort, Prosecution Decision-Making in a Regulatory Agency* (hereafter "Hawkins, *Law As Last Resort*"), 2002, which deals with the HSE. See also the discussion above, Chapter 2.5. This thesis is not a quantitative analysis of the enforcement system. To satisfy such an interest would require another study and so would an analysis of international enforcement practices.
[6] Convention for the Protection of Human Rights and Fundamental Freedoms.
[7] As in Chapters 4 (MAIB) or 8. Although "discretion" is dealt with on many occasions in various chapters.
[8] As is, or was, recorded on the MCA website (www.mcga.gov.uk) in 2005 and 2006, see Annexes 2 to 6. Current information about prosecutions (17 July 2008) date back only to 2003, see http://www.mcga.gov.uk/c4mca/mcga07-home/newsandpublications/prosecutions07.htm.
[9] Which can be found on www.maib.dft.gov.uk.

Inspector[10] and master and crew. The chapter concludes with a comparison of the Health and Safety Executive (HSE) and the MCA.

Chapter 3 focuses on the compliance with human rights by enforcement officers when collecting evidence on board a ship.

The contents and structure of Chapter 4 is set by analysing the role and influence of the MAIB and the possible impact of its investigations on criminal law enforcement and master and crew.

Chapters 5 to 8 constitute Part B and these discuss administrative enforcement measures and focus on detentions and port state control. Chapter 5 introduces the concept of a detention in UK merchant shipping law, and Chapter 6 discusses port state control, its legal basis and the general practice and legal problems of a detention by using a sample case. Chapter 7 analyses a number of selected detentions under various merchant shipping regulations and demonstrates in detail the complexities of the statutory law surrounding detentions in each particular case. Chapter 8 contains the evaluation of arbitration appeal provisions and ends by discussing the Award of the only known arbitration in that field so far.

Part C (in Chapters 9 to 13) covers criminal enforcement measures in areas where the bulk of the investigations and prosecutions occurred.[11] Chapter 9 discusses some basics of aspects of criminal law. It will consider problems surrounding a prosecution such as strict criminal liability and when and who to prosecute. In Chapters 10 to 12 I use the contents of MCA enforcement files to illustrate MCA prosecution practice. Chapter 10 addresses the "enforcement trigger"[12] of groundings and Chapter 11 prosecution problems and practice surrounding the International Regulations for Preventing Collisions at Sea 1972 (Colregs). Chapter 12 covers the subject of pollution. It focuses on the application of sanctions and the different types of pollution covered by Regulations. At that stage a deviation from national law appears to be necessary to discuss in Chapter 13 the recent developments in EU ship source pollution law.

Part D with Chapters 14 and 15 conclude the thesis by addressing its main findings in Chapter 14. Chapter 15 focuses on a possible way forward. This last chapter discusses the appropriateness of administrative and criminal enforcement measures and argues that the system of strict liability should be reconsidered in the light of recent European legislation.

1.4. Contents of the annexes

The annexes to the thesis contain a variety of information which I have extracted and compiled from MCA files, the MCA and MAIB websites, and taken from other documentation. It would appear that this is the first time that such extensive research has been undertaken. The data in the annexes has been included in the printed materials out of an abundance of caution, as it is not available elsewhere. However, the reader should not find it essential to refer to details in the annexes.

Two annexes reproduce the questions and answers of two questionnaires, Annex 15 to Surveyors, and Annex 16 to the Head of the Enforcement Unit (EnU) in the MCA. There are also samples of forms which are used in the prosecution and detention process, and also a copy of the only known arbitration Award for a challenged detention. Most annexes will be self-explanatory but I will briefly address those which I compiled.

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[10] For the different terminology according to which, for example, an Inspector is an enforcement officer, see Chapter 2.
[11] However, alcohol related prosecutions which seem to occur on a regular basis are not dealt with in any detail, see Chapter 1.6 and 9.4.3.
[12] See below, Chapter 1.6.

Annex 1 is a compilation of short summaries which I prepared of the MCA files I have investigated.

I have taken Annexes 2 – 6 (convictions) from the MCA website and prepared them in a consistent manner without changing any wording. These annexes provide the main information of all convictions achieved by the MCA between 2001 and 2005.

In Annex 7 (categorised prosecutions) I have broken down all prosecutions by triggers[13] and have extracted the information on fines. I have also highlighted the link with any file I had access to and with any MAIB collision report (if one existed).

Annex 8 (UK detentions 2002 - 2006) provides information on all UK detentions of UK flagged ships. I have taken the information from the MCA website and put it in a format which makes the relevant data more easily accessible and comparable.

In Annexes 9 – 13 (foreign detentions) I have reproduced the information as to the detention of foreign flagged ships in the UK in a format similar to that of Annex 8.

Annex 14 (MAIB reports) is a short summary I composed using the relevant MAIB reports of what I consider to be the main facts and the key findings of all MAIB collision reports between 2000 and 2005. The incidents are linked with the relevant MCA file (if any) and the information on whether or not anybody was prosecuted for the collision.

Annex 15 is a collection of all Surveyor answers to a set of questions. The questions and the answers have been arranged so that anonymity could be guaranteed and that all answers are linked with the relevant question.

In Annex 16 lists the responses to a set of questions from the Head of the MCA Enforcement Unit.

Annexes 17 to 21 are copies of information sheets or forms produced by the MCA and they should be self-explanatory.

Annex 22 shows which merchant shipping regulations were applied for multi-defect detentions, and their frequency of application. Annex 23 is the same table for single defect detentions.

Annex 24 is an overview of all detained multi-defect vessels linked with the relevant Regulations and Annex 25 is the same table for single defect ships.

Annex 26 shows an email exchange with the MAIB which I refer to in the thesis.

Annex 27 is a standard form for a “Notification of Concern”.

Annex 28 is a copy of the Detention Notice for the “Koriana”. Annex 29 is a copy of the Report of Inspection for that vessel, and Annex 30 is a copy of the full Award and the reasons for the Award.

Finally, Annex 31 is a copy of an exchange with a Principal Surveyor in the Australian Maritime Safety Agency (AMSA).

Next I will describe the methodology applied in the thesis.

[13] “Triggers for enforcement unit involvement”, see below, *ibid.*

1.5. Methodology

I originally began the thesis with the aim of analysing the impact of criminal enforcement measures on the master of a ship. However, after a while it became clear that such an analysis would only represent part of the overall enforcement picture. That is why I firstly analysed investigation files of the MCA Enforcement Unit,[14] and secondly, files of detentions of ships.[15] This file research was complemented by two questionnaires. The first[16] was sent out to 32 experienced[17] Surveyors and Principal Surveyors around the UK of whom 20 responded,[18] and the second[19] went to the Head of the MCA Enforcement Unit.

The thesis includes much traditional analysis of legal material. The material covers international, EU and UK legislation, case law and governmental codes of practice. That legal material is based on the prior research regarding enforcement practices, which involved a close examination of the two kinds of enforcement files[20] of the MCA (i.e. only part of the thesis is about the files; most is legal analysis).

By the end of 2005 a record of 374 enforcement files had been supplied to me by the MCA Enforcement Unit. The record started with files 60, 118, 148 and 176 but listed files continuously only as of file 223 and ended with file 593. The list mainly covers the period between Spring 2002 and the end of 2005. It only became clear after some time that files also existed from before 2002 which I did not inspect.[21] There were inevitably practical limitations on the number of files that could be considered, but I am satisfied that I was able to obtain a satisfactory snapshot of MCA procedures and prosecution activities by restricting my research to the files of the initial list.[22] The individual files were all of different sizes but could comprise several cardboard boxes, particularly where prosecutions had been commenced and the case went to court.

It was possible to retrieve 207 out of these 374 files from the central MCA registry. It would appear that files which are not in use are not kept in the MCA's headquarters in Southampton but are stored in a warehouse outside the city. The files can only be accessed once they have been ordered in writing and then transported to the Southampton office.

A list of all files accessed, including a short excerpt and arranged in consecutive numbers is attached.[23] I have categorised the record by "enforcement triggers"[24] in accordance with what I considered to be the main incident investigated in the file.

In addition to this record I downloaded all official MCA news releases of convictions between 2001 and 2005 and organised them by number and year.[25] By the end of 2005 the record of convictions on the MCA webpage[26] comprised of 65 different news releases, each dealing with one conviction. This information on convictions is published by the MCA for the current and the previous five years before that.[27]

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[14] These files all begin with the prefix MS 10/74/ followed by the individual number of the file. Files are usually kept for seven years in common with police practice, see Head of the EnU, Annex 16, question 8.
[15] These files all begin with the prefix MS 71/03/ followed by the individual number of the file. Detention files are kept for 10 years according to Pat Dolby, Head of the MCA Inspection Branch (2 July 2008).
[16] Annex 15, Questions for Surveyors.
[17] Of whom I knew that they were at least two years or more employed by the MCA.
[18] At the time of the questionnaire (25 January 2008) the MCA had a total of 120 "MS1" (91 main grade Surveyors) and "G7" (29 Principal Surveyors) employed in Marine Offices around the UK according to information by the Human Resources department of the Agency.
[19] See Annex 16.
[20] Detentions (administrative enforcement measures) and prosecutions (criminal enforcement measures).
[21] Files are usually kept for seven years, see Head of the EnU, Annex 16, question 8.
[22] But I asked for an additional 16 files on collisions, see below.
[23] See Annex 1, "MCA file list categorised by enforcement triggers".
[24] See below, Chapter 1.6.
[25] See Annex 2 to Annex 6 "Convictions".
[26] www.mcga.gov.uk.
[27] 2 July 2008.

These releases are in many cases the only information available on convictions for breaches of merchant shipping legislation. The news release is not always recorded in the relevant file itself, and, in many cases, other information related to the actual conviction is also lacking. Furthermore, not all convictions are covered by files to which I had access.[28]

In October 2006 I inspected an additional 16 files[29] on collision issues, and these are now part of the list of all files seen. These 16 files are partly outside the date range for the other files (2002 - 2005). However, because those files will contribute towards clarifying prosecutions for Colreg breaches, and as several[30] also fall within the date range, I decided to take them into account as well. But these 16 additional files were not considered in any calculations referring to numbers of particular violations and their proportionate share in all files viewed.[31]

The files are not kept in the Southampton headquarters of the MCA but outside of Southampton in a warehouse. In practice, I ordered and inspected the prosecution files in batches according to the sequence of the file list I was given by the Head of the Enforcement Unit and extracted what I considered to be relevant information. After the inspection of all files I categorised them in accordance with the enforcement triggers.[32] In addition I used the answers to my questionnaires throughout the thesis to underpin and illustrate the findings resulting from my inspection of the files.

Apart from the enforcement files I also studied 30 detention files.[33] 19 of those files chosen were of vessels which, according to my analysis of the MCA webpage on detentions, had the highest number of deficiencies in the years 2001 – 2005.[34] Ten files concerned vessels with only one defect for which they were also detained. The one remaining file was chosen to clarify details of an enforcement file on pollution.

In addition I analysed all[35] 41 MAIB investigation reports,[36] published online, on collisions between 2000 and 2005. I used the reports to complement, where possible, the information taken from MCA files. But I also utilised the MAIB reports to analyse both breaches of Colregs and the relevant enforcement activities (or the lack of it)[37] of the MCA.

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[28] This is a consequence of (1) that I did not see many files prior to 2002, and (2) that not all files relating to a conviction were accessible to me.

[29] One of these files, no. 143, is categorized under “Pollution” and not under “Colregs” because it covers both pollution and Colregs.

[30] A total of eight files which were not recorded on the initial list I was given by the MCA.

[31] See, for example, the calculations provided in Annex 7.

[32] See below, Chapter 1.6.

[33] In Annex 8 (UK flag excluding fishing vessels) to Annex 13 (foreign flags) I put together all detentions of vessels in UK ports between 2001 and 2005 (for UK flagged ships only as of 2002 as no information existed on the web prior to that date). Out of 26 requested files 19 could be obtained.

[34] I wanted to investigate the five files of ships with the highest number of defects per year but could not get hold of all 26 files.

[35] In as much as these are identified as MAIB collision reports on the MAIB’s website.

[36] http://www.maib.dft.gov.uk/publications/investigation_reports.cfm (17 July 2008). I have extracted the MAIB collision reports from the total number of published MAIB reports on the web and have used the description under “Accident Type” to only review collision reports. Collision reports for this purpose are those which are referred to as “collisions” or “near miss”. Reports which only use the word “contact” or similar, e.g. “contact with breakwater”, have not been considered; a record of an excerpt of all 41 reports is attached as Annex 14; this excerpt is focusing on “reported facts” and “findings”; the information is used to establish whether or not a breach of any legislation appears to have occurred.

[37] On the question of why the MCA only investigated about 50% of cases which were investigated by the MAIB the Head of the EnU responded “The MAIB operates totally independently of the MCA, they decide themselves what to investigate and what not to investigate. I decide independently of them. I am dependant on what matters are reported to me and I also have to decide whether there is any reasonable prospect of getting sufficient evidence acceptable in a court of law to prove that an offence has been committed by an identifiably person or company. MAIB do not have those constraints and I cannot use MAIB reports as evidence”, Head of the EnU, Annex 16, question 24.

Many MCA files, but by far not all, contain a closing minute which summarises the contents, and, in case of a conviction records this as well.[38] Where these minutes were available they have been used for this thesis to state what happened and also what action the MCA took. Case contents of files without a minute were put together by me based on the information I was able to gather from the file.

For the evaluation of detentions I downloaded and analysed more than 500 detention reports from the MCA website. These triggered the request for 42 detention files of which I could eventually obtain 29. Each of the files represented one detention incident which I inspected in more detail. The detentions were ranging from 2001 to the end of 2005.

I will now turn to and explain the role of "enforcement triggers" which appeared to be of significant relevance for Part C of the thesis.

1.6. Enforcement triggers

The basis of the structure in Part C is the 14 "triggers for enforcement unit involvement".[39] Incidents which come under any of the triggers, and which are reported to the MCA Enforcement Unit (EnU), will prompt it to assess whether or not enforcement action is appropriate.[40] Those triggers are

1. Grounding

2. Pollution

3. Colregs[41]

4. Jumping Detention

5. Dangerous Goods

6. Ship Certification

7. People Certification

8. Forgery and Fraud

9. Equipment Deficiencies

10. Unsafe Operations

11. Wreck

12. Obstruction

13. Breach of Prohibition Notice

14. Reports from other Agencies.[42]

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[38] As the reasons for judgments are not given in writing in the Magistrates' Court the only documentary evidence of the outcome of a trial is usually the MCA press release.
[39] MCA Marine Enforcement Manual (hereafter MEM), chapter 1, s. 2. The manual is an internal MCA document and is not available on the MCA's website.
[40] MEM, chapter 2, s. 2.1.1.
[41] The International Regulations for Preventing Collisions at Sea 1972, hereafter "Colregs".
[42] MEM, chapter 1, s. 2.1. - 2.14.

To identify cases by Enforcement Trigger I have investigated 207 MCA enforcement files ranging from 2002 to 2005 in order to analyse how these triggers have been considered in practice in the MCA.[43]

The discussion in Chapters 10 to 12 of this thesis will focus on Triggers 1 to 3. I have taken this decision because the other trigger points appeared to fall into the following three Categories:

(1) they did not appear to be of enough relevance,
(2) they did not involve seagoing vessels, or
(3) they dealt with a variety of issues including those cases where the master or mate was intoxicated with alcohol.

Even though the latter cases in particular suggest a practical relevance, if a lack of novelty, the apparently limited relevance of serious breaches of s. 58[44] did not make it seem worthwhile to discuss that section and other regulations in addition to those covered under Triggers 1 to 3.

Cases under Triggers 4, 7, 11, 12, 13 and 14 mostly fall into Category 1 (not enough relevance). Only one file each was found under Triggers 4, 7 and 13, and none under Triggers 11, 12 and 14.[45]

Triggers 5, 6, 8 and 9, although of theoretical relevance to a master or seaman, did not document much involvement of seagoing vessels (Category 2). Investigations and prosecutions under Trigger 5, dangerous goods, mainly involve lorry transports of undeclared dangerous goods. Under Trigger 6, ship certification, mainly small boats were investigated, and only in two out of 15 cases, the files of which were found, was the owner fined.[46] Trigger 8, dealing with forgery and fraud, saw two trials and fines out of a total of 34 inspected files.[47] All cases were concerned with fraudulent certification, medical certificates or other documentation in relation to crew certification. Under Trigger 9 no file of a prosecution was found, although in one case the file suggested that a faulty valve existed, but no public interest[48] was established because the skipper showed remorse.[49]

Only Trigger 10 falls into Category 3 (various issues including intoxication by alcohol). Investigations covered various different aspects from a fisherman losing his hand,[50] over a boarding of a vessel by Greenpeace activists,[51] to a master found drunk on the bridge.[52] Out of the 27 files inspected it appears that only three led to a successful prosecution.[53] None of those files suggests that a conviction under the MSA 1995, s. 58 was achieved.[54] Section 58 of the MSA 1995 deals with conduct by masters and seamen who are endangering ships, structures and individuals.[55] Evidence of convictions under s. 58 was only found on the website.[56] The news releases indicate that use was made of s. 58 to

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[43] See Chapter 1.5. above.
[44] See below the discussion of Category 3 and also Chapter 11.3. Section 58 deals with conduct by a master or seaman (sub-section 1) or any person (sub-section 2) endangering ships, structures or individuals.
[45] See Annex 1, MCA file list categorised by enforcement triggers.
[46] Files MS 10/74/357 and 359, see Annex 1.
[47] See Annex 1.
[48] See also the discussion on public interest below, Chapter 9.3.
[49] File MS 10/74/334.
[50] File MS 10/74/225.
[51] File MS 10/74/436.
[52] File MS 10/74/456.
[53] See Annex 1, files numbers 256, 275 and 456.
[54] It appears that two attempts were made but charges under s. 58 were eventually dropped, Annex 1, files 436 and 456. The decision in *R v. Goodwin* [2006] 1 WLR 546, para. 45, which coincided with the end of the period for which files were investigated seems to suggest that s. 58 charges should not be brought for contraventions which can otherwise be dealt with under relevant Merchant Shipping Regulations. "Where allegations are made of conduct which infringes the 1996 [Collision] Regulations it would seem simpler and more appropriate to charge this offence rather than to allege breach of section 58."
[55] See s. 58(1).
[56] See Annex 7, numbers 24, 35 and 40.

convict intoxicated mates and masters before the Railways and Transport Safety Act 2003 came into force on 10 July 2003.[57] The lack of more detailed information in the files examined did not appear to be conducive for having a wider discussion on the application of s. 58.

However, as I will show in this thesis[58] criminal proceedings do not appear to be the tool most commonly used by the MCA for enforcement purposes. Significantly more use is made of detentions as an administrative enforcement measure. This is reflected in the structure of the thesis in that Part B will first discuss administrative enforcement measures before criminal proceedings are addressed in Part C.

[57] See below, Chapter 9, fn 145.
[58] See Chapter 15, Table 15.

Chapter [2] – Merchant shipping enforcement: personnel and procedure

2.1. Introduction
2.2. Enforcement officers
2.2.1. Departmental Inspector
2.2.2. Inspector appointed under s. 256(6)
2.2.3. Surveyor
2.2.4. Departmental Officer
2.2.5. Inspector of Marine Accidents
2.2.6. Other enforcement agencies
2.2.7. Summary
2.3. Enforcement procedure
2.4. Inspection
2.4.1. Meaning of "inspection"
2.4.2. Consequence of meaning of "inspection"
2.5. Health and safety legislation and enforcement

2.1. Introduction

The Maritime and Coastguard Agency (MCA) acts as the flag State administration of the UK. According to its webpage[1] it

> "is responsible throughout the UK for implementing the Government's maritime safety policy. That includes … checking that ships meet UK and international safety rules. "[2]

But "checking" that ships meet rules is only part of the remit as, within the MCA, the Enforcement Unit (EnU) is

> "tasked to investigate breaches of Merchant Shipping legislation and prosecute offenders where appropriate. Offences are varied and include pollution, safety and manning, breaches of the Collision Regulations and forged certificates."[3]

However, if enforcement were left to the EnU only, any violation of the law would stand a fair chance not being followed up as the EnU is only staffed with one Principal and three Enforcement Officers (one of them in Scotland) plus two support staff.[4] Only the Principal Enforcement Officer has experience as a Marine Office Surveyor and one officer does not have a shipping, but a police, background. In practice, and in accordance with the MSA 1995, enforcement work is carried out by all marine Surveyors working out of a total of 18 Marine Offices[5] around the coast of the UK. The term "enforcement officer" covers a number of different functions and it seems necessary for the rest of this thesis to see in what role and with which powers an officer may confront owner, master and crew.

I will discuss the term "enforcement officer" and the roles covered by that expression before I address the enforcement process. It is important to understand the different roles and powers of the officers in the context of prosecutions[6] and detentions[7] in order to

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[1] It would appear that by contrast with, for example, the Environment Agency (for which the Environment Act 1995, s. 2(1)(a)(ii) defines its principal aim) there is no specifically defined statutory role for the MCA. The definition of the MCA's powers and that of its officers would seem to follow from the MSA 1995, particularly s. 292(1). That section entitles the Secretary of State to execute the provisions of the MSA 1995. As a result of the apparent lack of any statutory definition of the role of the MCA I have resorted to the MCA's own view as to what its tasks are. However, in the Merchant Shipping (Port State Control) Regulations 1995, SI 1995 No. 3128, reg. 4(1), the MCA is identified as the "designated competent authority for the United Kingdom for the purpose of the Council Directive".
[2] See MCA website "www.mcga.gov.uk" (4 April 2006).
[3] www.mcga.gov.uk /Careers/About Us/Agency Structure/Operations/Enforcement (4 April 2006); similar on the most recent website http://www.mcga.gov.uk/c4mca/mcga07-home/aboutus/contact07/mcga-businessdirectory/mcga-contacts-and-roles-2.htm (17 July 2008).
[4] Information provided by the Head of the EnU, Annex 16, question 2.
[5] As of 19 December 2008, see http://www.mcga.gov.uk/c4mca/mcga07-home/aboutus/contact07/marineoffices.htm.
[6] For prosecutions see below, Chapter 9.
[7] For detentions see below, Chapter 5 *et seq.*

analyse whether or not the functions are always carried out in accordance with the rule of law.

2.2. Enforcement officers

The different categories of enforcement officers are addressed in s. 256 of the MSA 1995.[8] The term "enforcement officer" is used as a subtitle to the heading of Part X[9] of the MSA 1995, and the only sections covered under this subtitle are ss. 256 and 256A.[10] The term appears not to be used again anywhere in the MSA 1995 and is also not defined in s. 313.

Section 256 restates s. 724 and s. 728 of the MSA 1894.[11] The term "enforcement officer" was, however, not known in the 1894 Act. That Act did not use that term but instead the word "enforcing" in a subheading of Part XIV for s. 723 "Powers for enforcing Compliance with Act".[12] Section 723 is in the MSA 1995 restated in s. 257. However, s. 257 does not have any reference to enforcement in its subheading[13] which covers ss. 257 through to 260. These sections deal with the powers held by the different enforcement officers. Section 256 therefore seems to clarify who can be considered an "enforcement officer". These persons are Inspectors,[14] "Inspectors" for the purpose of ss. 261 to 266,[15] "Surveyors" of ships,[16] "Departmental Inspectors",[17] and "Departmental Officers".[18] It would appear to follow that all activities undertaken by these officers in performing their functions would be covered by the term "enforcement".

The number of different officers and their relevant titles does not make it easy for a reader of the MSA 1995 to get an understanding of the role and powers of the different officers. The lack of clarity and the additional allocation of powers through statutory instruments[19] leave a confusing array of complex inspection and power arrangements.

I will discuss the different enforcement officers in turn beginning with Inspectors.

Inspectors can either be appointed under s. 256(1) or under s. 256(6). The former are also called "Departmental Inspectors".[20] The only officers in the MCA who are appointed as "Departmental Inspectors" are officers of the Enforcement Unit.[21]

2.2.1. Departmental Inspector

The purpose of a "Departmental Inspector" is to report to the Secretary of State

> "(a) upon the nature and causes of any accident or damage which any ship has or is alleged to have sustained or caused;
> (b) whether any requirements, restrictions or prohibitions imposed by or under this Act have been complied with or (as the case may be) contravened;

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[8] For a Port State Control Officer, who is not mentioned in s. 256, see below, Chapter 6.2.
[9] MSA 1995, Part X, Enforcement Officers and Powers.
[10] Section 256A covers Scottish officers.
[11] N Phillips, N Craig, *Merchant Shipping Act 1995, an Annotated Guide,* 2nd ed., 2001, p. 243.
[12] MSA 1894, s. 723. The MSA 1894 also uses the term "enforcing" when addressing a detention, s. 692.
[13] Which is "Inspection etc powers".
[14] Section 256(1). All sections of any Act referred to hereafter in this Chapter are those of the MSA 1995 unless specified otherwise. "Section 256(1) Inspectors" hold wider powers than those appointed under s. 256(6), see s. 256(9)(a) in connection with s. 259(1)(b) and the discussion of powers below.
[15] Section 256(6) with the powers to issue improvement and prohibition notices.
[16] Section 256(2).
[17] Section 256(9)(a).
[18] Section 256(9)(c).
[19] See, for example, the Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, SI 1998 No. 1561, reg. 16(3) or the Merchant Shipping (Port State Control) Regulations 1995, SI 1995 No. 3128, reg. 14(1) which will be discussed in Chapter 6 *et seq*.
[20] Section 256(9)(a).
[21] MEM, chapter 2, s. 1.1.3. MAIB Inspectors would also appear to be Departmental Inspectors, see s. 267(8).

(c) whether the hull and machinery of a ship are sufficient and in good condition;
(d) what measures have been taken to prevent the escape of oil or mixtures containing oil."[22]

A "Departmental Inspector" holds extensive powers when he[23] is performing his functions.[24] Amongst others he

"(a) may at any reasonable time (or, in a situation which in his opinion is or may be dangerous, at any time)—
(i) enter any premises , or
(ii) board any ship,
if he has reason to believe that it is necessary for him to do so;

…

(c) may make such examination and investigation as he considers necessary;

…

(e) may take such measurements and photographs and make such recordings as he considers necessary for the purpose of any examination or investigation under paragraph (c) above;

(f) may take samples of any articles or substances found in the premises or ship and of the atmosphere in or in the vicinity of the premises or ship;

(g) may, in the case of any article or substance which he finds in the premises or ship and which appears to him to have caused or to be likely to cause danger to health or safety, cause it to be dismantled or subjected to any process or test (but not so as to damage or destroy it unless that is in the circumstances necessary);

…

(i) may require any person who he has reasonable cause to believe is able to give any information relevant to any examination or investigation under paragraph (c) above—
(i) to attend at a place and time specified by the Inspector, and
(ii) to answer (in the absence of persons other than any persons whom the Inspector may allow to be present and a person nominated to be present by the person on whom the requirement is imposed) such questions as the Inspector thinks fit to ask, and
(iii) to sign a declaration of the truth of his answers.

(j) may require the production of, and inspect and take copies of or of any entry in,—
(i) any books or documents which by virtue of any provision of this Act are required to be kept; and
(ii) any other books or documents which he considers it necessary for him to see for the purposes of any examination or investigation under paragraph (c) above.

…"[25]

The powers give a "Departmental Inspector" full discretion as to whether he wants to board a ship at any reasonable time provided there is a ground which makes him believe that it is necessary for him to go on board.[26] The term "reasonable time" is not defined.[27] It would appear that the time is reasonable when it falls within normal office hours[28] as the Inspector is explicitly entitled to enter at any time when he is of the opinion that the situation might be dangerous.[29] On board he can examine and investigate[30] as he sees fit.

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[22] Section 256(1).
[23] The use of the male personal pronoun is in no way meant to negate the fact that male as well as female Inspectors and masters are subject to the same legislation and procedures. However, for reasons of consistency I chose to use the male personal pronoun as most of the merchant shipping legislation is written using the male version only, e.g. MSA 1995, s. 131(1)(a) – "unless he proves". See also the Interpretation Act 1978, s. 6(a) "words importing the masculine gender include the feminine".
[24] Section 259(1) tailpiece. The functions appear to be those listed in s. 256(1).
[25] Section 259(2).
[26] But his discretion must be applied reasonably and proportionately. See, e.g., below the discussions in Chapters 5.2.3 and 6.7.2.
[27] A similar provision can be found in HSWA 1974, s. 20(2)(a) where the term is also not defined.
[28] See also *Small v. Bickley* (1875) 40 JP 119, where it was held that a Sunday afternoon might in some circumstances be a time for an Inspector of nuisances to visit a butcher shop.
[29] Section 259(2)(a).
[30] Which appears to also mean "inspect", see *R (on the application of London Borough of Wandsworth) v. South Western Magistrates Court* [2003] EWHC 1158 (Admin), para. 26.

He may undertake all the activities listed in s. 259[31] and may also interview any person and require them to sign a declaration of the truth of their answers.[32] He can also demand the production of any book or document on board and take copies of them.[33]

> "A Departmental Inspectors [sic] power to inspect documents extends beyond ships statutory documents to any document with or without reasonable suspicion that a discrepancy may exist. A Departmental Inspector is also entitled to take copies of any document he examines."[34]

However, a person cannot be forced by a Departmental Inspector under s. 259 to produce a document which that person would not have to produce on grounds of legal professional privilege.[35]

A Departmental Inspector (an Inspector appointed under s. 256(1)) also carries the powers of an Inspector appointed under s. 256(6).[36]

2.2.2. Inspector appointed under s. 256(6)

An Inspector appointed under s. 256(6) wields the same powers as a "Departmental Inspector" provided he is performing his functions. The functions of these Inspectors seem only to concern the purpose of ss. 261 to 266 (serving improvement or prohibition notices),[37] which is a purely administrative enforcement function.[38] It appears to follow that outside of these purposes such an Inspector does not hold the powers listed in s. 259(2). It would also be rather odd if either of the two types of Inspector would hold the same powers at all times, as under those circumstances there would be no need for a differentiation between them. If the powers were the same, but only the purpose was different, only one type of Inspector might well have sufficed for both the purposes under s. 256(1) and those under s. 256(6).

In comparison it seems, therefore, that an Inspector appointed under s. 256(1) holds wider powers than an Inspector appointed under s. 256(6). It would appear to follow that powers conferred on such an Inspector do not include the right to enter any premises in the UK.[39] Nor does a "s.256(6) Inspector" have the express right to take samples,[40] or have such questions answered as he thinks fit[41] - other than by the master to give any explanation concerning the ship or her crew within the restriction of s. 257(2)(d).[42] A "s. 256(6) Inspector" is also not expressly authorised to take copies of any document or book,[43] other than from official logbooks or other such documents.[44]

2.2.3. Surveyor

A Surveyor of ships[45] is considered to be a "Departmental Inspector" for scenarios covered by paragraphs (b) and (d) of s. 256(1) in relation to oil pollution.[46] It would appear

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[31] E.g. take samples, measurements and photographs, see s. 259(2)(e) and (f).
[32] Section 259(2)(i)(iii).
[33] Section 259(2)(j).
[34] MEM, chapter 2, s. 1.2.5.
[35] Section 260(2). See below, Chapter 3, the discussion on evidence and human rights.
[36] Section 256(7).
[37] Or as the MEM, chapter 2, s. 1.1.5, phrases it: "An Inspector carries the powers of a Departmental Inspector ONLY whilst engaged in this [for the purpose of ss. 261-266] activity".
[38] According to Hawkins, *Law As Last Resort,* p. 171, "A notice [improvement or prohibition] essentially represents a private enforcement transaction between the Inspector and the employer, but prosecution is a public matter with a correspondingly wider potential impact".
[39] See s. 259(1)(a).
[40] Section 259(2)(f).
[41] Section 259(2)(i).
[42] See also below, Chapter 3.2.2. and 4.2.6. *et seq*.
[43] Section 259(2)(j).
[44] Within the restriction of s. 257(2)(b).
[45] Hereafter called "Surveyor".
[46] Section 256(8).

that a Surveyor holds the powers of s. 259(2) in any case where a discharge from a ship which would fall under one of the relevant sections[47] would have to be investigated. A Surveyor also holds the powers of a "Departmental Inspector" when auditing a Safety Management System in a company or on board a ship.[48] It seems to follow that a Surveyor is not tasked to report upon the nature and causes of any accident or damage which any ship has or is alleged to have sustained or caused;[49] whether requirements of the MSA 1995 (other than in relation to oil pollution) have been complied with;[50] whether the hull and machinery of a ship is sufficient and in good condition;[51] or what measures have been taken to prevent the escape of any other liquid but oil or oily mixtures.[52] However, in s. 258 a Surveyor is empowered for the purposes of seeing that the merchant shipping provisions are complied with to inspect a ship and its equipment.[53] But it would appear that he is distinguished from a "Departmental Inspector" when visiting a ship[54] in that he does not hold the powers provided for under s. 259(2). Instead, a Surveyor is restricted to inspecting the ship and its equipment in accordance with s. 258(1).[55]

A Surveyor would appear to normally wear three, but may even wear four, different hats.[56] Apart from being appointed as a Surveyor he is usually[57] also appointed as an Inspector under s. 256(6)[58] which entitles him to serve improvement[59] and prohibition notices.[60] In addition Surveyors as a rule are PSC Inspectors provided they satisfy the relevant criteria.[61]

A Surveyor seems to be subject to similar limitations of his powers as a "s. 256(6) Inspector". He does not have the right to enter any premises in the UK,[62] but unlike such an Inspector, a Surveyor may do so in accordance with s. 258(4) when he has reasonable grounds for believing that provisions and water are stored for use on UK ships and that these provisions or water do not conform to safety regulations. Like a "s. 256(6) Inspector"

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[47] MSA 1995, Part VI, Chapter II.

[48] The Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, SI 1998 No. 1561, hereafter "ISM Regulations", reg. 16(3). This is a rather odd, and probably constitutionally incorrect, way of increasing the legal powers of Surveyors as it means that primary legislation (the MSA 1995) has been amended by secondary legislation (ISM Regulations). The Secretary of State does, however, only have the power under the MSA 1995, s. 85, to make safety regulations. Section 85 does not provide for an amendment of the MSA 1995. Section 86(2) does similarly not permit modifications of the MSA 1995 but is restricted to the 1894 to 1977 Acts. It would appear, therefore, that the Government has acted *ultra vires* when making reg. 16(3) of the ISM Regulations. Against this may be held the view that the ISM Regulations are subject to Parliamentary supervision (see C Turpin/A Tomkins, *British Government and the Constitution,* 2007, p. 448) which may justify such a legislative measure in a statutory instrument regulating health and safety. This view would, however, disregard that an SI under s. 85 is according to s. 86(5) subject to annulment by Parliament. "It can only be approved, annulled or withdrawn. Since the prospect of success in persuading the government to withdraw the SI, let alone to defeat it in a vote, is remote, a debate is exceedingly rare", M Zander, *The Law-Making Process,* 2004, p. 110. The ISM Regulations were laid before Parliament on 29 June 1998 but appear not to have been discussed, see *Hansard*, General Index for the Session 1997-98, Vol. 320.

[49] Section 256(1)(a).

[50] Section 256(1)(b).

[51] Section 256(1)(c).

[52] Section 256(1)(d). The discharge of any other substance than oil is not regulated in MSA 1995, see below, Chapter 12.

[53] Section 258(1).

[54] In accordance with s. 258(1)(a).

[55] See below Chapter 2.4. for the discussion of "inspection".

[56] See above, fn 47 (The Merchant Shipping (International) According to reg. 34 (3) of the Merchant Shipping (Prevention of Oil Pollution) Regulations 1996, SI 1996 No. 2154, a Surveyor acting as an Inspector under reg. 34 shall also have the powers of a Departmental Inspector.

[57] "Marine Office Surveyors are appointed under 256(6) at the request of their line management. In general MS1s [main grade Surveyors] have such appointments and others as necessary due to remote or lone working", Head of the EnU, Annex 16, question 4.

[58] *Ibid.*

[59] Section 261.

[60] Section 262.

[61] According to the Merchant Shipping (Port State Control) Regulations 1995, hereafter "PSC" or "Port State Control Regulations", reg. 14(1), Inspectors have to meet the criteria of MSN 1775, Annex VII. The central criterion is that a PSC Inspector must, as a minimum, have served one year as a flag State Inspector, see MSN 1775, Annex VII, para. 2. For the discussion on port state control and the role and powers of a PSC Inspector see below, Chapter 6.

[62] See s. 259(1)(a).

he does not hold any of the powers of a "Departmental Inspector" as enumerated in s. 259(2).

2.2.4. Departmental Officer

A "Departmental Officer" is any officer of the Secretary of State discharging functions of his for the purposes of MSA 1995.[63] It would appear that the term "any officer" includes any of the aforesaid officers in the service of the Secretary of State. This would seem to mean "Inspectors",[64] and "Surveyors" but also "PSC Inspectors" and "Inspectors of Marine Accidents".[65]

The MCA, however, seems to distinguish clearly between "Departmental Officer", "Inspector" and "Surveyor".

> "An officer who routinely inspects ships can be appointed under section 258(1)(c) for the purposes of inspecting ships and equipment. To avoid confusion with Surveyors or Inspectors such officers are described as Departmental Officers. A Departmental Officer's powers are drawn from section 257 and 258(1) of the Act."[66]

This appears not to be completely correct. Section 258(1)(c) does not seem to be a section under which an enforcement officer can be appointed by the Secretary of State. The wording of that section does not suggest that it gives the Secretary of State any power to appoint a person to a particular function but rather clarifies the powers that are attached to these functions. This latter interpretation would appear to be in line with the chapter sub-headings of the MSA 1995 under which s. 258 is covered by "Inspection etc. powers" as opposed to "Enforcement officers".[67]

> "Powers to inspect ships and their equipment etc.
>
> 258(1) For the purposes of seeing that the provisions of this Act other than sections 131 to 141 and sections 143 to 151 and the provisions of regulations and rules made under this Act (other than those sections) are complied with or that the terms of any approval, licence, consent, direction or exemption given by virtue of such regulations are duly complied with, the following persons, namely—
>
> (a) a Surveyor of ships,
> (b) a superintendent,
> (c) any person appointed by the Secretary of State, either generally or in a particular case, to exercise powers under this section,
>
> may at all reasonable times go on board a ship in the United Kingdom or in United Kingdom waters and inspect the ship and its equipment or any part thereof, any articles on board and any document carried in the ship in pursuance of this Act or in pursuance of regulations or rules under this Act."[68]

This section, in accordance with its heading, seems to define who may at all reasonable times go on board to inspect but not who can be appointed for that purpose. Persons permitted to go on board ships and inspect them are Surveyors, superintendents and persons appointed by the Secretary of State. This suggests that the appointment has to predate the time at which a person who is entitled to do so goes on board for the inspection purposes of s. 258(1).

Appointment of enforcement officers is dealt with in s. 256. Section 256(9)(c) makes particular reference to "Departmental Officers" without any reference to them having to be appointed. It is submitted that if they needed to be appointed such an appointment would have been addressed in s. 256(9)(c). Instead it appears that the term "Departmental

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[63] Section 256(9)(c).
[64] Both, those appointed under s. 256(1) and those appointed under s. 256(6).
[65] See below Chapter 2.2.5.
[66] MEM, chapter 2, s. 1.1.6.
[67] Chapter sub-heading for s. 256. The MSA 1970 carried the chapter sub-heading "Inspections" for s. 76 from which s. 258 is derived.
[68] Section 258.

Officer" is the generic term for any officer appointed under s. 256, as otherwise the general reference to "any officer of the Secretary of State" in s. 256(9)(c) would be difficult to understand. As regards s. 258, both Surveyors and Inspectors are officers[69] and both are discharging functions of the Secretary of State under the MSA 1995. This view seems to also be supported by s. 95(5) according to which a "relevant Inspector"[70] includes a Surveyor, a superintendent and any person appointed by the Secretary of State.[71] It follows, in my view, that when reference is made in the MSA 1995 to a "Departmental Officer" it always includes Surveyors and Inspectors.

"Departmental Officers" derive additional powers from s. 257(1)(a) whenever they have reason to suspect that the MSA 1995 or "any law"[72] in place relating to seamen or navigation is not complied with.[73]

> "(2) Those powers are—
>
> (a) to require the owner, master, or any of the crew to produce any official log-books or other documents relating to the crew or any member of the crew in their possession or control;
>
> (b) to require the master to produce a list of all persons on board his ship, and take copies of or extracts from the official log-books or other such documents;
>
> (c) to muster the crew; and
>
> (d) to require the master to appear and give any explanation concerning the ship or her crew or the official log-books or documents produced or required to be produced."[74]

Before the "Departmental Officer" can use his powers he has to have reason to suspect[75] that either "this Act or any law for the time being in force relating to merchant seamen or navigation is not complied with".[76] Even though the text does not make it completely clear what exactly is meant by "any law", it, in my opinion, certainly includes the merchant shipping regulations and will otherwise be law other than that made under the MSA 1995.[77]

Compared to s. 259(2) these powers appear to be rather restricted. For example, there is no mention of the right to take photographs, measurements[78] or samples,[79] and the officer only has the right to question the master, but apparently no other member of the crew.[80] The power to require the master to sign a declaration of the truth of his answers[81] is also not provided to the Departmental Officer.

Furthermore, the right of a "Departmental Officer" is not expressly extended to documents other than those mentioned in s. 257,[82] and thus appears, for example, not to entitle, a

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[69] See first subtitle of Part X of MSA 1995: "Enforcement Officers".
[70] Who has the powers to detain a dangerously unsafe ship, see s. 95(1).
[71] Section 258(1)(a) to (c).
[72] Section 257(1) tailpiece.
[73] *Ibid.*
[74] Section 257(2).
[75] It would appear that "reason to suspect" has a similar meaning as "reason to believe" (see as a guiding judgment *Cedeno v. O'Brien* (1964) 7 WIR 192, p. 196). Following on from there would suggest that a reason must actually exist before a believe or suspicion can be developed, see the Privy Council in *Nakkuda Ali v. M. F. de S. Jayaratne* [1951] AC 66, p. 77, and also the Court of Appeal in *R v. Douglas Percy Harrison, Percy Harry Horace Ward, Stanley John Wallis, Ronald Charles Samuel Gooding* (1938) 26 Cr. App. R. 166, p. 168. In the latter case it was held that "'had reasonable cause to believe' means 'had reasonable cause to believe, and did in fact believe'", p. 168.
[76] Section 257(1) tailpiece. Section 723 of the MSA 1894, which the current section replaces, used a comma after both "Act" and "navigation". In doing so it was undoubtedly clear that "this Act" was not subject to the provision "relating to merchant seamen or navigation". However, I do not doubt that the same result was envisaged with the current wording. See also the discussion below in Chapter 3.2.4.
[77] According to MSA 1995, s. 85(1) the Secretary of State may make those safety regulations as he considers appropriate. Examples of legislation falling under the term "any law" would be the Pilotage Act 1987 or the Railways and Transport Act 2003.
[78] Section 259(2)(e).
[79] Section 259(2)(f).
[80] Section 259(2)(i) empowers the officer to question any person and require them to sign a declaration of the truth of their answers.
[81] As provided for in s. 259(2)(i)(iii).
[82] And logbooks or other documents relating to the crew referred to in s. 257(2).

Surveyor when inspecting a ship to view all documents a "Departmental Inspector" is permitted to examine.

It would appear that "the official logbook or other such documents"[83] refers to documents carried in pursuance of statutory requirements.[84] This would, for example, comprise all documents required for the certification of ship and crew and any other papers carried on board required by any of the merchant shipping regulations issued under the Act. A Surveyor would appear not to be entitled to require production of any other documentation.

2.2.5. Inspector of Marine Accidents

For purposes of illustration I will briefly refer to the powers of "Inspectors of marine accidents".[85] In comparison to "Departmental Officers", an "Inspector of marine accidents" has the powers as conferred on a "Departmental Inspector".[86] It would appear, though, that the MAIB Inspector is not himself a Departmental Inspector but only has his powers conferred on him. The MAIB Inspector, however, cannot use his powers to ensure compliance with merchant shipping legislation. The sole objective of any MAIB investigation is to investigate an accident for the prevention of future accidents through the ascertainment of its causes and circumstances.[87] It would also seem that the restriction under the MSA 1995, s. 259(12) does not apply to an MAIB Inspector. An answer given to an MAIB Inspector under compulsion in accordance with s. 259(2)(i) would therefore not seem to be automatically excluded from evidence.[88]

Still, MAIB Inspectors have significantly extended powers compared to Surveyors whose task it is to enforce compliance with merchant shipping legislation.

2.2.6. Other enforcement agencies

Enforcement agencies, other than the MCA, which have jurisdiction in matters affecting merchant shipping are, for example, the police, the Environment Agency and the Health and Safety Executive (HSE), HM Revenue and Customs, and harbour authorities. As none of them has direct jurisdiction over the implementation of merchant shipping legislation I will only comment on these agencies where an overlapping jurisdiction appears to exist.[89]

2.2.7. Summary

It is not quite clear why such a confusing array of officers of the Secretary of State still exists in contemporary merchant shipping law. A revision of the different functions including their tasks and powers would appear to be helpful. Such a revision serves the clarity and certainty of the law particularly in light of developments in port state control, accident investigation and human rights law. It would appear to be impossible for a master, certainly a master who does not have a UK certificate of competency, to understand who he is confronted with, what the powers of that officer are, and what

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[83] Section 257(2)(b).
[84] An official logbook has to be kept in every UK ship, see s. 77(1).
[85] Section 267(1). These Inspectors work for the MAIB. The MAIB is dealt with in more detail in Chapter 4.
[86] Section 267(8).
[87] The Merchant Shipping (Accident Reporting and Investigation) Regulations 2005, SI 2005 No. 881, hereafter "2005 MAIB Regulations", reg. 5(1).
[88] See the discussion below, Chapter 4.2. *et seq*.
[89] See, for example, police: Chapters 4.2. and 9.3.; Environment Agency: Chapter 12.1.; HSE: Chapters 2.5., but an interface or overlap with HSE responsibilities exists, for example, in the offshore industry, where ships provide access to and host land based employees (e.g. stevedores, ship agents and servicing firms) and on inland waterways, see Chapter 4.2.10.; harbour authority: Chapter 12.2.1.

information he has to provide not to get himself into trouble. It seems that a revision of the law, therefore, ought to clarify particularly function and powers of the relevant officer.

In particular there would not appear any longer to be a need for both a Departmental Officer[90] and a "s. 256(6) Inspector". Clarification of the overlap between Surveyor and Departmental Inspector, and a clear definition of their respective tasks, would also appear to be beneficial for both the relevant officer and the owner or master confronted with him.

In the following table I will briefly address the different functions and powers of the currently relevant officers and the law these powers are derived from. For clarification purposes and to allow a comparison I also include the MAIB, and the port state control, Inspector.

Table 1: Functions and Powers of Departmental Officers

Officer	Function	Powers	Law
Departmental Inspector	Investigate and prosecute	Ask any question	MSA, s. 259
Inspector	Improvement or prohibition	Serve a notice	MSA, ss. 261, 262
Surveyor	Survey and inspect	Any ship in UK	MSA, ss. 257, 258, 259
Departmental Officer	Depends on original role	Depends on original role but certainly inspect log-books and muster crew	In any case MSA, s. 257
MAIB Inspector	Investigate only	MSA s. 259, ask any question	MSA, s. 267
PSC Inspector	PSC on non-British ships	Inspect practically everything on board if he has "clear grounds"	PSC Regs, reg. 6[91]

The second table shows actual and possible overlaps between the different officers' roles including, again, the PSC Inspector.[92]

[90] This would particularly seem to be the case after the Departmental Officer was replaced by "(b) any officer of a Minister of the Crown or Northern Ireland department who is authorised by the Secretary of State, either generally or in a particular case, to exercise powers under this section," in the Merchant Shipping and Maritime Security Act 1997, Schedule 1, para. 5(2)(b). This would seem to mean that as of that change there was no particular role left for a Departmental Officer. His function under s. 257 can also be, and is practically, carried out by a Surveyor.

[91] This would appear to be a long chain starting with the PSC Regulations, reg. 6(4) which refers to MSN 1775 Annex IV (Merchant Shipping Notice – as to the character of an MSN see the discussion in Chapter 6.4.3.). That Annex refers in para. 4 to the Paris MoU, Annex 1, on "Port State Control Procedures" (for the Paris MoU see below Chapter 6.4.1.). Section 5 of that Annex provides that the PSC Inspector, when carrying out a "more detailed inspection" after having established "clear grounds", can practically look at everything on board of that ship which is of relevance to health, safety and the environment.

[92] The latter's role and powers will be discussed below under Chapter 6.2.

Table 2: Departmental and Enforcement Officers

Officer	DI	I	S	DO	MAIB	PSC	appointed under
DI	NA	X	X	V	X	X	MSA 1995, s. 256(1)
I	-	NA	X	V	-	X	MSA 1995, s. 256(6)
S	X	X	NA	V	-	X	MSA 1995, s. 256(2)
DO	X	X	X	NA	X	X	referred to in MSA 1995, s. 256(9)(c)
MAIB	V	-	-	V	NA	-	MSA 1995, s. 267(1)
PSC	X	X	X	V	-	NA	PSC Regulations, reg. 14(1) or 2(2)?[93]

DI	Departmental Inspector	NA	not applicable
I	Inspector	V	is also
S	Surveyor	X	can also be (or is also)
DO	Departmental Officer	-	is not
MAIB	Inspector of Marine Accidents		
PSC	PSC Inspector		

A master of a ship may be confronted with any "Departmental Officer" including, on a foreign flagged ship, a PSC Inspector, for the purpose of enforcing merchant shipping legislation. It appears therefore to be important to understand the enforcement procedure which I will discuss in the following subsection.[94]

2.3. Enforcement procedure

The MCA's role as the State's maritime safety authority includes the promotion of "safety of lives and ships at sea".[95] The MCA sees itself as working "to prevent the loss of lives at the coast and at sea, to ensure that ships are safe, and to prevent coastal pollution".[96] This role is, amongst others,[97] fulfilled by Surveyors carrying out surveys and inspections aimed at ensuring compliance of ships with merchant shipping legislation. Breach of such legislation by owner or master is usually punishable and makes both owner and master liable to prosecution.[98] Surveys and inspections are carried out by Surveyors and thus by default they are also the officers to initially identify a violation of the law during any inspection or survey.

As well as findings about possible breaches of merchant shipping legislation made by their own staff (e.g. Surveyors or Coastguard Officers) such information also reaches the MCA through reports by third parties. In addition, but only to a limited extent,[99] mandatory reports by owners or masters about accidents or defects on board a ship[100] will also serve to deliver such information. But few of these reports will hardly ever focus on culpability of

[93] It does not appear to be clear under what legislation a PSC Inspector is appointed. In the UK such Inspectors are usually also Surveyors and "s. 256(6) Inspectors". However, this does not seem to be a requirement under port state control law, and it would appear that some other European countries (e.g. Germany) employ dedicated port state control officers who are not also Surveyors working for the flag State. The PSC Regulations, reg. 2(2) stipulate that "'Inspector' means a person duly authorised by the Secretary of State to carry out inspections required by these Regulations". It will probably suffice if the Inspector has been issued with an official document stating that he is a PSC Inspector.
[94] PSC Inspectors are dealt with below in Chapter 6.2.
[95] Indirectly per Lord Steyn who described the role of a classification society as fulfilling such a role "which in its absence would have to be fulfilled by states", *The Nicholas H* [1995] 2 Lloyd's Rep. 299, p. 316.
[96] MCA website, "about us", 6 June 2008.
[97] Reference is made to the Coastguard arm of the MCA.
[98] See, for example, the Merchant Shipping (Survey and Certification) Regulations 1995, SI 1995 No. 1210, hereafter "Survey and Certification Regulations", reg. 24(1), according to which the owner and master of "a ship to which these regulations apply proceeds or attempts to proceed to sea or on a voyage or excursion without complying with the requirements of regulations 4 to 7 of these regulations,… shall each be guilty of an offence…".
[99] Out of 20 responses (see Annex 15, question 11) by Surveyors 12 confirmed that ships or owners report defects. One Surveyor said that "some" report defects, another answered with a qualified "yes, but not the serious ones" and "yes, but late". Three answers stated that they have not experienced the report to the MCA of any defects (see, for example, no. 14 "You are having a laugh"). Two Surveyors gave a qualified "no" (very few, with exception).
[100] See Survey and Certification Regulations, reg. 8(1)(c)(i).

the master unless he wants to incriminate himself, and unreported defects will usually only come to the attention of the MCA when a survey or an inspection is carried out.

For ships in UK waters or ports this information will initially usually trigger an investigation (or rather "fact finding mission" as it is called internally)[101] by one of the Surveyors based in Marine Offices around the country as opposed to one of the four Departmental Inspectors in the Enforcement Unit.[102]

The internal MCA procedures[103] define the role of a Surveyor for enforcement purposes as having

> "to consider reports of alleged breaches of Merchant Shipping legislation. To determine whether the report satisfies the definition of "significant breach",[104] and should therefore be submitted to the Enforcement Unit for further investigation and action as appropriate."[105]

Under paragraph three the procedure "MCA 300" repeats the definition of "significant breach" given in the MCA's Marine Enforcement Manual (MEM)[106] that

> "A Significant Breach [sic] of safety and environmental aspects of Merchant Shipping Legislation is defined as:
>
> A contravention of Merchant Shipping or MARPOL legislation which could, or has caused, loss of life, serious injury, significant pollution or damage to property or the environment."[107]

The concept of a "significant breach" appears to require the application of discretion by the relevant MCA Surveyor and/or the EnU officer before a breach of merchant shipping legislation will reach the status of an investigation by the EnU.[108] This would seem to be in conflict with the concept of strict liability[109] but is, on the other hand, nothing but a pragmatic approach to deal with relatively minor breaches.[110]

UK flagged ships in foreign ports are usually not subject to UK flag State inspections.[111] It is a standard procedure, though, that surveys for ship certification purposes are carried

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[101] According to a leaflet issued to Surveyors by the Enforcement Unit at the end of 2007, see Annex 17.
[102] The Marine Enforcement Manual (MEM) in addressing the triggers for enforcement unit involvement appears to automatically assume that it is a Surveyor who will initially investigate the incident, see, for example, MEM, chapter 1, s. 2 et seq. "If it is not clear from the initial report that a "significant breach" is likely to have occurred, then the local MO will do an initial fact finding investigation to establish whether the matter should be referred to the Enforcement Unit", Head of the EnU, Annex 16, question 11.
[103] In the internal document numbered "MCA 300" - Procedure for Enforcement Action - (this document has been archived and its information is now, since July 2006, according to a note attached to the archived document, incorporated into the MEM, chapters 1 and 2; I have continued to refer to MCA 300 as it was the relevant document together with the MEM during the period I have investigated). The MSA 1995 only refers to a Surveyor in that he may be appointed by the Secretary of State for the purposes of the Act, s. 256(2).
[104] A "significant breach" is not defined in the MSA 1995 but is a policy definition by the MCA. "Its original form was devised by my predecessor, I have refined it slightly. It was developed to ensure that the work load of the unit could be managed and that only appropriate cases were dealt with according to enforcement unit procedures, and other breaches were rightly dealt with locally by the Marine Office staff", Head of the EnU, Annex 16, question 5.
[105] MCA 300 (Procedure for Enforcement Action), para. 4.1.
[106] MEM, chapter 1, s. 1.1. I have used the version which was in force as of July 2004. I did not have access to the version prior to that. I have indicated where I used the version in force since September 2007. The MEM is not (yet; see also Chapter 9.4.5.) publicly available.
[107] MCA 300, para. 3. This definition is repeated in the leaflet for Surveyors which was issued at the end of 2007, see Annex 17. For examples of Surveyors' understanding of a significant breach see the questionnaires for Surveyors, Annex 15, question 10.
[108] See particularly also the discussion about the discretion to prosecute in Chapter 12.2.4.
[109] See the discussion about strict liability and breaches of merchant shipping legislation below, Chapter 9.5. *et seq.*
[110] See Chapter 2, fn 104.
[111] According to a Principal Surveyor in the MCA it is an unwritten policy of the MCA to have every ship under the UK flag seen at least twice in five years by an MCA Surveyor. For vessels which do not call at any UK port this is normally achieved by visiting the vessel for an ISM Safety Management Certificate audit. During this audit the vessel will also undergo a general inspection and a relevant report will usually be filled out. A Safety Management Certificate is usually valid for five years (ISM Regulations, reg. 9(2): "…valid for a period not exceeding five years."), and an intermediate audit of the Certificate has to be carried out between the second and third anniversary (ISM Regulations, reg. 14). Other than for particular surveys (see below) an "appropriate

out by MCA Surveyors abroad.[112] Whereas the MCA has to foot the bill for costs of inspections, surveys and related travel costs are paid for by the ship's owner.

Once on board the Surveyor will attempt to find out what happened, talk to the master and crew and collect evidence. The Surveyor ought to report to the EnU[113] when the breach is considered significant enough to be prosecuted by both the Surveyor and the Surveyor-in-Charge (SIC) of the relevant Marine Office. Both, Surveyor and SIC thereby have a "filter function"[114] and may judge (sometimes after consultation with more senior staff) that a possible offence is better dealt with on an administrative (or even informal) rather than on a criminal level.

When a report reaches the EnU the Principal Enforcement Officer has to consider the report and initiate appropriate follow up.[115] An Enforcement Officer will then be appointed

> "to investigate a 'significant breach', in accordance with established practise [sic] and relevant sections of PACE and PASP."[116]

The Enforcement Officer is required to investigate the circumstances of the case, interview witnesses, and conduct interviews with the suspect under caution.[117] Only at this stage would a master, who is a suspect, have to face a formal interview and be told that

> "you do not have to say anything, but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."[118]

In addition it will be pointed out to the master before the interview that he has the right to legal advice, to the presence of an observer at the interview, to leave the interview at any time and to consult the Police Codes of Practice.[119] A master will be told that any of these rights may be exercised at that time or later.[120]

The Surveyor who attended the ship initially will not have interviewed the master or any other suspect under caution or pointed out any of the rights of a suspect. But interviews with suspects and witnesses will usually have taken place on request of the Surveyor. The Surveyor will have inspected documents and where appropriate have asked for copies, taken photos, measurements and samples and made notes.[121]

At this stage the first filter for or against a possible prosecution is applied.

Certifying Authority" is not automatically authorised to carry out an ISM audit. Authorised persons are Surveyors and those authorised by the MCA (ISM Regulations, reg. 2(1)). An "appropriate Certifying Authority" is an organisation listed in the Survey and Certification Regulations, reg. 1(2).

[112] In case of a cargo ship it is usually the choice of the owner whether or not he wants the MCA or an "appropriate Certifying Authority" to carry out the survey (Survey and Certification Regulations, reg. 3(1)). But this does not apply to a safety equipment survey when the vessel is in UK waters which must be carried out by a MCA Surveyor (Survey and Certification Regulations, reg. 3(2)(b)(i)). Surveys of passenger ships, independent of their location, may be carried out by a Surveyor of a Certifying Authority subject to being authorised by the MCA (Survey and Certification Regulations, reg. 3(2)(c)). Ro-ro passenger ships always have to be surveyed by a Surveyor of the MCA (Survey and Certification Regulations, reg. 3(2)(b)(ii)).

[113] See Chapter 2, fn 103.

[114] I call this the second filter, see below in this sub-section.

[115] MCA 300, para. 4.3.1.

[116] *Ibid.*, para. 4.3.3. According to para. 5 the definitions for the two acronyms are "PACE - Reference to Code 'C' of the Police and Criminal Evidence Act 1984 Codes of Practice" and "PASP - Guidance for Surveyors. A practical approach to successful prosecutions".

[117] *Ibid.*, para. 4.4.

[118] MCA form "MSF 1624", para. 1, "Notice to Suspect".

[119] MSF 1624, para. 2(a).

[120] *ibid.*, para. 2(b).

[121] See Annex 15, questions 1 and 12.

A Surveyor will choose what to inspect[122] and who to talk to. He can in practice decide what to look for, or to turn a blind eye to certain breaches, and emphasize others. A lot will probably depend on the co-operation of the master and crew. Should the master decide to interpret narrowly the Surveyor's right of access to "inspect the ship and its equipment or any part thereof, any articles on board and any document carried in the ship",[123] or simply decide not to co-operate, a Surveyor's attitude towards the ship may change and he may feel more inclined to begin "searching" for defects.[124]

On board the master will at the end of the inspection be given a report on a standardised form.[125] Should the Surveyor want to suggest prosecution he will have to prepare back at the office a more detailed document for the EnU with all the collected evidence attached. However, a desire to prosecute appears to be rather rare.[126]

At this stage the second filter is applied which may save an owner, master or crew member from prosecution. The option of a prosecution, if not considered rather obvious as, for example, in cases of a violation of Rule 10 in the Dover Strait[127] will thus heavily depend on the outcome of the Surveyor's inspection, his recommendation, and the opinion formed by the SIC after reading the Surveyor's report.

In the following subsections I will discuss the objectives of an inspection and the powers of a Surveyor carrying out an inspection. This requires a clear understanding of the meaning of the term "inspection".

2.4. Inspection

Any inspection by a Surveyor/Inspector independent of how it was triggered usually has two main objectives.

First, the Surveyor is interested in establishing whether the ship is operated in accordance with merchant shipping legislation. When, in his opinion, a breach has occurred he will have to decide whether it is sufficient to issue a Report of Inspection[128] with a requirement to fix the defect within a given period of time.[129] Alternatively the Surveyor may decide, usually in co-operation with the SIC or a Principal Surveyor,[130] whether the ship should be

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[122] An inspection differs from a survey where a Surveyor will usually follow a checklist or an "aide memoire" to ensure that all required items are subject of the survey. Checklists exist in Marine Offices or as "aide memoires" on the MCA intranet (see as an example Annex 18 with the "aide memoire" (MSF 5506) for a passenger ship safety certificate renewal survey). It is the practice that these lists will be passed on to the relevant vessel prior to the survey so that steps can be taken to rectify defects before the Surveyor comes on board. Subjects of a survey are to a certain extent regulated by law, see Survey and Certification Regulations, regs. 4 *et seq.* in connection with MSN 1751. However, "aide memoires" also exist for port state control inspections but are usually not as closely followed as survey checklists.

[123] Section 258(1); see above, Chapter 2.2.

[124] 13 out of 20 Surveyors confirmed in one way or another that their attitude may change towards the ship as "it makes me think they have something to hide", Annex 15, question 5. Two Surveyors answered with a qualified yes (may be, become more suspicious), two answered with a qualified "no" (unless the Surveyor believes the ship has something to hide, lack of co-operation may lead to a defect being raised), and three Surveyors said that their attitude would not change, all Annex 15.

[125] See blank copy of form MSF 1602/1603 for UK flagged vessels and MSF 1600A+B and 1601A for foreign flagged vessels, Annex 19.

[126] A detention appears to be clearly favoured over a prosecution by all Surveyors because, as one of them put it, "detention will stop ship going to sea in unsafe condition and is relatively quick fix", Annex 15, answer 2.7. However, prosecution is not completely ruled out by some if drunkenness is involved, somebody is injured, it is a criminal act (without specifying what that would cover), or if there is a blatant disregard for safety, answers 2.1, 2.11, 2.14 and 2.16. This, again (see above Chapter 2, fn 108) would appear to be discretion applied on the level of the Surveyor. Evidence of a breach is there but the Surveyor does not consider the violation significant enough to be prosecuted.

[127] See also below Chapter 11.3.1.

[128] MCA form MSF 1602/1603 for UK flagged ships (see Annex 19). A "Report of Inspection" (MSF 1600/1601, Annex 19) has to be issued to the master whose ship was subject to a port state control inspection, the Port State Control Regulations", reg. 8.

[129] Usually before departure, at next port or within 14 days (see MSF 1603, Annex 19).

[130] See Annex 15, answers to question 4.

subject to other administrative enforcement measures such as an improvement or prohibition notice or a detention.[131] Recommending prosecution would appear – not only for UK, but also for foreign, flagged ships[132] – to be the last resort.[133]

Secondly, Surveyors, who usually work on their own, may want to collect evidence to back up their findings in case any enforcement measure (other than issuing an inspection report at the end of their visit) is contemplated by them.[134] Initially they will only take notes and the decision to begin collecting evidence will usually depend on the emerging findings during the inspection. The objective of an inspection, which is usually unannounced and different from a survey,[135] is not prosecution, but to establish or enforce by other means[136] that the ship complies with merchant shipping legislation and can be operated safely. What appears questionable in the context of an inspection, and particularly if a prosecution should follow, is whether collecting evidence is within the powers of Surveyors unless they obtain statements, documents or other pieces of evidence on a voluntary basis.

Consequently it seems to be important to clarify what the power of a Surveyor to "inspect the ship and its equipment"[137] entails, as any collected evidence, i.e. photos and copies taken and statements recorded in writing, may have a direct impact on prosecution proceedings and a possible trial. Powers are defined to a limited extent for an Inspector and a Departmental Officer, [138] and in more detail for a Departmental Inspector,[139] but it remains unclear what the powers to inspect the ship and its equipment authorise a Surveyor/Inspector actually to do.

The MSA 1995 does not define the exact meaning of the term "inspect" or "inspection". The word "inspect" is used differently in the s. 258(1) tailpiece from s. 259(2)(j) and s. 259(4), the only two occasions on which the term is used in s. 259.

Section 258(1) tailpiece does not qualify the word "inspect" but just lists a number of items which may be subject to an inspection, e.g. ship, equipment and any part thereof. Inspecting ship and equipment also includes inspecting "the familiarity of the crew with essential procedures and operations relating to the safety of the ship".[140]

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[131] *Ibid.*, answers to question 3.

[132] See above, that the general approach is to rather detain than to prosecute. A UK flagged ship could also be subject to the withdrawal of certification without which it would not be permitted to go to sea.

[133] Hawkins, *Law As Last Resort*, p. 17, with regard to the HSE, sees prosecution as the last resort in two ways: either because no alternative is realistically possible or because all other alternatives have been exhausted. See also below, the relationship between detentions and prosecutions. For example, one MCA Surveyor (number 10.4.) commented on question 10 of the Surveyor questionnaire, Q: "Under what conditions would you report to the enforcement unit with a view to a criminal investigation and possible prosecution?" A: "Where there has been a clear breach of MS legislation and/or where there has been a deliberate action that endangers life at sea or damages the environment this would lead to engaging enforcement unit. Where, for example, there has been a gradual decline in performance that leads to detention or where a person's lack of competence has lead to an incident then it becomes a matter of judgement as to whether prosecution would add any value to the process of improving safety or environmental protection."

[134] Nearly all Surveyors who responded to the questionnaire stated that they would want to gather evidence which, in most of the cases also consists of taking photos, copies and samples, see Annex 15, answers to question 12.

[135] A survey is a visit to the vessel ordered and paid for by the owner with the objective to issue or revalidate a vessel's certificate. In theory, a vessel which is presented for survey should have been prepared for it before the arrival of the Surveyor and should not cause the finding of defects. If, however, defects are found the Surveyor has to advise the owner or master of the corrective action which is required, Survey and Certification Regulations, reg. 9(1). Such advice is given by pointing out what is wrong on the MCA inspection forms and setting the time limit for rectification, see Annex 19.

[136] See Annex 15, answers to questions 2, 9 and 10. This becomes very obvious when considering that not even one of the 500 documented foreign ship detentions between 2001 and 2005 led to a prosecution for the detention grounds, see below Chapter 9.1.

[137] Section 258(1) tailpiece.

[138] Under ss. 256(6) and 257(1)(a) and (2).

[139] Section 256(8) in connection with s. 259(2).

[140] The Port State Control Regulations inserted this wording into s. 258(1), see PSC Regulations, reg. 20(2). This procedure (i.e. amending primary legislation by secondary legislation) appears to be constitutionally correct. Even though the Statutory Instruments Act 1946 only confers power on the Secretary of State to

Section 259(2)(j) appears to clarify the restrictive meaning of the term "inspection" by adding to the power to inspect the additional right to take copies. On the other hand s. 259(4) refers to the powers conferred by s.259(2) to inspect premises and includes any apparatus used for transferring oil. The wording suggests that this subsection has to be read as including the whole list of powers[141] given to a Departmental Inspector in s. 259(2) and not only the right to enter premises as it does not restrict subsection (4) to letter (a) of subsection (2). In this context the meaning of the word "inspect" would appear to include all activities listed in that subsection.

Because the word "inspect" appears to cover different activities each time it is used it follows that it is questionable whether a Surveyor's power to inspect would include any of the specific powers conferred on Departmental Inspectors[142] unless the Surveyor is acting as such an Inspector. For that reason it seems appropriate to determine the meaning of the word "inspection". To do this I will first look at the use of the term "inspection" in merchant shipping legislation, its use in common language and in health and safety law ashore, to be followed, for illustration purposes, by a short analyses of the use of "inspection" in commercial maritime cases.

2.4.1. Meaning of "inspection"

Merchant shipping regulations make use of the word "inspection" in some cases and two examples are used here.[143]

> "8(1) The employer shall ensure that, where the safety of work equipment depends on the installation conditions, it is inspected by a competent person—
>
> (a) after installation and before being put into service for the first time; or
>
> (b) after assembly at a new site or in a new location,
>
> to ensure that it has been installed correctly, in accordance with any manufacturer's instructions, and is both safe to operate and capable of operating safely."[144]

The second example is closely worded to the latter.

> "12(1) The employer shall ensure that, where the safety of lifting equipment depends on the installation conditions, it is inspected by a competent person —
>
> (a) after installation and before being put into service for the first time; or
>
> (b) after assembly at a new site or in a new location,
>
> to ensure that it has been installed correctly, in accordance with any manufacturer's instructions, and is both safe to operate and capable of operating safely."[145]

It would appear that in both these examples the focus is not on the powers of the person inspecting the gear but rather on the issue of ensuring that the gear is safe to use.[146] The

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create a statutory instrument (s. 1(1)(b)), the MSA 1995 appears to permit such amendment procedure within the limits set in s. 86(2)(a). That subsection allows modifications by Regulation of provisions of the MSAs 1894 to 1977 which are re-enacted in the MSA 1995. Section 258 of the MSA 1995 is a re-enactment of s. 70 of the MSA 1970 and would therefore seem to be subject to a modification by Regulation.

[141] Section 259(2)(a) through to (k).

[142] For the discussion of the term "Surveyor" and "Departmental Inspector" see above Chapter 2.2. and Tables 1 and 2 in Chapter 2.

[143] In my understanding these two examples represent fairly well how the term "inspect" is applied in MS legislation.

[144] The Merchant Shipping and Fishing Vessels (Provision and Use of Work Equipment) Regulations 2006, SI 2006 No. 2183 (hereafter " MS Use of Work Equipment Regulations"), reg. 8.

[145] The Merchant Shipping and Fishing Vessels (Lifting Operations and Lifting Equipment) Regulations 2006, SI 2006 No. 2184 (hereafter "Lifting Equipment Regulations"), reg. 12.

[146] The Code of Safe Working Practices for Merchant Seamen, which is guidance issued by the MCA, defines in para. 7.3 an inspection in the context of Use of Work Equipment as "In this context 'inspection' means the carrying out of such visual or more rigorous inspection by a competent person and may include testing where this is considered appropriate."

Regulations referred to above do not authorise a person to inspect an item which is under the control of another party but require the person using or being responsible for the operation of the equipment to ensure it is safe to operate. Strictly speaking, therefore, these examples do not shed any additional light on the meaning of "inspection" as used within the context of enforcement.

Inspections play a central role in the Port State Control Regulations.[147] The latter refer to an Inspector as the person "duly authorised by the Secretary of State".[148] An inspection as such is not defined other than in reg. 6 which addresses the inspection procedure. The activities reg. 6 stipulates are "to check the certificates",[149] "to satisfy himself of the overall condition of the ship",[150] to "examine all relevant certificates and documents",[151] the "further checking of compliance",[152] and to "observe the relevant procedures".[153] The requirements an Inspector is supposed to follow do not appear to suggest that he might be entitled to take any physical evidence such as copies, samples or even photos.

A definition can be found for a "more detailed inspection".[154] But this definition only refers to an "in-depth inspection" which appears to differ from an inspection in so far as more items and areas are to be inspected and that operational tests may be carried out.[155] It does not appear to widen the activities described under reg. 6.

The scope of the powers for an inspection under the PSC Regulations is not defined. But the port state control procedure is not necessarily the valid parameter for the determination of the meaning of inspection as the PSC Inspector is entitled to "take such actions as may be necessary to ensure that the ship is not clearly hazardous to safety, health and the environment".[156]

This would appear to suggest that photos, copies, samples or any other physical evidence may be taken or collected as long as it serves the objective of ensuring the safety of the vessel. Otherwise such activities are not addressed as part of the inspection procedure which would seem to suggest that the understanding of "inspect" does not cover such activities.

A common understanding of "inspect" appears to be to

> "view or examine closely and critically, esp. in order to assess quality or to check for shortcomings; *spec.* examine officially (documents, military personnel, etc.)".[157]

This definition also suggests that it does not automatically include other activities such as taking copies, photos or samples.

It would appear that this meaning is supported not only by the definition of powers for a Departmental Inspector under the MSA 1995,[158] but also by similar legislation for health and safety inspections ashore where the word "inspect" appears. Even though the HSWA 1974, like the MSA 1995, does not directly define the term "inspection" it does define the powers of an Inspector. These powers explicitly include the ability "to require the production of, inspect, and take copies…" of books and documents.[159] Like in the MSA

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[147] For a more detailed analysis of port state control and applied enforcement measures see below, Chapter 6.
[148] PSC Regulations, reg. 2(2).
[149] Regulation 6(1)(a).
[150] Regulation 6(1)(b).
[151] Regulation 6(2).
[152] Regulation 6(3).
[153] Regulation 6(4).
[154] PSC Regulations, reg. 2(2).
[155] Paris MoU, Annex 1, s. 5.5.1 or 5.5.2. This Annex 1 is incorporated into UK law, see above, Chapter 2, fn 91.
[156] PSC Regulations, reg. 3(3), see also below, Chapter 6.2.
[157] L Brown (editor), *The New Shorter Oxford English Dictionary*, 1993, vol. 1, p. 1380.
[158] Section 259(2).
[159] HSWA 1974, s. 20(2)(k).

1995[160] a distinction appears to have been made between carrying out an inspection and actively doing something with or about an item. For, if an inspection would automatically entail the powers specifically addressed in s. 259(2), the law would not have to be detailed on what steps undertaken by a representative of the State are permitted. It would appear to follow that when the law entitles an enforcement officer or Inspector generally to carry out an inspection, but does not stipulate particular rights as to the taking of photos, copies or samples, that prior consent from the person affected by the activities of that officer would be required before he would be allowed, for example, to take photos.

Available authorities do not appear to cover the public law rights of a flag State officer. Case law mainly deals with inspections or addresses them in commercial disagreements such as the sale of a ship or cargo claims, and to a very limited extent covers surveys or inspections by classification societies.[161] I accept that the commercial definition of "inspection" does not necessarily have a bearing on the powers of a State official interfering with personal rights of a citizen, but, I am of the opinion that the commercial understanding of the word may help inform the interpretation found in public law, particularly as the case law raises practical examples.

Inspections and their scope in commercial cases are usually subject to the will of the parties and will be agreed upon in the relevant contract.[162] In *The Busiris*[163] the contract for the cargo inspection did not only require inspection of the tanks prior to loading, and the analysis of shore tanks prior to loading, but also spot testing the cargo for sulphur.[164] Not taking sufficient samples, not doing it regularly and not testing them for specific gravity was considered to be a contractual breach of the duty of care under the inspection contract.[165] The use of the word "inspection" on its own would not have sufficed to come to such a conclusion. The range of the inspection[166] was described by the existing contract and the acceptance of the defendant that to comply with the instructions given meant that "there was an obligation to exercise reasonable care to ensure that the cargo loaded was a homogeneous cargo complying with the stated specification".[167]

Where no contractual obligation is specified an inspection may follow the custom of the specific trade. In a case of short delivery of cargo the Court of Appeal mentioned "the ordinary practice for the inspection of vessels on arrival".[168] Such practice included the taking of measurements and samples of that cargo.[169]

In cases where the courts made an order for a (non State official) surveyor to go on board to establish certain evidence the courts in some cases ordered inspections of ships or part thereof. It is the scope of these inspections which appears to come closest to the understanding of what the word inspection entails when carried out under any public law entitlement.

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[160] In s. 259(2)(j). Section 259 appears to be modelled very closely on HSWA 1974, s. 20. The powers of a Departmental Inspector actually mirror the powers of an HSE Inspector to a large extent, e.g. as to entering, investigating, sampling, photographing and also obtaining a signed declaration of truth.

[161] For the latter see, for example, *The Sundancer* (a US case) 7 F.3d 1077 (2nd Cir. 1993), *Howard Marine & Dredging Co Ltd v. A Ogden & Sons (Excavations) Ltd* [1978] 1 Lloyd's Rep 334, or *The Torenia* [1983] 2 Lloyd's Rep 210, none of which deal with the question of what an inspection entails. In the context of classification societies the words "survey" or "inspection" appear to be used rather loosely by one substituting for the other. See, for example, *The Sundancer,* p. 1081 and *The Torenia,* p. 231.

[162] For example in *Bernhard Schulte GmbH & CO. KG v. Nile Holdings Ltd* [2004] 2 Lloyd's Rep. 352, para. 12: "In the event that, following inspection of any of the ship[s] in accordance with cl. 5.2,…". Clause 5.2. was not reproduced in the judgement.

[163] [1980] 1 Lloyd's Rep. 569.

[164] *The Busiris*, p. 573.

[165] *Ibid.*, p. 582; the judgement of Mr Justice Parker against this defendant was affirmed by the Court of Appeal, p. 596.

[166] But the scope of an inspection also appears to be defined by its purpose. In *The Ikarian Reefer* [1993] 2 Lloyd's Rep. 68, overruled by the CA, [1995] 1 Lloyd's Rep. 455 (but without affecting the argument made here), the judge suggested that a "full and careful inspection" would in his view have included the removal of the valve in question, p. 114.

[167] *The Busiris*, p. 575.

[168] *The Filiatra Legacy* [1991] 2 Lloyd's Rep. 337, p. 344.

[169] *Ibid.*, p. 344.

In *B L Shipping Company v. Pilot Trading Company*[170] the court had given an order for inspection of the ship in a case about the exact measurement of tanks. On appeal Greer LJ interpreted the order given by Roche J as meaning "that reasonable opportunities for inspection, measurement and testing shall be given by the plaintiffs to the defendants".[171] It appears that by clarifying that inspection includes measurement and testing the term inspection had to be understood according to the purpose the inspection was supposed to serve.

An order of the Admiralty Registrar specifically empowered a surveyor requested to enter upon the defendants' ship "Erikoussa"

> "and permit him to take samples from the bunker tanks, inspect and take copies of any general and pipe arrangement plans and inspect and photograph the ship or any part thereof in the company of a representative of the defendants".[172]

The defendants wanted the words "and permit him to take samples from the bunker tanks" to be deleted, a claim which the judge dismissed.[173] The appeal was dismissed and the claimants allowed to analyse the samples taken as the "analysis may show whether cargo has become intermixed with bunker oil".[174] This request had been made by the claimants "in order to ascertain the cause of the loss and short delivery of the cargo",[175] or in other words to obtain the relevant evidence to support their claim for short delivery.

"Inspection" in this context is not used to include other activities, but stands separately from the taking of samples, copies or photographs - activities which the judge explicitly empowered the surveyor to undertake.

In another case[176] about the short delivery of gas oil Sheen J confirmed that the order of the Admiralty Registrar fell "fairly and squarely within O. 75, r. 28".[177] The Registrar had ordered

> "that the defendants permit the plaintiffs' surveyor access to the vessel for the purpose of inspecting and photographing any part thereof, and to take samples from non-cargo spaces and to consider any relevant ship's documents, and in particular any general and pipe arrangement plans which may assist in the survey, and to take relevant copies of these documents".[178]

In a similar way to *Re Erikoussa* a clear distinction was made between inspecting and other activities such as photographing and taking samples and copies.

The discussion of both public and commercial law suggests that the scope of any inspection, if not carried out for a special purpose under a well established practice, will have to be defined. In commercial law this would be done by either contractual terms or court order, whereas in public law Parliament has to sanction an interference with a right of an individual. With regard to a Surveyor in his role as enforcement officer, the relevant merchant shipping legislation serves to define the limits of powers given to a Surveyor carrying out an inspection.

The discussion so far would appear to lead to the following consequences.

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[170] [1929] 34 Ll.L.Rep. 35.
[171] *BL Shipping Company*, p. 37.
[172] *Re Erikoussa,* unreported, 25 October 1984, QB Admiralty Court, *LexisNexis* Transcript, first page, see also [1985] 1 LMCLQ 10.
[173] *Ibid.,* last page.
[174] *Ibid.,* para. II.
[175] *Ibid.,* first page.
[176] *The Mare del Nord* [1990] 1 Lloyd's Rep 40.
[177] *Ibid.*, p. 43.
[178] *Ibid.*, p. 42.

2.4.2. Consequence of meaning of "inspection"

It is my view that the use of the word "inspection" in the MSA 1995 is practically the same in both commercial and public law. In both areas the meaning of the word requires qualification to define its scope. The MSA 1995 indirectly defines its scope by explicitly listing the powers of Departmental Inspectors and Departmental Officers; but it might also be said by *not* explicitly addressing in more detail certain rights for Surveyors which are held by Departmental Inspectors, the Act thereby excludes these specific powers.[179]

It appears in conclusion that a Surveyor carrying out an inspection, who is not expressly given the authority as laid down in s. 259(2) for Departmental Inspectors, would not have the powers to take photographs or samples unless acting as a Departmental Inspector or PSC Inspector. A master of a ship which is subject to an inspection[180] may therefore refuse a Surveyor the relevant request. For the same reason a master appears to have the right not to answer questions of a Surveyor asked outside of his power as Departmental Officer unless the law specifically requires the master to do so. It also seems to follow that seamen[181] who are not subject to s. 257(2)(d)[182] are not required to answer any question of a Surveyor/Departmental Officer at all. This is of interest as the master and crew may at a later stage be interviewed as a witness by a Departmental Inspector and be required to sign a declaration of the truth of their answers.[183] The Surveyor's report about the interview he carried out will thereby serve as a basis for any later interview by the EnU. Any statement a person makes towards a Surveyor will usually form the basis of a later investigation and possible prosecution.[184]

Yet, a master would still have to answer questions asked in accordance with s. 257(2)(d).[185] But it appears that if masters fear that, in answering any question a Surveyor is entitled to ask, they may incriminate themselves, they could have the right to remain silent and would then fall under the protection of Art. 6 of the European Convention on Human Rights.[186] The right to remain silent is a "generally recognised international standard(s) which lie(s) at the heart of the notion of a fair procedure under Article 6".[187]

The decision to remain silent is a difficult one to make at this stage as a Departmental Officer will not question a master under caution and will not suggest to the master that he is interviewed as a suspect. If a master decides not to answer questions asked in accordance with s. 257(2)(d) "he shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale".[188] If, however, the master's statement taken by the Departmental Officer can be used against him at a later trial a master could have incriminated himself against his will.

Similarly a master will be in a very uncomfortable position when asked by a Departmental Inspector acting within his statutory powers to answer such questions as the Inspector thinks fit to ask and to sign a declaration of truth.[189]

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[179] *inclusio unios est exclusio alterius* – the mention by name of the one is the exclusion of the other.
[180] But not a survey as that is a service provided by the flag state administration for a fee with the aim to issue a certificate which allows the vessel to go to sea; see *Reeman v. Department of Transport* [1997] 2 Lloyd's Rep. 648, p. 685. It would also appear that this conclusion does not follow for a PSC inspection, see above.
[181] See s. 313(1); a master is not a "seaman" according to the Act.
[182] See Chapter 3.2.4.
[183] Section 259(2)(i)(ii) and (iii), although, no answer given under sub-section (2)(i) shall be admissible in evidence against the master or crew member, s. 259(12). But once the information is there it would appear to be much easier to actually prove the point accepted as true in the declaration.
[184] But "only if it can be brought legally into evidence", Head of the EnU, Annex 16, question 14.
[185] See discussion below, Chapter 3.2.4.
[186] Brought into UK law by the Human Rights Act 1998, s. 1(2).
[187] *Murray v. United Kingdom* (1996) 22 EHRR 29, para. 45.
[188] Section 257(4)(c) and tailpiece.
[189] Section 259(i)(ii) and (iii).

In the next section I will provide an overview of the similarities and differences that exist between health and safety and merchant shipping legislation.

2.5. Health and safety legislation and enforcement

Before I begin the discussion on the enforcement of merchant shipping legislation enforcement I will briefly address the equivalent health and safety enforcement process on land and look at differences and similarities. I chose the land and not air because it would appear that a comparison with air traffic is not completely suitable for three reasons. First, "the legal competence to be the rulemaking and standard setting organisation for all aviation safety regulation"[190] seems to have been moved to the European Aviation Safety Agency (EASA).[191] Secondly, the Civil Aviation Authority does not seem to publish any enforcement reports on its website. Thirdly, "there is some overlap of Occupational Health and Safety (OH&S) legislation within UK in relation to aircraft"[192] with the HSE and the Health and Safety at Work Act 1974 (HSWA 1974).

I therefore decided that when discussing enforcement under merchant shipping legislation the Health and Safety Executive (HSE) was a rather suitable comparator.

The HSE carries out inspections by

> **"**warranted inspectors which involves assessing relevant documents held by the duty holder, interviewing people and observing site conditions, standards and practices where work activities are carried out under the duty holder's control. Its purpose is to secure compliance with legal requirements for which HSE is the enforcing authority and to promote improving standards of health and safety in organisations."[193]

HSE Inspectors have a high degree of autonomy[194] and decide, at least in routine cases, together with their Principal Inspector whether or not to prosecute.[195] When enforcing health and safety law an Inspector is guided by the enforcement principles of the organisation.[196] In applying the law the approach should be proportionate and relate an enforcement action to the relevant risk.[197]

> "In practice, applying the principle of proportionality means that enforcing authorities should take particular account of how far the duty holder has fallen short of what the law requires and the extent of the risks to people arising from the breach."[198]

The applicable law is structured similarly to that in shipping. The HSWA 1974 provides the statutory basis under which health and safety regulations can be made.[199] Other than in shipping where the penalty for an offence is part of the regulations the Act stipulates that it is an offence when a person contravenes any of the statutory instruments.[200] These regulations appear to fall into three major groups. First, there are those which explicitly

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[190] http://www.caa.co.uk/default.aspx?catid=3 (18 September 2008).
[191] *Ibid.*
[192] http://www.caa.co.uk/default.aspx?catid=1498&pagetype=90&pageid=8451 (18 September 2008).
[193] http://www.hse.gov.uk/foi/internalops/og/ogprocedures/inspection/index.htm (27 May 2008).
[194] Hawkins, *Law As Last Resort,* p. 63.
[195] *Ibid.,* p. 66. According to the Head of the EnU, Annex 16, question 15, the decision whether or not to prosecute is centralised and made by the Director of Finance and Governance who has been newly appointed and prior to taking office in the MCA worked as the "Director of Finance for the Valuation Office", see MCA press release of 16 April 2008 on http://www.mcga.gov.uk/c4mca/mcga07-home/newsandpublications/press-releases.htm?id=BD177C92406CEE55&m=4&y=2008 (28 May 2008). In the past the Deputy Director of Operations made that decision, see MEM, chapter 2, s. 5.1.1. In a more current information (4 November 2008) about the MCA's new structure the Head of the Enforcement Unit comes under the "Head of the Office of the Chief Executive" who does not have any seafaring background either.
[196] Health and Safety Commission (hereafter "HSE"), *Enforcement Policy Statement*, p. 6, para. 12, http://www.hse.gov.uk/pubns/hsc15.pdf (26 May 2008).
[197] HSE, p. 6, para. 11.
[198] *Ibid.*, p. 6, para. 12.
[199] HSWA 1974, s. 15.
[200] *Ibid.*, s. 33(1)(c).

offer the accused a general defence option in the statutory instrument[201] to avoid the otherwise strict criminal liability[202] imposed by the Act.[203] Secondly, there are regulations which have an "escape clause" built in to the specific provision establishing the *actus reus*. Under those provisions the requirement for the employer is not absolute, but only makes his action or omission an offence if it was reasonably practicable[204] to comply with the regulations.[205] The third group does not allow the defendant any ground for a defence.[206]

Merchant shipping regulations would appear mainly[207] to fall into the first category, always offering a defence clause.

HSE Inspectors[208] are more likely to prosecute a case which falls into the third group[209] because "if you've got the evidence to prove an absolute breach you're home and dry".[210] "Establishing what is 'reasonably practicable' is often difficult, and the test gives ultimate discretion to the court to decide the issue."[211]

> "Inspectors complained, for example, that magistrates frequently failed to grasp the meaning of the concept of the 'reasonably practicable', and that courts were 'more likely to let them off than where there's an absolute breach".[212]

Similar frustration was expressed by an MCA enforcement officer in one case[213] about the lack of understanding of maritime matters by the legal profession.

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[201] To name but three the Chemicals (Hazard Information and Packaging for Supply) Regulations 2002, SI 2002 No. 1689, reg. 15(1), the Dangerous Substances in Harbour Areas Regulations 1987, SI 1987 No. 37, reg. 45, and the Electricity at Work Regulations 1989, SI 1989 No. 635, reg. 29. The more or less standard text is that "it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence", see reg. 15(1) of the above Chemicals Regulations. The burden of proof that all reasonable precautions were taken is thereby always on the defendant, see also *Nimmo v. Alexander Cowan & Sons Ltd* [1968] AC 107, p. 126.

[202] See below the discussion on strict liability, Chapters 9.5., 10.3.1. and 10.3.2.

[203] Not all provisions of HSWA 1974, s. 33, impose strict liability, though. Sections 33(1)(h), (l) and (m), for example, require the defendant to intentionally commit the offence and thereby impose the element of *mens rea.*

[204] According to the HSE, p. 7, para. 14, "Deciding what is reasonably practicable to control risks involves the exercise of judgement [sic]. Where duty holders must control risks so far as is reasonably practicable, enforcing authorities considering protective measures taken by duty holders must take account of the degree of risk on the one hand, and on the other the sacrifice, whether in money, time or trouble, involved in the measures necessary to avert the risk. Unless it can be shown that there is gross disproportion between these factors and that the risk is insignificant in relation to the cost, the duty holder must take measures and incur costs to reduce the risk."

[205] Three examples for this type of Regulation are the Control of Noise at Work Regulations 2005, SI 2005 No. 1643, reg. 6(1), the Control of Vibration at Work Regulations 2005, SI 2005 No. 1093, reg. 6(1), and the Diving at Work Regulations 1997, SI 1997 No. 2776, reg. 10(1)(a).

[206] Three examples of this group are the Docks Regulations 1988, SI 1988 No. 1655, the Health and Safety (Consultation with Employees) Regulations 1996, SI 1996 No. 1513, and the Lifting Operations and Lifting Equipment Regulations 1998, SI 1998 No. 2307.

[207] However, I have not analysed all merchant shipping regulations of which there are more than 200 (the MCA database currently (28 July 2008) shows 209 different statutory instruments), but only those which were applied in the detention cases (see below, Chapter 7). The only set of merchant shipping regulations which I found not to allow for a defence other than for one particular requirement (which is reg. 40(1) – "measures shall be taken to reduce noise levels in machinery spaces as far as is reasonable and practical") are the Merchant Shipping (Cargo Ship Construction) Regulations 1997, SI 1997 No. 1509, reg. 58. I wonder whether it was simply forgotten to insert a defence clause because the Merchant Shipping (Passenger Ship Construction: Ships of Classes I, II and II(A)) Regulations 1998, SI 1998 No. 2514, reg. 91(7), have the standard defence provision that it shall be a defence when a person proves to have taken all reasonable steps, and likewise do the Merchant Shipping (Passenger Ship Construction: Ships of Classes III to VI(A)) Regulations 1998, SI 1998 No. 2515, reg. 73(5).

[208] For the MCA practice see above, Chapter 2.3.

[209] Breaches of an absolute requirement, Hawkins, *Law As Last Resort,* p. 399.

[210] *Ibid.,* p. 398, quoting an HSE Inspector.

[211] *Ibid.,* p. 397. This can probably only be understood in the context of the Inspector having to counter the evidence of the defendant that all reasonable precautions were taken, see Chapter 2, fn 201.

[212] *Ibid.,* p. 398.

[213] MCA file MS 10/74/303, where the enforcement officer vented his frustration about the legal profession [the context would suggest that all lawyers are included, i.e. solicitors, barristers and judges] in a minute on file by writing "The penalty imposed was a bit disappointing. The problem was again the old problem of lack understanding [sic] of maritime matters by the legal profession", minute of 11 November 2004, para. 4(b).

But differences between the health and safety law for the land and that for the sea exist not only in the different application of defence clauses. The four main distinctions would appear to be (1) that MCA inspection subjects are usually moving (ships) and can leave the country on short notice,[214] (2) that a significant number of MCA inspection objects are foreign flagged,[215] (3) that MCA is not only concerned about workplace safety but also about the environment and, (4) that the MCA has four enforcement tools[216] at its disposal whereas on land there are only three available.[217]

Compared to an HSE Inspector a MCA Surveyor[218] with the option of a detention has thereby the benefit of having a tool at hand which remains within the Inspector's control,[219] is a "relatively quick fix",[220] and also has the effect of a "financial penalty"[221] for the owner. A detention thereby appears to provide an MCA Surveyor with at least three advantages over an HSE Inspector. The MCA Surveyor achieves, first, bad publicity for the affected ship or owner both of UK and foreign flagged ships.[222] Secondly, the level of the "financial penalty" is actually equivalent to the income of the owner,[223] and would probably therefore not be considered inadequate.[224] Thirdly, I would argue in respect of UK flagged ships,[225] will a detention probably be less damaging to the personal relationship between company and Inspector (or rather MCA) than a prosecution.[226] Admittedly a detention will cost the company money, but does not entail the same personal public embarrassment and disapproval for senior management staff which a conviction would bring with it.

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[214] Ships as opposed to land based buildings and their equipment.

[215] 25% of all ship inspections are carried out on foreign flagged ships. The distinction to a foreign owned company ashore in the UK is that foreign flagged ships, even when owned by a company in the UK, will usually only be inspected by the MCA during a port state control inspection carried out in the UK. Foreign owned companies ashore, though, will be subject to standard HSE attendance. According to the MCA Annual Report and Accounts 2006-07, p. 23, a total of 6,400 inspections was carried out during the year 1,600 of which were port state control inspections, http://www.mcga.gov.uk/c4mca/mcga07-home/newsandpublications/mcga-publications/mca-annual-accounts06-07.htm (27 May 2008). For port state control see below, Chapter 6.

[216] Not considering any type of caution separately from an investigation which could potentially end with a prosecution. MEM, chapter 2, s. 2.4.1, lists six "principle" options of bringing a case to a conclusion, (1) no further action, (2) notification of concern, (3) formal caution, (4) conditional caution, (5) prosecution, and (6) inquiry under s. 61/63 of the MSA 1995.

[217] In addition to improvement and prohibition notices and prosecution also detention of ships. This is obviously linked with number (1) as buildings cannot leave the country from one moment to the next.

[218] The term Inspector or Surveyor does in this context have the same meaning as all MCA Surveyors are usually also appointed as Inspectors, see Chapter 2.2.

[219] As opposed to handing control over to the courts, Hawkins, *Law As Last Resort,* p. 172.

[220] Annex 15, Surveyor answer 2.7.

[221] *Ibid.*, Surveyor answer 2.15. Legally a detention is, of course, not a penalty as in "criminal penalty" but an administrative sanction. This sanction, however, does not only cost the owner the loss of operational income (like the relevant charter rate for the days the ship is not available to the charterer and may be off-hire) but also increases the target factor ("the Target Factor is in use within the Paris MOU on PSC as a tool for selecting ships eligible for an inspection only", http://www.parismou.org/ParisMOU/Target+Factor/default.aspx, 2 January 2009) of the vessel in the Paris MoU data base and creates a risk for certain types of vessel of being banned at some stage, see also below, Chapter 6.4.3.

[222] Or, as Hawkins, *Law As Last Resort,* p. 295, quotes an HSE Inspector in the context of talking about a prosecution "they don't like going to court. They don't like having their names in the paper. You don't get that with a notice". But, I have to add, you do get that to a certain extent with a detention, see below, Chapter 6.4.3.

[223] As the owner is going to lose the operational income for the time the vessel is under detention and probably also runs an increased risk of losing the next charter contract, see also the discussion in Chapter 8.6.

[224] Which N Gunningham, R Johnstone, *Regulating Workplace Safety: Systems and Sanctions*, 1999, (hereafter "Gunningham, Johnstone, *Regulating Workplace Safety"*), p. 257, maintain is the general view for occupational health and safety prosecutions. This would seem to be the case when a prosecution would only have resulted in the statutory maximum fine under summary conviction of £ 5,000 but the loss of income would have been above that amount.

[225] Because it is not really relevant for foreign flagged ships unless the owner also operates vessels under the UK flag.

[226] Hawkins, *Law As Last Resort,* p. 291, finds that "In certain circumstances Inspectors believe prosecuting may actually have damaging consequences. The damage that prosecution can do is in the harm it can cause to the personal relationships which Inspectors cultivate with employers, for employers' attitudes are precisely what Inspectors wish to change for the better." The MCA enforcement manual also accepts that "any situation requiring the use of a statutory power is one of conflict, no matter how apparently civilised it might seem", MEM, chapter 2, s. 1.4.1.

In the next Chapter I will discuss the impact of the Human Rights Act 1998 on enforcement measures taken by Departmental Officers.

Chapter [3] – Enforcement and human rights

3.1. Introduction
3.2. Human rights and the collection of evidence
3.2.1. Legal background
3.2.2. European Court of Human Rights and self-incrimination
3.2.3. English law and self-incrimination
3.2.4. Admissibility and specific powers under the MSA 1995
3.3. Human rights and the detention of ships

3.1. Introduction

It seems that there has been little attention paid to the effect of the Human Rights Act (HRA) 1998 on merchant shipping legislation generally. It would appear important, though, to identify the impact of that Act in particular on a possible defendant affected by the work of the relevant Departmental Officer. The roles of a Surveyor and a Departmental Inspector seem to be of particular interest, as their powers on the one hand overlap under certain circumstances but on the other hand also significantly differ.

In consequence, the following questions appear to arise for discussion.

(1) Does evidence obtained by a Surveyor outside of his powers against the will of the defendant affect his entitlement to a fair trial?

(2) Is the use of a statement in criminal proceedings requested from a master under compulsion by

(a) a Departmental Officer under s. 257(2)(d), or
(b) a Departmental Inspector under s. 259(i),

within the requirements for a fair trial?

(3) Do seamen have to answer questions of a Surveyor or Inspector in a pre-criminal investigation?

In answering these questions domestic English law must, so far as it is possible, be read and given effect in a way which is compatible with the rights of the European Convention on Human Rights since the Human Rights Act 1998 has come into force.[1] Even legislation that gave effect to a Directive prior to the Human Rights Act coming into force "must be interpreted according to principles of Community law, including its doctrines of fundamental human rights".[2]

Admissibility of evidence, or probably rather the entitlement to a fair trial,[3] will therefore have to be analysed under both European and domestic law.

3.2. Human rights and the collection of evidence

I will introduce the discussion by highlighting the relevant provisions applicable under domestic law.

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[1] HRA, s. 3(1).
[2] *R v. Hertfordshire County Council, ex parte Green Environmental Industries Ltd* [2000] 2 AC 412, p. 422.
[3] "Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts" according to *Peric v. Croatia,* Application no. 34499/06, final judgment on 27 June 2008, para. 17, and seemingly based on *Schenk v. Switzerland* (1991) 13 EHRR 242, para. 46; but "under the Court's case-law, the requirements of fairness of the proceedings include the way in which the evidence is taken and submitted", according to *Peric v. Croatia*, para. 17.

3.2.1. Legal background

A leading textbook on evidence does not consider the Human Rights Act 1998 to have changed English law on the admission of illegally obtained evidence which is said to be the same now as it was in 1995.

> "The combination of these approaches[4] leads to the conclusion that in England, illegally obtained evidence is admissible as a matter of law, provided that it involves neither a reference to an inadmissible confession of guilt, nor the commission of an act of contempt of court."[5]

This statement "was explicitly approved by the Court of Appeal" in 1994.[6] In that decision the Court stated that "it is an established rule of English law that the test of admissibility is relevance: relevant evidence, even if illegally obtained, is admissible".[7] The decision as to whether evidence is admissible, however, is in the hands of the courts, according to the Police and Criminal Evidence Act 1984 (PACE) s. 78(1). It is at least questionable whether under the influence of the Human Rights Act 1998 such a decision will always have the result which the Court of Appeal had stated before the Human Rights Act 1998 came into force on 9 November 1998.

Section 78 of the PACE allows courts to exercise their discretion when deciding the admissibility of evidence.

> "S. 78. In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."[8]

The court's discretion, however, is subject to the (qualified)[9] provisions of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).[10]

> "Article 6 . Right to a fair trial
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b) to have adequate time and facilities for the preparation of his defence;
>
> c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

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[4] 'These approaches' mean the analyses of the existing case law.
[5] C Tapper, *Cross & Tapper on Evidence*, 11th ed., 2007, p. 546-547; similar P Murphy, *Murphy on Evidence,* 10th ed., 2008, p. 54.
[6] C Tapper, *Cross & Tapper on Evidence*, p. 478, fn 347; see *R v. Khan* [1995] QB 27, p. 37.
[7] *R v. Khan*, p. 37.
[8] PACE, s. 78(1), exclusion of unfair evidence.
[9] See also below, Chapter 3, fn 23.
[10] HRA, s. 2(1)(a) "A court…determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights,…".

> d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Article 6 "as part of his right to a fair trial, protects a defendant's right to silence".[11] In the leading case[12] in the European Court of Human Rights (ECtHR) on the right to silence and the right not to incriminate oneself, both rights were said to be "generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6".[13] The ECtHR in *Saunders v. UK* also clarified that "the right not to incriminate oneself is primarily concerned…with respecting the will of an accused person to remain silent".[14] This

> "privilege against self-incrimination is commonly understood in the Contracting States and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement."[15]

However, the ECtHR conceded[16] that on occasion the right will be given a broader meaning as it had demonstrated in *Funke v. France.*[17]

Hence it appears that the real question which arises under the heading of this sub-chapter is whether or not a master's right to remain silent is breached by the use of evidence obtained on board by a Surveyor. Provided that a Surveyor collecting samples and/or taking photographs or measurements is not acting within his powers such activities would seem to be unauthorised and unlawful. To answer the question a distinction may have to be drawn between whether the master voluntarily, unknowingly or against his will provided what later might be used in evidence against him.

As English law must be "read and given effect in a way which is compatible with the Convention rights",[18] the interpretation of PACE s. 78 and the question of admissible evidence will first be looked at in the light of the European Court of Human Rights decisions before English case law will be discussed. [19]

According to s. 2(1) of the Human Rights Act any domestic judgment

> "determining a question which has arisen in connection with a Convention right must take into account any-
>
> > (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
> > (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
> > (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
> > (d) decision of the Committee of Ministers taken under Article 46 of the Convention,
>
> whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

The requirement to "take into account" judgments of the ECtHR is stricter than is required for legislation, as it "must"[20] be done and is not limited to be done "so far as it is possible".[21] However, "taking into account" does not mean that a court is bound to follow

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[11] *Hundal and Dhaliwal* [2004] EWCA Crim 389, para. 17.
[12] As stated by the House of Lords in *Hertfordshire County Council,* p. 422, and repeated by the Court of Appeal in *R v. Kearns* [2002] EWCA Crim 748, para. 27.
[13] *Saunders v. UK* (1997) 23 EHRR 313, p. 337.
[14] *Ibid.,* p. 337.
[15] *Jalloh v. Germany* (2007) 44 EHRR 32, para. 110.
[16] *Ibid.,* para. 111.
[17] (1993) 16 EHRR 297. This case will be discussed in more detail below.
[18] HRA s. 3(1).
[19] I have chosen not to integrate the discussion of European and English law despite the requirement of the HRA 1998, s. 6(3)(a) according to which it is unlawful for a court "to act in a way which is incompatible with a Convention right" because I believe such a distinction will more clearly identify any difference.
[20] HRA s. 2(1).
[21] *Ibid.* s. 3(1).

it.[22] The Convention has technically not been incorporated into English law but remains "an international treaty made between member states of the Council of Europe".[23] As such

> "there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation",[24]

but an English Court will not be bound by it despite the fact that the UK Government is so bound.[25]

In the following subsection I will analyse what appears to be the current position of the ECtHR on Article 6 and self-incrimination and follow with a similar analysis for English law. At the outset it appears to me that the English Courts have taken too restrictive a view of the ECtHR decisions which themselves seem to be rather cautious in interpreting the rights of citizens for a fair trial.[26]

3.2.2. European Court of Human Rights and self-incrimination

In *Saunders v. UK*[27] Inspectors were appointed by the Secretary of State for Trade and Industry (DTI) to investigate allegations and rumours of misconduct during the take over bid by Guinness for a public company, the Distillers Company plc.[28] The Inspectors had wide ranging powers under the Companies Act 1985.[29] A person not co-operating with the Inspectors could find themselves being punished for contempt of court.[30] Transcripts of interviews and documents obtained by the Inspectors were subsequently passed on to the police who were then formally asked by the Director of Prosecution's office to carry out a criminal investigation.[31] One of the co-defendants initially requested that the transcripts of two DTI interviews should be inadmissible evidence as they were either unreliable under PACE s. 76 or unfair pursuant to s. 78.[32]

Later before the ECtHR

> "the applicant complained of the fact that statements made by him under compulsion to the Inspectors appointed by the Department of Trade and Industry … during their investigation were admitted as evidence against him at his subsequent criminal trial".[33]

The applicant argued that the use made by the prosecution of the transcripts of the interviews in the later criminal proceedings constituted a violation of the Convention, Art. 6.[34]

In its assessment the Court distinguished between the right of the accused to remain silent and the use of materials which exist independent of the will of the suspect.[35] However, the Court only decided "whether the use made by the prosecution of the statements obtained from the applicant by the Inspectors amounted to an unjustifiable

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[22] M Amos, *Human Rights Law,* 2006, p. 20.
[23] *R v. Lyons* [2003] 1 AC 976, para. 26.
[24] *Ibid.*, para. 27.
[25] *Ibid.*, para. 27.
[26] See, for example, the dissenting opinion of judge Pavlovschi in *O'Halloran and Francis v. The United Kingdom* (2008) 46 EHRR 21. In this case about a speeding offence where the defendant was compelled to disclose the identity of the driver the dissenting judge says in para. OII66 "I am very much afraid that if one begins seeking to justify departures from the basic principles of modern criminal procedure and the very essence of the notion of a fair trial for reasons of policy, and if the Court starts accepting such reasons, we will face a real threat to the European public order as protected by the Convention".
[27] (1997) 23 EHRR 313.
[28] *Ibid.,* para. 18.
[29] *Ibid.,* para. 48 *et seq.*
[30] Companies Act 1985, s. 436(3).
[31] *Saunders v. UK,* para. 26.
[32] *Ibid.,* para. 28.
[33] *Ibid.,* para. 60.
[34] *Ibid.*
[35] *Ibid.,* para. 69.

infringement of the right" to remain silent.[36] A decision as to whether the use of illegally obtained documentary evidence would infringe the right to remain silent was not the concern of the Court.[37]

But despite having restricted its decision to the use of (oral) statements only the Court gave its opinion that the right to remain silent

> "does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing".[38]

It would appear that this statement was made *obiter* as the Court specifically said that it "is only called upon to decide"[39] whether the use made of the statements led to a violation of the applicant's rights.[40] However, it would seem that this *obiter* statement has become one of the central positions of the Court on the right to remain silent.[41] This right appears in the view of the Court generally not to be affected by the use in criminal proceedings of material obtained from the suspect through the use of compulsory powers during a preparatory investigation if that material has an existence of its own.[42]

But the Court also seemed to distinguish between specific as opposed to generally existing powers to acquire materials which might be used in criminal proceedings, and it specifically addressed a warrant as a specific means when acquiring documents.[43] The ECtHR also rejected the idea that the public interest can be invoked "to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings".[44]

It appears to follow that compulsory powers alone as the sole basis for obtaining documents do not seem to be sufficient for a State official. What is also needed is a warrant or some other specific power[45] to obtain material which exists independently of the will of the accused.

The decision in *Jalloh v. Germany*[46] seems to give an indication that material is in existence when access to it can be achieved by either of the following two alternatives. First, it would appear acceptable that the defendant would have to endure passively a minor interference with his physical integrity.[47] Secondly, even if the person's active participation is required the measure appears not to be in violation of Art. 6 as long as "material produced by the normal functioning of the body" is concerned.[48] This reference to *Saunders*[49] refers to breath, urine or voice samples.[50] Procedures to obtain such samples do not seem to contravene Art. 3.[51]

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[36] *Ibid*.
[37] *Ibid.,* para. 67.
[38] *Ibid.,* para. 69.
[39] *Ibid*.
[40] *Ibid*.
[41] See *Jalloh v. Germany* (2007) 44 EHRR 32, para. 102, like *Saunders* a Grand Chamber decision.
[42] *Saunders v. UK,* para. 69.
[43] *Ibid.* and referred to in *Jalloh v. Germany*, paras. 102 and 112.
[44] *Ibid.,* para. 74 and also applied in *Heaney and McGuinness v. Ireland* (2001) 33 EHRR 12, para. 58.
[45] This could simply be relevant domestic law to make the relevant act "lawful", see *Jalloh v. Germany*, para. 102, where material obtained in breach of domestic law would, as it appears, have been qualified as "unlawful".
[46] In that case the German prosecutor subjected a suspected drug dealer to the administration of emetics "by a doctor in order to provoke the regurgitation of the bag" (para. 12). To do this successfully the suspect had to be held down and was immobilised by four police officers. He was administered a salt solution and an emetic syrup through a tube into his stomach and injected with apomorphine, another emetic. "As a result, the applicant regurgitated one bubble containing 0.2182 grams of cocaine" (para. 13).
[47] *Ibid*., para. 114.
[48] *Ibid*.
[49] *Saunders v. UK,* para. 69.
[50] *Jalloh v. Germany*, para. 114.
[51] *Ibid*., para. 115.

It would appear to be permissible to extend the definition for "existing materials" beyond the sphere of physical interference with the defendant's body. The relevant reference in *Saunders* did not only refer to breath, blood or urine samples, but first of all to "documents acquired pursuant to a warrant".[52] The conclusion seems to be, therefore, that a "direct compulsion"[53] is acceptable provided it is only a minor interference within the framework set by *Saunders* and confirmed by *Jalloh*.[54]

What the Court in *Saunders* has not explicitly decided is the impact on the right of silence as discussed, when a State official obtains documents, first, without a warrant and, secondly, without the necessary authority. It would seem, though, that the general position of the Court that Article 6 serves to protect the suspect "against improper compulsion by the authorities"[55] points towards the conclusion that the lack of a warrant or any other specific power would render any obtained materials inadmissible as evidence in criminal proceedings.[56] Also, the fact that the public interest cannot override the right not to incriminate oneself by the use of answers obtained compulsorily in a pre-judicial investigation suggests that such unlawfully collected material cannot be used against the accused during criminal proceedings.

In the earlier case of *Funke v. France*[57] the ECtHR[58] came to a clearer conclusion where the applicant was compelled to produce documents as evidence without a warrant. The applicant had refused to produce bank statements in respect of which customs Inspectors had the right to require production.[59] The French Court ordered the applicant to produce the bank statements to the customs officers and imposed a fine for non-compliance.[60] The applicant's appeals in the higher national Courts were dismissed and the fine was increased.[61]

In its judgment the ECtHR in a very short reasoning gave its finding that there had been a breach of Art. 6(1).[62] Because the customs officers were

> "unable or unwilling to procure them [certain documents] by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed".[63]

The Court stated that the special features of customs law could not excuse a violation of an individual's right to remain silent and not to incriminate oneself.[64] It appears that the Court thereby acknowledged the self-incriminating nature, and breach of the right to silence, of documents compulsorily acquired against the will of the suspect.

By contrast with *Saunders* the decision in *Funke* was on the question of whether the compulsory disclosure of documents constituted an infringement of the right to a fair trial which is laid down in Art. 6(1) of the Convention.[65] The Court found explicitly that this right of the applicant had been breached by the authorities trying to compel him to produce evidence for the violations of the law of which he was accused.[66]

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[52] *Saunders v. UK,* para. 69.
[53] *O'Halloran and Francis v. The United Kingdom,* para. 53.
[54] And later again *O'Halloran and Francis v. The United Kingdom,* paras. 47 and 52.
[55] *Saunders v. UK,* para. 68.
[56] Or rather, as the Court "does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law" (*Jalloh v. Germany*, para. 94), make the proceedings unfair. See also below the decision referred to in *Schenk v. Switzerland* (1991) 13 EHRR 242, para. 46.
[57] (1993) 16 EHRR 297.
[58] With only one of the nine judges dissenting, para. 63, compared to four dissenting opinions out of 20 in the case of *Saunders,* p. 349 *et seq.*
[59] *Funke v. France,* para. 12.
[60] *Ibid*.
[61] *Ibid.,* paras. 13 and 14.
[62] *Ibid.,* para. 44.
[63] *Ibid*.
[64] *Ibid*.
[65] *Ibid.,* para. 41; by contrast with *Saunders* which concerned oral statements.
[66] *Ibid.,* para. 44.

An even earlier decision on evidence obtained without the necessary authority was dealt with by the ECtHR in *Schenk v. Switzerland.* The applicant was found guilty by the Rolle District Criminal Court of attempted incitement to murder and was sentenced to 10 years in prison.[67] He had hired Mr. Pauty, an ex-member of the Foreign Legion, to kill the applicant's wife. Instead of killing her Mr. Pauty informed her about the plan and both went to the police. Without any court order or permission Mr. Pauty then set up a cassette recorder with which he recorded the conversation when the applicant called.[68] The Swiss Federal Court upheld the conviction despite acknowledging that "the ingredients of an offence …were present as far as the recording in question is concerned".[69]

Before the ECtHR the Swiss Government "did not dispute that the recording in issue was obtained unlawfully"[70] because it had been obtained "using unlawful means".[71] The ECtHR ruled that the applicant had a fair trial and that the use of the recording did not contravene Art. 6(1).[72]

The Court found that

> "While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.
>
> The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole was fair."[73]

In the two main reasons for its decision[74] the Court argued, first, that the applicant had the opportunity of challenging the recording's authenticity and oppose its use. It did not matter that his attempts were unsuccessful.[75] What the Court appeared to suggest, however, is that the applicant had to be aware of the fact that the evidence obtained was unlawful.[76] Secondly, the recorded telephone conversation "was not the only evidence on which the conviction was based".[77]

The Court did not decide whether the evidence was inadmissible because, it said, Art. 6 does not lay down any particular rule on the admissibility of evidence.[78] What it appears the Court decided instead was that as long as an applicant can challenge the admission of unlawfully obtained evidence in his national courts the requirements of Art. 6(1) are satisfied.

Still, the Court did not quite follow its statement that it only has to ascertain whether the trial as a whole was fair. Some doubt about the fairness of a trial was left insofar as the Court seemed to suggest that if a conviction is solely or mainly based upon unlawfully obtained evidence the likelihood of the trial having been unfair will have increased.[79] In *Schenk* the tape was allowed as evidence because, accepting the argument of the Rolle Criminal Court, "it would have been sufficient to hear the evidence of Mr. Pauty as a witness in respect of the recording's content".[80] This together with the other evidence "which corroborated the reasons based on the recording for concluding that Mr. Schenk was guilty"[81] made the Court conclude that the Rolle Court "took account of a combination

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[67] *Schenk v. Switzerland,* para. 25.
[68] *Ibid.,* para. 13.
[69] *Ibid.,* para. 30.
[70] *Ibid.,* para. 43.
[71] *Ibid.,* para. 42. See also below Chapter 3, fn 76.
[72] *Schenk v. Switzerland,* para. 49.
[73] *Ibid.,* para. 46.
[74] See similarly *Khan v. United Kingdom,* (2001) 31 EHRR 45, para. 35.
[75] *Schenk v. Switzerland,* para. 47.
[76] "Unlawful because it had not been ordered by the competent judge", *Ibid.,* para. 47.
[77] *Ibid.,* para. 48.
[78] See also above, Chapter 3, fn 56.
[79] *Schenk v. Switzerland,* para. 48/49.
[80] *Ibid.,* para. 48.
[81] *Ibid.*

of evidential elements before reaching its opinion".[82] As a consequence the Court concluded that "the use of the recording in question in evidence did not deprive the applicant of a fair trial".[83]

Although it is difficult to square the three decisions of *Saunders, Funke* and *Schenk*[84] the following picture seems to emerge and suggests four factors influencing the right to a fair trial.

First, on the basis of *Schenk,* a violation of the requirement for a fair trial appears to be likely once a defendant is convicted on the basis only of unlawfully obtained evidence. It is unclear, though, where the line between a fair and an unfair trial lies, and what proportion of lawfully obtained evidence has to be used to achieve the objective of a fair trial. Indications for what is acceptable are probably the facts in *Schenk,* and for what is unacceptable those in *Jalloh*.[85]

By applying the rule which the Court used in *Niemietz v. Germany*[86] it would seem that any narrow interpretation of a person's right to a fair trial is similar to a narrow interpretation denying a person the protection of Art. 8(1) for professional activities[87] which the Court considered to be an interference with a person's right under Art. 8.[88] "Narrow" in the context of Art. 6 would be an exercise by which the available lawful and unlawful evidence would be put on an imaginary weighing scale to determine the preponderance of one over the other. As, it is submitted, the "object and purpose" of Art. 8 is similar to that of Art. 6, namely "to protect the individual against arbitrary interference by the public authorities",[89] any use of unlawful evidence can only come second to the protection of the individual.

With that in mind it is suggested that to achieve a fair trial the other (lawful) evidence would at least have to make it likely, or offer a fair chance, that a conviction might be achieved solely based upon its submission. Otherwise, when the weight of the unlawfully obtained evidence and the other evidence are not clearly separable, or when they are "so intermingled that there was no means of distinguishing between them",[90] and the share of necessary other evidence is not clearly defined, a suspect may suffer "inequality of treatment".[91] Because if it is not clear which evidence in the end was decisive a conviction could have been based on the unlawfully obtained evidence only.

The rationale of the right to silence and the right not to incriminate oneself

> "lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6".[92]

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[82] *Ibid.*
[83] *Ibid.,* para. 49.
[84] I consider it to be sufficient to refer to these three decisions in summary as the more recent judgments referred to above (e.g. *Jalloh* or *O'Halloran*) all build upon the foundations of *Schenk*, *Funke* and *Saunders*. I realize, though, that the Court in *Jalloh* appeared for the first time to establish four factors it will have regard to when determining whether the right not to incriminate oneself has been violated (*Jalloh v. Germany*, para. 117 *et seq.*
[85] The evidence in *Schenk* was unlawful but did not violate any other Article of the Human Rights Convention whereas in *Jalloh* the evidence was obtained lawfully (i.e. in compliance with domestic law) but through a breach of Art. 3. The Court in *Jalloh*, however, did also not set clear parameters. In para. 107 it left the question open "whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair". The ECtHR at least in *Gäfgen v. Germany,* Application no. 22978/05, 30 June 2008, para. 105, found that there is a "strong presumption that the use of items of evidence obtained as the fruit of a confession extracted by means contrary to Article 3 renders a trial as a whole unfair".
[86] *Niemietz v. Germany,* (1993) 16 EHRR 97.
[87] *Ibid.,* para. 29; the Court decided that the word "home" cannot be interpreted narrowly but has to include a professional person's office, para. 30.
[88] *Ibid.,* para. 33.
[89] *Ibid.,* para. 31.
[90] *Ibid.,* para. 29.
[91] *Ibid*.
[92] *Saunders v. UK,* para. 68.

It can hardly be said that a conviction based solely or overwhelmingly upon evidence obtained by compulsion contributes to the fulfilment of the aims of Article 6.

> "The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused."[93]

It is therefore hard to understand how in the following paragraph the Court concluded by referring to legal systems of the Contracting Parties that the right not to incriminate oneself does not cover in criminal proceedings the use of evidence which "has an existence independent of the will of the suspect".[94] It surely must be irrelevant whether the evidence has an existence independent of the will of the suspect when it is obtained by compulsion or coercion against his will unless the evidence could have been obtained independent of the defendant's participation.[95]

As a consequence, it is submitted, a court's decision which is not clearly based upon lawful evidence probably ought to be considered as violating the right of a fair hearing under Art. 6, although, it seems that the ECtHR it is not yet ready to go quite so far.

Secondly, in *Funke* as in *Saunders* the Inspectors had the compulsory powers to demand what they did, and the bank statements (in *Funke)* did exist independently of the will of the suspect. But whereas in *Saunders* the Court decided the sole question of the use of relevant (oral) statements made by the applicant under compulsion,[96] the Court in *Funke* decided on the actual use of documents which the applicant was compelled to provide.[97] For that reason it is submitted that *Saunders* is not the leading authority on the right to silence and the right not to incriminate oneself[98] when it comes to documentary evidence.[99] In *Saunders* the Court dealt with the use of compulsorily obtained documentary evidence *obiter* whereas in *Funke* the Court actually decided that question. The finding that the applicant was incriminating himself in *Saunders* was solely based upon the oral answers given by the applicant to the questions of the DTI Inspectors.[100] Documentary evidence played no role for the outcome of the case.[101]

In accordance with *Saunders* the result appears to be that the use of compulsorily obtained (oral) statements as evidence violates Art. 6, and so probably does the use of compulsorily obtained documentary evidence according to *Funke.*

Thirdly, the Court when making its *obiter* comments in *Saunders* spoke about compulsory powers but did not address obtaining documents without holding any powers to do so.[102] Arguably, therefore, documents obtained against the will of a suspect under the pretence of compulsory powers, against better knowledge or rather by bluff (or trick if that word is more adequate) are not covered by the Court's comments. Obtaining documents or other evidence in such a way does not, it is suggested, "contribute to the fulfilment of the aims of Art. 6",[103] and would thereby constitute a violation of the article.

Fourthly and lastly, the Court qualified its *obiter* comments in *Saunders* about acquiring documents by referring to a warrant. It is submitted that the Court did not contemplate

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[93] *Ibid*.
[94] *Ibid.,* para. 69.
[95] Judge Pavlovschi in his dissenting opinion in *O'Halloran and Francis v. UK,* para. OII65, points out that by following this approach the real criminal actually benefits whereas the minor offender is disadvantaged. "In my view it is illogical for persons who have committed minor offences to find themselves in a less favourable situation than those who have committed acts which are truly dangerous to society."
[96] *Saunders v. UK,* paras. 60 and 67.
[97] *Funke v. France,* p. 326.
[98] See above, *R v. Kearns,* Chapter 3, fn 12.
[99] This the more so as the Court in both *Jalloh* (para. 111) and *O'Halloran* (para. 54) appears to condone the decision in *Funke*.
[100] *Saunders v. UK,* para. 72.
[101] *Ibid.,* see particularly para. 74.
[102] *Ibid.,* para. 69.
[103] *Ibid.,* para. 68.

obtaining documents on the basis of compulsory powers only, i.e. without a warrant, as otherwise the Court would probably not have specifically mentioned such an instrument.

These four points appear to support the conclusion that *Saunders* is not the leading case[104] on the right to silence and the right not to incriminate oneself when the issue is about documents and not personal statements, the latter of which the decision in *Saunders* was about. Compulsory powers alone do not appear to be sufficient to legally obtain documents against the will of a suspect, but in addition a warrant would seem to be required to do so.

Funke, however, appears to be more of a leading case than *Saunders. Funke* was decided after *Schenk*[105] and deals with the compulsory disclosure of documents. It clearly addresses the particular features of a particular (in this case customs) law and ruled that those features did not excuse a violation of an individual's right to remain silent.[106] In combination with the above discussion of *Saunders* it therefore appears that admitting as evidence documents obtained illegally, and against the will of a suspect, violates his right to a fair trial.

It follows that it is questionable when applying the judgments of the ECtHR whether evidence such as documents, photos or samples obtained by MCA Surveyors without compulsory powers against the will of the defendant would support a proposition that the proceedings as a whole were fair. If the evidence has been obtained from a ship's master against his will it is suggested that, if proper account is being taken of European human rights law in a national court, the admission of such material could not be supported.

If documentary or other material evidence was obtained because the master did not know better, and believed he had to produce the documents, the evidence would similarly appear not to contribute to a fair trial unless it could have been obtained independently of his participation. For it cannot be expected for a master to have such a detailed knowledge of the law.[107]

It appears that only if a master voluntarily and with knowledge allows a Surveyor to obtain documents or other items, and that the evidence he produced may be used in court, should such evidence be admissible. It would therefore appear that a Surveyor carrying out a "fact finding mission"[108] ought to inform the master about his rights, the legislation the Surveyor is acting under and what hat he is wearing at the time. For a master would appear to have different rights depending on whether the Surveyor acts as a Departmental Inspector, a "s.256(6) Inspector", a Surveyor or a PSC Inspector.[109]

As the judgments of the ECtHR do not have to be directly implemented by an English Court[110] English law will have to be applied by a judge considering whether or not evidence is or is not admissible.[111]

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[104] See above, Chapter 3, fn 12.
[105] *Schenk* in 1988 and *Funke* in 1993.
[106] An even stronger opinion to that extent can be found in *Heaney and McGuinness v. Ireland* (2001) 33 EHRR 12, para. 58, where the Court found that "security and public order concerns of the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6(1) of the Convention."
[107] As can be seen from the answers of Surveyors it appears to be standard practice to collect copies, take photos and interview master and crew, see Annex 15, question 12.
[108] See above, Chapter 2, fn 101.
[109] See above Table 1 in Chapter 2 and also below Chapter 3.2.4.
[110] But "although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence", Lord Slynn in *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] All ER (D) 116, para. 27.
[111] Irrespective of the constitutional issue that the Convention is technically not part of English law (see above, Chapter 3.2.1.) this is also the opinion of the ECtHR in *Schenk v. Switzerland*, para. 46.

3.2.3. English law and self-incrimination

The House of Lords in *Hertfordshire County Council, ex parte Green*[112] had to decide whether or not the appellant would be deprived of his right to a fair trial if he would follow the statutory requirement to provide information about his activities of unlawfully depositing waste. The law empowered the waste regulation authority that it

> "may, by notice in writing served on him, require any person to furnish such information specified in the notice as … the authority… reasonably considers … it needs…"[113]

The House of Lords held that all requests were for factual information and "none invited any admission of wrongdoing".[114] Lord Hoffmann, who gave the main speech in this unanimous decision, pointed out that the public interest[115] to obtain the information was only one aspect. He argued that

> "the request under section 71(2) does not in itself form a part, even a preliminary part, of any criminal proceedings. It does not therefore touch the principle which prohibits interrogation of a person charged or accused. Nor is there any question of the potential abuse of investigatory powers which those rules are designed to prevent. The section does not provide for oral interrogation and the recipient of the request may answer upon advice and at his leisure. Nor does the obligation to give the information prejudice the fairness of a possible trial, since the accused would still have the protection of section 78 of the Act [PACE 1984]".[116]

By distinguishing the request to furnish information for administrative purposes from the criminal proceedings the ruling is brought in line with the interpretation of Art. 6 by the ECtHR in *Saunders* where the Court referred to an earlier decision[117] in which it distinguished between functions of an investigative and an adjudicative nature.[118] Lord Hoffmann only indirectly addressed, through his reference to PACE, s. 78, the clear ECtHR exclusion of the invocation of the public interest to justify the use of compulsorily obtained materials for a non-judicial investigation during the trial.[119]

What appears to me an artificial distinction between the administrative and the criminal investigation clearly puts the defendant at a disadvantage. Once a question has been answered or materials have been handed over the information is there. Even if a judge rules that the evidence is not admissible the fact of it will be on everybody's mind and an investigation and questioning will be fuelled by that fact.

In addition, the decision in *Funke* was simply brushed away by saying that there were "obscurities" in the reasoning.[120] By separating the criminal proceedings for the provision of the requested information from the consequence of such provision for a possible main criminal trial ("offences against the regulations governing financial dealings with foreign countries" as it would have been in the *Funke* case)[121] the *Funke* case is reduced to a simple and rather straightforward violation of customs law.[122]

No account is taken of the fact that *Funke* actually decided the question of documents obtained under compulsion. *Saunders* is said to be the leading case[123] although the

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[112] *R v. Hertfordshire County Council, ex parte Green Environmental Industries Ltd* [2000] 2 AC 412.
[113] Environmental Protection Act 1990, s. 71(2).
[114] *Hertfordshire County Council,* p. 426.
[115] See below the discussion of *Brown v. Stott* [2003] 1 AC 681.
[116] *Hertfordshire County Council,* p. 421.
[117] *Fayed v. UK*, (1994) 18 EHRR 393, para. 61.
[118] *Saunders v. UK,* para. 67. Lord Bingham cited this paragraph and observed that the ECtHR "is not concerned with extrajudicial inquiries", *Hertfordshire County Council,* p. 423.
[119] "The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings." *Saunders v. UK,* para. 74, see also the discussion above, Chapter 3, fn 44.
[120] *Hertfordshire County Council,* p. 424. This would not appear to be the view of the ECtHR who has condoned the decision on at least two recent occasions, see above, Chapter 3, fn 99.
[121] *Funke v. France,* para. 8.
[122] *Hertfordshire County Council,* p. 424.
[123] *Ibid.,* p. 422.

question decided there was about the use made of oral statements at the applicant's trial.[124]

The House accepted that in the public interest

> "Parliament cannot have intended that anyone questioned under those procedures should be entitled to rely on the privilege against self-incrimination, since that would stultify the procedures and prevent them achieving their obvious purpose".[125]

The powers conferred by the Act in question are for "the broad public purpose of protecting the public health and the environment".[126] This, however, appears to leave aside the reasoning of the ECtHR in *Heaney* that public order concerns cannot extinguish the very essence of the right against self-incrimination.[127]

What the decision confirms for English law is that it is left to the trial judge and his discretion to include or exclude answers in or from evidence. The ECtHR judgments appear only to serve as support in argument as long as the judgments fit the policy applied by the English Courts.

The use in a trial of compulsorily obtained information as evidence has similarly been confirmed for road traffic incidents. In *Brown v. Stott*[128] Lord Bingham also used the "clear public interest in enforcement of road traffic legislation"[129] and the reasoning that an "answer cannot of itself incriminate the suspect, since it is not without more an offence to drive a car"[130] to justify his opinion. In that case the defendant was asked by police who drove the car to which she replied that it was her. The powers of the police were laid down in the Road Traffic Act 1988, s. 172(2)(a). A breath test proved positive and she was prosecuted for being intoxicated while driving a car.[131]

Lord Bingham further argued that it was not easy to see why "a requirement to answer a question is objectionable and a requirement to undergo a breath test is not"[132] and that all motor car owners know that they subject themselves to a regulatory regime.[133]

Lord Steyn's approach in that case was based on the decision by the ECtHR that the right not to incriminate oneself is not absolute,[134] and that the relevant section of the Road Traffic Act addresses a "pressing social problem".[135] In balancing this problem on the one hand, and the (implied) privilege[136] under Art. 6 on the other, Lord Steyn concluded that the s. 172(2) approach is not more drastic than was justified.[137]

"The legitimate aim sought to be achieved in the general interests of the community"[138] has been balanced against the "very limited nature of the information which the defendant was required to provide"[139] and the test of proportionality has been passed.[140]

The arguments throughout the judgment would appear to suggest that inroads into the right not to self-incriminate and the right to silence can be made under English law

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[124] *Saunders v. UK,* para. 67.
[125] *Hertfordshire County Council,* p. 420.
[126] *Ibid.,* p. 420.
[127] *Heaney and McGuinness v. Ireland,* para. 58.
[128] [2003] 1 AC 681.
[129] *Brown v. Stott,* p. 705.
[130] *Ibid*.
[131] *Ibid.,* p. 688/689.
[132] *Ibid.,* p. 705.
[133] *Ibid*.
[134] *Ibid.,* p. 709. Similar also Lord Hope, p. 725, and Lord Clyde, p. 728.
[135] *Ibid.,* p. 711.
[136] *Ibid.,* p. 709.
[137] *Ibid.,* p. 711.
[138] The Rt Hon Ian Kirkwood in *Brown v. Stott,* p. 733.
[139] *Ibid.,* p. 733.
[140] *Ibid*.

when[141] a balancing act has been undertaken.[142] If the specific public interest to obtain the information which the defendant possesses outweighs the individual right under Art. 6 the information must be provided. General parameters, however, for such a balancing exercise do not seem to exist, and the problem will have to be solved on a case by case basis. It would appear that it is not only a question of construction of the relevant statutory provision,[143] but rather a fine tuned exercise during which it ought to be kept in mind that improper compulsion by authorities can lead to miscarriages of justice.[144]

In answering question (1) above[145] whether or not evidence which a Surveyor collected against the will of a defendant affects his entitlement to a fair trial, I conclude that the law of the ECtHR ought to prevent the use of the evidence if the Court would apply its own dicta in *Funke*[146] and *Saunders.*[147] However, by making the decision whether a compulsion affects the fairness of proceedings independent of the will of the defendant and subject to the satisfactory assessment by the court of a number of factors[148] the ECtHR appears to have moved away from its dicta in *Funke* and *Saunders*. It would seem that particularly by weighing the public interest as a decisive factor for using the evidence "to secure the applicant's conviction"[149] the Court acts in contradiction with its own decisions that the public interest cannot serve to justify the use of compulsorily obtained evidence.[150]

English Courts would already in the past seem to have made their decision by weighing up whether or not holding up the implied human right of silence and not to incriminate oneself (the interest of the defendant) is outweighed by the general public interest. This balancing act as in the judgment of the Privy Council in 2000 in *Brown v. Stott* seems to have been officially accepted by the ECtHR.[151]

It would appear, though, that using evidence which was unlawfully (i.e. outside of their power provided by law[152]) obtained by a Surveyor ought to prove a significant admission hurdle for a court to overcome as otherwise the principle of the rule of law would be made a mockery of. If the State (the authority - in this case the MCA) wants Surveyors to have the right to collect evidence in all circumstances it could be easily done by making them

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[141] It would appear that under the more recent judgments of ECtHR it is not a question of "when" a balancing act is undertaken but rather an obligation, see particularly *Jalloh*, paras. 97 and 101. Although it seems difficult to square the requirements addressed in para. 97 that "when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence at issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention".

[142] But as judge Pavlovschi points out in his dissenting opinion in *O'Halloran*, para. OII41, referring to *Saunders,* para. 74, "The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings".

[143] *Hertfordshire County Council,* p. 419.

[144] See *Murray v. United Kingdom* (1996) 22 EHRR 29, para. 45, "By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6."

[145] See above, Chapter 2.4.2.

[146] There was a breach of Art. 6(1) because customs officers had attempted to compel the applicant "to provide the evidence of offences he had allegedly committed", para. 44.

[147] "The general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction", para. 74.

[148] In *Jalloh v. Germany*, para. 117, the Court referred to (1) "the nature and degree of compulsion used to obtain the evidence", (2) "the weight of the public interest in the investigation and punishment of the offence at issue", (3) "the existence of any relevant safeguards in the procedure" and (4) "the use to which any material so obtained is put". In *O'Halloran v. UK*, para. 55, the ECtHR refers, after quoting long passages from its *Jalloh* judgment, to the principles in *Jalloh*, but does not specifically refer to the weight of the public interest. The public interest, however, comes back into the decision making frame by the Court, para. 57, in his reasoning referring explicitly to *Brown v. Stott,* where Lord Bingham on p. 705 stated that there is a "clear public interest" in enforcing road traffic legislation.

[149] *Jalloh v. Germany*, para. 119.

[150] *Saunders v. UK*, para. 74; *Heaney and McGuinness v. Ireland*, para. 57, but also *Jalloh v. Germany* in the rather confusing para. 97.

[151] Albeit, as it appears, only recently in the decisions in *Jalloh* and *O'Halloran*, see above.

[152] See above, Chapter 3, fn 45.

Departmental Inspectors. Those Inspectors have extensive rights under the MSA 1995, s. 259(2).[153]

A decision about admissibility of relevant information/evidence would appear to be easier if a master voluntarily and with knowledge of the possible consequences permits a Surveyor to collect documents, take photos and measurements and hold interviews with master[154] and crew etc. Under such circumstances it would not seem to be objectionable to admit evidence which a Surveyor collected.[155]

I will next examine requirements for oral explanations to be given by the master before discussing the wider powers of a Departmental Inspector under s. 259(2), with the specific focus on statements required under s. 259(2)(i). This particular aspect of the discussion will close with looking at the requirements for crew members to answer questions or produce documents.

3.2.4. Admissibility and specific powers under the MSA 1995

As a Surveyor does not interview any person under caution it would appear that no adverse (for the suspect) inferences can be drawn under the Criminal Justice and Public Order Act (CJPOA) 1994[156] when the suspect refuses to be available for an interview. Specific powers provided by the MSA 1995 for a Departmental Officer can be found in s. 257(2). A negative consequence for a master could result subject to the requirements of the MSA 1995, s. 257(2)(d), if the master refuses to give any explanation when requested to do so.

(a) Statement by a master requested under s. 257(2)(d)

A Departmental Officer, who is any Inspector or Surveyor,[157] can

> "require the master to appear and give any explanation concerning the ship or her crew or the official log-books or documents produced or required to be produced".[158]

A master who refuses

> "to give any explanation or knowingly deceives or misleads the officer…shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale".[159]

The master, however, only has to comply with such a requirement by a Surveyor

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[153] See discussion above, Chapter 2.2. and below, Chapter 3.2.4.*(a)*

[154] See also below, Chapter 3.2.4.*(a)*.

[155] An example for this scenario is an incident (i.e. collision, accident, or other) which has been reported to the relevant MCA Marine Office. For example, if a crew member is injured while operating ship's equipment, a Surveyor would be send out to investigate what and how it had happened. For this he would, amongst others, interview the master and relevant crew, inspect the master and crews' certificates, the ship's certificates, the proper application of the ship's ISM safety management system (see more on this below in Chapter 6.2.; the procedure would be identical on both foreign and UK flagged ships), the log-books and other documentation which could be relevant to establish the facts. He will also inspect the relevant equipment and possibly the vessel as a whole. A report would afterwards be send to the EnU where it will be decided whether or not to prosecute anybody. The report of the Surveyor will probably be used as evidence.
The master (other than under the MSA 1995, s. 257(2) – see below Chapter 3.2.4*(a)*) or crew would not appear to be obliged to answer any question. But the master would not appear to be able to prevent an inspection of the vessel. He might, on refusal of answering the Surveyor, also face the consequence of an EnU investigation instead in which he, or if he is not the suspect a member of the crew, would be interviewed under caution. All of master and crew who are not suspects would then appear to be obliged to answer any question the Departmental Inspector puts to them.

[156] Applying s. 34 of the CJPOA 1994. Section 34(1)(a) specifically requires a caution for sub-section (2), which allows adverse inferences to be drawn, to be applied. See also C Tapper, *Cross & Tapper on Evidence*, p. 692.

[157] See above, Chapter 2.2.

[158] MSA 1995, s. 257(2)(d).

[159] MSA 1995, s. 257(4)(c) tailpiece.

> "whenever the officer has reason to suspect that this Act or any law for the time being in force relating to merchant seamen or navigation is not complied with".[160]

The latter provision therefore does not force a master to respond when the request is not about navigation or not concerned with any merchant seaman.[161] Navigation is not separately defined here,[162] but it would seem that a master could not be requested to give an explanation if, for example, a question arose as to the construction of the ship, any equipment on board, or ISM compliance other than that related to navigation. The three subjects mentioned, however, cover a great deal of Surveyors' work[163] and it will usually be a Surveyor who would attend the vessel.[164]

Following from the foregoing conclusions it would seem that a Surveyor does not have the right to take samples or interview crew. If he takes samples despite the lack of legal power, i.e. unlawfully, and against the will of the master, there are strong grounds for arguing that a judge ought to exclude the Surveyor's evidence using the discretionary powers of the court. Interviewing crew should not cause such a problem as it is the choice of the crew whether or not to answer any question of a Surveyor.[165]

It would appear, though, that a Departmental Officer may take photos. These do not, like samples, interfere with a person's property, and it can probably be argued that they even fall into the same bracket as copies of log-books which are permitted to be taken under s. 257(2)(b).

It is questionable whether the court's discretion to exclude evidence should also apply when the master answers questions of the Departmental Officer while ignorant of his right not to do so.[166] As he is not compelled by the Surveyor to answer it might be assumed that it was the master's choice to respond.

It is different when issues of navigation are concerned. A master does not have the choice but must give an explanation on the basis of the threat of having committed an offence by not doing so. It would appear that giving an "explanation" is not a process where only the master talks. As he is required "to give any explanation" the Surveyor would seem to have the right to ask supplementary questions to get to the heart of the incident. The use of the term "any" explanation suggests that any clarification question by the Departmental Officer is permitted. There would appear to be a difference, though, to the right to ask "such questions as the Inspector thinks fit to ask".[167] Whereas the former ("any explanation") seems to focus on why and how the incident happened[168] the latter ("any question") would appear to also focus on who was involved and responsible for what occurred.

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[160] MSA 1995, s. 257(1) tailpiece.

[161] It would appear that the term is not restricted to crew only but excludes, for example, also any navy personnel.

[162] Although in another context in the MSA 1995 navigation has been described as "Navigation is planned or ordered movement from one place to another", *Steedman v. Scofield* [1992] 2 Lloyd's Rep. 163, p. 166. The Court of Appeal in *R v. Goodwin* [2006] 1 WLR 546, para. 33, appears to accept that approach.

[163] See, for example, below the discussion about port state control and defects, Chapter 6.

[164] The relevant visit to a ship will always be organised by a Marine Office which would send a Surveyor. See also above, Chapter 3, fn 155.

[165] As addressed above in Chapter 3, fn 155, not answering questions of a Departmental Officer does not necessarily provide an advantage for any crew as the next step would probably be that a Departmental Inspector would attend the ship and his questions must be answered. A second disadvantage could be that the ship would be detained as it might not be clear whether or not the vessel and its operation is safe enough not to pose a serious danger to human life. If not enough explanations are provided the Surveyor may come to that conclusion, see also below, Chapter 6. On the other hand it might, however, be considered an advantage by the crew to gain time before answering questions.

[166] See also the discussion above in Chapter 3.2.2.

[167] MSA 1995, s. 259(2)(i)(ii).

[168] *The New Shorter Oxford English Dictionary*, Vol. 1, states under "explain": "1 Make clear or intelligible (a meaning, difficulty, etc.); clear of obscurity or difficulty; give details of (a matter, how, etc)". The use of the term by the House of Lords and the Court of Appeal seems to very much mirror that understanding as illustrated in the following sample cases: *R v. Webber* [2004] 1 WLR 404, para. 29 "any explanation…of his reasons"; *Attorney-General's Reference No 114 of 2007* [2008] EWCA Crim 366, para. 3 "he did not know what was in the car and he did not have any explanation to give"; *R v. Robert George Morgan* [2007] EWCA Crim 3313, para. 6, "he was certainly unable to put forward any explanation as to why he had gone through that red

In line with the decision in *Hertfordshire County Council* it would again seem to be at the discretion of the judge whether or not any statements which the Surveyor may have obtained from the master would be admissible evidence.[169] A strong suggestion that such evidence ought to be excluded can be found when analysing the interview procedure of s. 259(2)(i)[170] which I will address in the following sub-section (b).

Foreign flagged ships are not covered by s. 257. They are, however, subject to inspections by Surveyors[171] and will be subject to port state control inspections.[172]

(b) Statement by master under s. 259(2)(i)

A different picture arises when a master (or any person) is interviewed by a Departmental Inspector as opposed to a Departmental Officer.

Section 259(2)(i),[173] on the one hand, does not give a person any choice but to follow the instructions for attendance[174] by the Departmental Inspector. The person has to answer all of the Inspector's questions,[175] and not only those related to any explanation. But, furthermore, the person must also sign a statement of truths of all of his answers if requested to do so.[176]

On the other hand none of the answers given under s. 259(2)(i) shall be admissible in evidence in any proceedings against that person.[177] This provision is a clear indication that in respect of a Departmental Inspector Parliament did not intend to have the coercive means of a threatened prosecution used to obtain evidence, but to "respect the general privilege not to be compelled to answer questions from people in authority".[178]

In my opinion s. 259(12) is also a clear indication that a judge should respect that general privilege when being confronted with information obtained under s. 257, or even without specific authority. It would seem to be wholly inappropriate and against the spirit of a fair trial to have compulsorily obtained oral statements excluded from any evidence by statute whereas unlawfully obtained or otherwise compulsorily obtained answers outside of that provision would be permitted to be used.

What s. 259(12) does not include under inadmissible evidence is information such as samples and documents. This appears to be where English law differs from the (occasional) interpretation of the ECtHR.[179] A master who is by law coerced to provide the relevant documentation can only hope that the trial judge would use his discretion under PACE, s. 78, to exclude such evidence.[180]

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signal".

[169] *Hertfordshire County Council,* p. 420.

[170] MSA 1995.

[171] *Ibid.*, s. 258(1)(a) and tailpiece.

[172] For the powers of port state control Inspectors see below, Chapter 6.2.

[173] For the relevant text of s. 259 see above, Chapter 2.2.

[174] MSA 1995, s. 259(2)(i)(i). According to s. 260(1) not following such requirement could result in a fine not exceeding the statutory maximum or imprisonment for a maximum of two years.

[175] Section 259(2)(i)(ii).

[176] Section 259(2)(i)(iii).

[177] Section 259(12).

[178] *Hertfordshire County Council,* p. 419.

[179] "However, the Court has on occasion given the principle of self-incrimination as protected under Article 6 § 1 a broader meaning so as to encompass cases in which coercion to hand over real evidence to the authorities was at issue. In the *Funke* case, for instance, the Court found that an attempt to compel the applicant to disclose documents, and thereby to provide evidence of offences he had allegedly committed, violated his right not to incriminate himself", *Jalloh v. Germany*, para. 111. The Court distinguished between "real evidence" as opposed to a confession, ibid, para. 110.

[180] The Privy Council in *Brown v. Stott,* p. 697, appears to clearly adopt the suggestion of the ECtHR in *Schenk,* para. 46, in that "the admissibility of evidence has been recognised as, generally speaking, a matter for national legal systems to regulate."

The powers under s. 259 apply both to UK and foreign flagged ships in UK waters.[181]

(c) Statements by seamen

Seamen, i.e. all crew members other than the master,[182] would appear not to have to answer any question by a Surveyor or Inspector if they do not want to. This includes requests under s. 257(2)(d) as that subsection explicitly only requires the master to give any explanation.

However, seamen, and also the owner, have to produce the documents required under s. 257(2)(a).[183]

When confronted by a Departmental Inspector seamen have to comply with his instructions within the limits of s. 259.

Having considered the position of Departmental Officers, masters and seamen I will now turn to the "most popular" enforcement action applied by MCA Surveyors and discuss the effect human rights have on a detention of a ship.[184] The impact of the HRA 1998 on legislation relevant to detention is again discussed from a different angle when turning to the topic of statutory arbitration, the owner's procedural remedy for an invalid detention.[185] It would have seemed out of context if I had analysed those particular aspects of the discussion at this early stage of the thesis.

3.3. Human rights and the detention of ships

A detention of a ship, like a prohibition notice ashore,

> "is a substantial interference in the freedom of an industrial undertaker or commercial undertaker to run his business in the way he considers it proper to do".[186]

A Detention Notice which does not refer to any particular breach in the law could be in contravention of Art. 1 of the First Protocol of the Human Rights Convention.[187]

> "Article 1
>
> Protection of property
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[188]

According to the ECtHR there are three rules:

> "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain

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[181] MSA 1995, s. 259(1)(b).
[182] *Ibid.*, s. 313(1).
[183] "Any official log-books or other documents relating to the crew or any member of the crew in their possession or control".
[184] Detentions are dealt with in detail under Chapters 5, 6, 7 and 8.
[185] See below, Chapter 8.3. *et seq*.
[186] *Readmans Ltd & Another v Leeds City Council*, QBD, 10 March 1992, p. 3 of the official transcript (a summary of the decision can be found in [1992] COD 419).
[187] According to s. 1(1)(b) of the HRA 1998 Art. 1 of the First Protocol is one of the Convention rights.
[188] Art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "Protocol 1 Art. 1").

> conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest."[189]

The first question to answer appears to be whether the second or the third rule comprised in Protocol 1 Art. 1 would apply before it can be established whether the first rule was complied with.[190]

However, it seems to be clear that the detention of a vessel constitutes an interference with a person's possessions.[191] Therefore that question does not need to be discussed any further.

Thus, the next step is to determine under which of the rules (two or three) the detention of a vessel would fall.[192] Following the judgment of the ECtHR on the detention of an aircraft[193] it would appear to be the third rule addressing the control of the use of property.[194]

When controlling the use of property it must be determined

> "whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[195]

Such a balance, in the case of a detention under the MSA 1995, would have to be reached between the protection of the property rights of the individual and a serious danger to human life.[196] In *R v. Secretary of State for Health, ex parte Eastside Cheese Co*[197] the Court of Appeal concluded that

> "While the court must never abdicate its duty of review, it will accord a margin of appreciation to the decision-making authority. Particularly must this be true, in our view, where the decision-making authority is responding to what it reasonably regards as an imminent threat to the life or health of the public."[198]

The Court did not doubt that the Secretary of State had taken into account that the order made[199] might lead to the destruction of cheese.[200] But as the cheese in that case was "reasonably regarded as unsafe"[201] the Court concluded that no unjustified violation of a human right was involved.[202]

It would appear that the principle applied in this food safety case can similarly be used for the MSA 1995. As long as the detaining officer[203] balances[204] the personal possessions interest with the public interest[205] as addressed in Protocol 1 Art. 1, and can reasonably

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[189] Referring here to the first sentence in the first paragraph. For the interference with a person's possessions see the ECtHR in *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* (2006) 42 EHRR 1, para. 141.
[190] *Sporrong and Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 61.
[191] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, para. 140.
[192] *Agosi v. The United Kingdom* (1987) 9 EHRR 1, para. 48 and 50.
[193] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*.
[194] *Ibid*., para. 142.
[195] *Sporrong and Lönnroth v. Sweden,* para. 69.
[196] MSA 1995, s. 94(1).
[197] [1999] 3 C.M.L.R. 123.
[198] *Ibid.,* para. 59.
[199] "The effect of the order was to prohibit the carrying out of any commercial operation in relation to cheese originating from R. A. Duckett & Co. Ltd of Walnut Tree Farm", *Ibid.,* para. 1.
[200] *Ibid.*
[201] *Ibid*.
[202] *Ibid*.
[203] Which is the Surveyor or PSC Inspector.
[204] "In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions", *Pressos Compania Naviera S.A. v. Belgium* (1996) 21 EHRR 301, para. 38.
[205] "It is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property", *Draon v. France* (2006) 42 EHRR 40, para. 75. This public concern does, for example, include the protection of fish stocks, *Alatulkkila v. Finland* (2006)

conclude that an unfair imbalance exists, his interference with the right under Protocol 1 Art. 1 would seem to be justified.

I will next address the Marine Accident Investigation Branch and its role and relationship with the MCA. This appears to be of importance as both MCA and MAIB have the task to investigate marine accidents.[206] As the following discussion will demonstrate, this could lead to a certain overlap which again could affect enforcement procedures and human rights despite the MAIB not being an enforcement agency.

43 EHRR 34, para. 67. The latter clearly suggests that public environmental interests also fall within the right of interference by public authorities under Protocol 1 Art. 1.

[206] The task of the MAIB is encapsulated in the Merchant Shipping (Accident Reporting and Investigation) Regulations 2005, SI 2005 No. 881, hereafter "MAIB 2005 Regulations", reg. 5(1).

Chapter [4] – The role of the MAIB

4.1. Creation of the MAIB
4.2. Information disclosure
4.2.1. Court ordered disclosure
4.2.2. Defence of reasonable excuse
4.2.3. International law and the MAIB
4.2.4. Case study on foreign co-operation
4.2.5. The MAIB Chief Inspector's role and the release of VDR data
4.2.6. MAIB, VDR data and human rights - Article 8
4.2.7. MAIB, VDR data and human rights - Article 6
4.2.8. Judicial review
4.2.9. MAIB investigation reports
4.2.10. Relationship between the MAIB and the MCA
4.3. Conclusion

4.1. Creation of the MAIB

The creation of the Marine Accident Investigation Branch (MAIB) was based upon the obligation of the Secretary of State to appoint Inspectors for the purpose of investigating marine accidents.[1] This obligation arose from s. 33 of the MSA 1988 which is re-enacted in s. 267 of the MSA 1995.[2] Section 33 which was clause 32 in the original introduction of the 1988 Bill[3] was a direct result[4] of the formal investigation into the capsizing of the "Herald of Free Enterprise".[5] The criticism of the then existing system was that a conflict of interest could arise for the Department of Transport where its own conduct might be in question. In para. 60 of the report the wreck commissioner, Sheen J, referred to an earlier Formal Investigation asking

> "whether it would be preferable for a wreck inquiry to be conducted by counsel to the tribunal who is independent of the Department of Transport."[6]

In relation to the "Herald of Free Enterprise" investigation this point was again stressed after counsel to the Secretary of State told the Court about his unease that he was "acting in a sense in the public interest, quite distinct from any interest of the Department".[7]

The report ends by stressing the importance of avoiding the appearance that the investigation is "a cover-up".

> "In every Formal Investigation it is of great importance that members of the public should feel confident that a searching investigation has been held, that nothing has been swept under the carpet and that no punches have been pulled. Many problems relating to the investigation of shipping casualties are under active consideration. In the course of considering all the related problems, further consideration should be given to the question of appointing counsel to the tribunal, and *not* on behalf of the Secretary of State, so that he can be seen to be wholly independent of the Department."[8]

The Legislative Proposal for the Merchant Shipping Act 1988 confirmed that "the Bill covers matters arising from the 'Herald of Free Enterprise' disaster".[9] It was clearly stressed that "the Chief Inspector [of the MAIB] will report directly to the Secretary of State, and will not be part of the Marine Directorate".[10]

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[1] MSA 1995, s. 267(1).
[2] N Gaskell, in *Current Law Statutes 1995*, 1996, p. 285; N Phillips, N Craig, *Merchant Shipping Act 1995,* p. 256.
[3] *Hansard,* Parliamentary Papers, 1987 – 1988, Vol. III, Bill 82.
[4] House of Commons, Command Papers, *Merchant Shipping: Legislative Proposal*, Cm 239, s. 12, 1987, hereafter "Cm 239".
[5] MV "Herald Of Free Enterprise", Report of Court No. 8074 Formal Investigation, London, 1987 (hereafter "Report of Court").
[6] *Ibid.*, para. 60.
[7] Statement reported to have been made by Mr David Steel Q.C., *Ibid*.
[8] *Ibid.*
[9] Cm 239, ss. 48 and 50.
[10] *Ibid.*, s. 51.

According to the MSA 1995, s. 267(3) the Secretary of State is empowered to make Regulations which define the term "accident" and make other relevant provisions.[11] Such Regulations were made in 1989,[12] in 1994[13] and revised more recently by the Merchant Shipping (Accident Reporting and Investigation) Regulations 1999.[14] It is the 1999 Regulations which applied to the files I investigated. The 1999 Regulations have since been replaced by the Merchant Shipping (accident Reporting and Investigation) Regulations 2005.[15]

Accidents which fall within the remit of the MAIB are accidents which involve any UK ship[16] or any other ship within UK waters.[17]

Pursuant to the MAIB 1999 Regulations it was the MAIB's purpose to determine the circumstances and causes of an accident with the objective of avoiding future accidents and improving safety of live at sea. It was not the purpose to apportion liability or apportion blame unless the latter was partly necessary to achieve the fundamental purpose of investigating an accident.[18]

The MAIB 2005 Regulations have done away with the express objective of improving the safety of live at sea.[19] The sole objective of an investigation shall now be the prevention of future accidents by ascertaining its causes and circumstances.[20] But preventing future accidents will probably have the same effect as in the 1999 Regulations in that a reduction in the number of accidents would have improved safety.

In a similar manner to the MAIB 1999 Regulations, it shall not be the purpose of the MAIB under the MAIB 2005 Regulations to determine liability nor apportion blame unless the latter is necessary to an extent for achieving the new objective.[21] To ascertain the causes and circumstances of an accident, MAIB Inspectors are given the powers of a "Departmental Inspector".[22] A Departmental Inspector has wide ranging powers in terms of collecting evidence and interviewing a person "who he has reasonable cause to believe is able to give any information relevant to any examination or investigation".[23] Any person failing to comply with a requirement in pursuance of MSA 1995, s. 259 becomes criminally liable.[24]

The fact that an MAIB Inspector has such wide-ranging powers[25] to acquire information for an MAIB report raises the question of guarding this information to protect the human rights of the interviewees who, in a criminal prosecution, may become suspects.[26] The criminal prosecution would, of course, be brought by the MCA or a public prosecutor.

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[11] MSA 1995, s. 267(4).
[12] SI 1989 No. 1172, The Merchant Shipping (Accident Investigation) Regulations 1989, hereafter the "MAIB 1989 Regulations".
[13] SI 1994 No. 2013, The Merchant Shipping (Accident Reporting and Investigation) Regulations 1994, hereafter "MAIB 1994 Regulations".
[14] SI 1999 No. 2567, which came into force on 12 October 1999, hereafter the "MAIB 1999 Regulations".
[15] SI 2005 No. 881 (hereafter "MAIB 2005 Regulations") which came into force on 18 April 2005.
[16] MSA 1995, s. 267(2)(a)(i) and the MAIB 2005 Regulations, reg. 4(1)(a).
[17] MSA 1995, s. 267(2)(a)(ii) and the MAIB 2005 Regulations, reg. 4(1)(b).
[18] MAIB 1999 Regulations, reg. 4.
[19] According to para. 4.2 of the *Explanatory Memorandum to the Merchant Shipping (Accident Reporting and Investigation) Regulations 2005* (hereafter "*Explanatory Memorandum"*, prepared by the MAIB, March 2005 (see http://www.opsi.gov.uk/si/em2005/uksiem_20050881_en.pdf (30 September 2008)), "the aim of these Regulations is to improve the efficiency and efficacy of the MAIB, reflect best working practices adopted by the Branch, and align MAIB practices more closely with the processes of other transport accident investigation branches".
[20] MAIB 2005 Regulations, reg. 5(1).
[21] *Ibid.*, reg. 5(2).
[22] MSA 1995, s. 267(7).
[23] *Ibid.*, s. 259(2)(i); see also above Chapter 2.2.1. and Table 1 in Chapter 2.
[24] *Ibid.*, s. 260(1).
[25] The Legislative Proposal for the 1988 Act referred to "the same statutory functions as Inspectors appointed under the present Merchant Shipping legislation", Cm 239, s. 51.
[26] See also above, Chapters 2 and 3.

In the process of establishing the MAIB the focus only appears to have been on separating survey and inspection from accident investigation. The then Secretary of State for Transport said during the second reading of the Bill in the House of Commons

> "The new branch will be separate from my Department's marine directorate and will report directly to me. It will therefore be free to take an entirely independent view should an accident raise questions about the regulatory policy of the Department. We also intend that all the branch's reports on the more important or significant accidents should be published."[27]

The rights of possible suspects appear not to have been addressed during the legislative process of the MSA 1988.[28]

The following sections will analyse whether or not the current legislation takes due notice of the human rights of an interviewee who may be at risk of being prosecuted, which in most cases will probably be the master of the vessel subject to an MAIB investigation.

4.2. Information disclosure

To understand the current provisions in the 2005 MAIB Regulations covering the release of information it appears to be sensible to analyse how they came about.

The first (1989) MAIB Regulations required the Chief Inspector to report to the Secretary of State who in turn "may publish the Report if he thinks fit and shall do so if"[29] it will improve safety at sea[30] or be related to a "serious casualty to a United Kingdom ship".[31] However, if it appeared that there was a breach of law and a prosecution should be considered the Report was not to be publicised.[32] Against this total protection of any possible suspect who was interviewed stood reg. 9(7) which permitted the Chief Inspector to release information if this was in his opinion vital in the interests of safety. Other than in reg. 9(2) the MAIB 1989 Regulations were silent as to the release of personal data.

The most important change, for this discussion, occurred in the next, the MAIB 1994, Regulations which did away with

> "the previous bar on publication of Reports if a prosecution or Inquiry into Conduct is contemplated [and was] changed to a discretionary provision".[33]

Regulation 9(2) gave the Secretary of State discretion to withhold publication until the decision whether or not to prosecute has been made.[34] In addition the MAIB 1994 Regulations limited the right of any person to release information save with prior written consent given by the Chief Inspector.[35] The Regulations did not contain any guidance for the Chief Inspector on this matter.

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[27] *Hansard,* House of Commons, Debates, 28 January 1988, p. 266, column 507.
[28] According to N Gaskell, in *Current Law Statutes*, p. 285, referring to the conception of s. 33 "the arrangement is deliberately modelled on that operating in the aviation field, where there is a separate accident investigation branch….(see generally s. 75 of the Civil Aviation Act 1982)". Section 75 is derived from ss. 10 and 63(6) of the Civil Aviation Act 1949. According to the Minister of Aviation, in Reports from Commissioners, p. 5, commenting on the "Committee on Accident Investigation Procedure" report from 1948, *ibid,* p. 7 *et seq*., it appears that no consideration was then given to the protection of the individual investigated. Section 75(1) of the 1982 Act empowers the Minister to make Regulations for the investigation of accidents. The latest Regulations appear to be the "Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996". These Regulations "re-enact the Civil Aviation (Investigation of Air Accidents) Regulations 1989…with some significant amendments designed to meet the requirements of Council Directive 94/56/EC", see *Shawcross and Beaumont on air law*, footnote 1, p. VI 132-140. "The new dispositions are all aimed at requiring caution of, and at imposing sanctions on, those persons who may tend to forget that it is not the purpose of accident investigation to apportion blame or liability;…", *ibid.*
[29] MAIB 1989 Regulations, reg. 9(1).
[30] *Ibid*., reg. 9(1)(a).
[31] *Ibid*., reg. 9(1)(b).
[32] *Ibid*., reg. 9(2).
[33] *Ibid*., Explanatory Note, para. (c).
[34] *Ibid*., reg. 9(2).
[35] *Ibid*., reg. 9(4).

The MAIB 1999 Regulations did not make such a radical change on the subject of disclosure, but appear to have moved somewhat closer back to the 1989 position. Whether it was an objective of the MAIB 1999 Regulations or not, a possible defendant was protected under the 1999 Regulations in so far as details of any person having given evidence to an MAIB Inspector were not to be disclosed. Records relating to communications with such person were not to be disclosed either unless a Court determined otherwise.[36] The wording of reg. 9 was as follows:

> "9(1) Except within the context of a report of an investigation, the names, addresses or any other details of anyone who has given evidence to an [MAIB] Inspector shall not be disclosed. Neither shall the following records be made available for purposes other than the investigation, unless a Court determines otherwise–…"[37]

It did not appear to be clear from the text of reg. 9(1), though, whether a court could also determine the disclosure of names, addresses or other details of a person having given evidence or whether the court's option to determine disclosure was limited only to what was addressed in the second sentence of reg. 9(1).

A breach of this provision was subject to a fine not exceeding level 5 of the standard scale.[38]

The MAIB 2005 Regulations seem to apply a clearer and stricter regime for the disclosure of personal details, records or any other details in that this requirement now stands on its own without an option for disclosure being expressly given to a court other then through the proviso in reg. 12(1).[39]

> "12(1) Subject to the following paragraphs, the names, addresses or any other details of anyone who has given evidence to an Inspector shall not be disclosed.
>
> (2) The following documents or records shall not be made available for purposes other than the investigation, unless a Court orders otherwise -
>
> > (a) subject to paragraph (3), all declarations or statements taken from persons by an Inspector or supplied to him in the course of his investigation, together with any notes or voice recordings of interviews;
> >
> > (b) medical or confidential information regarding persons involved in an accident;
> >
> > (c) any report made under regulation 6(4) or (5);
> >
> > (d) copies of the report other than the final report except as mentioned in regulation 13(3)(a), (4), or (8).
>
> (3) A person who has given a declaration or statement to an Inspector in the course of an investigation may make available a copy of his declaration or statement to another person as he sees fit.
>
> (4) Any independent technical analysis commissioned by the Chief Inspector and opinions expressed in such analysis may be made publicly available if he considers it appropriate to do so.
>
> (5) Subject to paragraph (6), no order shall be made under paragraph (2) unless the Court is satisfied, having regard to the views of the Chief Inspector, that the interests of justice in disclosure outweigh any prejudice, or likely prejudice, to -

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[36] *Ibid.*, reg. 9(1).
[37] *Ibid.*
[38] *Ibid.*, reg. 14(3).
[39] The intention of the new reg. 12 was to reduce "the range of documents or records that may not be made available without a Court Order", Marine Accident Investigation Branch, *Regulatory Impact Assessment: The Merchant Shipping (Accident Reporting and Investigation) Regulations 2005* (hereafter "*Regulatory Impact Assessment"*) March 2005, para. 3.1. This resulted, for example, in taking out the requirement that a court has to determine whether "all communications between persons having been involved in the operation of the ship or ships" can be released for purposes other than the MAIB investigation (reg. 9(1)(b) of the 1999 Regulations). Similarly, VDR data which could not be released unless a court so determined (reg. 9(1)(d) of the 1999 Regulations) and any voice or video recordings may now be released at the discretion of the Chief Inspector (reg. 12(7) of the 2005 Regulations).

(a) the investigation into the accident to which the document or record relates,

(b) any future accident investigation undertaken in the United Kingdom, or

(c) relations between the United Kingdom and any other State, or international organisation.

(6) The provisions of this regulation shall be without prejudice to any rule of law which authorises or requires the withholding of any document or record or part thereof on the ground that disclosure of it would be injurious to the public interest.

(7) Copies of information obtained from a voyage data recorder or from other recording systems, pertinent to the accident, including voice recordings (other than any recordings mentioned in paragraph (2)(a)), video recordings and other electronic or magnetic recordings and any transcripts made from such information or recordings, may be provided at the discretion of the Chief Inspector to the police or other official authorities."[40]

Paragraph (1) uses the plural and refers to "paragraphs" which suggests that more than one option exists which would allow disclosure of personal details. It is submitted that both the option to obtain an order for disclosure by a court under para. (2), and the private choice of an interviewee under para. (3), justify the plural in para. (1).

Paragraph (2) expressly gives a court the option to order disclosure of the items listed under letters (a) – (d).

Paragraph (3) allows interviewees to make a copy of their statements available to any other person and thereby also to the prosecution if the interviewee so agrees. A court would not be involved in this process.

The order for disclosure, however, is restricted by paras. (5) and (6). Paragraph (5) suggests that para. (2) is not available to request an order for the release of any documents or records protected by para. (2) unless a court decides that the interests of justice are paramount to both the interests for a fair and just investigation now and in the future or to any possible adverse affect on relations between the UK and other States or International Organisations.

Paragraph (6) restricts disclosure under para. (2) if under a different rule of law it would be considered injurious to the public interest were such documents or records disclosed.

It appears, therefore, that a court will first have to judge whether the balancing exercise required by para. (5) comes down in favour of disclosure. If that is the case the court will, as a second step, have to judge whether disclosure would be in conflict with any rule of law which requires the withholding of the document or record. But this decision is subject to the disclosure not being in the public interest.

Last, but not least, para. (7) leaves it at the discretion of the Chief Inspector to provide any recordings or transcripts obtained from the voyage data recorder to the police or other official authorities. Paragraph (7) thereby provides another opening into the protection of the individual under para. (1) as voice recordings[41] or their transcripts would make it relatively easy for an investigator to identify the person on the bridge at the time in question.

Whereas para. (1) appears to focus clearly on the protection of the person interviewed, para. (5) seems not to have such direct objective. Paragraph (5) moves away from the individual addressing the impact a disclosure could have on the system of accident investigation and on foreign relations. But the fall-out of para. (5) is that the individual is indirectly protected as the disclosure of declarations or statements, and most certainly medical information, would usually reveal the identity of the person in question.

[40] MAIB 2005 Regulations, reg. 12.
[41] Voice recordings are part of the data a VDR records, see Chapter 4.2.5. below.

Both an order for disclosure of records under para. (2) and the information which may be provided by the Chief Inspector[42] would weaken the protection of the individual significantly should this information be used in a prosecution against that person.

In the following sections the powers of the court to make an order under para. (2) will be analysed, as will be implications that may result from international co-operation of the MAIB and the possible sharing of otherwise restricted information. A discussion of the possible impact of the Chief Inspector's discretion will then lead into the role MAIB investigation reports play in court cases.

4.2.1. Court ordered disclosure

It would appear that an official of the MCA or the police can only succeed in the request for an order of disclosure under reg. 12(2) if it can be established that the legitimate public interest in the prosecution obtaining the information clearly outweighs protecting the conflicting aspects of the public interest of the MAIB or the State.[43] In practice the principle would probably mean that the interest to prosecute would have to clearly outweigh the interest of the MAIB to be seen as the guardian of its obtained information, and to ensure, through the safeguarded trust invested in the MAIB by prospective interviewed suspects, accurate statements by interviewees in any possible future incident. Thus it would appear that it would not be enough for an applicant prosecutor to show to the court only that a conviction is likely when applying *The Code for Crown Prosecutors,* but also that a disclosure is very much needed in the public interest.

A court cannot make an order for disclosure in accordance with reg. 12(2) unless the conditions of reg. 12(5) are satisfied which includes that the court must listen to the views of the Chief Inspector before it carries out its balancing exercise.[44] The court is not directly asked to consider the protection of the individual which would only have to be considered if it is part of the interests of justice. However, as it is "axiomatic that a person charged with having committed a criminal offence should receive a fair trial",[45] it appears that a court will inevitably have to take into account the individual rights of an interviewee who may become a suspect. It would seem to follow that the "interests of justice" include both the public interest in a fair trial of the defendant and the public interest in prosecuting a wrongdoer.[46]

The subject of disclosure in the context of a fair trial in public and/or criminal law is usually addressed when a public body withholds or wants to withhold evidence.[47] The matter is generally known as "public interest immunity" and "was largely developed in civil cases" before the Court of Appeal decided *R v. Ward* in 1992.[48]

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[42] Para. (7).

[43] "Although it is the practice to talk of conflicting public interests this can be misleading. The conflict is more accurately described as being between two different *aspects* of the public interest. If it is decided that the aspect of the public interest which reflects the requirements of the administration of justice outweighs the aspect of the interest which is against disclosure, then it is the public interest which requires disclosure", Lord Woolf in *R v. Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274*,* p. 298; an aspect, which, although, in a case in relation to civil proceedings, p. 288, I suggest applies to both civil and public and/or criminal proceedings.

[44] Which is that the court "is satisfied… that the interests of justice in disclosure outweigh any prejudice" of any of the three factors (i.e. the current investigation, any future investigation and UK foreign relations) addressed in the MAIB 2005 Regulations, reg. 12(5).

[45] *Attorney General's Reference (No. 2 of 2001)* [2004] 2 AC 72*,* para. 13.

[46] See also *Wallersteiner v. Moir* [1974] 1 WLR 991*,* p. 1006, "all of us have an interest in seeing that justice is done. And in bringing wrongdoers to book."

[47] See the chain of cases which led to the current law beginning with *R v. Ward* [1993] 1 WLR 619 (1992)*, R v. Davis* [1993] 1 WLR 613 (1993), *R v. Keane* [1994] 1 WLR 746 (1994), and others, culminating for the time being in "The Criminal Procedures and Investigations Act 1996", and the opinion of the House of Lords in *R v. H and Others* [2004] 2 AC 134.

[48] Such development took place prior to *Ward*, Lord Bingham in *H and Others,* para. 19. The decision in *Ward* was called a "ground-breaking decision", Lord Bingham, para. 20.

The case of the prosecution wanting to obtain disclosure of information gathered in an MAIB investigation thus establishes exactly the opposite to the interest of the prosecution in a standard public interest immunity case. Whereas all the authorities appear to revolve around the interest of the prosecution to withhold evidence, in the case of an MAIB investigation it is the prosecution which might be interested in the information held by another public body. The following discussion will, therefore, focus on the weight of the prosecution's interest within the balancing process. This weight, it is submitted though, does not change whether or not the prosecution wants to withhold or obtain evidence. In both scenarios the justification for a prosecution has to rest on either the interests of justice or an important public interest.[49]

The guidance which a court is given by the MAIB 2005 Regulations only focuses on the competing factors which must be identified. On the one side are the interests of justice[50] and on the other is the current investigation,[51] any future investigation,[52] or the UK's foreign relations.[53] Any analysis could stop at this stage if the court had been given clear guidance by Parliament as to how to carry out the balancing exercise. That, however, seems not to have been the case. There is no explanation of under what circumstances "the interests of justice in disclosure outweigh any prejudice, or likely prejudice"[54] to any of the three scenarios, and it would seem that Parliament left that decision to the judges.

It appears that, initially, the court would have to follow the "golden rule…that full disclosure of such material ['any material held by the prosecution which weakens its case or strengthens that of the defendant'] should be made".[55]

This approach seems to have found its statutory manifestation in the Criminal Procedures and Investigations Act 1996 which established the ground rule for disclosure by the prosecution in s. 3(1)(a).

> "3. Initial duty of prosecutor to disclose
>
> (1) The prosecutor must—
>
> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or…"

Against this rule stands s. 3(6).

> "(6) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly."[56]

Consequently it would appear that the golden rule may be deviated from when it is not in the public interest to follow it.

Translating this context into the MAIB situation would appear to mean that a court cannot order the disclosure of any documents or records unless the public interest requires the court to do so. This brings the discussion again back to the starting point, namely that the court does not have any explicit guidance as to how to judge the competing factors[57] or the interests of justice, the latter consisting of both the public interest in a fair trial and the penalising of wrongdoers. For the following discussion of what could be in the "interests of

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[49] *H and Others,* para. 18. Lord Bingham acknowledged that "circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest."
[50] MAIB 2005 Regulations, reg. 12(5), headpiece.
[51] *Ibid.*, reg. 12(5)(a).
[52] *Ibid.*, reg. 12(5)(b).
[53] *Ibid.*, reg. 12(5)(c).
[54] *Ibid.*, reg. 12(5), headpiece.
[55] *H and Others,* para. 14.
[56] The Criminal Procedures and Investigations Act 1996, s. 3(6).
[57] I.e. the four elements of reg. 12(2) v. the interests of justice.

justice" it will have to be kept in mind that the disclosure at stake concerns four categories of information:

category (1) declarations or statements of the (potential) defendant,[58]

category (2) confidential information regarding persons involved in the accident,[59]

category (3) any incident report required by the Regulations[60] to be send to the MAIB by the owner, master or senior surviving officer of the vessel,[61] and

category (4) preliminary reports by the Chief Inspector.[62]

It would seem, in consequence, that a court prior to balancing the "interests of justice" with any possible prejudice to the concerns of the MAIB and the State[63] will have to decide whether or not a disclosure to any other authority of any of the information addressed under reg. 12(2) would violate the right to a fair trial under Art. 6 of the Human Rights Convention.[64]

It appears that the ECtHR is rather clear in its position on obtaining statements against the will of the defendant. In *Saunders v. UK* the Court decided that answers which incriminated the defendant and which were obtained under compulsory powers constituted a violation of Art. 6.[65] But the ECtHR had excluded from the application of Art. 6 answers given to Inspectors which "were essentially investigative in nature and … did not adjudicate either in form or in substance".[66] However, the Court clarified that the privilege against self-incrimination

> "in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused".[67]

In my view, statements[68] obtained by MAIB Inspectors which would be requested by a prosecutor would come under that privilege. They may initially have been investigative in nature but by giving a prosecutor access to those declarations and statements they would appear to become evidence obtained through coercion. It would seem to follow that, as

> "the public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings",[69]

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[58] MAIB 2005 Regulations, reg. 12(2)(a).
[59] *Ibid.*, reg. 12(2)(b).
[60] *Ibid.*, reg. 6. The reporting has to be done under threat of a penalty, see reg. 18(1)(a). Although, the MAIB itself does not appear to envisage a prosecution for such an offence unless it "was blatant and repeated", see *Regulatory Impact Assessment,* para. 5.1. Similar to the MCA's attitude for breaches of strict liability provisions (for strict criminal liability see Chapter 9.5) the MAIB appears to have the same approach which replaces the decision by Parliament to make the offence one of strict liability with an offence which would seem to require some element of guilt on behalf of owner, master or senior officer.
[61] MAIB 2005 Regulations, reg. 12(2)(c).
[62] *Ibid.*, reg. 12(2)(d).
[63] As they are addressed in the MAIB 2005 Regulations, reg. 12(5).
[64] Interestingly the MAIB seems to be of the opinion that the European Convention on Human Rights is "not applicable" in the context of the MAIB 2005 Regulations, see the *Explanatory Memorandum*, para. 6.1. It would also appear that the public consultation exercise only raised concerns as regards the "commercial confidentiality of [the] ship" but no concern about a possible human rights violation, see *Regulatory Impact Assessment*, para. 6.5. This could suggest that human rights do not yet feature highly in merchant shipping or that the consultees who responded were more concerned with the profitability of their vessel. Although, in para. 4.3 of that document it is addressed that "concerns regarding the release of confidential information have arisen". It is not said, though, that these concerns originated from the public consultation exercise.
[65] *Saunders v. UK*, para. 71. See also above, Chapter 3.2.
[66] *Ibid.*, para. 67, and also *Fayed v. UK* (1994) 18 EHRR 393, para. 61.
[67] *Saunders v. UK*, para. 68.
[68] See above category (1) "declarations or statements".
[69] *Saunders v. UK*, para. 74. This principle seems to have been softened, though, by *Jalloh v. Germany,* para. 97. However, the issue in that case was not an answer obtained against the will of the defendant but a forced regurgitation of a plastic bag of drugs which the defendant had swallowed.

a court in the UK ought to follow that dictum and order oral statements by a potential defendant not to be disclosed to a prosecutor. This view would seem to be supported by the restriction in the MSA 1995, s. 259(12). That section makes answers given to a Departmental Inspector, using his powers under s. 259, inadmissible evidence against that suspect. For reasons of fairness this interpretation should similarly apply to the other three categories of reg. 12(2).

The release of any report[70] made about the accident and provided by owner, master or senior officer to the MAIB Inspector under his compulsory powers ought to be protected by Art. 6 of the Human Rights Convention because the report only came into existence through the creation of the defendant.[71] Medical information[72] could similarly be protected by Art. 6 of the Human Rights Convention as long as it did not already exist prior to the MAIB Inspector's request.[73] But copies of preliminary reports[74] seem to be less protected by Art. 6 than statements or the ship's accident reports. It could therefore be arguable that the public interest in favour of a prosecution could only dominate the interests of justice under English law if the request for disclosure covers pre-existing medical information or preliminary investigation reports.

If a court were to order disclosure, the protection for individuals provided by reg. 12(1)[75] could be compromised. But to make such a decision a court must find that the interests of justice outweigh the three potential listed disadvantages to MAIB and State.[76]

Provided that Art. 6 is not violated, a public interest to penalise, and as a consequence to prosecute, the culprit would appear to exist if the public interest factors of *The Code for Crown Prosecutors* in favour of a prosecution so suggest. But such public interest would in my opinion only outweigh any prejudice to (1) 'the current investigation of the accident'[77] if serious negligence[78] appears to have caused it and a prosecution would potentially have a similar public effect as an MAIB investigation. To outweigh any prejudice to (2) 'any future accident investigation'[79] it would seem that the public interest would have to be stronger than in the first case. This could, for example, be the case if the trust of the seafaring community in the confidentiality of the MAIB Inspectors were to come under a general threat if relevant information were provided to the prosecutor. To justify a release order under those circumstances, the lack of a prosecution would seemingly have to cause a level of broad public dissatisfaction should a prosecution appear to be failing due to a lack of access by the prosecutor to existing information. Outweighing any prejudice to (3) 'any international relations of the UK'[80] would seem to require at least an evenly balanced international interest in favour of a disclosure order. If, for example, the foreign relations to a country which is important for the security of the UK would be prejudiced by a disclosure order, there would not seem to be a justification to release MAIB held information.

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[70] Category (3) above.
[71] See, for example, the Court of Appeal in *R v. Kearns* [2002] EWCA Crim 748, para. 52. But such a report may come to the knowledge of the MCA during an SMC audit. Yet, even though an auditor has the same extensive powers as a Departmental Inspector (ISM Regulations, reg. 16(3)) a court ought to apply the same safeguards as apply to oral statements given by an accused and consider the report to be protected under Art. 6. This, however, is eventually left at the discretion of the judge because the MSA 1995, s. 259(12) only excludes "answers" from admissible evidence but not documents. See also the discussion above, Chapter 3.2.2.
[72] Category (2) above.
[73] As, if this information existed without the defendant having been forced to create it, English law would probably not consider a release of such information through a court order under reg. 12(2) to be a violation of Art. 6 of the Human Rights Convention. see, again *R v. Kearns,* para. 52.
[74] Category (4) above.
[75] MAIB 2005 Regulations.
[76] *Ibid.*, reg. 12(5)(a)-(c). These three potential prejudiced elements are (1) the current MAIB investigation, (2) any future investigations and (3) UK foreign relations.
[77] *Ibid.*, reg. 12(5)(a). See Chapter 4, fn 76.
[78] For "serious negligence" see below, Chapter 13.
[79] MAIB 2005 Regulations, reg. 12(5)(b). See Chapter 4, fn 76.
[80] *Ibid.*, reg. 12(5)(c). See Chapter 4, fn 76.

This seems to be putting the bar for a decision in favour of disclosure rather high but, still, the risk of disclosure continues to exist for an MAIB interviewee. The risk appears to be negligible as regards any statement or declaration a potential defendant has made if the case law of the ECtHR were to be applied. But an interviewee might have to face an increasing risk for an order of disclosure as regards the accident report sent to the MAIB by the vessel, any existing medical records and any preliminary report by the Chief Inspector.[81]

In consequence, this means that a master who is going to be interviewed by an MAIB Inspector finds himself in a similar dilemma to a master who is interviewed by an Inspector for a possible breach of the law relating to navigation.[82] The master will have to answer all questions on threat of prosecution for not doing so[83] unless, if questioned by an MAIB Inspector, he has a reasonable excuse.[84]

4.2.2. Defence of reasonable excuse

The MSA 1995 s. 260 deals with penalties for obstructions of Inspectors exercising their powers under the MSA 1995, s. 259.[85] Section 260 does not explain what constitutes a "reasonable excuse" and there does not appear to be any authority that deals with the definition of a reasonable excuse in the context of s. 260.

It has been said, generally, that an "excuse relates to the circumstances of the individual actor".[86] These circumstances are according to the MSA 1995 s. 260(1)(b) those which would excuse the master from criminal liability.

In *R v. Evans*[87] the Court had to decide about the breach of a restraining order which required the defendant not to use abusive words towards her neighbours.[88] Dyson LJ explained what could be seen as a reasonable excuse in that particular context.

> "Acting under a reasonable misapprehension as to the scope and meaning of the order is capable of being a reasonable excuse for acting in a manner which is prohibited by the order."[89]

It is doubtful whether a master could claim "a reasonable misapprehension" as to the contents of the MSA 1995, s. 259. But in the absence of authorities to determine what would constitute a reasonable excuse for the master of a ship not to comply with a requirement under that section I will draw an analogy with road traffic legislation[90] and case law.

Drivers of cars in the course of an investigation are required to provide two breath specimens or a specimen of blood or urine in accordance with s. 7(1) of the Road Traffic Act 1988. A failure of a person to provide such specimen without reasonable excuse constitutes an offence.[91]

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[81] Realistically, though, as most of the possible breaches of merchant shipping legislation are offences of strict liability, there will probably hardly ever be an interest of the MCA to obtain MAIB held information. As the specific guilty intent of the individual is irrelevant for the establishment of a breach such MCA interest would probably only come to bear for its own decision whether or not to prosecute. Otherwise personal culpability would appear to be of interest only when it comes to sentencing, see the following examples in the MCA recorded convictions (Annexes 2–6): 1+11/2001; 26,28+31/2002; 51/2004; 58, 59, 62, 63 + 64/2005.
[82] MSA 1995, s. 257(2)(d); see above Chapter 3.2.4.
[83] *Ibid.*, s. 257 tailpiece; see also above Chapter 3.2.4.
[84] *Ibid.*, s. 260(1)(b).
[85] For the discussion of s. 259 see above, Chapter 2.2. and Tables 1 and 2 in Chapter 2.
[86] D Ormerod, *Smith & Hogan Criminal Law*, p. 270.
[87] [2005] 1 WLR 1435.
[88] *Ibid.,* para. 2.
[89] *Ibid.,* para. 21.
[90] Road Traffic was chosen because some key offences such as driving while intoxicated or fatigued raise similar issues of safety in road traffic as they do in shipping.
[91] Road Traffic Act 1988, s. 7(6).

In *R v. Lennard*[92] the appellant, who was convicted for failing to supply a specimen of blood or urine, had raised the defence of a reasonable excuse on the basis that after having stopped driving, but before "being asked to give a specimen of either breath or blood, he had consumed a substantial quantity of alcohol".[93]

The Court in *Lennard* established the principle that

> "no excuse can be adjudged a reasonable one unless the person from whom the specimen is required is physically or mentally unable to provide it or the provision of the specimen would entail a substantial risk to his health".[94]

A similar view was taken in 1994 by Curtis J in *Director of Public Prosecutions v. Crofton*[95] in whose view it was clear that what would have to be considered to hold that the ground for the defendant's failure constituted a reasonable excuse is "the necessary causative link between the physical or mental conditions and the failure to provide the specimen".[96]

This causative link was missing, for example, in *DPP v. Grundy*[97] where the defendant was not considered to have provided the necessary evidence linking distress to the failure to provide a specimen.[98]

By analogy, for the master of a ship to have a reasonable excuse he would, for example, have to be mentally or physically unable to answer questions of an Inspector. The burden of proof, it appears, would rest on the defendant.[99] Simply claiming that he did not properly understand the legal requirements[100] would probably not suffice as it ought to form part of the master's training at nautical college.[101]

Without a reasonable excuse the master does not have a choice and must answer the questions of an MAIB Inspector or face the threat of criminal punishment.

In summary, it may be concluded that it is fairly unlikely (albeit still possible) that a master's (or other person's)[102] compulsorily made statement to an MAIB Inspector will ever be used against him in criminal proceedings. But the obstacles for a prosecutor to obtain information other than a statement or declaration from the MAIB[103] with the help of a court would seem less difficult to overcome. Still, it seems that, despite the residual risk of information provided by the master which may assist the prosecution, he would be well advised to satisfy the requirements of MSA 1995, s. 259 to avoid criminal proceedings

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[92] [1973] 1 WLR 483; an authority whose principles are still applied, see *Director of Public Prosecutions (DPP) v. Grundy* [2006] EWHC 1157, para. 3.
[93] *R v. Lennard*, p. 484-485.
[94] *Ibid.,* p. 487.
[95] [1994] R.T.R. 279.
[96] *Ibid.,* p. 285.
[97] [2006] EWHC 1157 (Admin).
[98] *Ibid.,* para. 11.
[99] *R v. Evans*, para. 24.
[100] Legal requirements in this context are International Conventions such as SOLAS or the Colregs. If ships' masters have any doubts as to local requirements they can always consult their local agent or resort to the pilot books which ships have to carry. Masters (and officers) have to have a sufficient knowledge of the English language, see STCW Code, Chapter II, Table A-II/1: "Adequate knowledge of the English language to enable the officer to use charts and other nautical publications, to understand meteorological information and messages concerning ship's safety and operation, to communicate with other ships and coast stations and to perform the officer's duties also with a multilingual crew, including the ability to use and understand the Standard Marine Navigational Vocabulary as replaced by the IMO Standard Marine Communication Phrases".
[101] See, for example Marine Guidance Note (MGN) 69, p. 17, which provides the syllabus for the oral examination of masters in the UK. As part of this syllabus masters are required to know about "reports required by the Marine Accident Investigation Branch (MAIB)". For masters who are holders of foreign certificates of competency see STCW Code, Chapter II, Table A-II/2, which requires masters to have the following competence: "Monitor and control compliance with legislative requirements and measures to ensure safety of life at sea and the protection of the marine environment". MGNs "give significant advice and guidance relating to the improvement of the safety of shipping and of life at sea, and to prevent or minimise pollution from shipping", see www.mcga.gov.uk (19 December 2008).
[102] E.g. owner or senior officer.
[103] I.e. the accident report sent by the vessel, medical information or the preliminary investigation report.

under s. 260. It seems that it will be rather difficult, if not impossible for the master, to establish a defence of reasonable excuse.

The master's personal interest could not only be compromised by the requirements under s. 259 but also by co-operation of the MAIB with marine investigators of foreign investigation institutions.[104] In a more recent case, for example, the MAIB co-operated with the German BSU.[105] In this context the possible influence of German law on a master being subject to an MAIB investigation will be looked at, as will be the international requirements under which the MAIB or any other accident investigation agency, would be working.

Before I will look at the co-operation with the BSU I will in the following subsection first introduce international law and its impact on an MAIB investigation.

4.2.3. International law and the MAIB

Whereas the MAIB 2005 Regulations stop short of obliging the MAIB to co-operate internationally in accidents other than those which involve ro-ro ferries and high-speed passenger craft, the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[106] makes it mandatory for flag States to co-operate in the case of a marine casualty on the high seas and the EEZ[107] subject to the provisions in Art. 94(7).

(a) UNCLOS 1982 provisions

> "Art. 94(7) Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation."[108]

The obligation for an inquiry in the flag State is restricted to incidents in which citizens of another State (hereafter called the "affected" State) than the flag State lose their life or sustain serious injury. An inquiry in the flag State is also mandatory when ships or installations of an affected State are seriously damaged.

UNCLOS 1982 does not provide a definition for the meaning of "serious injury" and "serious damage". It appears that the terms were left to be interpreted by the individual States.[109]

The second sentence of Art. 94(7) establishes the obligation of the flag State to co-operate with any inquiry held by the affected State. A reciprocal requirement for the affected State to co-operate with the flag State does not seem to exist unless the second mention of "other State" in the second sentence is read as always meaning any of the States involved which is holding an inquiry. If both States (in a case where two States are involved) hold an inquiry, each of them would be the "other State" from the perspective of the State holding an inquiry. But the fact that the affected State (i.e. the State the citizens of which are injured or dead) is not necessarily the flag State of the other vessel (in case

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[104] In three of the listed MAIB collision reports such co-operation took place, see consecutive nos. 36 (Malta), 38 (Hong Kong), and 41 (Antigua & Barbuda) in Annex 14.
[105] "Lykes Voyager" and "Washington Senator", MAIB investigation report 4/2006, on www.maib.gov.uk. The BSU (Bundesstelle für Seeunfalluntersuchung) is the German equivalent of the MAIB.
[106] The UK has acceded to UNCLOS on 25 July 1997, see http://www.un.org/depts/los/reference_files/status2006.pdf.
[107] UNCLOS, Art. 58(2) provides for articles 88 – 115 to also apply to the EEZ unless they are incompatible with Part V of UNCLOS. See also IMO, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, 2005, p. 32.
[108] UNCLOS, Art. 94(7).
[109] MAIB 2005 Regulations, reg. 2(1) defines "serious injury" but not "serious damage".

of a collision), but any other State[110] appears to suggest that the onus to carry out an inquiry and co-operate is only on the flag State which has not (necessarily) become an "affected" State. This would make sense as it is the flag State which has jurisdiction over the ship[111] and thus access to the relevant information.[112] In addition the word "that" before the second mention of "the other State" in the second sentence also suggests that the State referred to is the same "other" State as the one at the beginning of the sentence (which is not the flag State).

It seems that the word "and" before "causing loss of life..." separates two conditions which have to be satisfied before an inquiry becomes mandatory for a State.[113] First, it is required for a State that a ship flying its flag is involved in the incident. Secondly, the marine casualty or incident of navigation must have caused loss of life, serious injury or serious damage to citizens of or to the affected State.

UNCLOS 1982 does not provide any definition or guidance on the meaning and purpose of "inquiry". Therefore I will discuss the term in the following paragraphs.

It appears that there can be three main likely public objectives for an inquiry into a marine casualty or a navigational incident. First, incidents may be investigated with the aim to improve the future safe operation of ships (health and safety recommendations possibly leading to activities of the flag State administration or even Parliament). Secondly, investigations may be held to establish whether certification of, for example, crew members or ships should be withdrawn (administrative measures against individuals). Thirdly, an investigation may have the purpose to establish whether a criminal prosecution should be commenced (criminal prosecution against individuals).

It is not the duty of the flag State to look after the citizens of the affected State or to ensure that the affected State is in a position to successfully prosecute persons. But it is in the interest of any State to improve the safe operation of ships in general independent of the flag they fly, for example, in respect of collisions. This can sensibly only be done on an international level as it requires a common understanding of the application of the Colregs. Investigating incidents which may repeat themselves if nothing is done to prevent them in the future appears in consequence to be a measure which falls into this international bracket.

Taking legal action in a civil or criminal court, on the other hand, does not usually require the co-operation of the other State and was common practice before UNCLOS 1982 came into being. Sorting out civil or criminal liability can be done within the existing laws in each State by the individual or the authority concerned. But laws for the co-operation of States in inquiries did not exist before they were agreed in UNCLOS 1982.[114] This points towards giving "inquiry" the meaning of "investigation" as used within the MAIB context.

In favour of this understanding is also the fact that UNCLOS 1982 deals separately with penal jurisdiction and disciplinary matters in cases of collision,[115] and that States are required to conform to "generally accepted international regulations, procedures and practices".[116] One such procedure is the IMO Code for the Investigation of Marine

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[110] Which could also be an additional, and thereby third, State.
[111] UNCLOS, Art. 92(1).
[112] The IMO's approach appears to be that both flag and affected State are always required to co-operate, see *Implications of the United Nations Convention …*, p. 32. This would undoubtedly be the desirable provision, however, it is submitted that the text of Art. 94(7) does not inevitably lead to such understanding.
[113] This appears also to be the view of the IMO: *ibid.,* p. 32.
[114] See "Convention on the High Seas, 1958", which in Art. 10 provided for the measures flag States have to take for their vessels to ensure safety at sea; Art. 11 referred to criminal and disciplinary responsibility of the master and the institution of relevant proceedings; the convention does not address the investigation of accidents; according to R R Churchill, A V Lowe, *The Law of the Sea,* 3rd ed., 1999, p. 264-265, UNCLOS "sets out in more detail the duties of the flag State – including…to hold inquiries into shipping casualties".
[115] UNCLOS, Art. 97; it also appears to be the view of the IMO, see IMO document *Implications of the United Nations Convention …*, p. 32.
[116] UNCLOS, Art. 94(5).

Casualties and Incidents[117] which is also referred to as one of the measures "for the effective application and enforcement of the relevant conventions".[118]

(b) Application of UNCLOS 1982 to the MAIB

If, as submitted above, "inquiry" has to be read as "investigation" under UNCLOS, then when applied to the MSA 1995 (and its delegated legislation), it appears that the MAIB 2005 Regulations issued under that Act[119] do not fully comply with the UNCLOS 1982 requirement of Art. 94(7).

The obligation to co-operate stipulated in that article is independent of the type of ship. But the MAIB 2005 Regulations do not take that approach and restrict the co-operation requirement to incidents involving ro-ro ferries and high-speed passenger craft only.[120]

As a consequence it appears that the MAIB 2005 Regulations neither fully comply with UNCLOS 1982 nor address the requirement for the MAIB to apply the IMO Code for all its co-operation with other States.[121] What seems to follow from the UNCLOS 1982 provision[122] is that each State is required to conform to internationally accepted procedures.

It appears therefore to be a breach of the international consensus for the MAIB not to follow the IMO Code in all investigations with international involvement. By not sharing interview transcripts with co-operating investigation authorities of other States for investigated incidents which occurred on the high seas independent of the type of ship involved, the MAIB does neither appear to follow UNCLOS 1982 nor the IMO Code.

This practice, however, has the effect of protecting the individual master of a vessel which was involved in an accident investigated by the MAIB. The risk of information passed on via the MAIB to any UK prosecutor is further minimised. But as the following discussion demonstrates such a risk still continues to exist.

4.2.4. Case study on foreign co-operation

Co-operation with foreign investigation institutions can possibly compromise the protection of an interviewee under reg. 12(1) and (2)[123] when the foreign law does not provide at least similar protection as UK law for an interviewee, and an exchange of data is taking place.[124]

To take one example, German law stipulates that any statements made by any person and obtained in accordance with the relevant chapter of the statute[125] must not be used to the disadvantage of the interviewee. However, by contrast with UK law, it also provides that personal data may be transferred to a prosecuting agency.[126] It appears that even

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[117] Hereafter the "IMO Code".
[118] R R Churchill, A V Lowe, *The Law of the Sea,* p. 273-274.
[119] MSA 1995, s. 267. But this is different to s. 268 ("formal investigation into marine accidents") which focuses on the possible cancellation of officers' certificates of competency and is dealt with in Art. 97(2) of UNCLOS 1982.
[120] MAIB 2005 Regulations, reg. 11(1).
[121] See also *Implications of the United Nations Convention …*, p. 5, where it is stated that IMO Resolutions "are normally adopted by consensus and accordingly reflect global agreement by all IMO Members".
[122] UNCLOS 1982, Art. 94(5).
[123] MAIB 2005 Regulations.
[124] According to Captain Smart, the Head of the EnU, see Annex 16, question 22, co-operation with foreign enforcement agencies happens in "some cases". Examples were three co-operations with France, Isle of Man and Denmark.
[125] Seeunfall-Untersuchungs-Gesetz [Marine Accident Investigation Statute], § 19(4); see http://www.bsu-bund.de/cln_007/SharedDocs/Downloads/DE/Seesicherheits__Untersuchungs__Gesetz__SUG,templateId=raw,property=publicationFile.pdf/Seesicherheits_Untersuchungs_Gesetz_SUG.pdf (19 March 2007).
[126] § 15(1) in connection with § 26(1) and § 25(1) Flugunfall-Untersuchungs-Gesetz (FlUUG).

though the statement by an interviewee towards an accident investigator cannot be used in a German prosecution the personal data of people involved, however, can. It follows that it is not a big step imagining UK prosecutors contacting German prosecutors, or the German police, asking them to pass on personal details of the relevant persons.[127] It appears that such evidence could be admissible unless it is irrelevant and prejudicial to the defendant.[128] A decision as to whether admission of such evidence would be in conflict with the right to a fair trial, because of the argument that the evidence would not have reached the prosecution through UK channels, will depend on the particular circumstances of the case.[129]

A German prosecutor also has the right to request the inspection of files[130] in which the BSU records all personal data and any interview statements.[131] Even though German law does not apply in the UK it is, again, not difficult to imagine that co-operation between a UK and a German prosecuting agency may open direct access for the UK agency to transcripts of interviews which could be used in a prosecution. At the very least the German prosecution agency can, on the basis of the single file concerned, have access to information which, when not used directly as evidence in a case, may give valuable information to the relevant UK or German prosecutor.

It is also possible that interview transcripts may be exchanged between accident investigating agencies. This could theoretically open another access route for a UK prosecutor. However, the MAIB states that interview transcripts are confidential and are not part of any such exchange.[132]

According to the understanding of the MAIB, co-operation between the MAIB and a foreign accident investigating agency is based upon the rules of IMO Resolution A.849(20) and the IMO Code attached to it.[133] In addition the relevant EC Directive also requires mandatorily that

> "Member States shall comply with the provisions of the IMO Code for the investigation of marine casualties and incidents when conducting any marine casualty or incident investigation involving a ship referred to in this Directive."[134]

But the statutory obligation for the MAIB is limited in that "the Chief Inspector shall enable a substantially interested State which is an EEA State to participate or co-operate in the investigation in accordance with the IMO Code"[135] but only when the investigation involves a ro-ro ferry or a high-speed passenger craft[136] operating to or from an EU port[137] in which case the IMO Code applies.[138] This requirement is based upon Directive 1999/35/EC which explicitly restricts its application to ro-ro ferries and high-speed craft.[139] However, reality appears to show that co-operation takes place in case of involvement of other vessels as well.[140]

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[127] Which may be done by a prosecuting agency under the procedure and requirements of the "Crime (International Co-operation) Act 2003", chapter 2.
[128] *R v. Byrne* [2002] EWCA Crim 632, para. 31. See also above, Chapter 3.2.3.
[129] See above Chapter 3 and particularly *Schenk v. Switzerland,* para. 46, where it was stressed, i.a., that the trial as a whole has to be fair and that in that case the unlawfully obtained evidence was not the only evidence the conviction was based upon, p. 265-266.
[130] Section 26(3) FIUUG.
[131] Section 25(1) FIUUG.
[132] See Annex 26, emails of 28 February, 7 and 13 March 2007.
[133] See Annex 26, according to MAIB email of 7 March 2007. To view the IMO Resolution see, for example, http://maiif.org/Resolutions%20Rev.htm (17 July 2008).
[134] Directive 2002/59/EC, Art. 11.
[135] MAIB 2005 Regulations, reg. 11(1).
[136] *Ibid.*
[137] Directive 1999/35/EC, Art. 3(1).
[138] MAIB 2005 Regulations, reg. 11(1) and (2).
[139] Directive 1999/35/EC, Art. 1 and 12(1).
[140] Annex 14, no. 36, involved a UK container, and a Maltese general cargo, vessel colliding in the Baltic Sea; no. 38 involved a UK container and a Hong Kong container vessel colliding in the East China Sea; no. 41 involved an Antigua & Barbuda general cargo vessel and a UK light house, and the co-operation with the BSU happened after a collision between two container ships in the Taiwan Strait.

This is not reflected in the MAIB 2005 Regulations which therefore appear not to fully implement the Directive 2002/59/EC. The Regulations do not explicitly apply the IMO Code to investigations which involve ships other than ro-ro ferries and high-speed craft and thereby do not appear to take full consideration of the IMO Code. The latter provides in para. 6.2. that for incidents in the territorial sea flag and coastal State should co-operate and mutually agree the lead investigating agency. For the high seas this task is left to the relevant flag States involved.[141]

The lead investigating State, such as the UK through the MAIB in the investigation of the "Lykes Voyager" and the "Washington Senator",[142] should amongst others be "the custodian of records of interviews and other evidence gathered by the investigation".[143]

When two States have agreed to co-operate, the lead investigating State should allow representatives of the other State's organisation amongst others to "question witnesses",[144] "view and examine evidence and take copies of documentation",[145] and, particularly, "be provided with transcripts, statements and the final report relating to the investigation".[146]

According to the information provided by the MAIB the latter has not happened when it co-operated with the BSU.[147] That leaves a discrepancy between what the MAIB says it has done, and what the IMO Code (according to which the MAIB says it conducts its international co-operation) requires. There would appear to be two consequences of this. First, as the IMO Code has been incorporated into English law as regards particular types of ships[148] a breach of it by the MAIB would appear to be subject to judicial review.[149] However, not disclosing information which protects the interviewees would hardly trigger legal action by them. The only interested party would seem to be the foreign investigation agency. They would probably not take any action as they are depending to a large extent on the co-operation of the MAIB. Secondly, a breach of the IMO Code in investigations for which the IMO Code is not incorporated[150] would not seem to have any legal consequence. Other than having no legal consequence there would, similar to the latter point, also not appear to be any interested party which would go public and blame the MAIB for its failure to co-operate in accordance with international standards.

The following subsection will conclude the discussion on the possible impact on the master or any other subject of the release of information held by the MAIB. The section will discuss how the Chief Inspector's discretion to release certain data may impact on any master or other person affected. In practice this would appear to be of significant importance as electronically recorded data for the first time provide an objective and true source of information about a ship's movements and its management. The release of such data to a prosecution agency may have far reaching consequences for master and watchkeeping personnel.

4.2.5. The MAIB Chief Inspector's role and the release of VDR data

The "Chief Inspector" of the MAIB is appointed by the Secretary of State[151] and reports to him.[152] The Chief Inspector's functions are specified by the MAIB 2005 Regulations.[153]

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[141] IMO Code, para. 6.3.
[142] "Lykes Voyager" and "Washington Senator", MAIB investigation report 4/2006, front page.
[143] IMO Code, para. 7.4.
[144] *Ibid.*, para. 9.1.1.
[145] *Ibid.*, para. 9.1.2.
[146] *Ibid.*, para. 9.1.4.
[147] See above, Annex 26, MAIB email of 13 March 2007.
[148] MAIB 2005 Regulations, reg. 11(1). It appears that only ro-ro ferries or a high speed passenger craft are covered by the regulation.
[149] See below, Chapter 4.2.8.
[150] This would appear to all marine casualties other than those involving ro-ro ferries and high speed craft.
[151] MSA 1995, s. 267(1).
[152] *Ibid.*, s. 267(7).

The Chief Inspector has what appears to be a general and unrestricted discretion to provide certain information to the police or other official authorities.[154] Information covered by his discretion includes copies obtained from a voyage data recorder (VDR) or other recordings or their transcripts unless they are declarations, statements, any notes or voice recordings of interviews.[155]

(a) The Voyage Data Recorder

The purpose of a VDR is to assist in casualty investigation.[156] SOLAS Chapter V requires a VDR to be fitted on ships above a certain size, built after a certain date and when operating internationally.[157]

National law in the UK has implemented SOLAS Chapter V through "the Merchant Shipping (Safety of Navigation) Regulations 2002".[158] A UK flagged ship and any ship within UK waters[159] to which the Regulations apply shall be fitted with a VDR meeting the requirements of the MCA SOLAS V Publication (the "MCA Publication").[160]

The MCA Publication incorporates the "IMO Recommendation on Performance Standards for voyage data recorders",[161] and refers for further information in its guidance notes to Annex 10 of the publication.[162] Annex 10 incorporates the "IMO Guidelines on Voyage Data Recorders" (the "IMO VDR Guidelines").

Amongst the data items to be recorded are the bridge audio[163] and the VHF communications audio.[164]

Although the shipowner has at all times ownership of the VDR,[165] custody of it in all circumstances during an investigation should be with the "investigator".[166] Investigator in this context is an MAIB Inspector.[167] Access to the data other than by the Inspector must also be granted to the shipowner.[168]

As the VDR records a minimum of 12 hours[169] before it stops or is stopped[170] it will usually provide exact details, amongst all the other items recorded,[171] on what has been said on the bridge. This will probably provide more accurate technical-nautical information as to what happened in the wheelhouse than any interview with bridge watchkeepers. It will

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[153] *Ibid.*, s. 267(4)(e).
[154] MAIB 2005 Regulations, reg. 12(7). See above Chapter 4.2.
[155] *Ibid.*, reg. 12(2)(a).
[156] SOLAS, Chapter V, reg. 20(1).
[157] *Ibid.*
[158] SI 2002, no. 1473 (hereafter "Safety of Navigation Regulations").
[159] *Ibid.*, reg. 4(1).
[160] *Ibid.*, reg. 5(1) and (2).
[161] IMO Resolution A.861(20); see MCA SOLAS V Publication (on www.mcga.gov.uk), reg. 18.2: "Systems and equipment,…shall conform to appropriate performance standards not inferior to those adopted by the organization."
[162] MCA SOLAS V Publication, Guidance Notes, para. 11.
[163] IMO Resolution A.861(20), data item 5.4.5.
[164] *Ibid.*, data item 5.4.6. Other items are date and time, ship's position, speed, heading, radar data - post display selection, water depth, main alarms, rudder order and response, engine order and response, hull openings status, watertight and fire door status, acceleration and hull stresses, and wind speed and direction.
[165] IMO VDR Guidelines, para. 1.
[166] *Ibid.*, para. 3.
[167] This can be deduced from IMO Guidelines, para. 5, which as regards access to the recorded data of the VDR refers to relevant domestic legislation and the IMO Code.
[168] IMO VDR Guidelines, "a copy of the data must be provided to the ship owner at an early stage in all circumstances", para. 5.
[169] See MCA SOLAS V publication, Annex 10, section 4.4.
[170] "The owner must be responsible, through its on-board standing orders, for ensuring the timely preservation" of evidence in a non-catastrophic accident, IMO Guidelines, para. 2(a).
[171] See above Chapter 4, fn 165.

also usually not be difficult to allocate the spoken word to the master or to other individuals having been present on the bridge at the time of the accident.

It is this information[172] which, at the discretion of the Chief Inspector, may be provided to official authorities.

(b) VDR Information and the Human Rights Convention

Although concerns over self-incrimination were addressed on one occasion in the *Regulatory Impact Assessment*[173] there is no indication that an impact assessment of the HRA 1998 and the Human Rights Convention on the MAIB 2005 Regulations has actually taken place.[174] Therefore it seems to be appropriate to have this discussion here.

It seems that there could be two potential violations of the right to a fair trial under the Human Rights Convention[175] which will be looked at in turn. First, the master may not have timely access to information which he would need for his defence and, secondly, the Chief Inspector's seemingly unfettered discretion to pass on data to a prosecuting authority could be unlawful.[176]

The next two sub-sections will look in more detail at these two points, namely the master's access to VDR data, and the Chief Inspector's discretion.

(i) Master's access to VDR data

If the IMO VDR Guidelines are applied, which, it is submitted, appears to be the accepted practice of the UK administration,[177] the shipowner has access to the VDR information[178] and thereby to vital evidence which he can use for his defence should there be a prosecution. But such access is not guaranteed to the master or any watchkeeper under the MAIB 2005 Regulations, the IMO VDR Guidelines or the IMO Code on casualty investigation.[179] This appears to be of some significance as the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996[180] specifically hold the owner and the master (and any person for the time being responsible) criminally liable for any contravention.[181]

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[172] Amongst all the other items recorded in accordance with the IMO VDR Guidelines, such as, for example, position, speed, heading and radar data-post display.

[173] In para. 4.3.2, second count on p. 24, it was said that "Voice recording of interviews can be released to the Police and other official authorities under this Regulation, which contravenes the right against self-incrimination as contained in the European Human Rights Convention". According to the following para. no. 2 these concerns were intended to be addressed in that "the Regulation will be amended to make clear that only recordings pertinent to the accident in question, not interviews subsequent to the accident, are included". Reference to human rights and VDR data has not been made in the document. See also above, Chapter 4, fn 64.

[174] See above, Chapter 4, fn 64.

[175] Human Rights Convention, Art. 6.

[176] According to the HRA 1998, s. 6(1), "it is unlawful for a public authority to act in a way which is incompatible with a Convention right".

[177] Even though the MCA SOLAS V Publication is incorporated in parts into UK law including its regs. 18.1, 18.2 (incorporating in turn various IMO Performance Standards), 18.3, 18.7 and 18.8 (test requirements for VDRs; for all regulations see Safety of Navigation Regulations, reg. 5(2)), the Guidance Notes at the end of MCA SOLAS V Publication, reg. 18, appear to be what they say they are: guidance notes. Guidance note 10 refers to Annex 10 of the MCA SOLAS V Publication which therefore appears not to be incorporated into the Regulations. However, in the absence of any other statutory requirement for the flag State administration and the MAIB as to how to deal with VDR data the IMO VDR Guidelines which are included as part 6 of Annex 10 appear to form the basis for any action of the MCA.

[178] IMO VDR Guidelines, para. 5.

[179] The latter is only concerned with access of investigators to VDR data, e.g. s. 5.5.

[180] SI 1996 No. 75, hereafter "Prevention of Collision Regulations". These Regulations are not to be confused with the International Regulations for preventing Collisions at Sea 1972 (Colregs); the Prevention of Collision Regulations 1996 incorporate the Colregs into UK law, Reg. 4(1).

[181] *Ibid.*, reg. 6(1); see also below Chapter 10.

Despite a violation of the Prevention of Collision Regulations (and thereby also a breach of the Colregs) being an offence of strict criminal liability, the owner and the master may have completely different interests in conducting their defence and may be in a position of "competitors" rather than co-operating on their defence particularly when cargo has been damaged.[182] The master's and owner's[183] common objective will probably be not to be found guilty. The owner might, for commercial reasons (particularly when he is also the contracting carrier), also want to establish that he would not be criminally liable were it not for the offence being one of strict criminal liability, and, more importantly, for the master having been negligent[184]. Even though evidence to this effect would probably not be admissible because it would go beyond proof of the specified elements of the offence[185] which does not require any *mens rea,* an owner might want to have his "innocence" on record. The owner would want to focus on avoiding the possibility that the trial discloses serious negligence on his behalf which would most likely cause a higher sentence.[186]

The owner's interest will be to ensure that he is not blamed in any possible ensuing civil claim for damages for having operated an unseaworthy vessel. In the latter case the owner may have acted in violation of the warranty in an insurance voyage policy to provide a seaworthy vessel at the commencement of the voyage.[187] As regards damaged cargo, he might be in a similar position. Unseaworthiness could trigger his liability[188] whereas establishing negligence of the master in the navigation of the ship might exclude the owner's/carrier's liability.[189]

Leaving aside possible conflicting interests one might otherwise usually expect an owner to inform his master about the VDR recording and debrief him after a collision, but such communication might also not happen for the following reasons. The master may have been employed by a manning agency or may only be in a one-off employment for a few months. Although there is usually a duty of care for employers to take care of their employees[190] it might be that the law of the relevant (foreign) flag State is different. And if the manning agency is the employer it does not follow that it has access to the VDR data so as to be able to help the master even if it wanted to.[191] In the case of a foreign and particularly a flag of convenience owner,[192] access to justice for a master may prove difficult if he attempts to get the courts of the relevant flag State to help him access the VDR evidence.[193]

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[182] This appears also be the position of the Nautical Institute which suggests that "the lawyers [likely to be appointed by the vessel's insurers] may advise the Master and crew of their legal position and if the circumstances merit it, recommend that the crew or their union appoint their own lawyers". The Nautical Institute*, The Mariner's Role in Collecting Evidence* (hereafter "*The Mariner's Role*"*),* 3rd ed., 2001, p. 92.

[183] For the sake of argument I will assume in this discussion that the owner is an individual. If it were a company the problem would be to identify who in the company actually was the person who was responsible or negligent, see, for example, the discussion in *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 AC 469, para. 27, or the Privy Council in *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 AC 500, p. 507, ("Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company?").

[184] Error in navigation by the master is a carrier's defence to a cargo claim under the Hague and Hague Visby Rules Art. IV r. 2(a).

[185] *R v. Sandhu,* [1996] EWCA Crim 1677, Court of Appeal, 10 December 1996, transcript p. 4-5 (own numbering - a summary of the case and a case note can be found in [1997] Crim.L.R 288).

[186] See above, Chapter 4, fn 81.

[187] Marine Insurance Act 1906, s. 39(1).

[188] If the Carriage of Goods by Sea Act 1971 applies, Schedule, Art. 4(1).

[189] *Ibid*., Schedule, Art. 4(2)(a) which is Art. IV r. 2(a) in the Hague and Hague Visby Rules.

[190] See e.g. *Waters v. Commissioner of Police of the Metropolis* [2000] IRLR 720*,* para. 11.

[191] The IMO VDR Guidelines clearly address the shipowner but not any other person such as the manager, bareboat charter or manning agent, para. 5.

[192] The ITF has currently (March 2007) declared 32 "flag of convenience" countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda (UK), Bolivia, Burma, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, French International Ship Register (FIS), German International Ship Register (GIS), Georgia, Gibraltar (UK), Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands (USA), Mauritius, Mongolia, Netherlands Antilles, North Korea, Panama, Sao Tome and Príncipe, St Vincent, Sri Lanka, Tonga, Vanuatu, see http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm (March 2007).

[193] See, for example, *What do FOC's mean to seafarers?* on http://www.itfglobal.org/flags-convenience/flags-convenien-184.cfm (March 2007); also in general terms on the difficulties for seafarers to get access to justice in foreign countries, in: A D Couper, *Voyages of Abuse,* 1999, p. 154-155.

Not having guaranteed access to existing evidence appears to violate the principle of the "equality of arms".[194] In a civil or criminal trial a party must have knowledge of all evidence.[195] If that is not the case a breach of Art. 6(1) of the European Human Rights Convention would seem to be established.[196]

The question may be asked whether it is realistic to pose a scenario where the shipowner deliberately deprives his master of information to get the better of any particular investigation. The fact that the Nautical Institute advises master and crew to appoint their own lawyers after a collision[197] suggests that the above is not too far fetched. The MCA files also reveal a few cases where the breakdown of the relationship between shipowner and master became obvious,[198] and the companies in each case tried to establish that it was not their fault, but always that of the master or crew member.

It is submitted that the problem of possibly depriving a suspect of his right of access to VDR data should be solved by ensuring that not only the shipowner, who also owns the VDR, but all other persons who may become defendants[199] are guaranteed access to the VDR data at the same time as the owner. The requirement for "equality of arms"[200] for the prosecution and the defence demands that anybody possibly affected by the VDR data ought to have timely access to that information.

(ii) The Chief Inspector's discretion

The second point deals with the more fundamental problem of whether the Chief Inspector has unfettered discretion in passing on VDR data to any other public authority. The discretion of the Chief Inspector does not appear to be subjected to any formal statutory control. Without any parameters against which he can determine whether or not his discretion is applied in accordance with the rule of law[201] any such decision may be subject to the risk of being arbitrary and may not comply with requirements of provisions allowing public authorities to interfere with private life.

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[194] "It is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence", ECtHR in *Edwards and Lewis v. United Kingdom* (2005) 40 EHRR 24*,* para. 52.

[195] Although not much evidence for uncooperative behaviour of owners was found in the MCA files it has to be noted that on two occasions owners appear to have immediately taken action against the master or a crew member; in conviction 49/2004 owners were suing the master for £8,000 in damages after he was found guilty and fined £400; in conviction 51/2004 the defence (owner) blamed the cadet for illegal dumping of garbage.

[196] ECtHR in *Lobo Machado v. Portugal* (1997) 23 EHRR 79*,* para. 31; also confirmed in *Nideröst-Huber v. Switzerland* (1998) 25 EHRR 709*,* para. 24.

[197] "While the investigating lawyers are likely to be appointed by the vessel's insurers and will not be directly representing the interests of the Master and crew, these interests do to a certain degree coincide with those of the insurers", *The Mariner's Role,* p. 92; the important interests for master and crew to be represented will obviously be those which do not coincide with the interests of the insurers.

[198] For example in the following cases: In conviction 49/2004 (Annex 5) it was stated that the master, who appears to have been under the influence of alcohol (the relevant words were missed out in the web information) and was fined £400. After that his company was suing him for £8,000 for the delay the vessel suffered in port. In conviction 51/2004 (Annex 5) the cadet who dumped a garbage bag in the Solent and caused the company having to pay a fine of £10,000 was, according to the defence, dismissed. It could well be that this information which appears to be completely irrelevant for the outcome of the case was used by the defence to suggest that the fine should be rather low as the company would usually comply with environmental rules and regulations. In another case reference is made to the ship's manager whose defence it was that the "failure in this case was limited to the personal failing of the master to follow" the ship's safety management system (MCA file MS 10/74/286, Preliminary Case Analysis, The Manager's Defence, para. 6.7). Similarly in file MS 10/74/284 it is stated in the minute on file (11 January 2005) that the defence of the company was "that it was the fault of the Master and Crew for not implementing the company instructions".

[199] For example the master, OOW, pilot, ship's manager and the bareboat charterer.

[200] See above, *Edwards v. UK,* Chapter 4, fn 195.

[201] Which is the minimum a citizen is entitled to in a democratic society, *Malone v. United Kingdom* (1985) 7 EHRR 14*,* para. 79.

> "The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."[202]

The remaining question is how the limits of discretion are determined when the statutory instrument does seemingly not provide for any limitation. It appears that the principle established by the House of Lords in *Padfield v. Minister of Agriculture*[203] still applies.[204] The principle addressed by Lord Reid is that

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court."[205]

When the discretion is used it must be exercised reasonably. Matters which are irrelevant have to be excluded, and it has to be considered unreasonable to take into account extraneous matters.[206]

The following discussion will consider the scope of the Chief Inspector's discretion and its limitations to determine whether the discretion satisfies the requirement of the Human Rights Convention "that everyone has a right to respect for his private life"[207] and that there shall be no interference by a public body unless it is in "accordance with the law".[208] The discussion appears to be appropriate as the HRA 1998 makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right".[209]

4.2.6. MAIB, VDR data and human rights - Article 8

Before it can be assessed whether there was an interference by a public authority with a person's right it is required to establish if one of the rights of a person addressed under Art. 8(1) has been violated.[210]

> "Art. 8 Right to respect for private and family life
>
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

VDR data comprise of, amongst others, voice recordings of any person who was present on the bridge at the relevant time. This would seem to raise the question of whether the provision of those data to the prosecution authority constitutes a breach of the right to (1) the (potential) defendant's private life, (2) his home, or (3) his correspondence.

It seems to be accepted by the ECtHR that the notion of "home" also covers business premises[211] and that the seizure of electronic data constitutes an interference with a

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[202] H W R Wade, C F Forsyth, *Administrative Law,* 9th ed., 2004, p. 355; a view supported in the House of Lords by Lord Bridge in *R v. Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd* [1988] AC 858, p. 872, in a unanimous judgment.
[203] [1968] AC 997.
[204] *R v. Gateshead Metropolitan Borough Council* [2006] QB 650, para. 42, a decision of the Court of Appeal in a judicial review case in 2006 where the Court referred to *Padfield* and stated "it is trite law that discretionary statutory powers must be exercised to promote the policy and objects of the statute".
[205] *Padfield v. Minister of Agriculture, Fisheries and Food,* p. 1030; similarly Lord Hudson, p. 1046, who spoke of the "intention of the Act" or Lord Pearce on p. 1054, who referred to Parliament's intention, and last but not least (Lord Morris was dissenting) Lord Upjohn, p. 1060, who wanted discretion to be "determined by looking at the Act and its scope and object".
[206] *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223, p. 229.
[207] Human Rights Convention, Art. 8(1).
[208] *Ibid.*, Art. 8(2).
[209] Section 6(1).
[210] See also *Campbell v. MGN Ltd* [2004] 2 AC 457, para. 20.
[211] *Wieser and Bicos Beteiligungen GmbH v. Austria* (2008) 46 EHRR 54, para. 43.

person's correspondence.[212] The test as to whether the private life of a person is interfered with is according to Lord Nicholls "whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy".[213] This ought to lead to the conclusion that the provision of VDR data to the prosecutor by the Chief Inspector of the MAIB interferes with rights under Art. 8(1) if the persons on the bridge could reasonably have had such an expectation.

It can probably be assumed that any crew member, including the master who regularly attend the bridge for watchkeeping purposes, would know about the voice recording facility of the VDR. It seems arguable, however, that persons who are not regular visitors would not necessarily have that knowledge. Even if a person knew about the recording facility he could probably reasonably rely on the notion that custody of a VDR during an investigation should always be with the MAIB and not with the prosecutor.[214] Unless it can be completely excluded that any person on the bridge at the time of the incident was fully aware that his oral statements or instructions were recorded by the VDR and could be provided to the prosecution an interference with Art. 8(1) would seem to have occurred if the recording were to be handed to the prosecutor.

In establishing whether a breach of Art. 8 occurred it is necessary to ascertain whether that interference was in accordance with the law. Case law will help to analyse those requirements.

In a complaint of seven prisoners that the control of their mail by the prison authorities was in violation of Articles 8 and 10 of the Human Rights Convention the ECtHR in *Silver v. UK*[215] had to deal with the discretion of the prison governor. His discretion, set out in a statutory instrument, the Prison Rules 1964, was wide ranging and only restricted by two indeterminate requirements, namely that the contents of communication had to be objectionable or that it was of inordinate length.

> "…the governor may, at his discretion, stop any letter or communication on the ground that its contents are objectionable or that it is of inordinate length."[216]

The Court, when discussing general principles as regards the meaning of "in accordance with the law"[217] found that "a law which confers a discretion must indicate the scope of that discretion".[218] A citizen must be able to foresee to a reasonable degree what his action may entail. A law is not "law" unless it is sufficiently precisely formulated. But it is not absolute certainty which is required. The Court accepted that the interpretation of certain laws requires the application of practice, which if laid down in orders and instructions, may satisfy the criterion of foreseeability as long as those concerned are aware of those provisions.[219]

To be foreseeable the law must be adequately accessible to a citizen.[220] The Court found that instructions and orders which were not accessible to the prisoners did not meet the foreseeability criterion.[221]

A year later the Court in *Malone v. UK*[222] strengthened its position and stressed that "especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident."[223] In this case the applicant was charged with several offences for

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[212] *Ibid.*
[213] *Campbell v. MGN Ltd,* para. 21.
[214] See above, Chapter 4.2.5.
[215] (1983) 5 EHRR 347.
[216] Rule 33(2) of the Prison Rules 1964 quoted after *Silver v. United Kingdom* (1983) 5 EHRR 347*,* para. 28.
[217] *Ibid.,* para. 85.
[218] *Ibid.,* para. 88.
[219] *Ibid.*
[220] *Ibid.,* para. 87.
[221] *Ibid.,* para. 93.
[222] (1985) 7 EHRR 14.
[223] *Ibid.,* para. 67.

dishonestly handling stolen goods.[224] His telephone had been tapped on the authority of a warrant issued by the Secretary of State for the Home Department.[225] The applicant claimed, amongst others, that he had been the victim of a breach of Art. 8.[226] The ECtHR concluded that the tapping of the phone constituted a breach of Art. 8 and was "not in accordance with the law"[227] because

> "it cannot be said with any reasonable certainty what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive."[228]

The House of Lords in *R v. P*[229]accepted that

> "this decision made it clear that the enactment of a statutory provision which was sufficiently accessible and precise was essential if the United Kingdom Government was to comply with its obligations under the Convention."[230]

Lord Hobhouse also explicitly stressed that

> "…the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence."[231]

The requirements referred to by Lord Hobhouse were based upon the general principles addressed in *Silver v. UK*[232] which were again discussed by the ECtHR in *Malone v. UK.*[233] Applying the general principles establishes whether or not an act of a public authority is in accordance with the law.[234] The ECtHR in *Malone v. UK* summarised those principles as follows:

> "…it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."[235]

This seems to suggest that the requirement for a statutory provision to be clear should meet four main requirements. First, a provision has to clarify the scope or range of any discretion. Secondly, the law has to point out the way in which discretion may be exercised. Thirdly, such discretion must have a legitimate objective, and, fourthly, has to ensure ample protection of the individual. Applying these principles to the Chief Inspector's discretion appears to lead to the following conclusions.

(a) The law must indicate the scope of any discretion

A master or crew member, as the case may be, involved in any accident the investigation of which requires the analysis of VDR data would be exposed to the "unfettered power" of the Chief Inspector as regards the release of any VDR data to a prosecuting authority. Due to the lack of any orders or instructions[236] a master does not have any indication on what a Chief Inspector would make his discretion depend. The scope of his discretion is

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[224] *Ibid.,* para. 13.
[225] *Ibid.,* para. 59.
[226] *Ibid.,* para. 15.
[227] *Ibid.,* para. 80.
[228] *Ibid.,* para. 79.
[229] [2002] 1 AC 146.
[230] *Ibid.,* p. 157.
[231] *Malone v. UK,* para. 67, quoted in *R v. P,* p. 157, by Lord Hobhouse who gave the main speech in the unanimous opinion.
[232] Paras. 86-88; see above.
[233] Paras. 66-68.
[234] *Ibid.,* para. 69 *et seq.*
[235] *Ibid.,* para. 68.
[236] See above (*Silver v. UK*, para. 88)

not indicated with sufficient clarity or, rather, it is not indicated at all. Thus, it appears that the regulation[237] is not sufficiently precise.[238]

(b) The law must indicate the manner of its exercise

It is also not clear in what way the Chief Inspector would come to his conclusion to provide VDR information to the police or the MCA.[239] No guidance is available as to whether he has to weigh up one public interest aspect against another, let alone has he been given any guidance as to which public interest aspects to consider. Public interest aspects which appear to be at stake are the interest of the MAIB not to jeopardise the current and any future investigations. Opposed to this interest may stand the demand of the police or MCA to obtain the relevant data which in turn triggers as a third aspect the interest of the individual affected. This person would be very much interested in having any information protected from police or MCA access which could serve to prove his guilt and thereby weaken his position in court.

(c) The law must have regard to the legitimate aim of the measure in question

It has not been clarified what the legitimate aim of the Chief Inspector is when providing recordings or transcripts to official authorities.[240] Generally it may be a legitimate aim to provide the police or the prosecutor with information which serves to charge wrongdoers. It would appear, though, that such an aim ought to be addressed in the relevant legal instrument.[241] The only objective the MAIB 2005 Regulations acknowledge is the prevention of future accidents,[242] and reg. 12(7) of the MAIB 2005 Regulations does not clarify for what purposes the Chief Inspector may provide the VDR data. The question, therefore, seems to be whether providing the data would be to afford evidence for the prosecution to demonstrate that a master or watchkeeper was not to blame for a collision or whether it would be to prosecute the accused? "The circumstances and the conditions or criteria"[243] for the use of the discretion of the Chief Inspector are not defined.

In addition it appears that the release of any VDR data would not further the purpose of preventing future accidents but might rather develop into an obstacle for future investigations because it would demonstrate to the seafaring community that the MAIB co-operates closely with the prosecutor. Balancing the unclear aim of the disclosure with, for example, the adequate protection of the master could become an arbitrary decision by the Chief Inspector who on these two aspects is lacking the required guidance by the law.

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[237] MAIB 2005 Regulations, reg. 12(7).
[238] Lord Hobhouse in *R v. P,* p. 157.
[239] See MAIB 2005 Regulations, reg. 12(7).
[240] It would seem to be left to a potential defendant to understand that the fact that "provision is also made for the Chief Inspector, at his discretion, to share certain information or data with the police or other official authorities" (MAIB 2005 Regulations, Explanatory Note for reg.12) means that VDR data can be used for prosecution purposes. But the explanatory note is not part of the Regulations. Therefore, a tension seems to exist between the legitimate aim of the Chief Inspector which, according to the Regulations, only appears to be the future prevention of accidents.
[241] When discussing the powers to authorise telephone tapping under the Police Act 1997, the Court of Appeal held in *R v. SL* [2001] EWCA Crim 1829, para. 68, for example, that the Act complied with the requirements of Art. 8 because "s.92 constitutes a clear and detailed indication within the Act itself as to the circumstances and the conditions or criteria under which authorisation to use intrusive surveillance techniques may be given".
[242] MAIB 2005 Regulations, reg. 5(1). It may be said that a successful prosecution would also be an effective deterrent. But there is no proof that that is actually the case in shipping. There is also no proof that MAIB reports contribute to the prevention of future accidents. However, MAIB reports, other than prosecution reports on the MCA website, analyse the accident in very much detail and offer recommendations for industry, MCA and the legislature. It appears to me more likely that MAIB reports will have a positive effect because commercial seafarers will, as a rule, inevitably be concerned with their professional performance in the job as they will with their safety. A prosecution, particularly under provisions of strict criminal liability, cannot achieve the same effect because it does not deliver the same amount of detailed analysis for the seafaring community to understand what actually went wrong.
[243] *R v. SL,* para. 68

(d) The law must give the individual adequate protection

Last but not least, the MAIB 2005 Regulations do not address the problem of adequate protection for the individual affected by the release of VDR data to the police or MCA. But this problem seems to have been subject of the preparatory discussion of the 2005 Regulations. The *Regulatory Impact Assessment* suggests that concerns existed because

> "passing on sensitive information to the MCA or Police at the discretion of the Chief Inspector will undermine MAIB's position. Police should be required to apply to the Courts for access to confidential information".[244]

The MAIB intended to counteract these concerns by making it clear in reg. [12(7)][245]

> "that the only information covered here will be physical evidence that should be made available to other official authorities conducting their own investigations regardless of who holds the information. Police currently have these powers".[246]

What the impact assessment does not say, though, is that the addressed police powers are subject to a warrant issued by a justice of the peace.[247] Code B even clearly stresses that

> "Powers of entry, search and seizure should be fully and clearly justified before use because they may significantly interfere with the occupier's privacy. Officers should consider if the necessary objectives can be met by less intrusive means".[248]

It would appear to follow that the police do not have the powers mentioned in the MAIB *Regulatory Impact Assessment* without holding a warrant. The justification in the 2005 Regulations to hand over "physical evidence", which seemingly is compared with the power of seizure of the police in that impact assessment, would only appear to be appropriate if the Chief Inspector was subject to a similar authorisation by a (Magistrates') court as the police. Otherwise the provision of Code B can be circumvented.

Handing over evidence to the MCA[249] is not covered by Code B. The recognition that "the right to privacy and respect for personal property are key principles of the Human Rights Act 1998",[250] however, appears to apply to the MCA as it does to the police. Without particular powers to seize evidence, therefore, the MCA seems to be in the same position as the police. The agency cannot decide to seize property without a warrant other than what the MSA 1995, s. 259, permits. That section does not seem to provide for the seizure of property other than samples.[251]

Conclusion

In my view, it can surely not have been intended by Parliament that the Chief Inspector's discretion goes beyond the right of a court to decide about the release of information otherwise being protected from disclosure.[252] Such an approach would change the supremacy in decision making which, as regards any disclosure of otherwise protected information, is clearly with the court.[253] This conclusion appears to be backed by the

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[244] *Regulatory Impact Assessment,* para. 4.3.1.
[245] Draft reg. 12(6) is reg. 12(7) in the MAIB 2005 Regulations.
[246] *Regulatory Impact Assessment,* para. 4.3.1, second count on p. 24.
[247] Code B – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises (hereafter "Code B"), para. 12.2 (version of 31 January 2008). This Code has been issued by the Secretary of State under his powers of the PACE 1984, s. 1.
[248] *Ibid.*, para. 1.3.
[249] "This Code of Practice deals with police powers", Code B, para. 1.1.
[250] *Ibid.*, para. 1.3.
[251] MSA 1995, s. 259(2)(f).
[252] MAIB 2005 Regulations, reg. 12(2).
[253] *Ibid.*, regs. 12(2) and (5). Lord Donaldson in *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, p. 715, made the point that "where Parliament authorises ministers to take executive action, it is the duty of the courts in appropriate cases to consider whether ministers have exceeded that

"*Padfield* principle" that the discretion should promote the policy and object of the statutory instrument.[254] The explanations for the 2005 Regulations state that it is the MAIB's "main concern that safety lessons should be learned"[255] and not that wrongdoers get convicted. This policy aim is also laid down as a clear object[256] of the 2005 Regulations.[257] The policy of the MAIB 2005 Regulations, reg. 12, seems to focus on ensuring

> "that an order is made only where the Court is satisfied that the interests of justice in disclosure outweigh any prejudice to accident investigation or to the United Kingdom's external relations."[258]

This may be concluded even though the following sentence points out that

> "provision is also made for the Chief Inspector, at his discretion, to share certain information or data with the police or other official authorities."[259]

Thus, it appears that the original concern[260] that handing over sensitive information to the police or the MCA, which "will undermine the MAIB's position",[261] has not been satisfactorily dealt with by the MAIB 2005 Regulations. Consequentially it seems that reg. 12(7) is technically a contravention of Art. 8, in as much as the discretion granted is "expressed in terms of unfettered power".[262] As a consequence of the lack of clarity in the Regulations, Art. 8(2) seems to be violated because the Chief Inspector's discretion is not in accordance with the law. The release of VDR data to the police or MCA would inevitably reveal names of possible suspects (albeit indirectly through linking, for example, voices heard on the bridge with crew lists or log books) and names of anybody who has given evidence.[263]

This conclusion makes it unnecessary to examine whether or not any of the other requirements of Art. 8(2) have also been breached.[264] But such a conclusion does not put any defendant in a much better position and is not the end of the evaluation. Because this breach of Art. 8 does not in itself determine whether or not evidence obtained unlawfully through unfettered discretion would violate the right to a fair trial under Art. 6 of the Human Rights Convention so that the VDR data must be excluded at any later trial.

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authority". The Chief Inspector, as a civil servant, is a representative of the minister and is therefore subject to the same restrictions.

[254] See above, Chapter 4.2.6., *Padfield v. Minister of Agriculture,* p.1030. MAIB 2005 Regulations, regs. 12(1) and (2) would seem to suggest that certain information is protected unless a court rules otherwise.

[255] MAIB 2005 Regulations, Explanatory Note, explanation for reg. 5.

[256] See above, Chapter 4.2.6., *Padfield v. Minister of Agriculture,* p. 1030.

[257] As expressed in reg. 5(1): sole objective is the prevention of future accidents; and in reg. 5(2): it is not the purpose to apportion blame.

[258] MAIB 2005 Regulations, Explanatory Note, explanation for reg. 12.

[259] *Ibid.* The MAIB says in the *Regulatory Impact Assessment*, para. 4.3, that reg. [12(7)] "was included to allow the MAIB to give the Police and other official authorities a copy of any data contained within the voyage data recorder on board a ship, and any other technical data the MAIB may hold. However, concerns regarding the release of confidential information have arisen." By justifying the inclusion of reg. [12(7)] with the alleged powers of the police the MAIB seems to suggest that if the police were not to hold these powers the relevant information were to be treated confidential. As the police does not hold those powers without being in possession of a warrant the MAIB ought to honour its obligation for confidentiality. There does not seem to be a reason why the police could not have applied for a warrant in the first place.

[260] As addressed in the *Regulatory Impact Assessment,* para. 4.3.1, see above under (4).

[261] *Regulatory Impact Assessment,* para. 4.3.1.

[262] *Malone v. UK,* para. 68. In the most recent (4 December 2008) decision the Grand Chamber of the ECtHR in the *Case of S. and Marper v. UK*, Applications nos. 30562/04 and 30566/04 reiterates that "it is as essential, in this context [the retention of DNA records], as in telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness".

[263] Such information shall only be disclosed subject to reg. 12(2)-(7), MAIB 2005 Regulations, reg. 12(1).

[264] *Khan v. UK* (2001) 31 EHRR 45, para. 28.

4.2.7. MAIB, VDR data and human rights - Article 6

The ECtHR examined the relationship between Art. 8 and Art. 6[265] of the Human Rights Convention in *Khan v. UK*.[266] A drug dealer under investigation had visited a friend whose house was, unknown to both of them, fitted with a listening device. It had not been foreseen that the applicant would visit the premises in question.[267] The Court, when stating its judicial duty, established that

> "It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence--for example, unlawfully obtained evidence--may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair."[268]

The "unlawfulness" which occurred needs to be examined "and, where violation of another Convention right is concerned, the nature of the violation found".[269] The Court did not explain itself any further and did not clarify what impact the "nature of the violation found" would have on the Court's decision. It appears that this was left to be interpreted by national courts.

The Court in *Khan v. UK* first analysed its decision in *Schenk v. Switzerland*[270] where it was established that Art. 6 does not provide rules for the admissibility of evidence which is primarily to be regulated under national law.[271] In *Khan v. UK* the ECtHR recalled three reasons why the decision went against the applicant in *Schenk.* First, the applicant had the opportunity to challenge the authenticity of the recording.[272] Secondly, the defence could summon the police inspector responsible for the recording.[273] Thirdly, the Court recognised that in *Schenk* weight was attached to the fact that the recording was not the only evidence.[274]

It then went on to say that the recording of the applicant's conversation was not unlawful "in the sense of being contrary to domestic criminal law"[275] after just having had established that "the interference in the present case cannot be considered to be 'in accordance with the law'".[276] It is not quite clear why the Court then made the point that

> "The "unlawfulness" of which complaint is made in the present case relates exclusively to the fact that there was no statutory authority for the interference with the applicant's right to respect for private life and that, accordingly, such interference was not "in accordance with the law", as that phrase has been interpreted in Article 8(2) of the Convention."[277]

It appears that this point reverts back to the "nature of the violation found".[278] The ECtHR in *Khan v. UK* seemed to want to distinguish one "unlawfulness" from another, and verify that one is not as bad as the other. The discussion of the ECtHR suggests that as long as there are guidelines,[279] although lacking statutory power, the violation of Art. 8(2) is less severe than when there is nothing. The Court, however, did not expressly make such a point and left open why it is of significance that the case exclusively relates "to the fact

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[265] See for the text of Art. 6 above, Chapter 3.2.1. where the impact of Art. 6 was discussed in the context of the right to silence.
[266] Para. 29 *et seq.*
[267] *Ibid.,* para. 9-11.
[268] *Ibid.,* para. 34.
[269] *Ibid.,* para. 34.
[270] (1991) 13 EHRR 242.
[271] *Ibid.,* para. 46.
[272] *Khan v. UK,* para. 35.
[273] *Ibid.*
[274] *Ibid.*
[275] *Ibid.,* para. 36.
[276] *Ibid.,* para. 28.
[277] *Ibid.,* para. 36.
[278] *Ibid.,* para. 34, see above.
[279] In that case Home Office Guidelines, *Khan v. UK,* para. 36.

that there was no statutory authority".[280] Instead the Court moved on to discuss the importance of the evidence in the light of *Schenk.*[281]

It was noticed that the evidence in question in *Khan v. UK* was, by contrast with *Schenk,* the only evidence.[282] As the evidence in *Khan* was very strong the Court said that "the need for supporting evidence is correspondingly weaker".[283] It then acknowledged again that the Court in *Schenk* attached weight to the fact that the recording in that case was not the only evidence. But the conclusion in *Khan v. UK* was that "this element was not the determinative factor in the Court's conclusion"[284] despite quoting the Criminal Cassation Division of the Vaud Cantonal Court in *Schenk* which stated that the evidence might perhaps have had a decisive influence. It is true that in *Schenk* the ECtHR had been at pains to make the point that "it emerges clearly from this passage that the criminal court took account of a combination of evidential elements before reaching its opinion"[285] and that the judgment was not solely based upon the unlawfully obtained evidence.

The passage the ECtHR refers to lists in detail all the other facts the Rolle Criminal Court relied upon for its conviction. The ECtHR in *Schenk* even said that

> "The Rolle Criminal Court refused to declare the cassette inadmissible in evidence as it would have been sufficient to hear the evidence of Mr. Pauty as a witness in respect of the recording's content."[286]

The ECtHR conclusion in *Schenk* appears to have been based upon the fact that the recording was not the only evidence and did therefore not deprive the applicant of a fair hearing.[287] It is therefore slightly puzzling to see that the ECtHR in *Khan* did not appear to give much weight to its own conclusion in *Schenk,* but instead pointed out that the "central question in the present case is whether the proceedings as a whole were fair".[288] To decide this question it did not matter that the (unlawfully obtained) evidence available was the <u>only</u> evidence.

The yardstick for the ECtHR to decide whether or not the proceedings were fair appears to be the Domestic Courts' proceedings which could have excluded the evidence under the discretion they are given under PACE, s. 78[289] if "the admission of the evidence would have given rise to substantive unfairness".[290]

It seems that in doing so the Court effectively passed the decision making right as to whether a judgment contravenes Art. 6 back to the national courts.

Accordingly, the House of Lords held in *R v. P* referring to *Khan v. UK* that

> "An assessment and adjudication under section 78 [of PACE] is the appropriate and right way in which to respond to an application to exclude evidence on the ground of a breach of a right to privacy."[291]

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[280] *Khan v. UK,* para. 36, see above; this point was already made in *R v. Khan (Sultan)* [1997] AC 558, p. 581, by Lord Nolan in the House of Lords: "This brings one back to the fact that, under English law, there is in general nothing unlawful about a breach of privacy. The appellant's case rests wholly upon the lack of statutory authorisation for the particular breach of privacy which occurred in the present case, and the consequent infringement, as the appellant submits, of article 8". Lord Nolan, when discussing the impact of the judge's discretion under s. 78 after an apparent breach of Art. 8, went on to say that "its [the probable breach of Art. 8] significance, however, will normally be determined not so much by its apparent unlawfulness or irregularity as upon its effect, taken as a whole, upon the fairness or unfairness of the proceedings".
[281] *Khan v. UK,* para. 37.
[282] *Ibid.*
[283] *Ibid.*
[284] *Ibid.*, which appears to refer to *Schenk.*
[285] *Schenk v. Switzerland,* para. 48.
[286] *Ibid.*
[287] *Ibid.,* para. 49. See also the discussion above in Chapter 3.2.2.
[288] *Khan v. UK,* para. 38.
[289] *Ibid.,* para. 39.
[290] *Ibid.*
[291] *R v. P,* p. 161.

For the purposes of excluding evidence to secure a fair trial s. 78 has been seen as conferring upon the court a power "at least as wide as that conferred by the common law".[292]

> "…as a matter of English law evidence which is obtained improperly or even unlawfully remains admissible, subject to the power of the trial judge to exclude it in the exercise of his common law discretion or under the provisions of section 78…"[293]

In my view, it is therefore enough to establish what the discretion of the judge was at common law before s. 78 was in force. In *R v. Sang,*[294] Lord Diplock held

> "that there has now developed a general rule of practice whereby in a trial by jury the judge has a discretion to exclude evidence which, though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value."[295]

It appears to follow that a judge has discretion to exclude evidence when the prejudicial influence of otherwise admissible evidence would not be proportional to its real value. "Admissibility of evidence is primarily a matter of its relevance."[296] Whether or not relevant evidence is admissible may then become a matter which is significant to s. 78 when "evidence has been obtained in circumstances which involve an apparent breach of article 8".[297] But even then "the criterion to be applied is the criterion of fairness in article 6 which is likewise the criterion to be applied by the judge under section 78".[298]

Fairness seems to require that the rights of the defence are not disregarded,[299] that the defence can challenge the authenticity of the evidence and oppose its use,[300] and that the defence has access to examine witnesses.[301] But it appears also that

> "…fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted."[302]

Despite there remaining

> "considerable flexibility, and consequential uncertainty, in determining exactly what forms of impropriety will justify judicial intervention, whether by excluding evidence at trial, or by allowing an appeal"[303]

the fairness criteria seem to imply that a Chief Inspector of the MAIB would not violate Art. 6 even though a breach of Art. 8 may occur when he decides to provide data to the police or MCA.[304] A breach "of the rights of privacy enshrined in article 8 does not of itself mean that the trial is unfair".[305] Such a breach does not require a remedy in accordance with Art. 13 of the Human Rights Convention "to be given within that trial".[306]

As long as the defence in a hypothetical case in which the Chief Inspector has handed VDR data over to the police or MCA has the opportunity to challenge the recording and oppose its use, it is hard to imagine that a court would decide such evidence automatically inadmissible. In addition such evidence, if voices are recorded on it, would not be the only

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[292] *R v. Khan,* HL, p. 578.
[293] *Ibid.,* HL, p. 577-578.
[294] [1980] AC 402.
[295] *Ibid.,* p. 434.
[296] *R v. Ajit Singh Aujla* [1998] 2 Cr. App. R. 16*,* p. 21; a case which "was rightly decided" according to Lord Hobhouse in *R v. P,* p. 166.
[297] *R v. Khan,* HL, p. 581.
[298] *R v. P,* p. 162.
[299] *Schenk v. Switzerland,* para. 47; referred to in *R v. P,* p. 161.
[300] *Ibid.,* para. 47; referred to in *R v. P,* p. 160.
[301] *Ibid.,* para. 47.
[302] *Sang,* p. 437.
[303] C Tapper, *Cross & Tapper on Evidence*, p. 544.
[304] Regulation 12(7) of the MAIB 2005 Regulations leaves it at the discretion of the Chief inspector to provide VDR data to the police or the MCA.
[305] *R v. P,* p. 161.
[306] *Ibid.,* p. 162, in reference to the ECtHR in *Schenk v. Switzerland.*

evidence as there would – usually - always be the other party to whom the suspect was talking.

By analogy with the speech of Lord Nolan in *R v. Khan,* it may be said that it would be strange if a master or watchkeeper whose voice on a publicly known recording proves, and who therefore has admittedly caused, for example, a collision, "should have his conviction set aside on the grounds that his privacy has been invaded."[307]

This, however, is not the end of the matter for the master or watchkeeper. Instead of challenging the admissibility of evidence they may bring a judicial review against the Chief Inspector and the Government.

4.2.8. Judicial review[308]

It appears that an unlawful exercise of discretion by the Chief Inspector could theoretically be properly challenged in a judicial review[309] procedure[310] because judicial review[311] applies to decisions of public bodies,[312] of which the MAIB is clearly one. In addition an affected master could seek a declaration of incompatibility of the relevant regulation under the Human Rights Act in any proceedings.[313]

A judicial review is "a remedy invented by the judges to restrain the excess or abuse of power"[314] and "to secure that decisions are made by the executive or by a public body according to law."[315]

An application for a prohibition or quashing order against the decision of the Chief Inspector[316] has to be made to the High Court.[317] The applicant has to prove that he has "sufficient interest" in the subject of the application.[318] A master who could be seriously affected by the Chief Inspector's decision has a very obvious interest[319] in the matter to which the application relates and would in my view therefore satisfy this requirement.

A claim can be brought by a person who would be the victim of such an unlawful act.[320] In judicial review proceedings the master would be considered to have "sufficient interest" if he would be a victim of the Chief Inspector's act.[321]

A person is a victim if he would be a victim under Art. 34 of the Human Rights Convention.[322]

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[307] *R v. Khan,* HL, p. 582. The original quote is: "It would be a strange reflection on our law if a man who has admitted his participation in the illegal importation of a large quantity of heroin should have his conviction set aside on the grounds that his privacy has been invaded."
[308] It is beyond the limits of this thesis to discuss in detail the problems and procedural rules associated with a judicial review; this subject will therefore only be dealt with to the extent that the master's remedy in public law is addressed.
[309] C Lewis, *Judicial Remedies in Public Law,* 2000, paras. 4-012 to 4-014.
[310] SCA 1981, s. 31.
[311] When claiming that an act of a public authority was unlawful a claimant can either bring a judicial review or rely on the Convention rights in any legal proceedings, HRA 1998, s. 7(1)(a) and (b).
[312] H Southey, A Fulford, *Judicial Review: A practical Guide,* 2003, p. 11.
[313] HRA 1998, s. 4(1), although a declaration under s. 4 would not affect the validity and continuing operation of the regulation in question and is not binding on the parties, see s. 4(6)(a) and (b).
[314] *ex parte Brind,* p. 751.
[315] *Mercury Energy Ltd v. Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521, p. 526.
[316] Who is the head of a public body because the MAIB is part of the Department of Transport.
[317] SCA 1981, s. 31(1)(a).
[318] *Ibid.*, s. 31(3).
[319] H Southey, A Fulford, *Judicial Review: A practical Guide,* p. 6: "In many cases it will be obvious that a person has sufficient interest."
[320] HRA 1998, s. 7(1)(a) and tailpiece.
[321] *Ibid.*, s. 7(3).
[322] *Ibid.*, s. 7(7).

This test is "very broad in some ways",[323] but narrower than the general test of standing for judicial review.[324] "The applicant must be directly affected by the alleged violation or at a risk of suffering a violation in the future."[325] A person would appear to be directly affected when the prosecuting authorities may bring a prosecution even though the relevant law has not been enforced so far. To be considered a victim under Art. 34, it is enough for a person to "run the risk of being directly affected".[326]

In my view, a master who runs the risk of being the subject of a prosecution if VDR data are handed over to the police or the MCA would be directly affected by the act of the Chief Inspector. The master would therefore appear to be entitled to bring proceedings under the Human Rights Act[327]and apply for a prohibition order which should secure that the Chief Inspector does not hand over any data unless it is done lawfully.

The master would have to claim that the intended act by the Chief Inspector is unlawful in that it is incompatible with a human right[328] and may apply for an injunction which is "quite often granted to prohibit wrongful or unlawful action".[329]

If the court finds the proposed act to be unlawful "it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate".[330] A very likely outcome would seem to be that the court might decide to acknowledge the human right's violation, but leave the decision as to the admissibility of the evidence to the trial judge.

The judicial review would seem to be rather costly for an individual master or crew member unless he has financial support from his employer, his trade union or any other source. Combined with the uncertain outcome it would appear to be a last resort to be chosen by any potential defendant.

I will now turn to the MAIB investigation reports which are another source that could serve to inform prosecution authorities and courts about failures to comply with merchant shipping legislation.

4.2.9. MAIB investigation reports[331]

In addition to any disclosure restrictions under reg. 12,[332] the report which the Chief Inspector has to make publicly available in the shortest time possible[333] shall not be admissible in "any judicial proceedings" if any part of the report is based upon information obtained by the Inspector pursuant to his powers under MSA 1995, s. 259.[334] This section, it will be recalled, provides that any answer given to a Departmental Inspector under compulsion is not admissible in evidence against the interviewee.[335] A provision such as reg. 13(9) did not exist in the MAIB 1999 Regulations and it was even stipulated that the Chief Inspector may have made a draft report available "in confidence to the coroner or procurator fiscal".[336] However, this indirect protection in the MAIB 2005 Regulations for interviewees, and thereby support for MAIB Inspectors which may help them getting co-

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[323] D Feldman, *Civil Liberties and Human Rights in England and Wales,* 2nd ed., 2002, p. 47
[324] M Amos, *Human Rights Law,* p. 28.
[325] D Feldman, *Civil Liberties and Human Rights in England and Wales,* p. 47.
[326] *Norris v. Ireland* (1991) 13 EHRR 186*,* para. 33.
[327] HRA 1998, s. 7.
[328] *Ibid.*, s. 7(1) in connection with s. 6(1).
[329] H W R Wade, C F Forsyth, *Administrative Law,* p. 562.
[330] HRA 1998, s. 8(1).
[331] See also the overlap with MCA investigations addressed in Chapter 11.4.
[332] Of the MAIB 2005 Regulations.
[333] *Ibid.*, reg. 13(1).
[334] *Ibid.*, reg. 13(9); "…judicial proceedings includes [sic] any civil or criminal proceedings before any court, tribunal or person having by law the power to hear, receive and examine evidence on oath.", reg. 13(10).
[335] MSA 1995, s. 259(12).
[336] MAIB 1999 Regulations, reg. 10(9).

operation from possible suspects, can still be overruled by a court subject to it having regard to reg. 12(5)(b) or (c).[337]

Thus, an admission of the report for use in judicial proceedings would be possible if a court decides that the interests of justice in using the report in a trial outweigh the harm for any future investigation or UK foreign relations. It would appear, however, that in a similar way to a decision about disclosure of information listed in reg. 12(2), the court is restricted by the same strict principles[338] which allow for the report to be admissible in judicial proceedings.

In essence, therefore, the problem associated with requiring a master or other interviewee to answer questions and sign a declaration of the truth of their answers, as may be requested by an MAIB Inspector,[339] continues to exist despite the changes[340] in the law. A master (or any other interviewee of an MAIB Inspector) still runs a risk, even though rather small, that an MAIB report will be used in Court proceedings. Experience has shown that courts have actually made use of MAIB reports.[341]

In *O'Connor,*[342] where the managing agent of the owner of a fishing vessel which sank appealed against his conviction for manslaughter, MAIB reports had been used by the expert witness on hypothermia. The witness, however, agreed that the incidents reported about in the MAIB reports and the case in question were very different incidents. [343]

The judge allowed the claimant to adduce the MAIB investigation report as fresh evidence In *St Jacques II*.[344] This limitation of liability case would have turned on the evidence of the MAIB report if the facts reported therein were the only proof relied upon by the judge.[345]

In *Davis v. Stena Line*[346] a ferry passenger had fallen over board and drowned due to the negligence of company and master.[347] The judge was "fortified in that conclusion [of serious and negligent failures and omissions by the company] by the recommendations made by MAIB in its subsequent report into the incident".[348]

The contravention of the mandatory reporting requirement of an accident by master and ship owner,[349] the obligation for a master and owner of a UK ship to preserve all relevant evidence for up to 28 days,[350] and the publicly stressed confidentiality of MAIB interviews,[351] place the MAIB in a prime position to actually find out all relevant facts of the accident.

A master may as a result find himself confronted with evidence, and conclusions based upon it, collected by the MAIB as an involuntary right hand of the prosecution if a court so

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[337] MAIB 2005 Regulations, reg. 13(9).
[338] The principles, being important public interests aspects such as national security, protecting witnesses or keeping the secret police methods of investigation, may favour a disclosure but only if partial disclosure would not achieve the same result, see Chapter 4.2.1.
[339] See MSA 1995, s. 259(2)(i)(ii) and (iii); see also Chapter 2.4.2.
[340] I.e. the initial protection of an interviewee under the MAIB 2005 Regulations, reg. 13(9).
[341] Although, it appears, so far only in claims for damages. No public or criminal law decision was found where the court referred to an MAIB report.
[342] [1997] EWCA Crim 522.
[343] *Ibid.,* Court of Appeal, 20 February 1997, p. 10 of the judgment as recorded in *LexisNexis.*
[344] *St Jacques II,* para. 5.
[345] *Ibid.,* para. 20.
[346] [2005] 2 Lloyd's Rep. 13.
[347] *Ibid.,* para. 108; judgment was given on 17 March 2005, p. 13, one month before the MAIB 2005 Regulations came into force.
[348] *Ibid.,* para. 65.
[349] MAIB 2005 Regulations, reg. 6(1)(a) and (b); under the MAIB 1999 Regulations only the master, reg. 5(1), and only when the ship is lost the master, owner or senior officer, reg. 6(2).
[350] MAIB 2005 Regulations, reg. 9 and para. (4)(b) in particular; MAIB 1999 Regulations, reg. 7 and para. (b) in particular.
[351] See Annex 26, email of 13 March 2007 by MAIB FOI Officer.

decides. It also appears that the rights of the master to remain silent would in such scenario have been circumvented, particularly if he had to answer questions of an Inspector operating with the powers given under MSA 1995.[352] It appears that the decision as to whether reports are admissible in evidence will be at the discretion of the judge under English law.[353]

As long as the parameters used by the ECtHR[354] and by the House of Lords[355] are followed a master or any other interviewee should, however, not really be disadvantaged.

4.2.10. Relationship between the MAIB and the MCA

A potential conflict of interests between the MAIB and the MCA may exist where accidents have to be investigated. This conflict may impact on master, crew or other people involved or affected by the incident, e.g. owner, operator or manager.[356] Of particular interest is the requirement for the benefit of the MAIB investigation to preserve evidence.[357]

This obligation may be considered to be in the public interest, but it also touches upon the master's right for a fair trial insofar as his right to remain silent is affected.[358] Subject to a penalty of a maximum of level five on the standard scale, or an unlimited fine in case of a conviction on indictment,[359] the master must ensure that any evidence, whether self-incriminating or not, is kept and that no alterations are made.[360] Even though the MAIB 2005 Regulations provide for an interviewee's personal details, and any statement made to an MAIB Inspector, to remain confidential[361] no such requirement exists for other evidence such as charts, logbooks or electronic records.

An MCA Surveyor on a "fact finding investigation",[362] or a Departmental Inspector during an investigation, will certainly benefit from the preservation of evidence as they know which information has to be available on board.[363] The master thereby seems to be put in a position worse than that of any serious criminal who will not have to face criminal charges for destroying any evidence that was available against him.[364] The documents and records mentioned are available on board for both the MCA and the MAIB Inspector.[365] Against this, one can probably say that there is an argument that, as ships

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[352] MSA 1995, s. 259(2).
[353] See above, Chapter 3.2.3.
[354] As, for example, done in *Botmeh v. UK,* see above.
[355] In *H and Others,* see above.
[356] The conflict between accident investigation and enforcement has internationally been recognised in the *Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident*, Annex to IMO Circular letter No.2711 of 26 June 2006. According to s. VII, para. 13.2. "seafarers should take steps to ensure that they fully understand their right not to self-incriminate, and that they fully understand that when statements are made to port, coastal or flag State investigators, these may potentially be used in a future criminal prosecution".
[357] MAIB 2005 Regulations, reg. 9.
[358] But see discussion of the Human Rights Convention, Art. 6, above, Chapters 2 and 3, which suggests that there is a distinction between answering questions of an MCA or an MAIB Inspector and that the right to remain silent is only breached when an MCA Inspector on a fact finding mission requests copies of documents he is not entitled to.
[359] MAIB 2005 Regulations, reg. 18(2); MAIB 1999 Regulations, reg. 14(2).
[360] MAIB 2005 Regulations, reg. 9(1) tailpiece; MAIB 1999 Regulations, reg. 7(1).
[361] MAIB 2005 Regulations, reg. 12 (1).
[362] As defined by the Head of the Enforcement Unit of MCA according to whom "an initial fact finding investigation is purely to gather information in order for the Surveyor to decide if they think that a significant breach of legislation has occurred", in an email of 9 January 2007. See also above, Chapter 3.2.3. *et seq.*
[363] Which, following an accident, is regulated in the 2005 MAIB Regulations, reg. 9 and includes apart from charts and log books "all documents or other records which might reasonably be considered pertinent to the accident" (reg. 9(1)(d)).
[364] But the defendant may have an adverse inference drawn from the fact that evidence was destroyed, *Secretary of State for the Environment, Transport and The Regions v. Holt* [2000] R.T.R. 309, p. 313.
[365] For the discussion about access to evidence for an MCA Inspector see above, Chapter 3.2.3.; in this context particularly the opinion of the ECtHR in *Saunders v. UK,* para. 69, needs to be noted that "as commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it [the right not to incriminate oneself] does not extend to the use in criminal proceedings of material which may be

may move beyond the jurisdiction, there are greater difficulties in collecting evidence and a greater risk of evidence becoming unobtainable.

The priority of access for questioning of master and crew, however, is not regulated between MCA and MAIB.[366] When MAIB Inspectors and MCA Inspectors/Surveyors arrive at the same time they have to find a way to arrange locally who has first access to the master.[367]

Although a Memorandum of Understanding (MOU) exists[368] between the Health and Safety Executive (HSE),[369] the MAIB and the MCA, that MOU does not agree the priority for access to interviewees in investigations other than stressing "general principles of co-operation". One of these principles is that

> "Each organisation will:
>
> …
>
> - ensure effective and efficient prosecution of offences by a co-ordinated approach to the decision making process and wherever possible the timing of any joint public announcement of the final prosecution decision;"...[370]

The MOU does not clarify what it means by "co-ordinated approach to the decision making process" and appears to confuse in this statement the different responsibilities of the MCA and MAIB. According to the MOU the former is "responsible for enforcing all merchant shipping regulations in respect of occupational health and safety, the safety of vessels, safe navigation and operation"[371] whereas the latter "investigates accidents related to ships and crew".[372] As it is not the purpose of the MAIB to prosecute or apportion blame[373] the MAIB can therefore not "ensure effective and efficient prosecution"[374] without breaking the law, unless this wording is understood as the MAIB standing back when it comes to interviewing master or crew after accidents and collisions. It would seem, though, that the latter interpretation was not meant to address rights of access.

Depending on the position one takes it is either advantageous or disadvantageous for the master to be interviewed first by an MAIB Inspector rather than by an MCA enforcement officer.

> "Witness testimony is an important element in determining facts that reveal causal factors. It is best to interview principal witnesses and eyewitnesses first, because they often provide the most useful details regarding what happened. If not questioned promptly, they may forget important details."[375]

Applying this advice suggests that if the identification of causal factors is important the MAIB Inspector should have first access. This, however, would also give the interviewee the opportunity to reflect on the event and possibly raise his awareness of what may have

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obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect…".

[366] Although the MAIB on 27 March 2006 concluded a Memorandum of Understanding with the Association of Chief Police Officers which states on p. 17 under para. 3.3. "The MAIB investigating team must have immediate and unrestricted access to any person involved or connected to an accident. If the decision is taken to interview or take a declaration, it must take place before the police carry out an interview." I was sent a copy of the MOU after I made an FOI request to the MAIB FOI officer on 10 January 2008.

[367] Or, as one enforcement officer put it in a meeting on 2 February 2007 in Southampton, that sometimes the faster car decides depending on how far the incident is away from the MAIB office in Southampton.

[368] Memorandum of Understanding, hereafter MOU, http://www.mcga.gov.uk (15 July 2008). The MOU was signed by the HSE on 10 October 2005, by the MCA on 18 October 2005 and by the MAIB on 25 October 2005.

[369] For a certain overlap of HSE and MCA responsibilities see above, Chapter 2, fn 89. See also the HSE/MCA/MAIB MOU, para. 1.3.3.

[370] MOU, para. 1.6.1.

[371] *Ibid.*, para. 1.4.1.

[372] *Ibid.*, para. 1.5.1.

[373] MAIB 2005 Regulations, reg. 5(2).

[374] MOU, para. 1.6.1.

[375] Marine Accident Investigators' International Forum, *Investigators' Manual*, Chapter 4, p. 17, on http://maiif.org/pdf/Chapter4.pdf (15 July 2008).

to be filtered out when the enforcement officer, be it an Inspector/Surveyor or Departmental Inspector, eventually gets access to the witness or suspect.

Even supposing a master may be affected only in the longer term by giving away all relevant details to the MAIB Inspector, any evidence collected by an enforcement officer could have direct repercussions.

Everything a witness or accused says to the enforcement officer can be used directly in a prosecution.[376] But statements to the MAIB Inspector can only be used in a court case if the hurdles set by the MAIB 2005 Regulations[377] can be overcome, and that will require additional time for the prosecution.

The MCA is under time pressure to decide whether or not it wants to prosecute, for it has to commence proceedings for summary offences under the MSA 1995 within six months[378] unless the accused has been out of the country during that period. In the latter case proceedings have to be instituted within two months after he returned to the UK but before the expiration of three years from the date of the offence.[379]

The time bar of six months serves as a protection for a master when the offence is classed as a summary offence. Any legal action brought against the MAIB by an interviewee, when the MAIB intends to release information to the MCA or when a Court has to decide whether or not records shall be disclosed,[380] will work in favour of the master. Such action will most likely delay the point in time at which a prosecution can be brought significantly beyond six months. However, this protection no longer applies when the offence is not summary under the MSA 1995 but is indictable.[381]

As a result it appears to be advantageous for the individual master who may also be a suspect if he gets interviewed first by the MAIB Inspector which, however, may not be in the interests of justice.

4.3. Conclusion

A similar wording to the following can be found on every introductory page of an MAIB investigation report stating that it

> "is not written with liability in mind and is not intended to be used in court for the purpose of litigation. It endeavours to identify and analyse the relevant safety issues pertaining to the specific accident, and to make recommendations aimed at preventing similar accidents in the future."[382]

However, despite this written commitment, and the good intention it may convey to a master and other interviewees, a report or other information obtained under the protection of the MAIB 2005 Regulations may still end up in court used as evidence against a master.[383]

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[376] But see also above, Chapter 2.
[377] See above, Chapter 4.2. *et seq*.
[378] MSA 1995, s. 274(1)(a).
[379] *Ibid*., s. 274(1)(b).
[380] MAIB 2005 Regulations, reg. 12.
[381] MSA 1995, s. 274(2). Most merchant shipping regulations provide for both summary and indictable offences. For example, the Merchant Shipping (Fire Protection: Large Ships) Regulations 1998, SI 1998 No. 1012 (hereafter also "Fire Protection Regulations") in reg. 105(1); the Merchant Shipping (Life-Saving Appliances for Ships other than Ships of Classes III To VI(A)) Regulations 1999, SI 1999 No. 2721 (hereafter also "LSA Regulations"), in reg. 86(1); or the Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, SI 1998 No. 1561 (hereafter also "ISM Regulations"), reg. 19(1).
[382] Title page of MAIB investigation report 4/2006 ("Lykes Voyager") – a version which developed over time; this wording appears to have been adopted more recently, see, for example, the different versions in the MAIB investigation report 10/2005 ("Scot Explorer"), already after the MAIB 2005 Regulations came into force, or the MAIB investigation report 35/2002 ("Global Mariner") when the MAIB 1999 Regulations were still in force.
[383] But it needs to be noted that I did not find any evidence in the files where any MAIB documents or records led to a prosecution or conviction or were even passed on to the prosecution.

Even if documents are protected in the UK they may find their way into the court system once a foreign accident investigation agency is co-operating with the MAIB if its investigation is carried out in full compliance with international law and the relevant guidance.

It is also outside of the influence of any master to control the discretion of the Chief Inspector of the MAIB other than going down the route of a judicial review. The discretion which can be applied when dealing with VDR data is not subject to any statutory control. In addition, VDR information to which the owner has access is not required to be disclosed to the master or watchkeeper involved.

Part B Administrative enforcement measures

The principal administrative enforcement measures under the MSA 1995 are Improvement Notices,[1] Prohibition Notices[2] and Detentions. I will, however, only cover the subject of detentions in detail. Improvement and Prohibition Notices can be issued by Surveyors from local Marine Offices.[3] However, as there does not appear to exist a central or even local recording system, such as that centrally in place for detentions,[4] I could not verify the use of Improvement and Prohibition Notices. From my own experience I can say that they are by far not as frequently used as detentions.

An Improvement Notice can be issued by an Inspector appointed under s. 256(6).[5] Its purpose is to require the recipient to remedy a contravention of merchant shipping legislation within a period specified in that notice.[6]

A Prohibition Notice can also be issued by such an Inspector. The notice can be used to direct that certain activities must be stopped or that the ship is prohibited from going to sea unless the relevant contravention of merchant shipping legislation has been remedied.[7] Even though Prohibition Notices can achieve the same result in that ship's have to stop their current activities detentions appear to be clearly preferred by Surveyors. The reason might be that in case of a detention it is usually required to rectify all defects before the ship is released whereas a Prohibition Notice only covers the particular matter in question.

Sections 261(1) and 262(3) of the MSA 1995 are in large parts identical with ss. 21 (Improvement Notices) and 22(3) (Prohibition Notices) of the HSWA 1974, and appeals against detentions are discussed in this Part to a large extent in the light of court decisions about the validity of such notices.[8]

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[1] MSA 1995, s. 261.
[2] *Ibid.*, s. 262.
[3] See above, Chapter 2.2.2.
[4] I.e. all detentions get centrally recorded in the MCA and the registry in the organisation holds a file for each ship for each detention.
[5] See above, Chapter 2.2.2.
[6] MSA 1995, s. 261(2)(b).
[7] *Ibid.*, s. 262(3)(d)(i) and (ii).
[8] See below, Chapter 6.3.1. and 8.

Chapter [5] – Detentions and Merchant Shipping Legislation

5.1. Introduction
5.2. Detention of a dangerously unsafe ship under the Merchant Shipping Act 1995
5.2.1. The dangerously unsafe ship: examples prior to the Club Cruise case
5.2.2. Dangerously unsafe: analysis
5.2.3. The definition of a dangerously unsafe ship in the Club Cruise case
5.3. Detention under Merchant Shipping Regulations

5.1. Introduction

A vessel may be detained for a variety of reasons and the power of detention can be found both in the Merchant Shipping Act 1995[1] as well as in Regulations issued under it.[2] Detention is to be distinguished from arrest. Whereas an authorised State official[3] can detain a ship on grounds stipulated in merchant shipping legislation, arrest of a ship is a private remedy to obtain security for outstanding debt which arose in connection with a ship.[4]

This Chapter will analyse under what law a vessel may be detained.[5]

In the next section (5.2) I will discuss the law and the circumstances under which a vessel may be detained under the MSA 1995 itself as opposed to regulations made under it.[6] In a most recent case[7] the validity of a detention under the MSA 1995 was an issue and I will therefore look in detail at that judgment after having analysed the current legislation. The *Club Cruise* decision contains three main issues which were (1) the discussion of what constitutes a dangerously unsafe ship, (2) what makes a detention notice invalid and (3) what are the remedies for an owner who had suffered loss due to an invalid detention. Issue (2) will be discussed below in Chapter 6.3.1. and issue (3) in Chapter 8.6.

5.2. Detention of a dangerously unsafe ship under the Merchant Shipping Act 1995

According to the MSA 1995, s. 95(1)

> "Where a ship which is-
> (a) in a port in the United Kingdom, or
> (b) at sea in United Kingdom waters,
> appears to a relevant Inspector to be a dangerously unsafe ship, the ship may be detained."

A vessel may also be detained where a harbour master has reason to believe that the master or owner discharged any oil or mixture containing oil.[8]

A dangerously unsafe ship is defined in the MSA 1995, s. 94.

> "94(1) For the purposes of sections 95, 96, 97 and 98 a ship in port is 'dangerously unsafe' if, having regard to the nature of the service for which it is intended, the ship is, by reason of the matters mentioned in subsection (2) below, unfit to go to sea without serious danger to human life.

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[1] See below, Chapter 5.2.
[2] Issued under the MSA 1995, s. 85(7)(a).
[3] These officials are listed in the MSA 1995, s. 284(1). A harbour master, for example, cannot detain a vessel under the MSA 1995 nor under the Harbours Act 1964.
[4] Under the Supreme Court Act 1981, s. 21(4)(a).
[5] The practice of the MCA will be discussed below in Chapters 6 and 7.
[6] See below, Chapter 5.3.
[7] 18 November 2008, *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm).
[8] MSA 1995, s. 144(1) in connection with s. 131; discussed below, Chapter 12. Note also the power of a receiver of wreck to detain a vessel and secure a civil salvage claim, see MSA 1995, s. 226(1)(a).

> (1A) For the purposes of those sections [as mentioned in sub-section (1)] a ship at sea is 'dangerously unsafe' if, having regard to the nature of the service for which it is being used or is intended, the ship is, by reason of the matters mentioned in subsection (2) below, either-
>
> (a) unfit to remain at sea without serious danger to human life, or
> (b) unfit to go on a voyage without serious danger to human life.
>
> (2) Those matters are—
> (a) the condition, or the unsuitability for its purpose, of—
> (i) the ship or its machinery or equipment, or
> (ii) any part of the ship or its machinery or equipment;
> (b) undermanning;
> (c) overloading or unsafe or improper loading;
> (d) any other matter relevant to the safety of the ship;
> and are referred to in those sections, in relation to any ship, as 'the matters relevant to its safety'….[9]

A ship is dangerously unsafe in port when it is unfit to go to sea.[10] At sea a ship is dangerously unsafe when it is unfit to remain at sea or to go on a voyage.[11] In port and at sea the lack of safety must present a serious danger to human life.[12] Matters which can make a ship unfit because of the condition or the unsuitability for its purpose are the ship itself, any part of it, its machinery or equipment, its manning (or rather lack of),[13] overloading or any other matters relevant to the safety of the ship.[14]

A detention is executed by a Surveyor[15] in serving on the master of the ship a detention notice.[16] Such a "detention notice" is not a prescribed statutory form, but has been created by the MCA.

A ship, however, does not have to be dangerously unsafe; it only has to *appear*[17] to the Inspector to be unsafe for him to be entitled to serve the notice.[18]

> "But I draw attention to the fact that the verb is that it *appears* to them, not that the planning authority must be satisfied as to a certain state of affairs. Prima facie, therefore, one approaches this section with the idea in mind that a *prima facie* case only need be shown to satisfy the prerequisites of a valid notice."[19]

5.2.1. The dangerously unsafe ship: examples prior to the *Club Cruise* case

"DSV Norlift"

An illustration of a matter relevant to the safety of the ship which may be understood as "dangerously unsafe" is one case[20] in which "a suspension chain holding the lifeboat failed causing the lifeboat to plunge into the water".[21] The respondent company responsible for

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[9] *Ibid.*, s. 94(1A) and (2).
[10] *Ibid.*, s. 94(1).
[11] *Ibid.*, s. 94(1A). This sub-section was introduced by the Merchant Shipping and Maritime Security Act 1997 (c. 28), Schedule 1, para. 1(3). It thereby defined a "dangerously unsafe" ship at sea in similar terms to an "unsafe" ship in port in the original version of the MSA 1894, s. 459(1). A vessel had to pose a "serious danger to human life". "459(1) Where a British Ship, being in any port in the United Kingdom, is an unsafe ship, that is to say, is by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, such ship may be provisionally detained for the purpose of being surveyed, and either finally detained or released as follows:-…".
[12] *Ibid.*, s. 94(1), (1)(A).
[13] The addition to the MSA 1894, s. 459(1) of "undermanning" making a ship unsafe was effected by an amendment to the 1894 Act introduced by the MSA 1897, s. 1.
[14] MSA 1995, s. 94(2).
[15] The words "Surveyor" and "Inspector" are used interchangeably.
[16] MSA 1995, s. 95(3).
[17] See also below, Chapter 5.2.1 the "City of Limerick".
[18] Upjohn LJ in *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 QB 196, p. 225, where he interpreted similar wording in s. 23(1) of the Town and Country Planning Act 1947.
[19] *Ibid.*
[20] *Ziemniak v. ETPM Deep Sea Ltd.* [2003] 2 Lloyd's Rep. 214.
[21] *Ibid.,* para. 2.

the operation of the vessel[22] was of the opinion that "the condition of a lifeboat chain would unquestionably have been covered by s. 94(1) and (2)(a) and (d)".[23]

"Olavus"

In one older case[24] it was held that a ship was unsafe[25] when the master allowed "the ship to be in a condition of having been loaded so as to submerge beyond what is proper".[26] In that case a vessel with a timber cargo had arrived from Finland and was found in the Victoria Dock in Hull to be overloaded by 134 tons due to wet and stormy weather on the way across.[27]

"City of Limerick"

This case[28] does not provide much information of what constitutes a dangerously unsafe ship, but it helps clarifying that a ship did not in fact have to be unsafe as long as a reasonable person came to the conclusion that it was.[29] The vessel was detained in 1881 on the grounds of

> "'improper construction, viz., unusual proportions,' and after giving the length, breadth, and depth of the ship there was a statement that these formed 'a proportion unknown in the merchant service in any other vessel.'"[30]

The Surveyors had not expressed in their report that they were of the opinion that the ship was unsafe which caused the judge in the first appeal of the detention to be of the opinion "that there was an absence of reasonable cause".[31] The MSA 1876 determined at that time under what conditions ships could be detained and what remedy an owner could seek for an invalid detention.

> "S. 6 Where a British ship, being in any port of the United Kingdom, is by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as 'unsafe') may be provisionally detained for the purpose of being surveyed and either finally detained or released.
>
> (1) The Board of Trade, if they have reason to believe on complaint or otherwise that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed."[32]

In the opinion of Brett LJ

> "the true interpretation [of s. 6] seems to me to be that if upon the evidence given at the trial of what by all means of examination possible under the circumstances in which the ship then was and all reasonable inquiries *might have been made known*, though it was not, to the Board of Trade, a person of ordinary skill would have had reasonable and probable cause so far to suspect the safety of the ship as to make it reasonable to detain her for the purpose of inquiry, the shipowner has no remedy given to him, though his ship was in fact a safe ship; but if upon such evidence a person of ordinary skill would have had no reasonable and probable cause to suspect the ship, then compensation is given to the shipowner, although the facts erroneously stated to the Board of Trade

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[22] *Ibid.*
[23] *Ibid.*, para. 19(a); this point of the discussion was irrelevant for the outcome of that case and no opinion of the Court was given concerning the statement of the respondent, para. 54.
[24] *Radcliffe v. Buckwell* (1927) 28 Ll. L. Rep. 27.
[25] The MSA 1894 only required a ship to be an "unsafe ship" (s. 459(1)), which, however, posed a "serious danger to human life" (s. 459(1)). Section 439 provided that a ship which was overloaded was an unsafe ship "within the meaning of the provisions hereafter".
[26] *Radcliffe v. Buckwell*, p. 29.
[27] *Ibid.,* p. 28.
[28] *Thompson v. Farrer* (1881-82) LR 9 QBD 372.
[29] *Ibid.,* Cotton LJ on p. 385.
[30] *Ibid.,* p. 375.
[31] *Ibid.*, p. 377.
[32] MSA 1876, s. 6 (quoted from the case).

> would, if correct, have given to a person of ordinary skill reasonable and probable cause to suspect, and consequently detain the ship."[33]

The opinion that no compensation was due to the owner even though his ship was safe was based by Brett LJ on the wording of s. 10 of the Act.

> "If it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey."

According to Brett LJ the section "clearly does not go so far as to say that the shipowner shall be compensated if in fact his ship was not unsafe".[34]

"Mary Ann"

In an even older case,[35] the "Mary Ann" was believed by the then Board of Trade "by reason of the defective state of her hull [to be] unfit to proceed to sea without serious danger to human life".[36] The defects found were "that the decks of the *Mary Ann* are quite worn out, the deck-beams and knees defective, and all her timbers rotten".[37] The three judges of the Divisional Court agreed unanimously that the Board of Trade was justified in detaining the vessel.[38]

5.2.2. Dangerously unsafe: analysis

There does not appear to be one rule which suits all cases and it would appear to depend on the particular circumstances as to whether a ship is found to be "dangerously unsafe". But in this context it has been acknowledged

> "that the Marine Safety Agency[39] officer is best able to determine the fitness or unfitness of a particular vessel to go to sea so far as the specified safety considerations are concerned".[40]

Yet, the discretion of the officer would appear to be limited to specific safety considerations. Those considerations ought to be reasonable and be restricted to factors which are relevant and not extraneous to the matter.[41]

> "(3) The officer detaining the ship shall serve on the master of the ship a Detention Notice which shall—
>
> (a) state that the relevant Inspector is of the opinion that the ship is a dangerously unsafe ship;
> (b) specify the matters which, in the relevant Inspector's opinion, make the ship a dangerously unsafe ship; and
> (c) require the ship to comply with the terms of the notice until it is released by a competent authority."[42]

There seem to be no authorities clarifying the meaning of "the Inspector is of the opinion" in the context of merchant shipping legislation. But[43] guidance can be found in health and

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[33] *Thompson v. Farrer,* p. 381.
[34] *Ibid.,* p. 380.
[35] *Lewis v. Gray* (1875-76) LR 1 CPD 452.
[36] *Ibid.*, p. 466.
[37] *Ibid.*, p. 468.
[38] *Ibid.*, pp. 468 and 470.
[39] Now the MCA.
[40] *Re Ullapool Harbour Trustees,* Scotland, Outer House, 31 January 1995, *LexisNexis* transcript, para. 18 (own numbering). See also above, Chapter 2.2. on the powers of a MCA Surveyor/Inspector.
[41] See discussion above, Chapter 4.2.5.
[42] MSA 1995, s. 95(3).
[43] See below, Chapter 6.7.2.

safety law as regards the issuing of a prohibition notice.[44] It needs to be noted, though, that a difference exists between the relevant section in the HSWA 1974[45] and the MSA 1995 in that according to s. 22(3) of the HSWA 1974 "a prohibition notice shall

> (a) state that the inspector is of the said opinion;
> (b) specify the matters which in his opinion give or, as the case may be, will give rise to the said risk;
> (c) where in his [the Inspector's] opinion any of those matters involves or, as the case may be, will involve a contravention of any of the relevant statutory provisions, state that he is of that opinion, specify the provision or provisions as to which he is of that opinion, and give particulars of the reasons why he is of that opinion;…"[46]

An Inspector thereby has to specify the relevant statutory provision of which the other party is in his opinion in breach.[47] Under the MSA 1995 the Inspector only has to be of the opinion that the ship is dangerously unsafe and has to specify the relevant matters. An obligation like that in the HSWA 1974, namely to specify a statutory provision which was contravened, appears not to be required for the detention of a dangerously unsafe ship. This, however, would appear to be different when the Inspector is using a detention power under any merchant shipping regulations, where the relevant recipient (usually the master) must be told what exactly and why it is wrong.[48]

In an HSAW 1974 case, *Readmans Ltd v. Leeds City Council,*[49] the relevant City Council Inspector issued a Prohibition Notice. In that notice he was

> "of the opinion that the following activities, namely: the use of the Buko shopping trolleys fitted with child seats…involve, or will involve, a risk of serious personal injury".[50]

The Court required that it was for the Inspector to satisfy the Tribunal "that his [the Inspector's] opinion that there is a risk of serious personal injury is sustainable".[51] Roch J then continued to explain the three issues the Inspector had to demonstrate to make his case.

> "That is why he is required by section 22(3)(b) to specify the matters [issue 1] which in his opinion give rise to that risk. That is also why the inspector must also show a prima facie case [issue 2] that there has been a breach of a section of the Act, in this case section 3(1). Again, that is why section 22(3)(c) requires the inspector to give particulars of the reasons why he is of the opinion [issue 3] that there has been a breach of a section of the Act. In my judgment those matters must be established by the inspector on the balance of probabilities, the appeal against the prohibition notice not being a criminal proceeding."[52]

The requirement under the MSA 1995, s. 95(3) would only appear to require satisfying issue one (specify the matters) because that section does not oblige the Inspector to specifiy a provision "as to which he is of that opinion"[53] (issue 3) nor, it would appear, does it require a *prima facie* case (issue 2) that there has been a breach of a section of the Act.

This would seem to mean that a court is not supposed to decide whether the ship in question was dangerously unsafe, but only whether the Inspector has specified the matters which in his opinion made the ship dangerously unsafe.[54] If a court would judge

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[44] It appears that in *Banks v. Secretary for the Environment* [2004] EWHC 416 (Admin), para. 10, Sullivan J understands "being of the opinion" to carry the same meaning as "being satisfied".
[45] Section 22(3).
[46] HSWA 1974, s. 22(3)(c).
[47] The wording of s. 22 appears to support the opinion that a prohibition notice may even be issued when there is no relevant legislation in place, see D Adamson *et al*., *Prosecuting and Defending Health and Safety Cases,* 2007*,* p. 142.
[48] See below the discussion of HSAW 1974, s. 21(b) and *BT Fleet v. McKenna* [2005] EWHC 387 (Admin), Chapter 6.3.1.
[49] Queens Bench Division, 10 March 1992, official transcript on *LexisNexis*; a summary can be found in [1992] COD 419).
[50] *Ibid.,* p. 2.
[51] *Ibid.,* p. 5.
[52] *Ibid.*
[53] HSWA 1974, s. 22(3)(c).
[54] As to the reasonableness of the Inspector's opinion see the discussion below, Chapter 6.3.1. See also above, Chapter 5.2.1, the case of the "City of Limerick" in *Thompson v. Farrer.*

whether the ship was dangerously unsafe it would appear to replace the Inspector's view with that of the court. For if a judge considers it improbable that the ship is dangerously unsafe his opinion would contradict and replace that of the Inspector.

However, such a merits review is not the task of the court. "Judges are not being set free to second-guess administrators on the merits of their policies."[55] A court is not to substitute its own view for that of the Inspector.[56] It follows, in my opinion, that, as with an Inspector who is satisfied that a certain risk exists, an Inspector who is of the opinion that a ship is dangerously unsafe is entitled to hold this view unless it is perverse[57] or held in bad faith.[58] The view of the Inspector, however, must be subject to him having established and properly balanced the qualifying element of "serious danger to human life" before he can detain the ship.[59]

The test then would appear to be whether the Inspector is of the opinion that a fact has been established which is serious enough to make the ship dangerously unsafe.[60] Without establishing circumstances that lead the Inspector to believe that the relevant requirement of the MSA 1995, s. 94(1) is satisfied an Inspector could not come to the opinion that the ship is dangerously unsafe.

If, therefore, an Inspector has, for example, witnessed a poor drill for abandoning ship he has to believe that as a consequence the ship is "unfit to go to sea without serious danger to human life"[61] before he can conclude that the ship is dangerously unsafe. That this

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[55] J Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review,* 2000, p. 681. This view was shared by Lord Steyn in *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532, para. 28, and agreed with by the other four Law Lords. It does not appear to be completely clear, though, how the substitution of the Court for that of the authority can always be prevented when applying the principle of proportionality. According to H W R Wade, C F Forsyth*, Administrative Law,* p. 368, "It is difficult not to regard these decisions (*Daly* [2001] 2 AC 532, and *R (P and Q) v. Secretary of State for the Home Department* [2001] 1 WLR 2002) as clear examples of merits review." It is against this background and on the basis of the earlier House of Lords decision in *Ex parte Brind* [1991] 1 AC 696, that I assume H W R Wade, C F Forsyth*,* p. 366, formed their position when they say that "Proportionality is therefore a more exacting test in some situations and is to be rejected as requiring the court to substitute its own judgment for that of the proper authority." In *Ex parte Brind* Lord Ackner, p. 763, left the reader in no doubt that he believed the proportionality doctrine did not have any place in domestic law unless the Human Rights Convention was incorporated into English law. Technically, the Convention has in fact not been incorporated by the HRA 1998 in the sense that it does not have direct effect but "is an international treaty made between member states of the Council of Europe", see *R v. Lyons and others* [2003] 1 AC 976, paras. 26 and 27. Still, it appears that the scales have now clearly tipped towards the *Daly* approach. According to Lord Bingham in *R (SB) v. Governors of Denbigh High School* [2007] 1 AC 100, para. 30, the inadequacy of the traditional approach "was exposed in *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493 , para 138, and the new approach required under the 1998 Act was described by Lord Steyn in *R (Daly) v. Secretary of State for the Home Department*, paras. 25–28, in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v. Ministry of Defence, ex parte Smith* [1996] QB 517".

[56] *Banks v. Secretary for the Environment,* para. 10. But see also *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] All ER (D) 116, the House of Lords appears to soften this approach slightly, para. 53, in "that the court had jurisdiction to quash for a misunderstanding or ignorance of an established and relevant fact". It would seem that by deciding that an Inspector misunderstood or ignored what the Court would consider to be a relevant fact (and the Inspector considered to be irrelevant), the Court replaces elements of the Inspector's view with its own.

[57] See below, Chapter 6.7.2. *Little v. George Little Sebire & Co* [2001] EWCA Civ 894, para. 18.

[58] To quote the respondent (who lost the case) in *Readmans Ltd v. Leeds City Council*, p. 3 of the transcript.

[59] MSA 1995, s. 94(1). For the balancing of the property right and the right to life see above, Chapter 3.3. That such a proportionality test has to be carried out appears to be the essence of Lord Steyn's general remarks in *R (Daly) v. Secretary of State for the Home Department*, para. 27, which at least Lord Bingham and Lord Cooke seemed to be in full agreement with. Lord Hutton and Lord Scott appear to at least accept a "modified" and higher review standard than *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*, for certain cases of interference by a public body, paras. 35 and 36. They seem to agree with Laws LJ in *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840, para. 18, where Laws LJ considered a Wednesbury review to be "exiguous a standard of review" which would "involve a failure to recognise what has become a settled principle of the common law". The principle addressed is that "the intensity of review in a public law case will depend on the subject matter in hand" independent of "our incorporation of the Convention by the Human Rights Act 1998".

[60] See above, *Banks v. Secretary for the Environment,* para. 10.

[61] MSA 1995, s. 94(1).

belief is reasonable would be supported by establishing the opinion that a contravention had occurred of the Musters Regulations,[62] reg. 10, "Abandon ship drills".[63] When the vessel poses a serious danger to life the Inspector would appear not to have a choice but to conclude the dangerously unsafe state of the vessel. With that finding he will then have to balance the property right of the owner with the risk to life before coming to the decision whether or not to detain the ship. A poor abandon ship drill is by default a danger to human life and would therefore appear always to outweigh other rights.[64] It does not inevitably follow, however, that the ship must be detained because that decision is at the Inspector's discretion in that he "may" detain the vessel under the MSA 1995, s. 95(1).

Only when it is proportionate, which in this case would appear to mean that there is no other option to eliminate the risk, would he have the option to detain the vessel.[65] If, for example, the ship could not sail anyway because the engine would first require major repairs, or the owner is prepared to voluntarily stay in port and this could be verified would a detention not seem to be a proportionate measure.

If the vessel is detained the elements of the defective drill, which make the ship a danger to human life, would appear to have to be clearly addressed in the Detention Notice.[66]

I will now turn to the *Club Cruise* case and after introducing the background will refer to the part of the decision which discussed a dangerously unsafe ship.

5.2.3. The definition of a dangerously unsafe ship in the *Club Cruise* case

The *Club Cruise* case appears to be the first case for a century dealing with the legality of a detention under UK merchant shipping legislation.[67] The facts in the case were as follows.

At about 1900 hours on 28 May 2006 a Surveyor of the Maritime and Coastguard Agency (MCA) issued a detention notice to the master of the cruise vessel "Van Gogh".[68] On 30 May 2006 the Surveyor handed the master a second detention notice at about 1520 hours which was dated 28 May 2006. Following a re-inspection of the vessel the Surveyor eventually released the ship from detention at about 1945 hours on 30 May 2006.[69]

The first Detention Notice in the *Club Cruise* case was filled out, under a heading "Statutory Requirement", with the words "MS Shipping Legislation. MS Act 1995", and in the box "Ship does not comply because" the Surveyor had inserted "Outbreak of Norovirus on previous two cruises".[70] The second notice stated that

> "in exercise of the powers in section 95 of the Merchant Shipping Act 1995, the ship is hereby prohibited from going to sea or on a voyage until released by an officer of the [MCA]."[71]

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[62] The Merchant Shipping (Musters, Training and Decision Support Systems) Regulations 1999, SI 1999 No. 2722 (hereafter "Musters Regulations").
[63] However, it would seem that a contravention of merchant shipping legislation is not necessarily required to belief that the vessel is unfit to go to sea. But under those circumstances it would appear to be rather difficult to prove that such a belief was reasonable.
[64] According to Art. 2(1) of the Human Rights Convention "Everyone's right to life shall be protected by law". See also the discussion below, Chapter 6.7.3. This would appear to be independent of how many people are actually at risk – whether it is several hundred or only one person, see below, Chapter 6, fn 319.
[65] This would appear to be different from the requirement under the PSC Regulations, reg. 9(2)(a) where a PSC Inspector does not have a choice but to detain, see below, Chapter 6.4.3.
[66] For the discussion of a Detention Notice see below, Chapter 6.3.1. I found it more appropriate to discuss the requirements for a Detention Notice at that later stage as detentions under the MSA 1995 hardly ever happen which is different from detentions under the PSC regime.
[67] It would seem that the question has not been dealt with since *Thompson v. Farrer* (1881-82) LR 9 QBD 372, although *Larsen v. Hart* (1900) 2 F(J) 54 considered whether a detention notice was served "forthwith".
[68] [2008] EWHC 2794, para. 5.
[69] *Ibid*., para. 11.
[70] *Ibid*., para. 6.
[71] *Ibid*., para. 9.

The reasons given in the second notice were:

> "outbreak of norovirus on two previous cruises. Over 100 passengers and crew affected on last seven day cruise. Director of Public Health advised that the vessel should remain docked for 48 hours to monitor crew and vessel".[72]

When questioned about the detention by the claimant's solicitor on 7 July 2006 the MCA justified the detention by stating that the ship had been dangerously unsafe within ss. 94 and 95 of the MSA 1995.[73] Only later, it appears, did the MCA try to justify the detention by reference to the Merchant Shipping (Health and Safety at Work) Regulations 1997.[74] Regulation 28 provides that "if [the Inspector is] satisfied that the ship does not conform to the standards required of United Kingdom ships by these Regulations, [he] may…detain the ship".[75]

By 7 July 2006, it would appear, the claimant had clearly missed the time bar of 21 days provided for in the MSA 1995, s. 96(1). Club Cruise Entertainment instead tried to claim for compensation under the tort of conversion.

On 27 June 2008, Aikens J ordered a trial of five preliminary issues on an agreed set of facts. Those preliminary issues can be summarised as follows:[76]

1. Where it appears to an Inspector that a ship is dangerously unsafe for the purposes of Section 95 must he have reasonable grounds for any such opinion?
2. Was the form of the detention notice sufficient in law for the purpose of a valid detention?
3. Did the Surveyor wrongfully interfere with the ship and does the Court have power to order statutory compensation under section 97 of the Act?[77]

I will first discuss question one above. The second question will be addressed in the discussion of Detention Notices[78] and the last question will be covered in the discussion about compensation for an invalid detention.[79]

It was accepted by the parties that a Surveyor must have "reasonable grounds" for his opinion,[80] in order to justify a detention under s. 95. The judge was "concerned about reaching a conclusion that [the Surveyor]… acted unreasonably … without having heard his evidence".[81] This, however, did not stop the Court from assessing on the evidence before it that the "Van Gogh" was not a dangerously unsafe vessel. Whilst Flaux J was not ready to accept

> "that the power to detain a ship under those sections of the Act [ss. 94 and 95] only arises where the ship is a death trap, the adverb "dangerously" must add an important qualification to "unsafe". It does not seem to me possible to say the matters pleaded without more would render the ship <u>dangerously</u> unsafe."[82]

According to the *Club Cruise* judgment the Surveyor did not follow the law in that he misjudged what the term "dangerously unsafe" ship meant, and therefore he acted unreasonably.[83] The Court did not comment on whether the Surveyor could rationally have come to his conclusion, but decided, that because the ship was not dangerously

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[72] *Ibid*., para.10.
[73] *Ibid*., para.12.
[74] SI 1997 No. 2962 (hereafter "H and S Regulations"), see para.12.
[75] H and S Regulations, reg. 28(1)(a)(ii).
[76] The preliminary issues are more fully set out at [2008] EWHC 2794, para. 18.
[77] Here I will only discuss question number one whereas below in Chapter 6.3.1. question two and in Chapter 8.6. question three will be dealt with.
[78] Chapter 6.3.1.
[79] Chapter 8.6.
[80] *Ibid.,* para. 35.
[81] *Ibid.,* para. 35.
[82] *Ibid*., para. 38.
[83] This conclusion (paras. 36-38) has to be drawn despite the judge's attempt at para. 35 to tone down his finding, and his expressed misgivings that he should determine the issue on the assumed facts, para. 36.

unsafe in the eyes of the Court, the Surveyor "acted unreasonably".[84] This decision would not appear to answer the question of Aiken J nor does it appear to accommodate the judgments of the courts referred to above.[85]

Aiken J had asked whether an Inspector must have reasonable grounds for his opinion, but not whether the ship was reasonably unsafe. That the actual facts and the reasonable opinion of the Inspector are different issues seems to have been discussed in the cases of *Banks v. Secretary for the Environment*[86] and also *Readmans Ltd v. Leeds City Council.*[87]

The MSA 1995, s. 94(1A)(b) defines a dangerously unsafe ship to be "unfit to go on a voyage without serious danger to human life". Case law does not seem to offer much clarification of the term "dangerously unsafe",[88] so that there is no real general understanding of it. However, it was acknowledged in *Re Ullapool Harbour Trustees* that an MCA Surveyor/Inspector is best placed to make such a judgment.[89]

The key question to determine whether the ship was dangerously unsafe would, therefore, seem to be whether a norovirus outbreak could involve "serious danger to human life". It would appear that the judge did not consider the impact of both sick crew and passengers to be of enough significance to hold that the vessel was "dangerously" unsafe.[90] Although the judgment does not definitively decide that a vessel *cannot* be dangerously unsafe when affected by norovirus, the total of 6% of crew[91] affected by the illness was apparently not enough for such a classification. More detailed evidence was not available to the judge, but it would appear that the risk for more crew to be infected by the virus was relatively high as crew quarters on old cruise ships[92] are usually very cramped with small, shared cabins and communal toilets and bathrooms which would appear to be an ideal environment for passing on the virus.[93] Furthermore, it would seem that the cleaning of the vessel took some two days because the ship was only released after having been alongside for 2.5 days.[94] The cruise was supposed to start on the day the vessel was detained.[95] If, therefore, the ship was not satisfactorily decontaminated on the scheduled day of departure it would seem to have posed an uncalculated risk to unsuspecting, and particularly old, passengers, and so far uninfected crew.

But this would seem not to be the only concern for the safety of the vessel. Cruise ships are usually tightly manned, i.e. the number of crew does not allow for much flexibility or down time for crew members. More important, however, would appear to be the fact that, independent of rank, nearly every crew member is required to assist and guide passengers in case of emergency before looking after themselves. This assistance and guidance is based on the assumption that all but a very few of the crew members are available in emergencies and that passengers are usually able to move about freely. If 15% of all passengers[96] require active assistance by a reduced number of crew the risk

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[84] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 35 in connection with para. 38.
[85] Chapter 5.2.2. and particularly Chapter 6.7.2.
[86] [2004] EWHC 416 (Admin), para. 10, see above, Chapter 6.7.2.
[87] *LexisNexis* transcript, p. 5; see above, Chapter 5.2.2. See also below in this sub-section.
[88] See above, Chapter 5.2.1.
[89] *LexisNexis* transcript, para. 18 (own numbering); see also above Chapter 5.2.2.
[90] It had been agreed between the parties that the norovirus is "a relatively mild, well known and very common illness; it typically lasts 24 to 48 hours and has no long term effect and it affects between 600,000 and a million people in the UK each year, being particularly common in "semi-closed" environments like hospitals, schools and cruise ships"; *ibid.*, para. 3. The DfT wished to qualify that statement by adding "that it [the norovirus] is temporarily disabling and can be fatal to the elderly or those in poor health"; *ibid.*
[91] 13 crew out of 225, *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 4.
[92] The "Van Gogh" was built in 1975, see www.equasis.org.
[93] See, for example, http://www.nhs.uk/Conditions/Norovirus/Pages/Introduction.aspx?url=Pages/what-is-it.aspx&r=1&rtitle=Norovirus+-+Introduction.
[94] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para.11. A master will usually call the Surveyor to release the vessel as soon as the ship is in a satisfactory state. There is no indication in the judgment that the release was in any way delayed by the MCA.
[95] *Ibid.*, para. 2.
[96] 80 passengers out of a total of 519, para. 4.

for a safe emergency evacuation of everybody on board would seem to have increased dangerously.

In addition, life boat crews usually consist of crew of all ranks, not only deck crew, as there is never sufficient deck crew available on cruise ships to man all lifeboats. It would appear that when a significant number of the crew, independent of the rank they hold, cannot be mobilised in an emergency a satisfactory response of the ship to a crisis is seriously jeopardized.[97]

By considering these arguments and when applying his discretion as to the unfitness of the vessel it only has to appear[98] to the Surveyor that the ship is dangerously unsafe. As long as he does not act unreasonably,[99] which is also said to mean irrationally,[100] he would appear to be better placed than a judge to decide whether or not a ship is safe to go to sea.[101] The MSA 1995, s. 95, does not seem to require a court to decide whether the ship is actually dangerously unsafe, but only whether the Surveyor reasonably and rationally is of the opinion that the vessel is dangerously unsafe.[102] By making its decision, a court ought not to substitute its own view for that of the Surveyor.[103] This makes a lot of sense as a Surveyor probably sees more ships in one year than any seafarer does during his whole career, let alone a judge who will probably never have the opportunity to be directly confronted with the factual deficiencies of vessels. In the *Club Cruise* case the Surveyor would seem to have acted perfectly reasonably if acting on the advice of the Director of Public Health.[104] It is difficult to agree with the confidence expressed by Flaux J that the pleaded facts would not have justified the opinion of the Surveyor, who was convinced (presumably in good faith) that the ship was dangerously unsafe. On the other hand the defence pleading may have been too sparse, and it may not have been sufficiently explained to the Court how seriously the emergency response on board a cruise vessel is affected by the number of crew and passengers infected with the virus.

The decision can only undermine the confidence of Surveyors in deciding what is a "dangerously" unsafe ship and thereby possibly help "death traps" to develop. Although one must be careful in analysing cases decided on assumed facts, it is perhaps unfortunate that Flaux J expressed his opinion on this issue so definitively on the information available, given the risks involved. The result is that while ss. 94 and 95 do not require evidence that the ship is a "death trap", it is not sufficient that the Surveyor expresses an opinion that the ship is dangerously unsafe. The judge left it open what evidence would have made the vessel dangerously unsafe, but it seems he would have required more than evidence of illness and a remote possibility of death. It does suggest that a detention for a norovirus outbreak would not be justified under ss. 94 and 95, unless there is greater evidence than the possibility of fatalities in older passengers.[105] It also indicates that Surveyors may need to be able to base detentions on the detailed

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[97] This aspect appears to have found only marginal appreciation in the judgment. In *Club Cruise* at para. 4 the judge stressed that only two of the 13 affected crew were deck crew. That the presence of the virus would affect the response in an emergency situation was addressed by the defence, para. 7ii.
[98] MSA 1995, s. 95(1) tailpiece.
[99] *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223, p. 229.
[100] *Council of Civil Service Unions v. Minister for the Civil Service Respondent* [1985] AC 374, p. 410; see the more detailed discussion below in Chapter 6.7.2.
[101] This particularly in the light of the proportionality approach having to weigh up public health with the commercial interests of the company, see for the relevant test *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532, para. 27.
[102] See also above the discussion of *Thompson v. Farrer* and the "City of Limerick" in Chapter 5.2.1., where under the MSA 1876 the Board of Trade had to have reason to believe that the ship was unsafe. Brett LJ found that "to ask a judge whether upon certain measurements of length, depth, and breadth a ship would have sufficient stability, or whether with a cargo loaded in a given form she would be safe, is on the face of the proposition to my mind absurd", pp. 382-383.
[103] "It is not for the Court to substitute its own view of whether there were 'reasonable grounds for supposing …'", *Banks v. Secretary for the Environment* [2004] EWHC 416 (Admin), para. 10.
[104] As the second Detention Notice stated, see para.10.
[105] Although it is submitted that information concerning the crew (such as that outlined above) ought to be relevant.

regulations, such as the H and S Regulations; these may penalise a lower level of defect, e.g. that the ship is merely "unsafe", as opposed to "*dangerously* unsafe".

In comparison to the understanding that a lifeboat suspension chain which may break is dangerously unsafe,[106] it would likewise not seem to be a lesser threat to life considering that a number of passengers or crew may not be rescued because insufficient manpower is available for the safe mustering of all people on board or for their disembarkation into lifeboats.

What would appear to be questionable about the decision is whether the principle that the Court is not to substitute its view for that of an Inspector was complied with.[107] It would seem that a judge will have to respect when a vessel "appears to a relevant inspector to be a dangerously unsafe ship"[108] that the Inspector's opinion can only be substituted if he acted unreasonably which is also said to mean irrationally.[109] That the Inspector did not act irrationally or unreasonably would in the *Club Cruise* case appear to follow from the fact that the Surveyor apparently followed the advice of the Director of Public Health.[110]

In my view, therefore, it is clearly arguable that the "Van Gogh" was a "dangerously unsafe" ship. Even if, after evaluating all facts, it would eventually be concluded that that was not the case it seems that the Inspector was fully justified in his opinion at the time of the detention.

The current detention record does not suggest that detentions under section 95 of MSA 1995 are very common. For example, none of the vessels with the highest number of deficiencies recorded between May 2002 and January 2006 was detained under s. 95.[111] It is not clear why that was the case, but it would appear that when specific defects are found on board they are used to serve as evidence for a violation of the relevant regulations which on that basis provide the power to detain. Thus it would seem to be of rather more importance to any master and owner what different options for detention are useable under merchant shipping regulations.

5.3. Detention under Merchant Shipping Regulations

Between May 2002[112] and January 2006 a total of 24 UK flagged vessels and (commercially operated) boats[113] were detained in the UK under merchant shipping regulations.[114] This number compares with exactly 500 foreign flagged vessels for which the MCA website shows records of detention for the period between 2001 and 2005.[115] The number will, however, have been greater as the MCA did not post any information for March 2001 and February 2004, and the total will rather have been between 515 or 520 detentions.[116]

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[106] See above "DSV Norlift".
[107] See the discussion below in this section and particularly *Banks v. Secretary for the Environment,* para. 10.
[108] MSA 1995, s. 95(1) tailpiece.
[109] *Council of Civil Service Unions v. Minister for the Civil Service Respondent* [1985] AC 374, p. 410.
[110] As the second Detention Notice stated in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 10. This statement was not challenged by the claimant.
[111] According to MS 071/03/ file numbers 1646, 1654, 1347, 1730, 1193, 1764, 1825, 1823, 1824, 1826, 1834, 1837, 2003, 2007, 2032, 2049, 2108, 2123, and 2158.
[112] The earliest date for which information was available on the MCA website: http://www.mcga.gov.uk/c4mca/mcga-newsroom/mcga-dops_inspec_newsroom-detentions/mcga-dops-detentions-uk_merchant_ships.htm.
[113] Excluding fishing vessels; for details see Annex 8 "Detention of UK flagged ships".
[114] For a factual combined with a legal analysis see next paragraph.
[115] All information taken from: http://www.mcga.gov.uk/c4mca/mcga-newsroom/mcga-dops_inspec_newsroom-detentions/mcga-dops_detentions-foreign_merchant_ships.htm. Systematically prepared records can be found in Annexes 9 to 13,"Detention of foreign flagged ships" by month and year.
[116] As can be seen from Annex 9 the average number of monthly detentions was 9.1 ships in 2001 and 8.4 ships in 2004 (Annex 12).

Detentions of UK flagged vessels will not be dealt with in more detail as the illustrative purpose of analysing detentions as regards their legal basis and impact on master and owner appears to be better served with the larger number of foreign detentions.

Supporting this approach is the observation that hardly any larger UK flagged cargo vessel was affected, and it appears that only 6 UK vessels of more than 500 gt were detained during the recorded period.[117] MCA Surveyors seem to have a mixed approach towards UK flagged ships. There is the view that their role is to treat UK flagged ships more carefully than foreign flagged ships,[118] to ensure UK ships do not get detained overseas,[119] or that a Surveyor would have an "easier time" on a UK vessel;[120] whereas others consider themselves to have the same approach whether it is a foreign or a UK flagged ship.[121] There is also the view that the role of an MCA Surveyor is "to protect the UK PLC interest".[122] Protection, however, may focus on the seafarers or on the owner.[123] As such, protection appears to some Surveyors to mean that they should rather shy away from a detention and try to "educate"[124] owner or crew.

Whereas it is understandable that UK "customers" will be looked after, it is arguable that it could be a worrying factor for merchant shipping law enforcement that there might be different standards under the same statutory requirements which in effect would then serve to discriminate on the basis of nationality (flag) only. However, the argument in favour of such discrimination is that UK owners and their vessels are known by the MCA Surveyors who visit them more or less regularly whereas no history, other than technical information kept on the official databases,[125] is known of a vessel being subject to port state control, and no other (follow-up) visit may happen in the near future.[126] If, therefore, the "educational"[127] rather than the "enforcement" process delivers the result of having safe ships operating under the UK flag, it would appear that the end justifies the means.[128]

I will now begin to discuss port state control in the UK. It would appear that detentions under the port state control regime by far outnumber any other enforcement measure.[129]

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[117] See Annex 8, pp. 1, 2, and 3; all other vessels/boats (for several of which there were no details provided) appear to be rather small or at least below 500 gt. This result seems to differ from the perception of the individual Surveyors who in seven cases said they had detained a UK flagged vessel (or, including fishing vessels, in nine cases). See Annex 15, answers to question 8.

[118] One comment, Annex 15, answer 6.3, drastically demonstrates that there might be conflicts between MCA (informal) policies and Surveyors' work: "– should make no difference, but given the politics within MCA and our customers it seems one loose comment on a UK ship will end up rammed back down your throat by our senior mangers within minutes." The underlying pressure is no doubt the laudable desire to encourage ships back to the UK register on the basis that they will not be in a worse position than foreign flagged ships.

[119] Annex 15, answer 6.17.

[120] *Ibid.*, answer 6.19.

[121] A majority seems rather to see themselves more on side of the "customer" service, than that of enforcement, Annex 15, answers under question 7. However, as seen above, customer service or protection is seen to apply in different ways and the two approaches may not be entirely incompatible, see, for example, Annex 15, answer 7.4.

[122] *Ibid.*, answer 7.2.

[123] For the two positions see Annex 15, answers to question 7. A particular clear example appears to be answer 7.2. on the one hand and 7.6. or 7.14. on the other, highlighting the different approaches.

[124] *Ibid.*, answer 7.6.

[125] Those databases would be the (internal and to a certain extent external) Paris MoU database called "Sirenac" (www.parismou.org) and the publicly accessible database "equasis" (www.equasis.org).

[126] See Annex 15, answer 6.4. by a Surveyor: "Yes, I always expect to find defects simply because all ships have defects. The question is always 'how significant to the vessel's safety or the protection of the environment are those defects?' With a UK vessel we generally have knowledge of the history of the vessel and an existing working relationship with the operators. In other words we know which way the owner responds to criticisms of their vessel and how effective any close-out action will be. The prior history and working relationship gives us more scope to work with the operator to find solutions to problems. With a PSC inspection, unless it is a re-inspection, then there is no prior relationship and therefore to be consistent and fair the inspection and any defect close-out must be carried entirely in accordance with procedure."

[127] See, for example, Annex 15, answers 7.5. and 7.6.

[128] It is probably difficult to measure the success of the "educational" approach. But if the Paris MoU white list is anything to go by the UK seems to do rather well with its fleet: in 2002 and 2003 the UK topped the white list. In 2004 and 2005 the UK ranked third to be followed by being at the top of the white list again for 2006. See www.parismou.org, "Annual Reports" for the relevant years.

[129] See below Chapter 9.1.

Chapter [6] – General aspects of port state control

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6.2. Port state control practice in the UK
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6.8. Lessons from the "Ocean Glory 1" case

6.1. Introduction

Port state control inspections are only carried out on ships flying a flag other than that of the port State.[1] At least 25% of the average yearly number of visiting foreign seagoing ships must be inspected by the authorities of a Member State.[2]

Port state control within the boundaries of the Paris Memorandum of Understanding (Paris MoU) was conceived in 1982 as the direct result of the "Amoco Cadiz" grounding in March 1978 which caused a massive oil spill off the coast of Brittany.[3] Currently the memorandum has been signed by 27 States.[4] The origins of port state control, however, go at least back to 1978 and the fact that "it was assumed that some flag States were negligent in respect of exercising proper control over their ships".[5]

The IMO website currently lists nine different regional port state memoranda of understanding in all parts of the world.[6] In addition the United States Coast Guard operates its own port state control system.[7]

6.2. Port state control practice in the UK

The powers of a port state control Inspector[8] (or port state control officer - PSCO) are such that he may

> "take such action as may be necessary to ensure that the ship is not clearly hazardous to safety, health or the environment."[9]

These powers seem not to be affected by any of the provisions of the MSA 1995 in Part X or in any other set of regulations.[10] It would, therefore, appear that a PSC Inspector[11] can

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[1] Directive 95/21/EC, Art. 2(3).
[2] *Ibid.*, Art. 5(1).
[3] http://www.parismou.org/ParisMOU/Organisation/About+Us/History/default.aspx (30 November 2008).
[4] Belgium, Bulgaria, Canada, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovenia, Spain, Sweden, United Kingdom, http://www.parismou.org/ParisMOU/Organisation/About+Us/Scope/default.aspx (30 November 2008).
[5] Z O Özcayir, *Port State Control*, 2nd ed., 2004, p. 121.
[6] http://www.imo.org/home.asp (30 November 2008).
[7] http://homeport.uscg.mil/mycg/portal/ep/browse.do?channelId=-18371 (30 November 2008).
[8] "'Inspector' means a person duly authorised by the Secretary of State to carry out inspections required by these Regulations", PSC Regulations, reg. 2(2). It would appear, though, that a PSC Inspector is also a "Departmental Officer", see above, Chapter 2.2.
[9] PSC Regulations, reg. 3(3).
[10] PSC Regulations, reg. 3(3).

ask anybody on board any question, request to see any document or inspect any room or compartment, provided it is necessary to ensure that the ship is safe. The focus ought not to be on securing evidence for a prosecution, even though a PSC Inspector in the UK has usually also been appointed as an Inspector under the MSA 1995, s. 256(6) and as a Surveyor under s. 256(2).[12] Thus, this would seem to exclude a role of the PSC Inspector as part of any investigation for any prosecution other than that his report could probably be used as evidence. If so used, a master of a foreign flagged vessel would seem to be worse off compared with his colleague on a UK flagged vessel. For a Departmental Officer, other than a Departmental Inspector, does not have the same, all encompassing, rights when carrying out an inspection.[13]

After arriving on board the Inspector will follow the procedure as outlined in the PSC Regulations[14] and first inspect all relevant ship's certificates and crew documents.[15] Following that there is usually a walk through the accommodation, over the deck and through the engine room. This "initial inspection"[16] will on average last about three hours.[17] If "clear grounds"[18] are found during this initial inspection which suggests that the ship might "not substantially meet"[19] the requirements of any merchant shipping legislation incorporating an international convention, a "more detailed inspection"[20] will be carried out.[21] The latter will increase the total average inspection time to about six hours or more, depending on the number of defects found.[22] These times have to be seen within the context of a regular 7.5 hour working day of an Inspector, the standard practice not to inspect vessels after darkness, and do not include travel time. In addition an inspection may not have commenced at the beginning of the working day because the ship was not yet alongside, but rather several hours later. A ship may be due to sail, and unless the Inspector has established "deficiencies which are clearly hazardous to safety, health or the environment"[23] he may have to quickly finish off recording the defects[24] in his "Report of Inspection". This is a document which he has to write on board of the vessel before he leaves the ship.[25] If an Inspector decides to detain a vessel he will also have to fill in and issue the Detention Notice on board of the vessel. During this process the master and any of his officers present will usually be briefed by the Inspector about the defects and the reason(s) for the detention. Directly after the inspection the Inspector will have to spend additional hours in the office to prepare a detention fax, search for fax numbers of relevant flag State authorities and inform all of them accordingly.[26]

Inspections may therefore have to be carried out under time pressure or after hours. They can last considerably longer than the average time and may even force the Inspector to

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[11] In the UK PSC Inspectors are usually also Surveyors and Inspectors under the MSA 1995, s. 257, see for comparison also above, Chapter 2.2.
[12] See above, Chapter 2.2. and particularly Table 1 in Chapter 2.
[13] See above, Chapter 3.2.4.
[14] Regulation 6(1).
[15] That will usually be all ship's certificates which are subject to regular surveys as well as the master's and crew's certificates of competency.
[16] MSN 1775, s. 15.
[17] According to Pat Dolby, Head of the MCA PSC Inspection Branch, on 3 April 2008, assuming a general cargo ship of approximately 50,000 gt.
[18] PSC Regulations, reg. 6(3), see also MSN 1775, Annex III, giving examples for "clear grounds".
[19] PSC Regulations, reg. 6(3).
[20] *Ibid.*
[21] *Ibid.* and MSN 1775, s. 15.
[22] Head of MCA PSC Inspection Branch on 3 April 2008 and personal experience.
[23] PSC Regulations, reg. 9(2)(a), in which case he will have to detain the vessel. See discussion below under Chapter 6.5.
[24] Defects are recorded in "prose" and are given an Action Code. The three most used Action Codes are 17 (before departure), 16 (within 14 days) and 15 (next port). Action Code 30 signifies "detention", see Annex 19, MSF 1601A.
[25] See below, Chapter 6, fn 109. A Report of Inspection is still filled out in handwriting which, particularly when many defects have been found, will usually take quite some time.
[26] The detention fax is sent to the owners, the agent of the owners, the flag state administration or the flag State's Consulate,* the Classification Society (or Recognised Organisation),* Customs, the harbour master and to the MCA inspection branch in the headquarter (*denotes that this information is required to be sent by the Paris MoU, s. 3.10.2).

finish his report relatively late in the day. By that time he will have been moving around on the vessel for several hours, will have had had more or less co-operative discussions with master and crew and may actually be pretty exhausted. The timing will, therefore, not always allow the verification by other (senior) colleagues back in the office[27] of the possible violation of merchant shipping regulations which the findings may suggest. The lack of verification by (senior) colleagues combined with the on-site lack of access to merchant shipping regulations or M-notices[28] thus poses the risk of faulty judgments which may lead to erroneous Detention Notices. I would argue, therefore, that the uncertainty which surrounds every detention (even when run past a colleague or Principal Surveyor in the office over the phone) makes an Inspector to use as many grounds as possible to justify a detention.[29] This would particularly seem to be the case as a detention, which is an administrative enforcement measure, inevitably contains a punitive element.[30] A detention can have serious commercial consequences for a company and the loss of use of the ship for a day, depending on its size, will usually be greater than the maximum fine under a summary conviction.[31] Evidence of owners contesting a detention is still rather sparse, though.[32]

In the next section I will discuss the requirements for both the Notice of Detention and the Report of Inspection using both the example of the detention of the "Ocean Glory 1" and refer to the part of the *Club Cruise* judgment dealing with the Detention Notice.[33]

6.3. Requirements for a Detention Notice and a Report of Inspection

To detain a vessel the detaining officer will have to serve the master with a Detention Notice.[34] By way of illustration I propose throughout Chapter 6.3. – 6.8. to consider the case of the "Ocean Glory 1"[35] as this detention provides a good example for the introduction of detention requirements. It highlights the requirements for Detention Notices and emphasises, mainly due to its shortcomings, the need for satisfactory and accurate information. This discussion will also show the need for a proper balancing exercise to be undertaken by the Inspector.

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[27] Nearly all Surveyors would, for example, contact the Surveyor-in-Charge in their office before they detain a vessel, see Annex 15, question 4. Any required verification of findings through a specialist or relevant policy manager in the MCA headquarters is usually not possible after office hours. Even if such a person would stay longer he would at the latest have to leave the MCA building by 1900 hours when the building is shut. PSC inspections and detentions, however, do not always fit the working hours of a normal working day.

[28] Surveyors do usually not carry a laptop with relevant databank software when carrying out a PSC inspection.

[29] See Annex 24, list of statutory instruments under which the multi-defect vessels were detained. See also the discussion of the arbitration Award in case of the "Koriana" where the arbitrator held against the MCA that not all defects supporting the detention were recorded on the Notice of Detention, below, Chapter 8.5.

[30] This would also seem to be indicated by the Paris MoU in Annex 1, s. 9.3.2.1 that "ships which are unsafe to proceed to sea will be detained upon the first inspection irrespective of the time the ship will stay in port"; similar also the Directive 95/21/EC in Annex VI, s. 1 ("must be detained upon the first inspection irrespective of how much time the ship will stay in port") and MSN 1775 in Annex VI, s. 1 ("must be detained upon the first inspection irrespective of how much time the ship will stay in port").

[31] Which is £5,000, see below, Chapter 9, fn 235. See, for example, the charter rates mentioned in Chapter 6 fn 85or Chapter 8, fn 410. The daily costs for a modern cruise vessel will probably be over £100,000 per day.

[32] See the "Van Gogh" in the *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm) and the arbitration case of the "Koriana" (arbitration Award in Annex 30). The "Van Gogh" is discussed in parts under Chapter 5.2. and throughout Chapter 7, and the "Koriana" is discussed below in Chapter 8.5.

[33] The discussion of the Detention Notice in the *Club Cruise* case seemed to me to better fit here than under the previous analysis of the *Club Cruise* judgment (Chapter 5.2.3.) which was focussing on the dangerously unsafe ship for two reasons. First, I did not want to discuss general requirements for a Detention Notice in two different places. Secondly, there does, particularly after the *Club Cruise* judgment, not seem to be a difference whether a Detention Notice is issued under the MSA 1995 or under the port state control (PSC) regime, as a port state control officer (PSCO) is also always a Departmental Officer (see above, Chapter 2.2.) who can issue Detention Notices under the MSA 1995.

[34] Which has to comply with the requirements of MSA 1995, s. 95(3)(a)-(c), see above, Chapter 5.2.

[35] Detention no. 35 on 2 July 2001 (Annex 9).

In the "Ocean Glory 1" case the "Notice of Detention"[36] issued to the vessel provided that the "Ocean Glory 1" was detained under the Port State Control Regulations. A particular regulation was not specified, but the Detention Notice in the box which is headed "Ship does not comply because" carries the words "ISM CODE SECTION 10", "SOLAS 74 CHAPTER IX", "AND NUMEROUS OTHER SOLAS RELATED DEFICIENCIES".[37] The "Notice of the Detention of a Ship"[38] does not specify in any detail why the ship did not comply with the ISM Code, and the "Report of Inspection"[39] only stated that "at request of Portuguese Authority vessel re-detained in" the relevant port.

6.3.1. The Detention Notice

(a) General discussion

The format and contents of a Detention Notice is not spelled out in the PSC Regulations, but the MSA 1995 lays down some requirements as to the contents of a Detention Notice for a dangerously unsafe ship in s. 95(3) and they would appear to apply generally to any detention under the MSA 1995.[40] The requirements under s. 95(3) are (1) that the notice must state that the Inspector is of the opinion that the ship is dangerously unsafe,[41] and (2) that the notice must specify the matters which in the Inspector's opinion make the ship unsafe.[42] The notice must also require the ship to comply with the notice.[43] The Act does not provide that the notice must spell out the statutory provision of which the Inspector considers the vessel to be in breach.

A similar wording is used when describing the requirements with which a prohibition notice must comply.[44] Although there does not appear to be an authoritative judgment defining what the words "specify the matters" in the MSA 1995, s. 95(3)(b) exactly entails, there are authorities dealing with the problem of specification in circumstances of an improvement and prohibition notice ashore under both planning legislation and the HSWA 1974 requirements.

In *East Riding County Council v. Park Estate (Bridlington) Ltd*[45] an enforcement notice was considered to be invalid because "it did not contain such particulars of what was alleged against the offender as the Act in question required".[46] In that case the construction of s. 23 of the Town and Country Planning Act 1947 was the subject.

> "(2) Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with,…"[47]

Like the MSA 1995 in s. 95(3)(b), sub-section (2) of s. 23 of the Town and Country Planning Act 1947 requires that a notice served under s. 23 must specify the matters which are alleged not to have been complied with. The essence of the unanimous judgment is probably epitomised by Lord Radcliffe's statement:

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[36] See, as a sample, the copy of MSF 1701 for the "Koriana", Annex 28.
[37] Notice of Detention on file MS 071/003/1646. See the detailed discussion below, Chapter 6.7.
[38] Which the notice itself has as its heading. Hereafter it is also called "Detention Notice" which the PSC Regulations refer to in reg. 9(2)(b) and (c). MSN 1775, paras. 25 and 26 also calls this notice a "Detention Order".
[39] Hereafter also called "ROI". The ROI was also on file MS 071/003/1646.
[40] A detention under the PSC Regulation is in the end a detention under the MSA 1995 as the Regulations are made under the powers vested in the Secretary of State under s. 85 of the MSA 1995.
[41] MSA 1995, s. 95(3)(a).
[42] *Ibid.*, s. 95(3)(b).
[43] *Ibid.*
[44] *Ibid.*, s. 262(3)(b): "(3) A prohibition notice shall—(b) specify the matters which in his opinion give or (as the case may be) will give rise to the said risk;…".
[45] [1957] AC 223.
[46] *Ibid.*, p. 240.
[47] Town and Country Planning Act 1947, s. 23(2).

> "But I think that such a general phrase is not enough and that the Act does entitle an alleged offender to receive a particular allegation, not merely of what he is said to have done that is wrong but also of the respect in which what he has done is said to be a ground for the issue of an enforcement notice against him."[48]

Although this case was specifically about an enforcement notice dealing with the use of agricultural land as a holiday site it would appear that the general findings as to the required specificity of the information in the enforcement notice could also apply to a Detention Notice issued under the MSA 1995 relevant regulations. This view would seem to be supported by the construction applied in the following case.

In *BT Fleet Limited v. McKenna*[49] a company contended that a notice issued under s. 21 of the Health and Safety at Work Act 1974 by an HSE Inspector was invalid.[50] Section 21(b) provides that an Inspector

> "may serve on him [the person in contravention of a statutory provision] a notice (in this Part referred to as "an improvement notice") stating that he is of that opinion, specifying the provision or provisions as to which he is of that opinion, giving particulars of the reasons why he is of that opinion, and requiring that person to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period within which an appeal against the notice can be brought under section 24) as may be specified in the notice."[51]

When discussing the information an improvement notice is required to show, Evans-Lombe J quoted Evans LJ, in the decision of the Divisional Court in *The Borough of Bexley v. Gardner Merchant Plc* [52] who, referring to Lord Denning, said that

> "the question is this: does the notice enable the recipient to know what is wrong and why it is wrong? The requirement is that the notice should be clear and easily understood."[53]

Lord Denning,[54] when referring to *Miller-Mead v. Minister of Housing and Local Government,*[55] had found that

> "It is plain from that case that an enforcement notice is not to be regarded with the strict eye of a conveyancer. An inaccuracy or misdescription does not make it a nullity. Quite the contrary. So long as an enforcement notice tells a man fairly what he has done wrong and what he is required to do to put it right, then the notice is good."[56]

In *Miller-Mead* Upjohn LJ particularly referred to Lord Simonds in *East Riding County Council*[57] stressing

> "that the court must insist on a strict and rigid adherence to formalities, for the rights of owners and occupiers are being subjected to interference".[58]

But he qualified his statement in that

> "the requirements of the section must be interpreted with reasonableness in all the circumstances of the case…. the function of the court is not to introduce strict rules not justified by the words of the

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[48] *East Riding County Council v. Park Estate (Bridlington) Ltd,* p. 240. The "general phrase" Lord Radcliffe was referring to was "in contravention of planning control". Lord Simonds, in that case, p. 234, agreed with the judge of the Divisional Court who had said that "although a notice is not required to be in any specified form it is a notice which ought to give the person who receives it a clear indication as to what it is intended to apply and what development it is sought to remedy".
[49] [2005] EWHC 387 (Admin).
[50] *Ibid.,* para. 1.
[51] HSWA 1974, s. 21(b).
[52] 17 March 1993 cited in *BT Fleet v. McKenna,* para. 14; a summary is reported in (1993) COD 383.
[53] *BT Fleet v. McKenna,* para. 14.
[54] It is not until later in the judgment at para. 21 that Evans-Lombe J actually refers to the judgment he appears to have had in mind which was *Ormston v. Horsham Rural District Council* (1966) 17 P. & C.R. 105, see below.
[55] [1963] 2 QB 196, a case about an enforcement notice delivered under the Town and Country Planning Act, 1947, see p. 197.
[56] *Ormston v. Horsham Rural District Council*, p. 108, another case about an enforcement notice delivered under the Town and Country Planning Act, 1947.
[57] *East Riding County Council v. Park Estate (Bridlington) Ltd,* p. 233.
[58] *Miller-Mead v. Minister of Housing and Local Government,* p. 232.

> section. I repeat, therefore, that in my judgment the test must be: does the notice tell him fairly what he has done wrong and what he must do to remedy it?[59]

In the *McKenna* case the judge, being guided by these decisions, decided against the respondent health and safety Inspector because the improvement notice

> "did not properly enable the recipient to know what was wrong, why it was wrong and how the giver of the notice intended that what was wrong should be put right."[60]

A summary of the above non-maritime cases would suggest the following requirements for a Detention Notice:

1. Even if the legal instrument in question does not provide for the identification of a section or regulation that has been breached such a specification would seem to be required unless the recipient of the notice is in no doubt about his particular breach without that information. The recipient is entitled to know the ground for the issue of the Detention Notice.
2. The Detention Notice ought to say what the recipient has done wrong. The alleged offender is entitled to be informed about the particular allegation.
3. A Detention Notice is not invalid because it carries an inaccuracy or misdescription as long the recipient knows what he has done wrong.
4. The allegation or requirement of the notice ought to be clear and easily understood. The latter would appear to refer to a professional mariner who is not a lawyer.[61]

As will be demonstrated in the following discussion the *Club Cruise* decision does not comment on points two and four. On point one and three, however, the decision appears to differ from the common non-maritime approach in that on point one the Court considered a general reference to the MSA 1995 to be sufficient for satisfying the requirements of s. 95 of the MSA 1995.[62] On point three, which is a slight variation of point one, the *Club Cruise* judgment seems to consider that a missing specification of the provision in question does not make a notice invalid because form would otherwise triumph over substance. Although this aspect seems to be covered by the decision in *Ormston v. Horsham Rural District Council*[63] that decision seems to go further. It accepts that charging the wrong offence did in that case not make the notice bad.[64] On the other hand the decision in *East Riding County Council v. Park Estate (Bridlington) Ltd* is more restrictive in that the lack of providing a specific section or regulation if it deprives the recipient of information would appear to serve the notice invalid.

(b) The Detention Notice in the Club Cruise case

With regard to the first notice in the *Club Cruise* case[65] Flaux J decided that it was not defective because

> "the reference to "MS Act 1995" is sufficient to encompass not only powers granted by sections of the Act, but powers granted under regulations which are made pursuant to other sections of the Act, as in the case of the 1997 Regulations."[66]

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[59] *Ibid.*
[60] *BT Fleet v. McKenna,* para. 22.
[61] This is, it appears, what Lord Denning in *Ormston v. Horsham Rural District Council*, p. 108, means by referring to "a man". Similar Upjohn LJ in *Miller-Mead v. Minister of Housing and Local Government,* p. 232, "does the notice tell him fairly".
[62] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 33: "Parliament cannot possibly have intended that, if there was some invalidity in the detention notice served on the shipowner, that would invalidate the exercise of the power. A contrary conclusion would mean the triumph of form over substance".
[63] Page 108.
[64] Harman LJ in *Ormston v. Horsham Rural District Council*, p. 109.
[65] See also the earlier discussion of the *Club Cruise* case in Chapter 5.2.3.
[66] *Ibid*., para. 29.

However, as the facts suggested that the Surveyor[67] had actually detained the ship under the MSA 1995, ss. 94 and 95 and not under the H and S Regulations

> "a detention can [not] be justified retrospectively by reliance on a power under a Regulation which the surveyor neither had in mind when he acted to detain the ship, nor was purporting to exercise".[68]

The Court was of the opinion that if the case were to go to arbitration an arbitrator could not validate such a notice, but would probably consider the amount of compensation in the light of a possible detention under the H and S Regulations.

On the other hand, even "if there was some invalidity in the [second] detention notice"[69] the detention would not have been invalid because "a contrary conclusion would mean the triumph of form over substance".[70]

At first sight, the judgment appears to be helpful to the task of an MCA Surveyor who, when detaining ships, will not have to specify in writing the exact regulation or section of which he believes empowers him to detain the vessel. That, as the judge said, would be an impractical approach, and that is why a very general reference to the MSA 1995 would cover all powers granted under the Act and the regulations issued under ss. 85 and 86 of the Act.[71] The judgment does not decide that no explanations need to be given for the detention in order to clarify what is wrong and why it is wrong. However, the Court found that the Surveyor cannot form a reasonable view if he does not have in mind the standards[72] or requirements[73] against which he judges the non-conformity (and for which he issues the Detention Notice).

While the logic in this approach cannot be denied, it would appear to be similarly impractical for a Surveyor during an inspection to have in mind all the requirements set by more than 200 sets of merchant shipping regulations. But by drawing a parallel with improvement and prohibition notices under the Health and Safety at Work Act (HSWA) 1974, it would appear to be the prerogative of the master or owner to know what and why it is wrong and that the Detention Notice can be clearly understood.[74]

To specify why a vessel does not comply with the existing requirements would appear to necessitate knowledge of what those requirements actually are. Similarly, without knowing the relevant parameter it may be difficult to determine what is wrong. If neither the "why" nor the "what" are defined the Detention Notice would not appear to be good.[75] What therefore seems to follow from the *Club Cruise* judgment is that the Detention Notice does not need to carry the specific provision which stipulates the detaining power of the Inspector. However, what the Detention Notice must clearly display is the what and why.[76]

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[67] The term "Surveyor" and "Inspector" is used interchangeably because in practice an Inspector is always also a Surveyor, see above, Chapter 2.2.
[68] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 25.
[69] *Ibid*., para. 33.
[70] *Ibid*. This discussion would appear to be completely academic if the first notice was already invalid. Flaux J, however, did not decide this question, para. 29.
[71] *Ibid*., para. 28 and para. 29.
[72] *Ibid*., para. 25.
[73] Which form the other, similar, standard parameter for the discretion of a Surveyor when deciding whether or not to detain a ship in that he may detain the vessel when it "does not comply with the requirements". The Merchant Shipping (Fire Protection: Large Ships) Regulations 1998, SI 1998 No. 1012, reg. 106, the Merchant Shipping (Life-Saving Appliances for Ships other than Ships of Classes III to VI(A)) Regulations 1999, SI 1999 No. 2721 in reg. 87, and the Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, SI 1998 No. 1561, reg. 16(2)(b), to name but a few, use that wording.
[74] *BT Fleet v. McKenna* [2005] EWHC 387 (Admin), para. 14, where Evans-Lombe J quoted Evans LJ, in the unreported decision of the Divisional Court in *The Borough of Bexley v. Gardner Merchant Plc* of 17 March 1993, who again referred to Lord Denning in *Ormston v. Horsham Rural District Council* (1966) 17 P & CR 105 [a case about an enforcement notice delivered under the Town and Country Planning Act, 1947].
[75] *Ormston v. Horsham Rural District Council*, 108.
[76] Under the Fire Protection Regulations, for example, the powers to detain a vessel are laid down in reg. 106 ("In any case where a ship does not comply with the requirements of these Regulations,…). It would appear that the Inspector does not have to know this particular regulation if he wants to detain a vessel under this statutory instrument. If, however, he wants to detain the vessel for a breach of the requirement that "Fire appliances carried in any ship shall be maintained in good order" (reg. 50) he would appear to be required to

If the latter will only be clear by specifying the relevant provision of the legislation it seems that the reference to the particular section or regulation must be provided for the notice to be good. Flaux J did not comment on this aspect[77] other than saying that the minimum an Inspector must have in his mind "at the time that he issues a Detention Notice for non-conformity, [is] what standards the Regulations require."[78]

It would seem to be the duty of the MCA to set up a system which actually makes it practicable for Surveyors to know the standards or requirements so that when a Surveyor is on board a ship he can issue a Detention Notice which complies with such principles.

The question would appear to arise when such information is actually given to the vessel.[79]

The judge did not comment on the late service of the second Detention Notice. It can probably be assumed that this notice replaced the first notice when it was handed to the master on the day the vessel was eventually released. In accepting that, the Court seemed to suggest that a modification of a detention notice is possible for the MCA at any time during the detention. However, if the first notice was invalid, any loss that occurred for the owner during the time between issuing the first and the second notice would probably constitute the basis for a compensation claim.[80] In this case, it appears that the second Detention Notice would not have made any difference to the validity of the detention.

Still, it would seem that the Court did not completely follow through its own approach of not declaring a detention to be invalid when it is based on a partially invalid notice. By rejecting the validity of the later reference to the H and S Regulations it seems to have let "form triumph over substance".[81] Whether or not the Surveyor had in mind the wording and the specific requirements of the H and S Regulations, he would certainly have been aware that the norovirus posed a direct health threat to people on board of the "Van Gogh" and an indirect threat to the safety of passengers, crew and ship in an emergency.[82] It would seem unlikely that Parliament did not intend to protect the public from a health threat whether that was under the MSA 1995 or the H and S Regulations.[83] It seems somewhat incongruous to allow a Surveyor to make a general reference to the Merchant Shipping Act 1995, which will be of little or no help to the master or owner, but to criticise the MCA for a later attempt to clarify that reference. Although a detention can have serious commercial consequences for an owner, it is regularly used instead of prosecution, and is a very important weapon in the armoury of a Surveyor.

The result of the decision seems to be that on the one hand a Surveyor does not need to identify the number of the section or regulation under which he is detaining the ship, but on the other hand he will have to have in mind as a minimum "what standards the Regulations require".[84] However, those two approaches would not seem to be the norm under health and safety practice. What the decision has done is refuse to allow a defect in the notice to invalidate a detention if there are objectively justifiable grounds, but still to require an examination of the subjective state of mind of the Surveyor at the time of

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know the contents of reg. 50. It would seem that any master or owner who has the right to know why the Inspector wants to detain their vessel ought to be provided with the specific regulation so that the decision of the Inspector can be verified and, either be complied with or, if considered appropriate, appealed against.

[77] And it appears that the wider health and safety, nor the planning, case law was cited to the Court.

[78] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 25.

[79] It would seem that a detention becomes effective on service of the Detention Notice, MSA 1995, s. 96(1), according to which point in time the time bar for an appeal is set which is 21 days from the day of service.

[80] Provided the issue is taken to arbitration within the allowed period of 21 days.

[81] See [2008] EWHC 2794, at [33] for the wording in respect of the formal invalidity of the notice. In this case it would not seem to have made any difference to the recipient of the notice whether the reference was to the MSA 1995 or the H+S Regulations. The notice still told the master "fairly" what was wrong, see *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 QB 196, 232.

[82] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 7(ii).

[83] Taking into account the passage from *R v. Soneji* [2005] UKHL 49, [2006] 1 AC 340, cited by Flaux J in [2008] EWHC 2794, para. 15.

[84] *Ibid.,* para. 25.

detention. In practice, therefore, Surveyors on board a ship need only give a very general reference in the detention notice, and keep as quiet as possible about the detailed justification. It is submitted that the subjective requirement as to what the Surveyor had in mind was not really necessary, and that it would have been preferable to take only an objective approach allowing clarification, combined with the flexibility and clarity of the health and safety practice.

A Detention Notice, like a prohibition notice encroaches on private rights.[85] Therefore, a Detention Notice like a prohibition notice ought to be subject to "strict and rigid adherence to formalities".[86] It follows that a Detention Notice should clearly state for the benefit of the recipient what is wrong, why it is wrong[87] and what the master or owner is supposed to do to put it right. But other than under the HSWA 1974[88] it would appear to be the sum total of the defects, recorded on the face of the Detention Notice plus the deficiencies listed in the Report of Inspection,[89] in so far as they are also posing a hazard which made the Inspector require them to be rectified before departure, which would tip the scale away from a detention.[90] Only if the notice plus the Report of Inspection are not providing enough justification and detail (what is wrong, why is it wrong and what can be done about it) would a detention appear to become invalid.

The latter combined with the *Club Cruise* decision suggests that an Inspector who detains a vessel under s. 95 of the MSA 1995 and has recorded "MSA 1995" on the Detention Notice will have sufficiently specified his powers, but will only have provided satisfactory detail in the Detention Notice as long as he has recorded the facts he considers to have established a dangerously unsafe ship.[91] This would seem different for a detention under merchant shipping regulations despite the *Club Cruise* judgment.[92] I am of the opinion that in such a case the relevant regulation (and thereby the relevant statutory instrument) ought to be specified to ensure that the recipient master and owner of the Detention

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[85] *East Riding County Council v. Park Estate (Bridlington) Ltd,* p. 233. There may be significant commercial consequences. Not being able to sail due to a detention because of physical deficiencies of a vessel, for example, might place a vessel off-hire, see Z O Özcayir, *Port State Control*, p. 524. Özcayir suggests that a vessel sailing under an amended NYPE clause 15 (i.e. reading "any other cause whatsoever" instead of only "any other cause") might put the vessel off-hire during a port state control detention, p. 524. Considering the daily charter rate for a 34,000 gt container vessel of US$ 26,350 or of US$ 58,000 for a bulk carrier of 33,000 gt (according to Lloyd's List, 21.02.08, p. 14) the loss for an owner could be considerable. In addition see also *Hyundai Merchant Marine Co Ltd v. Furnace Withy (Australia) Pty (The Doric Pride)* [2006] 2 Lloyd's Rep. 175, para. 9, where the vessel was not delayed due to a physical deficiency but due to a US Coastguard inspection. Being under a NYPE charterparty with an additional clause 85 which read "Should the vessel be captured or seized or detained or arrested by any authority or by any legal process during the currency of this charter-party, the payment of hire shall be suspended until the time of her release,…", the Court of Appeal confirmed the High Court decision and held that the delay fell on the side of the owner, para. 49. Shelltime 4 in its amended version (December 2003), Clause 3, would seem to allow the charterer placing the vessel off-hire in case of a PSC detention as a consequence of which the vessel can no longer operate commercially. Clause 3(d): "Owners shall advise Charterers immediately, in writing, should the vessel fail an inspection by, …a…port state authority…". Clause 3(e): "If in Charterers reasonably held view: (i) failure of an inspection, or, (ii) any finding of an inspection, referred to in Clause 3(d), prevents normal commercial operations then the Charterers have the option to place the vessel off-hire from the date and time that the vessel fails such an inspection, or becomes commercially inoperable…". In T Coghlin, J D Kimball, A W Baker, J Kenny, *Time Charters,* 2008, p. 686, it is said that sub-clauses (d) and (e) "grant the charterers important rights should external agencies or commercial parties find fault with the ship on inspection".

[86] *East Riding County Council v. Park Estate (Bridlington) Ltd* [1957] AC 223, p. 233.

[87] The "why" would seem to inevitably include the specification of the relevant regulation of the statutory instrument in question.

[88] Under which there is no "detention" scheme (because a building cannot sail away…) and no Reports of Inspection are required to be issued, see ss. 18 to 26 which cover "enforcement".

[89] For the role of the Report of Inspection see Chapter 6.3.2. below.

[90] See the PSC Regulations, reg. 11(3) but more so the discussion of detention criteria, below, Chapter 6.5.

[91] The judge in the *Club Cruise* case did not comment on the "why" requirement when he rejected the submission of the claimant's counsel that the power of a surveyor derived from sub-ordinate legislation needed to be specified in the Detention Notice, para. 29. The judge only seemed to require that the Surveyor had the right standards in mind when detaining the ship, but not that he put down on the Detention Notice why he came to his conclusion, para, 25.

[92] In so far as the Court decided that it was sufficient to only specify "MS Act 1995" in the Detention Notice (para. 29), but required to know the relevant standards (and thereby the relevant legal instrument) to know what the Surveyor had in mind, *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 25.

Notice not only know why and what is wrong, but are also to be put in a position where they can verify the Inspector's findings and conclude what to do to put the defect(s) right. Such a specification does not only assist the recipient of the notice but also the Inspector who, by correctly identifying the applicable legislative requirement, reduces the risk of issuing an invalid Detention Notice. Otherwise, it would appear, an Inspector could write the minimum (i.e. "MSA 1995") into the Detention Notice, state that the vessel is dangerously unsafe and keep quiet about his reasons so that he does not have to run the risk of being seen as having the wrong standards in mind. The Inspector would then have enough time to prepare for an arbitration or court hearing where he could present the "correct" standards. But the recipient of a Detention Notice would under those circumstances not know for what matters his ship had been detained.

In summary it would seem to me that the principles addressed in the health and safety and planning law decisions insist on a greater degree of information in the detention notice to that in the *Club Cruise* case. It would seem that the other decisions come closer to the requirements under the MSA 1995[93] and ought therefore to be applied to a detention order or prohibition notice under secondary legislation issued under the MSA 1995.[94] Not only have the principles for precision in a similar enforcement context to a Detention Notice been set by the House of Lords[95] and the Court of Appeal,[96] but they were also decided on the basis of administrative law.[97]

However, it would not appear to be an absolute and detailed requirement for the Inspector's Detention Notice to state exactly how to put the defect right as long as there are several ways to remedy the relevant deficiency.[98] It is, in the end, the obligation of the owner and master to ensure that their vessel complies with relevant safety provisions[99] which is why they have to decide which appropriate measure they will apply to put things right.[100] It follows, in my view, that as long as the master and owner know in sufficient detail what and why it is wrong, then they have been provided with adequate information, and it should be clear enough to them how to rectify the deficiency. Their professional understanding of operating a vessel should put them in a position of having a full understanding of identified defects and their necessary rectification.

Applying the analysis in this sub-section to the Detention Notice of "Ocean Glory 1" suggests that the Detention Notice was deficient in so far as it did not comply with the specification requirements.[101] In my opinion it would have had to address the specific applicable sub-section of s.10 of the ISM Code,[102] state the fact which made the vessel not comply and would have had to be similarly specific about the "numerous other SOLAS related deficiencies".[103] Even though, it seems, the Report of Inspection would have to be read together with the notice[104] it is arguable that the additional information of the report does not cure the defects of the notice. The detention is based on the grounds stated in the notice, and if the report is seen as evidence it would qualify the notice in so far as it

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[93] "Specify the matter", MSA 1995, s. 95(3)(b). See also the discussion above, Chapter 5.2.2.
[94] See in addition the discussion below, Chapter 6.7.
[95] *East Riding County Council v. Park Estate (Bridlington) Ltd.*
[96] In *Ormston v. Horsham Rural District Council* and *Miller-Mead v. Minister of Housing and Local Government.*
[97] See also *BT Fleet v. McKenna.*
[98] This requirement was provided for in the Food Safety Act 1990, s. 10(1)(c) which was discussed in the *BT Fleet v. McKenna* case, para. 12.
[99] *Reeman v. Department of Transport and Others* [1997] 2 Lloyd's Rep. 648, p. 680.
[100] It should actually be in their interest to decide how to put things right as by deciding it themselves they can choose the most economical option for the rectification of the relevant defect.
[101] Of the MSA 1995, s. 95(3)(b).
[102] See also below the discussion of deficiencies under the ISM Code in Chapter 7.3.2. and also Chapter 10.5. Section 10 of the ISM Code covers several of the central requirements of the Code. They range from the requirement for the company to establish maintenance procedures to the obligation to record inspections, non-conformities and corrective action.
[103] Detention Notice in file MS 071/003/1646, part two.
[104] In *BT Fleet v. McKenna* [2005] EWHC 387 (Admin), para. 11, Evans-Lombe J accepted that a letter accompanying the enforcement notice was to be read together with it "and the letter may be taken as qualifying the notice".

would add more details to the reasons provided in the notice itself. The PSC Regulations, however, do not appear to make the report an integral part of the notice[105] so that the need for the notice to be clear as to what and why it is wrong cannot, in my view, be replaced by the report only. In my assessment, therefore, the notice issued to "Ocean Glory 1" was defective and this was not cured by the Report of Inspection.[106] However, it may well have been obvious to the owners in this case that there were so many serious defects that there was little practical purpose in contesting the notice.[107]

In general, it may be added, it would appear that the State is justified in issuing a Detention Notice (to control the use of property) as long as the enforcement of the MSA 1995 stipulations comply with the proportionality requirement between the right of the State and the right of the individual.[108]

6.3.2. The Report of Inspection

During a PSC inspection a Report of Inspection (ROI) is to be provided to the master at the end of the inspection,[109] and is required to contain, in case of a detention, information about the "nature of the deficiencies warranting the detention order (references to Conventions, if relevant)".[110] There is, however, no statutory requirement to provide such a report after any inspection which is not a PSC inspection. But the general practice in the MCA is that independent of the vessel's flag and the type of inspection or audit the ship will always be left with a Report of Inspection. In so far it can be assumed that the format of information available to a UK or a foreign flagged ship is the same after any inspection.

The "Report of Inspection" for "Ocean Glory 1",[111] in contrast with the "Detention Notice", appears to suggest that the vessel was detained for four reasons[112] one of which – the ISM non-conformity – was deleted when the vessel was made a general cargo, instead of remaining a passenger, ship.[113] The other defects were (i) "SAT C duplicate set inoperative due to faulty aerial",[114] (ii) "oil on tanktops main engine room & auxy engine

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[105] Which appears to be suggested by MSN 1775, Annex X, s. III.3.

[106] It appears that even if it were argued that a defective notice could be repaired by the report, in this particular case even the report was not specific enough when stating the deficiency as "ISM Code section 10 SOLAS 74 Chapter IX: At request of Portuguese Authority vessel re-detained in Dover". Furthermore, as seen below there seems to be no clear correlation between notice and report as to the "numerous other SOLAS related deficiencies".

[107] In *Miller-Mead v. Minister of Housing and Local Government,* p. 227, it was held that "the notice is not bad and invalid merely because it alleged too much".

[108] See also *R v. Secretary of State for Health, ex parte Eastside Cheese Co* [1999] 3 C.M.LR 123*,* para. 50: "He is however entitled to the narrower margin of appreciation appropriate to a responsible decision-maker who is required, under the urgent pressure of events, to take decisions which call for the evaluation of scientific evidence and advice as to public health risks, and which have serious implications both for the general public and for the manufacturers, processors and retailers of the suspect cheese." In *Stanley v. London Borough of Ealing* [2003] EWCA Civ 679, para. 31, the Court of Appeal even concludes that "in matters of public health and control Convention jurisprudence recognises a wide discretionary area of judgement in the hands of the national authorities, not only the national legislators but also the administrative and judicial authorities".

[109] Port State Control Regulations, reg. 8, which requires that the report must be drawn up in accordance with the requirements of MSN 1775, Annex 10.

[110] MSN 1775, Annex 10, s. III.3. When the vessel is not detained the master has to be informed about the "nature of the deficiencies", s. II.4.

[111] For a sample see the Report of Inspection for "Koriana", Annex 29 or a blank version in Annex 19.

[112] The reasons can still be identified despite the lack of detailed information on the Notice of Detention. The Action Codes (see Chapter 6, fn 24) given to individual deficiencies on the "Report of Inspection" highlight the relevant reasons for a detention. Action Codes have not changed over the period in question. Defects with an Action Code "30" signify "grounds for detention". See Annex 19.

[113] Report of Inspection on file 1646, deficiency no. 2. The ISM Code only became mandatory for ships other than passenger ships, oil tankers, chemical tankers, gas carriers, bulk carriers, and cargo high-speed craft on 1 July 2002, see ISM Regulations, reg. 3(2)(a)(ii).

[114] The "Sat C" (Inmarsat C ship earth station) equipment is satellite communications equipment which can be used for telex/fax communications only. It can be part of the vessels emergency radio equipment. The recorded defect refers to an inoperative Sat C equipment because of a faulty aerial.

room", and (iii) "lifeboat drill unsatisfactory".[115] A Report of Inspection, however, does not appear to have any function other than informing the master and will thereby probably serve as supportive evidence for any Detention Notice as to what deficiency exactly an Inspector has identified on board of the vessel.[116] The Port State Control Regulations clearly refer under the heading of "Rectification and detention" to a Detention Notice only[117] and not to the Report of Inspection which is addressed in a separate regulation.[118]

The recorded breaches of statutory requirements on the face of the Detention Notice constitute[119] the matters or grounds for which the vessel is detained.[120] These apply independently of the defects recorded in the Report of Inspection to which "Action Codes"[121] are applied.[122] The defects recorded in the ROI only provide explanations given for reasons of non-compliance which ought to be found on the face of the Detention Notice. But as an arbitrator in a detention appeal[123] must also have regard to matters not specified in the Detention Notice[124] it will probably be both the Detention Notice and the Report of Inspection which in their combined weight have to be judged when a detention becomes subject to an appeal.

6.4. The legal basis for a detention

As already explained, the original basis for a detention under the MSA 1995, s. 95(1)[125] is established if a vessel "appears to a relevant Inspector to be a dangerously unsafe ship".[126] The Port State Control Regulations appear to provide in addition a general ground for a detention of a vessel as a result of an unsatisfactory port state control inspection by requiring a port state control officer[127] to detain a vessel when certain conditions are met.[128] Other specific powers of detention are given in a host of specific merchant shipping regulations.[129]

The Port State Control Regulations are a direct consequence of the Directive 95/21/EC which again is based upon the commitments of Member States under the Paris MoU.[130]

In the following discussion I will focus on the detention requirements of the Paris MoU, the EC Directive and the PSC Regulations before analysing a number of statutory instruments which have been applied to detain ships as a result of a port state control inspection.

I will begin the discussion by looking first at the Paris MoU, as it is the original source for the current European and national legislation. Secondly, I will then analyse the detention

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[115] Report of Inspection on file 1646, deficiencies nos. 18, 33 and 34 respectively. The other three deficiencies will be dealt with below, Chapter 6.7.
[116] "When treated as a statement, a document constitutes testimonial evidence in the vast majority of cases;…", C Tapper, *Cross & Tapper on Evidence,* p. 60. When the recipient wants to appeal the detention before an arbitrator, see MSA 1995, s. 96 and also below "detention and arbitration", the arbitrator shall have regard to "any other matters not specified in the Detention Notice" (s. 96(3)).
[117] Port State Control Regulations, reg. 9(2)(b) and (c).
[118] *Ibid*., reg. 8.
[119] But not only, see the PSC Regulations, reg. 11(3) and the discussion under Chapter 8.5.
[120] MSA 1995, s. 95(3)(b).
[121] See above Chapter 6, fn 24 and also Annex 19, form MSF 1601A.
[122] For example, code "30" signifies that the vessel is detained for the particular grounds mentioned. See Annex 19.
[123] See below, Chapter 8.
[124] PSC Regulations, reg. 11(3).
[125] Above in this Chapter 5.2.
[126] Tailpiece. See discussion above, Chapter 5.2.
[127] Hereafter also referred to as "PSC Inspector", "PSCO", "Inspector" or "Surveyor".
[128] PSC Regulations, reg. 9(2)(a). See also the following discussion in Chapter 6.4.1 *et seq*.
[129] There are hundreds of specific regulations, each of which normally gives detention rights. To name but three, e.g. the ISM Regulations, reg. 16(2)(b), the Oil Pollution Regulations, reg. 35(2)(d) or the Hours of Work Regulations, reg. 14(1). The general principle is mostly the same in that the ship shall be liable to be detained if it does not comply with requirements of the regulations or part thereof.
[130] Directive 95/21/EC, Art. 1, second hyphen.

provisions under the Directive 95/21/EC which sets the conditions for the national law, the PSC Regulations.

For ease of reference I include at this stage a synopsis table which will help compare the different text elements in the different legal instruments.

Table 3: Synopsis of instruments regulating port state control

PSC Regulations	MSN 1775	Directive 95/21/EC	Paris MoU
Reg. 9(2)(a): "In case of deficiencies which are clearly hazardous to safety, health or the environment, the Inspector shall detain the ship, or…using powers of detention in Convention enactments as appropriate,…"	**Para. 25**: "If during an inspection deficiencies are found which are clearly hazardous to safety, health or the environment the ship will be detained (regulation 9)."	**Art. 9.2**: "In the case of deficiencies which are clearly hazardous to safety, health or the environment, the competent authority of the port state where the ship is being inspected shall ensure that the ship is detained,…"	**S. 9.1**: "The port state control officer will exercise his professional judgement in determining whether to detain the ship until the deficiencies are corrected or to allow it to sail with certain deficiencies without unreasonable danger to the safety, health, or the environment, having regard to the particular circumstances of the intended voyage."
Reg. 9(3)(a): "…when exercising his professional judgement as to whether or not a ship should be detained the Inspector shall apply the criteria set out in Annex VI of MSN 1775."	**Para. 25**: "In deciding whether or not a ship should be detained, the Surveyor will be guided by the criteria set out in Annex VI of this Notice." **Annex VI, s. 1**: When exercising his professional judgement as to whether or not a ship should be detained the Inspector must apply the following criteria - **Timing** Ships which are unsafe to proceed to sea must be detained upon the first inspection irrespective of how much time the ship will stay in port. **Criterion** The ship is detained if its deficiencies are sufficiently serious to merit an Inspector returning to satisfy himself that they have been rectified before the ship sails.	**Art. 9.3**: "When exercising his professional judgment as to whether or not a ship should be detained, the Inspector shall apply the criteria set out in Annex VI." **Annex VI, s. 1**: When exercising his professional judgement as to whether or not a ship should be detained the Inspector must apply the following criteria: **Timing:** Ships which are unsafe to proceed to sea must be detained upon the first inspection irrespective of how much time the ship will stay in port. **Criterion:** The ship is detained if its deficiencies are sufficiently serious to merit an Inspector returning to satisfy himself that they have been rectified before the ship sails.	**Section 9.3.2**: When exercising his professional judgement as to whether or not a ship should be detained the port state control officer will apply the following criteria: **.1 Timing:** ships which are unsafe to proceed to sea will be detained upon the first inspection irrespective of the time the ship will stay in port; **.2 Criterion:** the ship will be detained if the deficiencies on a ship are sufficiently serious to merit a port state control officer returning to the ship to satisfy himself that they have been rectified before the ship sails."
	Annex VI, s. 2, para. 1: "When deciding whether the deficiencies found in a ship are sufficiently serious to merit detention the Inspector must assess whether –" [14 assessment items follow]. **Annex VI, s. 2, last para.**: "If the answers to any of these assessments is negative, taking into account all deficiencies found, the ship must be strongly considered for detention."	**Annex VI, s. 2**: "When deciding whether the deficiencies found in a ship are sufficiently serious to merit detention the Inspector must assess whether:…" [14 assessment items follow]. **Annex VI, s. 2**: "If the answer to any of these assessments is negative, taking into account all deficiencies found, the ship must be strongly considered for detention."	**Section 9.3.3**: "When deciding whether the deficiencies found in a ship are sufficiently serious to merit detention the port state control officer will assess whether: …"[14 assessment items follow]. **Section 9.3.3**: "If the result of any of these assessments is negative, taking into account all deficiencies found, the ship will be strongly considered for detention."

6.4.1. The Paris Memorandum of Understanding (Paris MoU)

The Paris MoU is of relevance for this discussion as the PSC Regulations are not original English legislation but implement a European Council Directive[131] establishing common criteria and taking proper account of the Member States' commitments under the Paris MoU.[132] The Paris MoU had to be taken into account for the drafting of the Directive as the Paris MoU members comprise of States outside the EU, and Paris MoU parties are bound by that agreement.[133]

"The Paris MoU does not explain what deficiencies would be considered 'clearly hazardous'. It leaves this to the professional judgment of the Surveyor."[134] It appears, however, that this conclusion cannot directly be drawn from the Paris MoU other than by deducing it from Annex I, s. 9.1.

> "The port state control officer will exercise his professional judgement in determining whether to detain the ship until the deficiencies are corrected or to allow it to sail with certain deficiencies without unreasonable danger to the safety, health, or the environment, having regard to the particular circumstances of the intended voyage."[135]

The ship will be detained when the deficiencies found "are sufficiently serious to merit" the port state control officer[136] to return to the ship and check that the defects have been rectified.[137] The defects found are "sufficiently serious to merit detention"[138] if any result of 14 assessment criteria is negative "taking into account all deficiencies".[139]

The wording of the Paris MoU does not give clear instructions to the port state control officer (PSCO) other than declaring possible future intentions of an Inspector (the PSCO "will exercise his professional judgment",[140] "the ship will be detained if",[141] the PCSO "will assess whether"[142] or "the ship will be strongly considered for detention"[143]). It appears that the decision as to how to implement the intentions of the Paris MoU was left to its members. In the EU this has been done by a Council Directive[144] which in the UK has been transferred into national law by the Port State Control Regulations.[145]

6.4.2. Council Directive 1995/21/EC

The existence of the 1995 Directive seems to accept that the Paris MoU provisions are not clear enough and may therefore have been implemented differently in Member States for one of the means by which the purpose of the Directive is to be achieved is the harmonization of "procedures on inspection and detention".[146] Such harmonization would not be necessary if all Member States had the same implementation system in place.

The purpose of the Directive is to establish

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[131] Reg. 2(1).
[132] Directive 95/21/EC, Art. 1, second hyphen.
[133] Current members are EU Members plus Canada, Croatia, Iceland, Norway and the Russian Federation, see http://www.parismou.org.
[134] Z O Özcayir, *Port State Control,* para. 5.40.; a similar position was expressed in *Re Ullapool Harbour Trustees,* see above Chapter 5.2.2. "The port state control officer will exercise his professional judgement in determining whether to detain the ship until the deficiencies are corrected…", Paris MoU, Annex I, s. 9.1. See the discussion of "clearly hazardous" below in this Chapter.
[135] Paris MoU, Annex 1, s. 9.1.
[136] PSCO or Inspector or Surveyor.
[137] Paris MoU, Annex I, s. 9.3.2.2.
[138] *Ibid*., s. 9.3.3.
[139] *Ibid*., last paragraph; see also discussion below Chapter 6.5.
[140] *Ibid*., s. 9.1.
[141] *Ibid*. s. 9.3.2.2.
[142] *Ibid*. s. 9.3.3.
[143] *Ibid*.
[144] Directive 95/21/EC and relevant amendments.
[145] Reg. 2(1).
[146] Directive 95/21/EC, Art. 1, second hyphen.

> "common criteria for control of ships by the port state and harmonizing procedures on inspection and detention, taking proper account of the commitments made by the maritime authorities of the Member States under the Paris Memorandum of Understanding on Port State Control (MOU)."[147]

To ensure that the purpose of a Directive is achieved throughout the EU a Directive

> "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."[148]

Any choice of words different from those in the Directive, however, must still enable the national law to be interpreted in light of the wording of the Directive. Thus, the requirement to harmonise procedures on inspection and detention appears to require a Member State to do exactly that, i.e. ensure that its regulations match the provisions laid down in the Directive.

> "…in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive no 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article 189."[149]

The Directive clearly instructs the administration of the Member (port) State to detain a vessel when deficiencies (plural) are clearly hazardous to safety, health or the environment.[150] The plural used in Art. 9(2) suggests that when only one deficiency is found which satisfies the requirements set out a detention is not mandatory.[151]

> "2. In the case of *deficiencies* [emphasis added] which are clearly hazardous to safety, health or the environment, the competent authority of the port state where the ship is being inspected shall ensure that the ship is detained, or the operation in the course of which the deficiencies have been revealed is stopped…
>
> 3. When exercising his professional judgment as to whether or not a ship should be detained, the Inspector shall apply the criteria set out in Annex VI. In this respect, the ship shall be detained, if not equipped with a functioning voyage data recorder system, when its use is compulsory in accordance with Annex XII…"[152]

Article 9(2) contemplates two options which an Inspector may take. He can either detain the vessel or only stop the particular operation. The latter suggests that the defects involve activities and are not defects of a static nature such as construction defects or equipment malfunctioning.[153]

The Directive does not require a specific instrument to be used or a specific measure to be applied by an Inspector to stop the operation. It would appear therefore to be the choice of the PSC officer how to have the relevant activities seized and he can achieve this by oral orders (if his instructions are complied with by the master of the ship) or by prohibition notice.[154]

The Inspector does not appear to have a choice where the Directive refers to a detention.[155]

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[147] *Ibid*., Art. 1.
[148] Treaty of Amsterdam, Art. 249.
[149] ECJ in *von Colson and Kamann v. Land Nordrhein-Westfalen (NRW)* [1984] ECR 1891, para. 26. Article 189 has become Art. 249 in the Amsterdam Treaty.
[150] "Shall ensure that the ship is detained", Art. 9.2.
[151] See discussion below as to whether a single such defect would make a detention of the vessel mandatory.
[152] Directive 95/21/EC, Art. 9(2) and 9(3).
[153] Static defects would appear to be, for example, inoperative radio equipment or an inoperative emergency fire pump. Operational defects would in my view be constituted by the operation of lifeboat davits or crane winches by unskilled and untrained crew. However, static defects may have been caused by operational deficiencies in so far as the safety management system on board might not have been followed (see more on ISM below, Chapter 7.3.2. and 10.5.). But this would, in my opinion, not be covered under the option to stop the operation. The latter appears to say that activities are going on in the very moment an Inspector makes such a finding.
[154] See MSA 1995, s. 262.
[155] According to Article 9(2) he "shall ensure that the ship is detained".

A detention is "the formal prohibition of a ship to proceed to sea due to established deficiencies which, individually or together, make the ship unseaworthy".[156] This requirement would appear to rule out that a ship which is found to be unseaworthy in the sense of the Directive[157] could be made to stay in port by the relevant port state control authority using means other than a detention. But the majority of UK PSC Inspectors also seem to be prepared to consider means other than a detention to prevent ships from sailing.[158]

Alternative measures which Inspectors seem to contemplate include Prohibition and Improvement Notices,[159] preventative detentions,[160] Code 17[161] deficiencies,[162] or allowing the owner to present a plan of action which would be implemented before the ship sails.[163] But they also use rather unconventional measures such as persuasion to voluntarily fix the problem,[164] "gentle persuasion",[165] or even "threats" and "cajoling".[166] Some other Inspectors would seek to involve third parties such as classification societies,[167] port authorities or pilots,[168] or the flag State of the vessel.[169]

It may be safely assumed that Inspectors would not use these means if they did not produce the required result to have the ship in port as long as it takes to rectify the identified deficiencies.[170]

However, it would appear to be in contravention of European law if instead of a detention alternative measures were applied. If, for example, an informal "agreement" were to be made between PSCO/port State administration and master/company that the vessel would only sail after defects, which are clearly hazardous to safety, health or the environment, have been rectified it would seem to violate the Directive and the competition requirements of the Treaty of Amsterdam. The Directive does not provide for informal arrangements but, as the following discussion will demonstrate, rather for transparent consistent European wide action.[171] Informal measures taken in one port for one ship (and thereby for one particular owner) would also not seem to find approval under Art. 87(1) of the Treaty of Amsterdam. Alternative measures would only appear to be lawful when a detention is not mandatory or when it would be unjustified because it would be breaching the owner's property rights.[172]

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[156] Directive 95/21/EC, Art. 2(9).
[157] And for this discussion would have static, rather than operational, defects.
[158] Nearly all responses from Surveyors, who are all PSC Inspectors, indicate that they would use means other than a detention to prevent a ship from sailing, see Annex 15, answers to question 3. See also above in this Chapter 6.2.
[159] For example, Annex 15, answers 3.1, 3.3, 3.16, 3.17 and 3.18.
[160] *Ibid*., answers 3.7, 3.9, 3.13, 3.15 and 3.19. A "preventative detention" is a measure which stops a ship from sailing, but will not be recorded on the Paris MoU database. The MCA guidance in their document "MSIS 8", *Instructions for Guidance of Surveyors*, *Inspection and Enforcement Policy*, Chapter 28, s. 1.3, states that "the deficiencies requiring attention may not necessarily be the fault of the master/owner/operator but may be the result of accidental damage and it would be unreasonable to record a detention against the ship in the Paris MoU."
[161] See above/below, Chapter 6, fn 24.
[162] Annex 15, answer 3.11 and (although not specifically referring to Code 17) 3.17.
[163] *Ibid*., answer 3.5.
[164] *Ibid*., answer 3.4.
[165] *Ibid*., answer 3.6.
[166] *Ibid*., answer 3.19.
[167] *Ibid*., answers 3.6 and 3.15.
[168] *Ibid*., answers 3.8, 3.14 and 3.20.
[169] *Ibid*., answer 3.17.
[170] See also above the comment on the UK's rank on the Paris MoU white list, Chapter 5, fn 128.
[171] The seriousness of European wide transparent consistent action seems to have been emphasized in the recent announcement that "as of 2011, ship inspections in Community ports will be strengthened. They will focus on ships that do not conform to safety standards, which will be subject to more frequent inspections. A first warning will be in the form of a refusal to access Community ports for a period of three months. This period will increase to 12 months in the event of a second access refusal and to 24 months in the event of a third access refusal. After that, access refusal will be permanent, both for ports and anchorage zones within the community", Europolitics, No. 3656, 11 December 2008, p. 5.
[172] See above, Chapter 3.3.

The Council of the European Union has given a clear indication when addressing the rationale for adopting the Directive that "the rules and procedures for port-State inspections, …must be harmonized to ensure consistent effectiveness in all ports".[173] It was recognized that

> "publication of information concerning ships which do not comply with international standards on safety, health and protection of the marine environment, may be an effective deterrent discouraging shippers to use such ships, and an incentive to their owners to take corrective action without being compelled to do so".[174]

The Council identified the need for Inspectors to take "completely impartial decisions"[175] and that ships, the deficiencies of which are clearly hazardous, "must…be detained".[176]

The requirement to harmonise procedures has also been established in the text of the Directive.[177]

It would appear that a decision not to detain a ship which has deficiencies which are "clearly hazardous to safety, health or the environment" would be a contravention of the requirements of the Directive. It is arguable, though, that the purpose of the Directive of

> "increasing compliance with international and relevant Community legislation on maritime safety, protection of the marine environment and living and working conditions on board ships of all flags,"[178]

can be achieved with measures other than a detention,[179] but this would not guarantee the required harmonization. The latter, however, would seem to also be necessary for compliance with Art. 87(1) of the Amsterdam Treaty which is required under Art. 249 of the Treaty.[180]

> "1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market."[181]

"Aid" in the context of this provision is not only a direct financial contribution or subsidy by a State to a third party.

> "The concept of aid is more general than that of a subsidy. It embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect."[182]

Under Art. 87(1) "any aid …is, in so far as it affects trade between Member States, incompatible with the Common Market"[183] if it constitutes a direct or indirect advantage provided through the State.[184]

A decision not to detain a vessel brings with it some direct and indirect pecuniary advantages for that ship over other competitors trading between EU States. The vessel may be able to sail without the Inspector having to re-inspect it and may thereby gain time.[185] Also, owners of the vessel would not have to pay the fees incurred during a

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[173] Recital in the Preamble of Directive 95/21/EC.
[174] *Ibid*.
[175] *Ibid*.
[176] *Ibid*.
[177] Directive 95/21/EC, Art. 1, second hyphen.
[178] *Ibid*., Art. 1, first hyphen.
[179] Which I will also call "alternative measures".
[180] "…and in accordance with the provisions of this Treaty,…", Art. 249.
[181] Article 87(1) of the Treaty of Amsterdam.
[182] *Adria-Wien Pipeline GmbH v. Finanzlandesdirektion Für Kärnten* [2002] 1 C.M.LR 38, para. 38.
[183] *Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1995] 2 C.M.LR 97, para. 18.
[184] *Ibid*., para. 19.
[185] Time which is equivalent to money, see above in Chapter 6, fn 85, and in Chapter 8, fn 410, the examples of daily charter rates for vessels.

detention,[186] but more importantly the vessel would not be recorded in the Paris MoU database as a detained vessel. The latter entails not only the advantage of not publicly appearing to have been substandard[187] and thereby scaring off possible charterers,[188] but also reduces the risk of being banned from entering the UK or other Member States of the EU.[189]

On the basis that alternative measures applied by Surveyors constitute aid,[190] which could probably be called "operating aid",[191] such measures short of detention would appear to violate Art. 87(1).

> "The aim of Article 92 [now Art. 87] is to prevent trade between member-States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods."[192]

Despite the attraction of flexibility, in my opinion the use of measures other than a detention are technically unlawful and would require to be abolition or change,[193] hence the conclusion that deficiencies which are "clearly hazardous to safety, health or the environment"[194] must always trigger a detention.

The Directive, like the Paris MoU, does not clarify when a deficiency is "clearly hazardous". The decision is left to the PSCO but the Directive apparently assumes that he will exercise his professional judgment, and that the decision is made subject to the Inspector mandatorily applying the criteria in Annex VI of the Directive.[195] The Surveyor is not explicitly required to exercise his professional judgment, though.[196]

Neither the Directive, the Paris MoU nor the PSC Regulations define what they mean by "professional judgment". In the UK authorities the term is used in relation to different professions. A number of examples from different professions used in civil, criminal and public law cases will highlight some interpretation given to the term "professional judgment".

In case of the master of a rescue vessel "his professional judgment [was] based upon a high degree of skill and many years of experience".[197] The master of a cargo ship was

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[186] The MCA charges an hourly fee for the attendance and office work of the detaining PSC Inspector as of the moment the ship is detained. The fee is regulated in the Merchant Shipping (Fees) Regulations for the particular year (which was at the time of writing (September 2008) SI 2006 no. 2055 and meant a fee of £94 per hour, see reg. 4(2)(b)).

[187] Detentions can be looked up on www.mcga.gov.uk, www.parismou.org, or www.equasis.org. In addition the shipping press (e.g. Lloyd's List or the Nautilus UK Telegraph) regularly publishes detention information.

[188] Which appears to have been clearly recognised in the Preamble of the Directive when it is spelled out that such publication "may be an effective deterrent discouraging shippers to use such ships". See also above, Chapter 6, fn 85.

[189] Access refusal is regulated by the PSC Regulations, reg. 7B and MSN 1775, Annex XII. Gas, Chemical, and Oil Tankers, Bulk Carriers and Passenger ships can be banned when they have been detained once or twice before and fly certain flags. See also EC Directive 95/21/EC, Art. 7b(1).

[190] Because they are measures which mitigate charges and have the same effect as subsidies (see above, *Adria-Wien Pipeline GmbH,* para. 38*)* which are directly provided through the State (here the MCA - see above, *Sloman Neptun,* para. 19) and distort competition (see above, *Adria-Wien Pipeline GmbH,* para. 38, and also *Regione Siciliana v. Commission of the European Communities,* 27 November 2003, Case T-190/00, Celex No. 600A0190, para. 130).

[191] Which is "aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities". *Siemens SA v. Commission of the European Communities* (affirmed on appeal), 8 June 1995, Case T-459/93, Celex No. 693A0459, para. 48.

[192] *Re Aids to the Textile Industry: Italy v. E.C. Commission* [1974] 2 C.M.LR 593, para. 13.

[193] Treaty of Amsterdam, Article 88(2).

[194] EC Directive 95/21/EC, Art. 9(2).

[195] Art. 9(3) of EC Directive 95/21/EC refers to its Annex VI.

[196] "When exercising his professional judgment as to whether or not a ship should be detained, the Inspector shall apply the criteria…", Art. 9.3. This sentence appears to assume that he will exercise his professional judgment, but other than the Inspector being instructed that he must apply the criteria, the wording suggesting that the professional judgment will be applied is not worded as a clear instruction.

[197] *Mcfarlane v. E. E. Caledonia Ltd. (Formerly Occidental Petroleum (Caledonia) Ltd.)* [1993] P.I.Q.R. 241, p. 246 (a civil law decision which was overturned on appeal, [1994] 2 All ER 1, but does not appear to affect the qualification of "professional judgment", see p. 9).

only allowed a professional judgment within the "navigational area" which was reserved to him as opposed to the right for a decision "to economise on bunkers for no good maritime reason".[198] In the case[199] of a medical doctor acting as an independent expert advisor to the Benefits Agency reference was made to "the skills that she was able to bring to bear on medical issues in the exercise of her professional judgment".[200] Exercising her professional judgment meant "drawing upon her medical knowledge and her experience".[201] In case of a prosecutor's decision whether or not to prosecute "expert assessments of weight and balance"[202] were said to be "conspicuously within the professional judgment"[203] of the decision maker. Last but not least the best professional judgment of a medical doctor when assessing patients suffering from mental disorder will not necessarily be the only judgment available. "…, their [the doctors] conclusions will rarely be capable of scientific verification. There will often be room for a bona fide difference of professional opinion."[204]

Even though a definitive conclusion as to the exact meaning of the "professional judgment" of a PSCO cannot necessarily be derived from these decisions they seem to suggest that any professional judgment is based upon skill, experience and knowledge. The assessment will usually be made by what would be understood to be an expert giving a reasoned but also balanced opinion. A professional judgment can only be passed in the area of expertise of the relevant person and appears to be open to alternative judgments when it is highly unlikely that a scientific verification of the decision will be possible. For a PSCO this would mean that any decision could only be based upon facts within his area of expertise, but also that a detention which cannot be based on hard facts is not necessarily wrong when it also allows for a different professional judgment to be made. This could become the case when the PSCO applies his discretion as seems to be required under Annex VI.[205]

Although, as a first step, the criteria in Annex VI[206] must be applied when the PSCO exercises his professional judgment.

> "Introduction
>
> Before determining whether deficiencies found during an inspection warrant detention of the ship involved, the Inspector must apply the criteria mentioned below in sections 1 and 2…
>
> 1. Main criteria
> When exercising his professional judgment as to whether or not a ship should be detained the Inspector must apply the following criteria:
>
> Timing:
>
> Ships which are unsafe to proceed to sea must be detained upon the first inspection irrespective of how much time the ship will stay in port.
>
> Criterion:
>
> The ship is detained if its deficiencies are sufficiently serious to merit an Inspector returning to satisfy himself that they have been rectified before the ship sails…"[207]

The wording in s. 1 of Annex VI changes from a clear instruction ("must be detained") under criterion one ("timing") into the rather odd form under condition two ("criterion") of

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[198] *The Hill Harmony* [2001] 1 AC 638, p. 646 (civil law).
[199] *Gillies v. Secretary of State for Work and Pensions* [2006] 1 All ER 731 (House of Lords, social security administration).
[200] *Ibid*., para. 18.
[201] *Ibid*., para. 20.
[202] *R (on the application of Bermingham) v. Director of the Serious Fraud Office; Bermingham v. Government of the United States of America* [2006] 3 All ER 239, para. 63 (administrative law).
[203] *Ibid*.
[204] *R (on the application of Von Brandenburg (aka Hanley)) v. East London and the City Mental Health NHS Trust and another* [2004] 1 All ER 400, para. 9 (public law).
[205] Directive 95/21/EC, Annex VI.
[206] Sections 1 and 2.
[207] Directive 95/21/EC, Annex VI, Introduction and s. 1.

"the ship is detained". The latter wording would appear to suggest an automatic detention as long as "the deficiencies are sufficiently serious to merit an Inspector returning" to the ship to check whether the defects were dealt with satisfactorily. However s. 2 of the Annex seems to clarify that the ship is not automatically detained but requires the Inspector ("must assess") to consider 14 assessments[208] before he can decide whether a defect is "sufficiently serious".[209]

> "2. Application of main criteria
> When deciding whether the deficiencies found in a ship are sufficiently serious to merit detention the Inspector must assess whether:
>
> …
>
> If the answer to any of these assessments is negative, taking into account all deficiencies found, the ship must be strongly considered for detention. A combination of deficiencies of a less serious nature may also warrant the detention of the ship." [210]

At this stage Annex VI breaks the seemingly strict line of instructions in the Directive (leaving aside the requirement to apply his professional judgment) and gives the Inspector discretion. It is no longer mandatory for him to detain the ship[211] but he must only "strongly consider" whether or not to detain the ship when any answer to the 14 assessments "is negative, taking into account all deficiencies". The discretion, however, appears to be fettered by the purpose of the Directive which is "to help drastically to reduce substandard shipping in the waters under the jurisdiction of Member States".[212] This is a rather unclear objective but EU law does not seem to require legislation to be "unconditional and sufficiently clear and precise"[213] other than when a Directive is supposed to create a direct legal effect between individual and Member State.[214]

Thus, the Directive does not define "substandard shipping", and wants to achieve the purpose set out in Art. 1 by increasing compliance with international and EU legislation.[215] The inference may be drawn that, although not every deficiency which would make a vessel not comply with relevant legislation can be considered to make a ship "substandard", a ship would be substandard when the defects make the vessel clearly hazardous because at that stage the vessel would have to be detained.[216] By contrast I would therefore conclude that a ship which is clearly hazardous is substandard, and substandard shipping would be "reduced"[217] when the vessel is prevented from sailing, i.e. is detained. It follows that if more than one answer to any of the 14 assessments is negative the Inspector would have to detain the ship and would not have discretion as outlined in Annex VI.[218] This is perhaps a surprising conclusion and might be uncomfortable for many port State administrations.
The Directive is implemented in the UK by the Port State Control Regulations.[219] The aim of the following sub-section is to analyse the implementation of the Directive in the UK and to highlight the existing differences.

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[208] Confusingly these assessments appear also to be called "criteria" but only in the introduction to Annex VI.
[209] Directive 95/21/EC, Annex VI, s. 2 "Application of main criteria".
[210] *Ibid*. with the 14 sub-sections which address each of the 14 assessments between the two paragraphs. The 14 sub-sections will each be addressed below, Chapter 6.5.
[211] As is the case under the Directive 95/21/EC, Art. 9.2, when a defect is clearly hazardous.
[212] Art. 1.
[213] *Franz Grad v. Finanzamt Traunstein* [1971] C.M.LR 1, para. 9.
[214] *Ibid*.
[215] According to Art. 1, first hyphen.
[216] The preamble of the Directive, although not part of the law as such but outlining the policy and spirit of the Directive appears to suggest this approach: "Whereas non-compliance with the provisions of the relevant Conventions must be rectified; whereas ships which are required to take corrective action must, where the deficiencies in compliance are clearly hazardous to safety, health or the environment, be detained until such time as the non-compliance has been rectified".
[217] The purpose of the Directive in Art.1.
[218] EC Directive 95/21/EC, Annex VI, s. 2, last paragraph. The 14 assessments are discussed below in Chapter 6.5.
[219] Reg. 2(1).

6.4.3. Implementation of Directive 95/21/EC by the Port State Control Regulations

The legal basis for a port state control detention can be found in the PSC Regulations, reg. 9.

> "9(1) The owner shall satisfy the Maritime and Coastguard Agency that any deficiencies confirmed or revealed by an inspection referred to in regulation 5(2), 6 or 7 are or will be rectified in accordance with the Conventions.
>
> (2) (a) In case of deficiencies which are clearly hazardous to safety, health or the environment, the Inspector shall detain the ship, or require the stoppage of the operation in the course of which the deficiencies have been revealed, using powers of detention in Convention enactments as appropriate, or issuing a prohibition notice under section 262 of the Act, as the case may be.
>
> (b) A Detention Notice may:
>
> (i) include a direction that a ship shall remain in a particular place, or shall move to a particular anchorage or berth; and
>
> (ii) specify circumstances when the master of the ship may move his ship from a specified place for reasons of safety or prevention of pollution.
>
> …….
>
> (3) (a) Subject to paragraph (b) and without prejudice to any other requirement in the Convention enactments, when exercising his professional judgement as to whether or not a ship should be detained the Inspector shall apply the criteria set out in Annex VI of MSN 1775.
>
> ……"

Whether or not a ship ought to be detained appears to be subject to the decision of the PSCO[220] which has to be taken in accordance with the procedure outlined in reg. 9 of the PSC Regulations.

Regulation 9(1) puts the onus on the owner (and not on the master) to satisfy the MCA that any defect identified in a ship is or will be rectified in compliance with the relevant convention.[221]

It would seem that reg. 9(1) is subordinate to reg. 9(2) insofar as reg. 9(2) would override reg. 9(1) when deficiencies are clearly hazardous ("shall detain the ship"). In that case an owner would not appear to have the option to satisfy the MCA that deficiencies will be rectified before departure, but the ship will have to be detained. This would seem to be independent of defect duration or whether the existence of the deficiency was the fault of owner, master or crew.[222]

If the defect identified clearly poses a risk to safety, health or the environment reg. 9(2)(a) requires the Inspector to detain the vessel ("shall detain the ship") or stop the relevant activity ("shall require the stoppage").

Exactly how a deficiency is "clearly hazardous to safety, health or the environment" is not defined in the Port State Control Regulations, MSN 1775, the relevant EC Directive[223] or the Paris Memorandum of Understanding.[224] All instruments, however, give guidance as to how an Inspector may arrive at deciding that a deficiency is clearly hazardous.[225]
In the UK the normal practice appears to be that the relevant Surveyor will discuss with his Principal Surveyor back in the office whether or not a detention is appropriate before he makes the decision to detain a vessel.[226] The PSC Regulations follow the Directive by

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[220] Port State Control Officer.
[221] "Convention" means any convention listed in the Port State Control Regulations, reg. 2(2), e.g. SOLAS 74.
[222] See below in Chapter 8.5.2. the discussion about the purpose of a detention. The MCA appears to assume that fault of "master/owner/operator" is required for a detention, see above, Chapter 6, fn 160.
[223] Directive 95/21/EC.
[224] Paris MoU, see http://www.parismou.org.
[225] See table with synopsis below.
[226] Annex 15, question 4.

making it mandatory that a vessel on which deficiencies (plural)[227] are found which are clearly hazardous to safety, health or the environment, shall be detained.[228]

To highlight the specific differences between the text of the Directive and the PSC Regulations the following table presents a synopsis of the relevant wording in the Directive and the PSC Regulations.

Table 4: Comparison of Directive 95/21/EC and the PSC Regulations' detention requirements

Directive 95/21/EC	PSC Regulations
Article 9(1) The competent authority shall be satisfied that any deficiencies confirmed or revealed by the inspection referred to in Article 5(2) and Article 7 are or will be rectified in accordance with the Conventions.	Regulation 9(1) The owner shall satisfy the Maritime and Coastguard Agency that any deficiencies confirmed or revealed by an inspection referred to in regulation 5(2), 6 or 7 are or will be rectified in accordance with the Conventions.
Article 9(2) In the case of deficiencies which are clearly hazardous to safety, health or the environment, the competent authority of the port state where the ship is being inspected shall ensure that the ship is detained, or the operation in the course of which the deficiencies have been revealed is stopped.	Regulation 9(2)(a) In case of deficiencies which are clearly hazardous to safety, health or the environment, the inspector shall detain the ship, or require the stoppage of the operation in the course of which the deficiencies have been revealed, using powers of detention in Convention enactments as appropriate, or issuing a prohibition notice under section 262 of the Act, as the case may be. (b) A detention notice may: (i) include a direction that a ship shall remain in a particular place, or shall move to a particular anchorage or berth; and (ii) specify circumstances when the master of the ship may move his ship from a specified place for reasons of safety or prevention of pollution.
The detention order or stoppage of an operation shall not be lifted until the hazard is removed or until such authority establishes that the ship can, subject to any necessary conditions, proceed to sea or the operation be resumed without risk to the safety and health of passengers or crew, or risk to other ships, or without there being an unreasonable threat of harm to the marine environment.	(c) The detention notice or stoppage of an operation shall not be lifted until the Maritime and Coastguard Agency establishes that the ship can, subject to any necessary conditions, proceed to sea or the operation be resumed without risk to the safety and health of passengers or crew, or risk to other ships, or without there being an unreasonable threat to or harm to the marine environment.

The table seems to show that the wording of the PSC Regulations is more restrictive than the text of the Directive.

The Regulations differ from the EC Directive in that they only seem to permit a detention when the power of a Convention enactment is used.[229] Thereby the Regulations also restrict a detention to those Convention enactments only.[230] The Directive, on the other

[227] The German wording of the Paris MoU, for example, also uses the plural ("die Mängel") and so does the French version ("les anomalies"), see Bekanntmachung der Neufassung der Pariser Vereinbarung über die Hafenstaatkontrolle, Anlage 1, §§ 9.3.2.2 and 9.3.3, BGBl. II, No. 6, 9 March 2004, p. 190.
[228] Reg. 9(2)(a).
[229] *Ibid*.: "using powers of detention in Convention enactments as appropriate".
[230] These enactments are the hundreds of merchant shipping regulations in which international Conventions such as SOLAS, MARPOL or STCW are re-written. See, for example, the Merchant Shipping (Cargo Ship

hand, does not qualify "deficiencies which are clearly hazardous to safety, health or the environment"[231] by only restricting the power of detention to a violation of Convention enactments.[232] It is true, though, that Art. 9(1) requires defects to be rectified in accordance with the Conventions. But Art. 9(2) does not apply the same restriction. The Regulations follow Art. 9(1) literally in the requirement to rectify defects in accordance with the Conventions, but do not likewise follow Art. 9(2).

This would appear to suggest that the Directive encompasses a wider scope of clearly hazardous scenarios which an Inspector may consider and which are not restricted to Convention enactments only. The question then seems to be whether the PSC Regulations create a power, or only an obligation on the Inspector, to detain a ship if a defect is clearly hazardous. In the latter case a detention under the PSC Regulations would not seem to be legally possible because the actual powers to detain are then only found in the Convention enactments, and any defect identified which does not constitute a breach of a Convention enactment could not serve as a basis for a detention.[233] The MCA practice, however, suggests that the correct understanding is to follow the text of the Directive.[234]

In my view, the result to only detain under the Convention enactments would seem to constitute a breach of the EC Directive requirements in that they do not restrict the identification of clearly hazardous defects to a breach of Convention enactments. In light of the ECJ's decision in *von Colson and Kamann v. NRW*[235] which requires that national law is interpreted "in the light of the wording and the purpose of the Directive"[236] it would therefore appear that such a restriction violates European law principles and that the Regulations have to be interpreted in conformity with the Directive.[237] I will in any future interpretation of the PSC Regulations follow this conclusion.

One could argue, though, that the fall-back position for an Inspector would be to apply the MSA 1995, ss. 94 and 95 (dangerously unsafe ship) so that the requirement of the EC Directive would be met. However, the wording of the sections in the MSA 1995 which focus on a dangerously unsafe ship[238] is completely different from identifying defects which are clearly hazardous. It is not clear whether "clearly hazardous" would require a different level of danger than a "dangerously unsafe" ship. It would seem to me that if something is "unsafe" it presents a certain risk. If something is "dangerously unsafe" it would appear to constitute a high or a very high risk.[239] When something is clearly hazardous it would seem to indicate only that there is no doubt that it is unsafe or dangerous, but not that it qualifies the hazard as to the risk it poses.[240] Something clearly hazardous would appear to be on the same level of risk as something clearly unsafe.

Construction) Regulations 1997 (SI 1997 No. 1509), the Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 (SI 1996 No. 2154) or the Merchant Shipping (Training and Certification) Regulations 1997, SI 1997 No. 348.

[231] Directive 95/21/EC, Art. 9(2).

[232] Conventions which are covered by the PSC Regulations are listed in the Regulations under reg. 2(2). For examples, see above, Chapter 6, fn 230.

[233] For example, it would appear that a detention of a ship like the "Van Gogh" which poses a health hazard (see above, Chapter 5.2.3.) would not have been possible under the PSC Regulations for two reasons: first, the PSC Regulations only refer to other statutory instruments which enact Conventions, and secondly, the relevant Regulations (H and S Regulations) are not a Convention enactment but an enactment of EC Directives (see the explanatory note at the end of the H and S Regulations). The vessel could, however, possibly still be detained, but not as a result of a PSC Inspection despite the fact that a PSC Inspector may consider it to be clearly hazardous to health.

[234] See the examples of detentions under the PSC Regulations, Chapter 7.3.4.

[235] [1984] ECR 1891.

[236] *Ibid.,* para. 26.

[237] See also above below, Chapter 6.4.2.

[238] See the discussion above, Chapter 5.2.

[239] See also the qualification in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* that "'dangerously' must add an important qualification to 'unsafe'", para. 38.

[240] The following two examples would appear to support my view that "clearly hazardous" is a different qualification from "dangerously unsafe". In *Attridge v. Hovey Antwerp Ltd* [1968] 2 Lloyd's Rep 597, p. 601, the Court held a tarpaulin which covered "a mass of stuff of different shapes and sizes" (p. 599) to be clearly hazardous for the claimant to walk across. In *King v. Sussex Ambulance NHS Trust* [2002] EWCA Civ 953,

It appears to me, therefore, that ss. 94 and 95 do not offer a suitable alternative for accurate compliance with the EC Directive by the PSC Regulations. This would seem to be supported by the *Club Cruise* decision which required an important qualification added to "unsafe" to make it "dangerously unsafe".[241]

The PSC Regulations do not provide a definition of when a deficiency is clearly hazardous. But when a ship is clearly hazardous the Inspector must detain it.[242] The Regulations assume, in line with the Directive, that an Inspector will exercise his professional judgment "as to whether or not" the ship should be detained.[243] When exercising his professional judgment reg. 9(3)(a)[244] does not give an Inspector a choice but obliges him to apply the criteria of MSN 1775, Annex VI. According to this MSN[245]

> "In deciding whether or not a ship should be detained, the Surveyor will be guided by the criteria set out in Annex VI of this Notice."[246]

This wording, however, appears not to be as strict as the one used in reg. 9(3)(a) or in the Directive[247] and does not seem to help clarifying what the Inspector must actually do before he can detain a ship.

Whereas reg. 9(3)(a) and the Directive imply that it is mandatory for an Inspector to apply the criteria[248] before he can make the decision to detain a ship, MSN 1775[249] only suggests that the Inspector will be *guided* by the criteria of Annex VI; this implies that the criteria are not to be binding.[250] If criteria are for guidance only, a decision might take into account other criteria. However, an option to apply additional criteria is not addressed in reg. 9(3)(a). Requirements to be satisfied prior to a detention outside of reg. 9(3)(a) appear to be only the proviso in reg. 9(3)(b)[251] and possible provisions for a detention in merchant shipping legislation which are governed by international Conventions.[252]

As an intermediate result it appears that there is a potential conflict between MSN 1775 and the PSC Regulations insofar as para. 25 of MSN 1775 does not comply with reg. 9(3)(a) because it does not make it mandatory for an Inspector to "apply the criteria". In case of a discrepancy between regulations and an MSN the interpretation would usually have to be in line with the regulations as they are law enacted by Parliament, as opposed to an MSN which is a publication of the maritime administration. Even though MSN 1775 is mentioned in the definitions of the Port State Control Regulations[253] its general text does not appear to be incorporated into the law. Only a number of annexes or parts

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para. 24, the Court of Appeal held that it was clearly hazardous for an ambulance technician to carry a patient of an estimated weight of between 10 and 14 stone down a stairs in an upright chair.

[241] See above Chapter 6, fn 239.

[242] PSC Regulations, reg. 9(2)(a).

[243] *Ibid*., reg. 9(3)(a). This probably ought to mean that the Inspector uses his professional to establish whether a defect is clearly hazardous.

[244] *Ibid*.

[245] For the legal status of an MSN see below, Chapter 6, fn 255.

[246] MSN 1775, para. 25, page 4.

[247] "Shall apply the criteria", Art. 9(3).

[248] MSN 1775, Annex VI, s. 1. uses the same wording as the Directive ("shall apply the criteria").

[249] In addition to the vague wording of para. 25 in MSN 1775 the mandatory approach of reg. 9(2)(a) ("shall detain") suffers from an unclear sentence in MSN 1775 probably caused by a typographical error. Under the heading of "application of main criteria" it is provided that "if the *answers* [plural – emphasis added] to any of these assessments *is* [singular – emphasis added] negative, taking into account all deficiencies found, the ship must be strongly considered for detention". The Directive uses the singular "answer". The interpretation of the MSN 1775 would therefore have to follow the wording of the Directive.

[250] Which appears to be in line with the understanding of the words "guided by the criteria" by the ECJ, see *European Commission v. European Parliament* [2003] All ER (EC) 421, para. 45 and 48, where the words "guided by the criteria" were helping to clarify that the criteria in question in that case were not binding.

[251] Which makes it compulsory for an Inspector to detain a ship which is not equipped with a functioning VDR.

[252] See reg. 9(2) of the Port State Control Regulations. An example for this appears to be SOLAS, Chapter XI, reg. 4 which requires, "when there are clear grounds for believing that the master or crew are not familiar with essential shipboard procedures relating to the safety of ships" (reg. 4.1) that "the Contracting Government carrying out the control shall take such steps as will ensure that the ship shall not sail until the situation has been brought to order in accordance with the requirements of the present Convention." (reg. 4.2).

[253] *Ibid*., reg. 2(2).

thereof of MSN 1775 are explicitly incorporated by direct reference to them, one of which is Annex VI.[254] It follows, in my view, that text of MSN 1775 which is not explicitly incorporated into the Regulations only serves as guidance by the administration but does not have any binding force.[255] As a consequence the apparent conflict between reg. 9(3)(a) and MSN 1775, para. 25 will have to be decided in favour of the wording in reg. 9(3)(a) because para. 25 is not part of the law.

It would seem to ensue that an Inspector must follow reg. 9(3)(a) and apply the criteria set out in Annex VI of MSN 1775 (including the assessments in s. 2) to decide whether or not the defects merit a detention of the vessel. He cannot only be guided by the criteria when establishing whether or not defects are clearly hazardous.

Assuming that the procedure outlined in reg. 9(3)(a) and MSN 1775 serves to identify whether or not deficiencies "are clearly hazardous to safety, health or the environment"[256] the last paragraph of MSN 1775, Annex VI, s. 2, which is identical[257] to the wording in the Directive, appears to be unclear and not to follow reg. 9(2)(a).[258] Whereas reg. 9(2)(a)[259] requires a ship to be detained when deficiencies (plural) are clearly hazardous, MSN 1775, Annex VI, s. 2 appears to suggest that one clearly hazardous defect suffices as long as other defects have been found which together with that one defect call for a detention.[260]

However, if the answer to any of the 14 assessment criteria identified a deficiency which is not clearly hazardous it would be difficult to understand why such a vessel must be strongly considered for detention, as the MSN would then be in conflict with reg. 9(2)(a).[261] Such a recommendation would appear to clash with the requirement that "the Inspector shall make all possible efforts to avoid a ship being unduly detained or delayed."[262] Without any hazard there does not appear to be a valid reason for a detention. On the other hand it is arguable that one clearly hazardous defect should provide enough of a reason to detain a ship without having to take into account any other deficiency. It seems hard to understand why a ship should be allowed to sail under such conditions.

It would appear that this problem can only be solved if the text in Art. 9(2) of Directive 95/21/EC were to be amended so that it clarifies whether or not ships can be detained on the basis of single defects only.

The discussion over the single defect detention poses the question as to whether a negative answer to any of the 14 assessment criteria addressed in the following section would always establish a clearly existing hazard to health, safety or the environment and what the consequence ought to be.

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[254] To name but a few, reg. 2(2) incorporates the procedures set out in Annex XII, s. B of that Annex; reg. 2(2) incorporates the list in Annex III; reg. 5(2)(b)(i) incorporates Annex I, Part I and reg. 5(2)(b)(ii) incorporates Annex I, Part II; or, as mentioned, reg. 9(3)(a) incorporates the criteria listed in Annex VI.
[255] N Gaskell, *Current Law Statutes,* p. 21, refers to proposals to deregulate "technical shipping matters" and "allow technical matters to be set out in Merchant Shipping Notices". Gaskell gives the example of the Merchant Shipping (Delegation of Type Approval) Regulations 1996 (SI 1996 No. 147). Regulation 1(2)(iii) incorporated M-notice 1645 and any notice replacing it. This is now standard practice, see, for example, the Merchant Shipping (Fire Protection: Large Ships) Regulations 1998 (SI 1998 No. 1012), regs. 1(2) and 4(4)(b), or the Merchant Shipping (Life-Saving Appliances for Ships other than Ships of Classes III to VI(A)) Regulations 1999 (SI 1999 No. 2721), regs. 2(2) and 6. If an MSN would automatically become legally binding such reference would not have to be made in a statutory instrument.
[256] Port State Control Regulations, reg. 9(2)(a).
[257] Not considering the typographical error, see Chapter 6, fn 249.
[258] See above the text of the Directive, Annex VI, s. 2, last paragraph.
[259] And also Art. 9.2 of the Directive.
[260] In fact ships are detained on single defects only, see below, Chapter 7.4.
[261] Of the Port State Control Regulations.
[262] *Ibid*., reg. 9(7).

6.5. Detention assessment criteria

The PSC Regulations, in line with the requirements of the Directive,[263] refer[264] to 14 criteria which "when deciding whether the deficiencies found in a ship are sufficiently serious to merit detention the Inspector must assess".[265]

> "1. the ship has relevant, valid documentation
> 2. the ship has the crew required in the Minimum Safe Manning Document
>
> During inspection the Inspector must further assess whether the ship and/or crew is able to –
>
> 3. navigate safely throughout the forthcoming voyage
> 4. safely handle, carry and monitor the condition of the cargo throughout the forthcoming voyage
> 5. operate the engine room safely throughout the forthcoming voyage
> 6. maintain proper propulsion and steering throughout the forthcoming voyage
> 7. fight fires effectively in any part of the ship if necessary during the forthcoming voyage
> 8. abandon ship speedily and safely and effect rescue if necessary during the forthcoming voyage
> 9. prevent pollution of the environment throughout the forthcoming voyage
> 10. maintain adequate stability throughout the forthcoming voyage
> 11. maintain adequate watertight integrity throughout the forthcoming voyage
> 12. communicate in distress situations if necessary during the forthcoming voyage
> 13. provide safe and healthy conditions on board throughout the forthcoming voyage
> 14. provide the maximum of information in case of accident."[266]

It is submitted that the following conclusions should be drawn when evaluating the assessments in respect of each of the above 14 criteria:

1. Neither the Directive nor the Regulations define "relevant, valid documentation". It has to be assumed that this point refers to certificates and documents as required by the relevant conventions.[267] A vessel without such documentation would appear to always pose a hazard to people and the environment as the lack of documentation suggests a lack of surveys. A lack of surveys means that the vessel would usually not have been subject to the appropriate verification of the flag State administration and would therefore appear to pose a serious hazard by default.[268]

2. A vessel without the crew required by the Minimum Safe Manning Document is unsafe by default unless an exemption by the relevant flag State authority is carried. If the minimum crew to safely operate a vessel is not on board such a vessel poses a hazard to its own crew as well as to others and the environment.

3. A vessel which cannot safely manoeuvre is by default an unsafe vessel.

4. If cargo cannot be handled, carried and monitored safely throughout the forthcoming voyage, crew, dockers, passengers, people possibly affected by the vessel and its cargo (e.g. gas tankers) or the vessel itself may be considered unsafe.

5. An engine room which cannot be operated safely poses a hazard to persons on board and to the ship.
6. A ship without proper propulsion and steering is by definition unsafe.

7. If fires on board cannot be fought effectively it appears to be obvious that such a ship has to be considered a serious hazard.

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[263] Directive 95/21/EC, Annex VI, s. 2.
[264] Port State Control Regulations, reg. 9(3)(a).
[265] MSN 1775, Annex VI, section 2, p. 20.
[266] *Ibid*. (the layout here follows the MSN).
[267] This, I suggest, would appear to follow from, for example, the SOLAS, Chapter I, reg. 19(a), requirement that "Every ship when in a port of another Contracting Government is subject to control by officers duly authorized by such Government in so far as this control is directed towards verifying that the certificates issued under regulation 12 or regulation 13 are valid." Conventions which have to be considered would be those listed in the Port State Control Regulations, reg. 2(2).
[268] See also SOLAS 74, Chapter I, reg. 19(c), according to which "the officer carrying out the control shall take steps to ensure that the ship shall not sail" if the vessel carries no or invalid certification.

8. A vessel which cannot be abandoned speedily and safely poses a safety risk to her passengers and crew.

9. By not being able to prevent pollution a vessel constitutes a clear hazard for the environment.

10. A lack of stability throughout the voyage both poses a safety risk to all persons on board and a pollution risk to the environment.

11. One of the key functions of a ship is to float. If this cannot be guaranteed due to a lack of watertightness a ship is very apparently unsafe.

12. A vessel which cannot communicate in distress situations clearly poses a hazard to all persons on board and to other vessels requiring assistance.

13. If safe and healthy conditions cannot be provided on board a ship thus clearly poses a health and safety risk.

14. When the maximum of information cannot be provided in case of an accident it will put lives and possibly the environment at risk. Even though the term "accident" is not explained in MSN 1775 it is submitted that by analogy the definition used for reports to be made to the MAIB can safely be used in this context.[269] All the scenarios described there, although being a danger to health and safety in themselves, pose a continuous hazard unless detailed information about them is provided and an investigation has ascertained "its causes and circumstances" to prevent future accidents.[270]

It appears that a negative answer to any of the (implicit) questions posed by the 14 criteria would clearly establish that there is a hazard to health, safety or the environment. But neither the Directive, nor the PSC Regulations including MSN 1775, instruct an Inspector to detain a vessel with only one clearly hazardous defect. Neither the wording of the Directive nor the PSC Regulations appear even to contemplate the option of detaining a vessel with one clearly hazardous defect only. It seems to be arguable that such a ship cannot be detained under the PSC Regulations unless the reference to the Inspector's professional judgment[271] also refers to cases outside of those addressed by Directive and Regulations, i.e. scenarios in which only one hazardous deficiency has been identified. But that appears not to be the case. Yet, it should not pose great difficulty for a resourceful Inspector to find a second defect on a vessel he believes ought to be detained.

Regulation 9(3)(a) which incorporates Annex VI of MSN 1775 was introduced into the PSC Regulations in 2003.[272] The current text was substituted for the original text, which stated

> "(3) Without prejudice to any other requirement in the Convention enactments, when exercising his professional judgment as to whether or not a ship should be detained the Inspector shall apply the criteria set out in Annex VI of M. 1639."[273]

This wording appeared to distinguish clearly between a decision taken under the PSC Regulations for which the Inspector has to exercise his professional judgment and apply the criteria in the relevant MSN, and a decision taken under regulations which enact, for example, SOLAS or MARPOL requirements. A detention under any such instrument

[269] See MAIB 2005 Regulations, reg. 3(1)(a), (b) and (c); also MGN 289, Annex B.
[270] MAIB 2005 Regulations, reg. 5(1).
[271] "As to whether or not a ship should be detained", in Art. 9(3) of the Directive and reg. 9(3)(a) of the PSC Regulations.
[272] The Merchant Shipping (Port State Control) (Amendment) Regulations 2003, SI 2003 No. 1636, reg. 10(3).
[273] Regulation 9(3) in the unamended version of the Port state Regulations (SI 1995 No. 3128).

would not be affected by the PSC Regulations but by other merchant shipping legislation.[274]

Regulation 9(3)(a) keeps the relevant wording which refers to the Convention enactments ("…and without prejudice to any other requirement in the Convention enactments,…"). It follows, in my view, that a reference in the PSC Regulations to an Inspector's professional judgment (reg. 9(3)(a)) as to whether or not deficiencies require a detention of a vessel only cover the scenarios addressed by the PSC Regulations (and the Directive). Any other scenario, such as only identifying one clearly hazardous deficiency without any other defects, would fall outside of the scope of the PSC Regulations.

6.6. PSC and MSA detention powers: conclusion

The above analysis is unnecessarily technical, as a result of an apparent lack of clarity about the relationship between the wording of the Directive and the PSC Regulations. The result seems to lead to the following three step approach for detaining a vessel.

First, it seems that a vessel may be detained for one clearly hazardous defect only as long as it is not done under the PSC Regulations but under other provisions enacting Conventions such as SOLAS.

Secondly, a detention under the PSC Regulations is possible[275] and may even be required when one clearly hazardous defect is identified as long as it is not the only deficiency.

Thirdly, when more than one clearly hazardous defect has been found the vessel must be detained in accordance with the PSC Regulations.

The MSA 1995 would not appear to offer a fall back position for an Inspector if he wants to detain a vessel but is in doubt whether the PSC regime offers him the option to do so.[276] A ship on which he found clearly hazardous defects is not necessarily "dangerously unsafe".

For a detention under the PSC regime an Inspector would appear to be well advised to clarify in much detail in the Report of Inspection what exactly the defects are. He should further, in the Detention Notice, provide both the information about the statutory requirement, which in his professional judgment has been violated, and record all grounds why he came to such his conclusion. It would seem to be beneficial for the Inspector if the defects in the Report of Inspection are consistent with the grounds given in the Detention Notice.

A Report of Inspection is not required for a detention under the MSA 1995. However, such a report could serve to strengthen the case of the Inspector should the detention be contested by master or owner. The Inspector must state that he is of the opinion that the vessel is dangerously unsafe and specify why he is of that opinion. He does not have to specify the relevant legal provision which he believes the vessel is in breach of. A reference to the MSA 1995 appears to suffice.

In the next sections I will discuss the use of a Detention Notice and a Report of Inspection.

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[274] As mentioned above, Chapter 6, fn 129, those would be, for example, detentions covered by the ISM Regulations, reg. 16(2)(b), the Oil Pollution Regulations, reg. 35(2)(d) or the Hours of Work Regulations, reg. 14(1).
[275] Thereby assuming that it is actually the wording of the Directive 95/21/EC which applies.
[276] Or because he is not an authorised PSC Inspector.

6.7. Discretion of the PSC Inspector in practice

I will now focus on the discretion of a PSC Inspector and will, for illustrative purposes, continue to use the example of the "Ocean Glory 1".[277] That detention was also related to the communications equipment, cleanliness of the engine room and to an insufficient life boat drill.[278]

The discussion of this detention and of all other detention cases in Chapter 7 will now have to be interpreted in the light of the judgment in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport.* The Court accepted in that case that the powers of the Inspector do not need to be precisely specified in the Detention Notice. [279] Flaux J did not comment on what other information such a notice is supposed to carry or what would constitute good practice. It was particularly not discussed whether or not it is required to specify the relevant statutory provision in the Detention Notice in respect of what constituted the defect.[280] There appears to be a strong body of other case law which suggests that Detention Notices must provide detailed information to a recipient as to the reasons for the detention, i.e. describing what is, and why it is, wrong.[281] Assuming that there is now no need in a Detention Notice to specify the provision as to the powers granted to the Inspector other than a reference to the MSA 1995, I will in my conclusions address what I believe the requirements for information are and what would appear to constitute good practice. I am of the opinion that the case law dealing with prohibition notices in health and safety and planning law provides by contrast to the *Club Cruise* case a much more detailed analysis of the information a recipient of a Detention Notice is supposed to receive. That case law does not appear to contradict the *Club Cruise* judgment,[282] but rather specifies that the reasons for the detention which the Inspector has in his mind at the time of issuing the Detention Notice are clearly conveyed to the recipient of it.

6.7.1. Communications equipment

The recorded defect was "SAT C duplicate set inoperative due to faulty aerial".[283] The Radio Installation Regulations provide for the power to detain where a ship does not comply with the requirements of the Regulations.[284]

It is only a requirement of the Regulations for a ship operating in area three[285] to have on board a second ship earth station if the means of initiating the transmission of ship-to-shore distress alerts has been chosen to be an additional ship earth station.[286]

From the existing information in the Report of Inspection it cannot be verified whether that was the case, but the master of the vessel will have known about it. If, therefore, this requirement was not complied with, a ground for a detention would appear to have been present.[287]

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[277] See above, Chapter 6.3.1.
[278] Report of Inspection on file, MS 071/003/1646, part two.
[279] Chapter 6.3.1.
[280] The Court in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 25, did not require the Inspector to record in the Detention Notice what standards he had in mind at the time he issued the notice to the ship.
[281] See above, Chapter 6.3.1.
[282] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 25.
[283] See above, Chapter 6.3.1.
[284] The Merchant Shipping (Radio Installations) Regulations, SI 1998 No. 2070 (hereafter "Radio Regulations"), reg. 49(1).
[285] "'Sea area A3' means an area, excluding sea areas A1 and A2, within the coverage of an INMARSAT geostationary satellite in which continuous alerting is available", Radio Regulations, reg. 7. According to reg. 7 the areas are defined in the Admiralty List of Radio Signals.
[286] Radio Regulations, reg.14(1), Alternative A, (d)(iii).
[287] See the discussion on proportionality and the risk to life below (*(a) health risk*).

6.7.2. Engine room cleanliness

The second defect used to justify the detention was "oil on tanktops main engine room & auxy engine room".[288] The report did not specify the provisions which the ship did not comply with, other than referring to IMO Resolution 787 but without giving any details.[289]

The recorded defect could possibly have constituted a violation of health (e.g. slippery floor), safety (fire risk)[290] and environmental protection provisions (risk of pollution). The record in the Report of Inspection did not make it clear to the master why in particular this defect constituted a ground for detention.

I will discuss the three risks in turn.

(a) Health risk

A slippery floor is only of relevance in so far as

> "The employer and master shall ensure that safe means of access is provided and maintained to any place on the ship to which a person may be expected to go."[291]

An oily and thereby slippery tanktop does not in my opinion provide safe means of access to valves, pipes and other equipment or machinery located on the tanktop, and unless there was an accidental spill which could not have been cleaned up yet, would appear to constitute a breach of the regulations. This view is supported by the advice in the Code of Safe Working Practices[292] which, however, does not have to be kept on board of foreign flagged ships.[293]

> "Waste oil should not be allowed to accumulate in the bilges or on tank tops. Any leakage of fuel, lubricating and hydraulic oil should be disposed of in accordance with Oil Pollution Regulations at the earliest opportunity."[294]

An Inspector may when "he is satisfied that the ship does not conform to the standards of health and safety required of United Kingdom ships by these Regulations" detain a ship "where conditions on board are clearly hazardous to safety or health".[295]

There do not appear to be any authorities defining the requirements for an Inspector to be satisfied that a ship does not conform to the relevant health and safety requirements. The

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[288] See above, Chapter 6.3.2.

[289] IMO Resolution A.787(19), which has been amended by Resolution A.882(21), deals with procedures for port state control. It does not provide a legal basis for a detention because it is not incorporated into UK law.

[290] As a reference code for the SIRENAC data base the defect was classed in case of "Ocean Glory 1" under the 0700 code series "fire safety measures" as "0799 – other (fire safety)", see Annex 21 (PSC short version codes, hereafter "PSC Codes")). As the Inspector can only record one code (see the Report of Inspection form, Annex 19) which is used to categorise the data in the Paris MoU data bank, the code used may give an indication about the matters the Inspector thought were unsafe but can, in my view, not be used to explain the reason upon which the opinion of the Inspector is based (see also the discussion above in Chapter 5.2.3.) A master, unless being in possession of a PSC Codes list, will usually not know what the codes stand for.

[291] The Merchant Shipping (Safe Movement on Board Ship) Regulations 1988, SI 1988 No. 1641 (hereafter "Safe Movement Regulations"), reg. 4(1).

[292] The "Code is concerned with improving health and safety on board ship….Much of the Code relates to matters which are the subject of such regulations. In such cases the Code is intended to give guidance as to how the statutory obligations should be fulfilled. However, the guidance should never be regarded as superseding or amending regulations", Code of Safe Working Practices (COSWOP), Revision 2.03, Introduction, p. 17, para. 1.

[293] The Merchant Shipping (Code of Safe Working Practices for Merchant Seamen) Regulations 1998, SI 1998 No. 1838, reg. 3.

[294] COSWOP, Chapter 15.7.6. The principle underlying this advice is, however, applied on a world wide basis by responsible ship owners.

[295] Safe Movement Regulations, reg. 15(1)(b)(ii).

condition that an "Inspector has to be satisfied" can, however, be found in other public law contexts.[296]

In *Banks v. Secretary for the Environment*[297] an Inspector had issued a Movement Restriction Notice (MRN) for a beef herd which effectively prevented the herd from entering the human food chain.[298] The relevant regulation provides

> "Where an Inspector is satisfied he has reasonable grounds for supposing that any TSE[299] susceptible animal has been fed mammalian meat and bone meal… he shall by notice in writing served on the owner or person in charge of the animal prohibit or restrict the movement of the animal from the premises described in the notice."[300]

According to Sullivan J the test in this case is

> "not whether the Inspector has reasonable grounds for supposing, but whether he is satisfied that he has such grounds. If he is so satisfied he must serve a MRN. Given this subjective element, the grounds upon which the Court can review an Inspector's decision to serve a MRN are limited to those available in a conventional Wednesbury challenge. It is not for the Court to substitute its own view of whether there were 'reasonable grounds for supposing' …".[301]

The "Wednesbury challenge", as the Court put it, or the "Wednesbury unreasonableness"[302] is constituted by an administrative action which is irrational.[303]

> "It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[304]

It appears that in the *Banks* case[305] this approach as opposed to the "more precise and more sophisticated"[306] criteria used in *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[307] is justified in so far as the Court had to decide whether the Inspector's grounds were reasonable. But the judge seems to have decided two different questions by applying the Wednesbury challenge. Those were, first, that not only the grounds which the Inspector had were reasonable, but also, secondly, whether he was right to be satisfied. Whereas for the first point the "unreasonableness" decision might suffice, it is my view that for the latter point it does not necessarily do so. A balancing act taking into consideration the impact of the decision on all parties involved appears to be required as well. As Lord Steyn pointed out "the intensity of review is somewhat greater under the proportionality approach."[308]

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[296] Although this discussion touches upon issues which were addressed in Chapter 5.2.3. But as the particular wording addressed here ("the Inspector is satisfied") has not been interpreted before in this thesis (and in the context of merchant shipping legislation), I considered it important to do so.
[297] [2004] EWHC 416 (Admin).
[298] *Ibid.,* para. 2.
[299] Transmissible Spongiform Encephalopathy.
[300] The TSE (England) Regulations 2002 (as amended), SI 2002 No. 843, reg. 29A(1), see *Banks v. Secretary for the Environment,* para. 9.
[301] *Banks v. Secretary for the Environment,* para. 10. R Matthews, J Ageros, *Health and Safety Enforcement,* 2007, para. 4.93, are of the opinion that it is currently unclear as to whether appeal proceedings under HSWA 1974, s. 24 "should be limited to a review of the Inspector's opinion". In my view the conclusion of Sullivan J that the Court is not to substitute its own view for that of the Inspector is in line with the other decisions as outlined below. It would appear that even though there are three options in s. 24 (cancel, affirm or affirm and modify) they only provide the option to say that the Inspector was wrong (because the decision was perverse, see below) or that he was right. The right for a modification only applies when it was first established that his notice is to be affirmed. Any modifications will therefore not change the substantial decision of the Inspector.
[302] *Council of Civil Service Unions v. Minister for the Civil Service Respondent* [1985] AC 374, p. 410.
[303] *Ibid*.
[304] *Ibid*.
[305] [2004] EWHC 416 (Admin).
[306] Lord Steyn in *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532, para. 27.
[307] [1999] 1 AC 69, p. 80.
[308] Lord Steyn in *R (Daly) v. Secretary of State for the Home Department*, para. 27. See also above, Chapter 5, fn 55.

If Sullivan J's approach would suffice it would follow that unless the Inspector's decision is perverse it is "entirely that of the Inspector".[309] In my opinion this approach will have to be qualified by particularly looking at the three differences as addressed by Lord Steyn between the traditional Wednesbury principle and the refined approach accepted by the Privy Council.[310]

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex parte Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights."[311]

In my understanding this approach would seem to suggest that the decision, already not being perverse or outrageous, is not entirely that of the Inspector. He will, first, not only have to make a rational and reasonable decision but will also have to ensure that he strikes a balance between the interest of the State and the individual. Secondly, the balancing interests will have to be weighted so that it becomes clear which considerations ought to prevail. Thirdly, if an interference with a human right is at stake it might not be sufficient that the decision is reasonable within the balancing act carried out by the Inspector.[312] What appears to be important under such circumstances is that the State in pursuing its interest not only ensures "the use of the least drastic means, and no disproportionately severe effect on those to whom the restriction applies",[313] but in addition must balance the individual human right, which may go beyond the pure freedom of the individual, with the interest of the State or rather the impact on the larger community.

Applying the whole discussion to a detention under the Safe Movement Regulations (or any other similar provisions) suggests two steps. First, it is not the question whether or not the ship conforms to the standards of health and safety required by the UK, but only whether or not the Inspector is satisfied that the vessel does not so conform.[314] It would, however, not suffice that the Inspector's decision is rational, i.e. not outrageous in its defiance of logic or accepted moral standards or is not perverse, an Inspector will have to make his decision within the given parameters of the law.[315] Secondly, if the law offers him some discretion[316] the decision to detain is only his to the extent that it is proportionate. The detention is only proportionate when a balance has been struck between the interest of the State and the individual taking particularly into account that a human right is affected.[317]

In short, (taking the "Ocean Glory 1" example) if an Inspector is satisfied that the oil on the tanktop made the vessel not to conform with UK legislation he would only appear to

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[309] *Little v. George Little Sebire & Co* [2001] EWCA Civ 894, para. 18. See also the discussion on Detention Notices and arbitration below in Chapter 8.5. In this tax law case the Court of Appeal commented on the role of a tax Inspector: "The judge said that the fact was that the Inspector of Taxes was not satisfied of that as at 30 April 1993 on the material available to him, and that unless that view was perverse, the judge could not substitute a different conclusion, the decision being entirely that of the Inspector. The judge found that the decision was not perverse and so regarded himself as bound to approach the case on the basis that the shares became of negligible value during 1994/95."

[310] In *Elloy de Freitas* [1999] 1 AC 69, p. 80.

[311] *R (Daly) v. Secretary of State for the Home Department*, para. 27.

[312] The test in *ex parte Smith* [1996] QB 517*,* p. 554, which Lord Steyn refers to appears to be as follows: "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

[313] *Elloy de Freitas,* p. 80.

[314] See also the discussion of the *Club Cruise* case in Chapter 5.2.3.

[315] For the comparison of a Detention Notice with a shore-based prohibition notice see above, Chapter 6.3.

[316] As in the Safe Movement Regulations where when "he is satisfied" he may detain the ship, reg. 15(1)(b)(ii).

[317] Which would, in case of a detention, be Art. 1 of the First Protocol to the Human Rights Convention, see discussion above, Chapter 3.3.

be justified in his decision to detain the vessel if he could establish that such an interference with property rights[318] is justified, because otherwise a disproportionately severe effect would occur for other individuals. Such would be the case if the unsafe access would have put human life in danger.[319]

However, a Detention Notice specifying this matter was not issued in case of "Ocean Glory 1" where the reference in the Report of Inspection referred to fire safety only.[320] Even if reference had explicitly been made in the report to a lack of safe means of access[321] it would, in my opinion, not justify such "a substantial interference in the freedom of an industrial undertaker or commercial undertaker to run his business" [322] unless it was dangerous to walk anywhere on the tanktop. It would appear that such a hazard ought to have been specifically addressed on the Detention Notice or in the Report of Inspection.

(b) Safety (fire) risk

The fire risk of an oily tanktop is not specifically covered in any statutory provision. As noted already, where a ship in a port of the UK appears to an Inspector to be dangerously unsafe[323] he may detain the ship.[324]

It appears that when there is a risk of fire a vessel would not be fit to go to sea because serious damage to the ship could occur.[325] If serious damage to the ship was likely it would inevitably also establish a serious danger to human life, and thereby seem to give an Inspector a reason to detain the ship.[326] The proportionality requirement ought not to pose an obstacle as a risk to life is at stake. But in the "Ocean Glory 1" case, the Detention Notice had not clarified what was wrong and why. The general fire risk had only

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[318] And it would appear not only the owner but possibly also other members of the community relying on the service of the vessel.

[319] The right to life is considered "one of the most fundamental provisions in the Convention - indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe", *McCann v. United Kingdom* (1995) 21 EHRR 97, para. 147. According to Lord Bingham, *R (Middleton) v. West Somerset Coroner* [2004] 2 AC 182, para. 5, it must rank "among the highest priorities of a modern democratic state governed by the rule of law" to comply with the substantive obligations "to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life", para. 2. See also above, Chapter 3.3. the discussion of Art. 1 of the First Protocol to the Human Rights Convention.

[320] See above, Chapter 6.7.2. where it is addressed that the PSC Codes used (0799) only referred to fire safety in general.

[321] Which would have been PSC Code 0530.

[322] To use the words of Roch J when describing the impact of a prohibition notice on a shore based business in *Readmans Ltd v. Leeds City Council* [1992] COD 419, p. 4 of the transcript.

[323] The meaning of a dangerously unsafe ship is regulated in the MSA 1995, s. 94, set out above, Chapter 5.2. See also the discussion below, Chapter 6.7.3.

[324] MSA 1995, s. 95(1)(a) and tailpiece. See also the discussion above in Chapter 5.2.

[325] See, for example, *Overseas Tankship (U.K.) Ltd v. The Miller Steamship Co. Pty (The Wagon Mound 2)* [1967] 1 AC 617, p. 643, where, however, the oil was not on the tanktop but surrounding the vessel on the surface of the water.

[326] According to Lord Nicholls in *In re McKerr* [2004] 1 WLR 807, para. 18, the State has the "positive obligation… to protect everyone's life". The authorities will have violated their positive obligation if it is established that "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals", *Osman v. United Kingdom* (1998) 5 BHRC 293, para. 116. But in the eyes of the Court of Appeal Art. 2 of the Human Rights Convention will engage at an earlier stage (a lesser degree of risk to life) because "such a degree of risk [real and immediate] is well above the threshold that will engage article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself", *R v. Lord Saville of Newdigate* [2002] 1 WLR 1249, para. 28. This view, does, however, not seem to be supported by the House of Lords. *In re Officer L* [2007] 1 WLR 2135, para. 20, Lord Carswell established with the support of the House that "the standard [of establishing whether or not a risk to life exists] is constant and not variable with the type of act in contemplation, and is not easily reached". The latter appears to be explicitly supported by the House of Lords in *Chief Constable of the Hertfordshire Police v. van Colle* [2008] UKHL 50, para. 35, and it was questioned by Lord Bingham, para. 34, whether the above cited observation by the Court of Appeal in *Lord Saville of Newdigate,* para. 28, was correct. The *Osman*-test would appear to be the applicable test, *van Colle*, para. 35.

been recorded on the Report of Inspection in the form of a mini code[327] which the master will most likely not have understood.[328] Neither the Detention Notice nor the Report of Inspection spell out that there is a fire risk and it would appear to depend on the professional expertise of the master whether or not he would link oil on the tank top to a fire risk. Still, if the quantity of oil on the tanktop would have posed an obvious[329] fire risk it would appear to be sufficient to have recorded that there was oil. More details would only seem to have been required if the fire risk would not have been recognisable for a reasonable professional seafarer. But if the Inspector had wanted to play it safe he would probably have estimated the quantity to ensure such a record would have been available in case of a challenge of the detention.

(c) Risk of pollution

Every ship over 400 gt has to have a tank for oil residues from oil leakages in machinery spaces.[330] Such a tank shall not have a direct connection overboard.[331] The owner and master of every foreign flagged ship have to ensure that the condition of their ship shall comply with the requirements of MARPOL, Annex I.[332]

The tanktop in the machinery spaces, however, has to have a direct connection to the sea so that water entering the hull, i.e. in this case the machinery space (e.g. in case of collision or grounding) "can be pumped out through at least one suction pipe".[333] Thus, oil on the tanktop constitutes a risk of accidental or deliberate pollution as it could be pumped overboard through the bilge pumping system and must therefore be kept in the sludge or slop tank. Consequentially it is considered to be a defect which may warrant the detention of a ship under the PSC Regulations when the "remaining capacity of slop and/or sludge tank [is] insufficient for the intended voyage".[334]

However, the requirement to have a clean tanktop is not covered expressly by the Oil Pollution Regulations or MARPOL[335] which do not state that oil cannot be kept on the tanktop and thus do not provide the power to detain a ship for such a defect.[336]

But a detention would still appear to have been justified if the oily tank top clearly constituted a hazard for the environment, provided the decision for a detention followed the procedures under the PSC Regulations.[337] It would seem that unless more than one clearly hazardous defect had been identified an Inspector would have to apply his reasonable judgment as to whether to detain or not.[338] For the latter, the detaining officer would have to weigh up the impact on the environment compared with the affect on a community and individuals by and relying on the movement of the vessel. For example, it would in my opinion be arguable whether it was justifiable and proportionate to detain a

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[327] Also called "PSC short version codes", see Annex 21.
[328] See above, Chapter 6.7.2.
[329] For a reasonable professional seafarer who is aware of fire risks on his ship, see the discussion above, Chapter 6.7.2. (*(a) health risk*).
[330] MARPOL, Annex I, Regulation 17(1).
[331] *Ibid*., Regulation 17(3).
[332] Oil Pollution Regulations, reg. 5(1)(b).
[333] The Merchant Shipping (Cargo Ship Construction) Regulations 1997 (SI 1997 no. 1509), reg. 12 referring to MSN 1671, Schedule 1, para. 1 (for cargo ships). The Regulations apply to foreign flagged ships over 500 gt while they are within UK national waters, reg. 4(a)(ii) and (iii).
[334] MSN 1775, Annex VI, section 3.6.2.
[335] MARPOL (referring to the version and Chapter numbering as was the case at the time of the detention of "Ocean Glory I") Annex I, Chapter II, reg. 9(6) required that "oil residues which cannot be discharged into the sea … shall be retained on board…". MARPOL did not explicitly oblige ships to have a clean tanktop or bilges. It only required every ship of 400 gt and above to be provided with adequate tank capacity to collect oil residues during the voyage, Annex I, Chapter II, reg. 17(1). Under the redrafted Annex I reg. 9(6) is now reg. 15(9) and reg. 17(1) is reg. 12(1).
[336] Oil Pollution Regulations, reg. 35(2). Regulation 35 restricts the power to detain a vessel to relevant breaches of the Oil Pollution Regulations, but does not cover violations of other statutory instruments.
[337] Port State Control Regulations, reg. 9(2)(a), see discussion below, Chapter 12.
[338] See below, Chapter 6.5.

vessel if only a small quantity of oily bilge water was at stake,[339] but where the losses for the other part of the community[340] would be high or, for example, if public health were to be affected.[341]

Nonetheless, a Detention Notice based on a hazard to the environment was not issued in the "Ocean Glory 1" incident.

6.7.3. Life boat drill

Safety drills are covered by the Merchant Shipping (Musters, Training and Decision Support Systems) Regulations 1999.[342] The Regulations apply to UK ships and to other seagoing ships while they are in UK waters.[343] Each member of the crew shall participate at least in one abandon ship drill every month.[344] Requirements for such drills are listed in reg. 10.[345]

The Musters Regulations do not give an Inspector the power to detain a vessel, but in case of a breach of a requirement of the Regulations the master and owner of the vessel shall be guilty of an offence.[346] A criminal prosecution was not instigated in the case of the "Ocean Glory 1".

As the PSC Regulations do not require reference to another statutory provision, but only that defects are clearly hazardous, a ground for detention exists when that is the case.[347] But it would appear that the Detention Notice would as a minimum have to clarify which of the enumerated conditions in the Musters Regulations[348] the ship was in breach of,[349] or for what other reason a lifeboat drill was "unsatisfactory".[350] Failing that, the Report of Inspection would have to serve as a source of information for the master.

In the case of the "Ocean Glory 1" no details were provided in either document. Such a finding would suggest that the detention on this ground ought to have been invalid. Even if the judgment in *Club Cruise* would be followed to the letter it would not appear to be clear what standards the Inspector had in mind[351] when he concluded that the drill was "unsatisfactory". Such poor documentation can hardly be described as a mere "inaccuracy" or "misdescription" because the Detention Notice did not tell the master what was wrong.[352]

6.8. Lessons from the "Ocean Glory 1" case

It would appear that the "Ocean Glory 1" was detained on the basis of a defective Detention Notice because the deficiencies were not satisfactorily specified. Although the Report of Inspection cannot act as a substitute for a defective notice it would provide

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[339] That means some oily bilge water would still be present in the machinery spaces and in addition there is no indication that illegal discharges have taken place in the past.
[340] For example, losses for owner, charterer, port, or consignees; or when, for example a small island community waiting for essentials to be delivered by the vessel in question would be affected.
[341] In case, for example, of an island community waiting for fuel supply for their power station.
[342] SI 1999 No. 2722, hereafter "Musters Regulations".
[343] Reg. 3(1)(a) and (b).
[344] Reg. 8(2).
[345] Of the Musters Regulations. Reg. 10(1) lists in letters (a) to (i) what each abandon ship drill shall include.
[346] Reg. 15(1).
[347] PSC Regulations, reg. 9(2)(a). See also discussion above, Chapter 6.5.
[348] Regulation 10(1).
[349] But see the discussion above in Chapter 6.3.1. ((a) ..in the club cruise case); the decision in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* would appear not to have required such detail, para. 29.
[350] As was plainly stated in the Report of Inspection, on file.
[351] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 25.
[352] See the discussion above in Chapter 6.3.1. and the relevant reference to *Ormston v. Horsham Rural District Council* (1966) 17 P. & C.R. 105, p. 108.

evidence which must be considered as to whether the detention over all was justified. In this case all reasons addressed in the Report of Inspection could have called for a detention if the facts would have supported the decision that clear hazards existed. But the latter cannot be verified from the Notice of Detention or the Report of Inspection in respect of the defects recorded as grounds for the detention. It would seem, however, to be obvious that the sheer number of defects suggests that the ship was unsafe. When considering both, the Detention Notice and the Report of Inspection with regard to all defects a decision to detain the vessel would still appear to be proportionate. The balance that would have had to be struck appears to be that the interest of the State in protecting human life would have outweighed the property interest of the individual owner.[353]

As a result I am of the opinion that despite the notice having been defective the detention ought to have stood a fair chance of being modified in an appeal procedure.[354] For if an arbitrator actually takes into account all circumstances[355] the state of the vessel ought to make it clear that a detention was justified.

I will next look at selected detentions over the period between 2001 to 2005.

[353] See the discussion above on detention and human rights, Chapter 3.3. and the proportionality debate in Chapter 6.7.2.
[354] See the discussion about a modification of a Detention Notice below, Chapter 6.3.1 (*(b) The Detention Notice in the Club Cruise case*).
[355] See also the discussion in Chapter 8.5.

Chapter [7] – Analysis of detentions under the port state control regime

7.1. Introduction
7.2. Ships which were issued with multi-defect Detention Notices
7.3. Analysis of Detention Notices of multi-defect detentions
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7.3.8. Detention under the Construction Regulations
7.3.9. Detentions under the Safety of Navigation Regulations
7.3.10. Detention under the Guarding Machinery Regulations
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7.5. Analysis of Detention Notices of single defect detentions
7.5.1. Detentions under the Load Line Regulations
7.5.2. Detentions under the LSA Regulations
7.5.3. Detentions under the Safety of Navigation Regulations
7.5.4. Detention under the Fire Protection Regulations
7.5.5. Detention under the Safe Manning Regulations
7.5.6. Detention under the Survey and Certification Regulations
7.6. Detentions – conclusions

7.1. Introduction

This Chapter contains the only systematic analysis ever undertaken of UK ship detention practice. The detailed analysis in Chapter 7.2. to 7.5. of some 112 sets of reasons is not always easy reading, but it is necessary because no real evaluation has ever been done on how and why UK Inspectors detain vessels. In Chapter 7.6. I pull together the results of the detailed analysis (in 7.2. to 7.5.) in order to see what lessons can be learned about UK practice.

To illustrate the justification for a detention of foreign flagged ships in the UK[1] within the feasibility of this thesis, I selected ships with the five highest numbers of detentions ("high defect detentions" also referred to as the "multi-defect detentions") for analysis for each year between 2001 and 2005 and on the opposite end of the scale the vessels which only had one deficiency ("single defect detentions"), but were detained for that defect.[2] This appears to be of interest as it will suggest whether a higher level of accuracy has been employed by the PSC Inspector to write out the Report of Inspection and Detention Notice for single defect detentions.[3] It will also show whether detentions were effected under different statutory instruments.[4] Each ship's file was inspected to obtain more detailed information than is available on the MCA website.

Out of a total of 26 requested multi-defect files[5] 19 could be obtained.[6] The other files were in use or had not yet been returned to the central file registry.

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[1] For the reasons to only look at foreign flagged ships see above, Chapter 5.3.
[2] I will distinguish the files by multi and single defect files.
[3] It would appear that a single defect detention does not provide the inspector with any safety net should he make a decision about that single defect which would later be reversed by an arbitrator. See also the discussion below under Chapter 6.2.
[4] See also the discussion below in Chapter 6.2.
[5] Six files instead of five per year were requested for 2003 as two vessels had an identical number of recorded defects, i.e. "Donetsk" (detention 37/2003 – the number refers to the running number in the relevant year of "Detention of Foreign flagged Ships" (here Annex 11), and "Glacier Bay" (detention 109/2003, Annex 11); neither file could be obtained.

The lowest number of recorded defects (of the group of vessels with the highest number of defects) was 35,[7] and the overall record holder was the Panamanian general cargo vessel "African Warrior" with a total of 80 deficiencies.[8]

But the number of deficiencies is not necessarily a reason for a detention, as can be seen from the total of 16 detentions of vessels with only one recorded defect.[9] However, a high total number of deficiencies can provide its own ground for a detention.[10]

All files for the total of 16 single defect detentions[11] which I identified on the MCA website throughout the same period were requested.[12] But out of these 16 files I could in the end only use 10 for the intended purpose.[13]

Most of the ships with the highest numbers of deficiencies were detained for a variety of reasons.[14] I will discuss each of them clustered by subject, i.e. the reasons for a detention under, for example, the Fire Protection Regulations[15] or the ISM Regulations.

I will begin the discussion of all detention grounds by first looking into the high defect detentions after which I will turn to the single defect detention cases.

7.2. Ships which were issued with multi-defect Detention Notices

Before I begin to examine the details of each individual ground for a detention found on the face of the Detention Notice I will first provide an overview of the relevant vessels and their number of defects. This list provides information of what kind and type of vessels were affected, what the total number of defects were and which different sets of regulations were applied in each case. The list provides an overview of the detentions discussed by sequence of events beginning in 2001 and allows to focus on the legal analysis in the discussion of the multi-defect detention cases.

The specific legislation the vessels were detained under is referred to and summarised in a table.[16]

(1) "RMS Aramon"

The 499 gt Bahamian flagged general cargo vessel "RMS Aramon"[17] was built in 1978. During the PSC Inspection 32 defects were identified. The reason given for the detention[18]

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[6] See above Chapter 5, fn 111.
[7] Panamanian passenger vessel "Ocean Glory 1" (detention 35/2001, Annex 9).
[8] Detention 11/2003, Annex 11.
[9] Detentions no. 80, 88/2001 (Annex 9), detentions no. 48, 54, 65, 109/2002 (Annex 10), detentions no. 13, 42, 45, 79, 91, 93/2003 (Annex 11), detention no. 19/2004 (Annex 12), detentions no. 33, 59, 78/2005 (Annex 13).
[10] E.g. "Walili", which was detained on five grounds, one of them being a violation of the ISM Code, s. 10, as was recorded in the "Report of Inspection", p. 5 on file MS 071/03/2123; this information cannot be found in the MCA information on the website, detention 31/2005, see Annex 13. But see below the discussion about detentions for a contravention of the ISM Code under "Paloma C".
[11] See a list of all single defect detention ships in Annex 25.
[12] See Annex 25.
[13] One file was not found ("Apollo Fox", Annex 11, 93/2003), in one case I had asked for the wrong vessel ("Multi Coaster", Annex 12, 20/2004 instead of "Sava Ocean", Annex 12, 19/2004). In another case the detention was dealing with outstanding defects from Antwerp ("Gulser Ana", Annex 10, 65/2002). The next vessel not dealt with had more than one defect ("Ocean Comfort", Annex 11, 45/2003), and the last two detentions which I did not deal with ("Rasa", Annex 9, 88/2001 and "Tafelberg", Annex 10, 54/2002) occurred in Gibraltar and not in the UK.
[14] The reasons will be discussed below in Chapter 7.3.
[15] The Merchant Shipping (Fire Protection: Large Ships) Regulations 1998, SI 1998 No. 1012, hereafter "Fire Protection Regulations". For more detail see below, Table 6.
[16] Annex 24.
[17] File MS 071/003/1654.
[18] Detention no. 43 on 16 July 2001 (Annex 9).

was “see attached lists [word unreadable] MCA forms MSF 1600 (x1) and MSF 1601(x5)”. No applicable legislation under which the ship was detained was specified.

(2) “Gulser Ana”

The Detention Notice[19] in the case of the Turkish flagged 23,602 gt bulk carrier “Gulser Ana” [20] which was built in 1984 recorded six grounds why the ship did not comply with, and addressed three different sets of, Regulations.[21] The total number of deficiencies found on board was 40.

(3) “Spyros”

The Greek flagged 13,661 gt general cargo vessel “Spyros”[22] which was built in 1974, was detained[23] on nine different grounds according to the Detention Notice and on 12 different grounds according to the Report of Inspection. Such a difference between Detention Notice and the Report of Inspection appears to prove that the Report of Inspection cannot be considered to be sufficient for the provision of detailed grounds as to why the vessel is detained.[24] It is not clear why the Inspector provided two different counts of reasons for a detention. Such a difference is a rather frequent occurrence,[25] and I can only assume that the full oversight was lost in the heat of the moment.[26]

The total number of defects found on board amounted to 36.

(4) “Pongo”

After the 664 gt Bahamian flagged general cargo vessel “Pongo”,[27] which was built in 1981, had been detained in 2001[28] it was detained again in 2002.[29] It is the latter detention I will be discussing.[30]

The “Pongo” was detained on three different grounds and the total number of defects found on board was 26.

(5) “Lily”

The Brazilian flagged bulk carrier “Lily”[31] was detained[32] on eight grounds according to the Detention Notice, and on 11 grounds when consulting the Report of Inspection. 42 defects were identified on board the 28,347 gt vessel which was built in 1984.

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[19] Detention no. 72 on 16 October 2001 (Annex 9).
[20] File MS 071/003/1347.
[21] The Merchant Shipping (Life-Saving Appliances for Ships other than Ships of Classes III to VI(A)) Regulations 1999, SI 1999 no. 2721, (hereafter the LSA Regulations); the Merchant Shipping (Fire Protection: Large Ships) Regulations 1998, SI 1998 No. 1012, (hereafter “Fire Protection Regulations”) and the Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, SI 1998 No. 1561, (hereafter “ISM Regulations”).
[22] File MS 071/003/1730
[23] Detention no. 21, 1 March 2002 (Annex 10).
[24] See discussion above, Chapter 6.3.
[25] See below “Lily” (5), “Ist” (6), “Panagia Odigitria” (7), “Nememcha” (8), “African Warrior” (11), “Paloma C” (13), “Balkan Future” (16), “Walili” (17).
[26] See also the discussion above in Chapter 6.2. and particularly above, Chapter 2, fn 134.
[27] File MS 071/003/1193. “Pongo” is a 664 gt general cargo vessel, see Report of Inspection, p. 1 (on file 1193).
[28] Detention no. 73 on 18 October 2001, (Annex 9).
[29] Detention no. 73 [coincidentally the identical number, see Annex 10] on 30 September 2002 (Annex 10).
[30] It proved impossible to obtain the 2001 file. The 2002 detention was still one with a rather large number of defects, a total of 26 (on the website it said 28).
[31] 28,347 gt, file MS 071/003/1764.
[32] Detention no. 53 on 26 July 2002 (Annex 10).

Three grounds were recorded as falling under the Fire Protection Regulations, two under the LSA Regulations, one under the Guarding Machinery Regulations[33] and two under the ISM Regulations.

(6) "Ist"

The Croatian bulk carrier "Ist"[34] was detained[35] for three different reasons under the ISM Regulations. The defects do not tally with the reasons for a detention given in the Report of Inspection. That report lists three major non-conformities (MNC)[36] which are not allocated the Action Code for a detention.[37] Instead the deficiency "port & stbd lifeboat falls block cheek plates badly wasted rectify", recorded on the following page, carries Action Code number 30.

The 1981 built vessel was found to have 44 "hardware deficiencies".[38]

(7) "Panagia Odigitria"

The Marshall Islands flagged bulk carrier "Panagia Odigitria"[39] was detained[40] on 10 grounds according to the detention report written by the detaining officer.[41] The Detention Notice,[42] however, only lists eight grounds for the detention.

The 41,643 gt bulk carrier, built in 1984, vessel was found to have "over 30" hardware deficiencies.[43]

(8) "Nememcha"

The 16,013 gt Algerian flagged bulk carrier "Nememcha"[44] was detained[45] for seven different reasons. The number does not tally with the Report of Inspection on which 10 reasons[46] for a detention are recorded.

The 1977 built vessel had a total of 49 recorded defects.

(9) "Berrak N"

The Turkish flagged bulk carrier "Berrak N"[47] was detained[48] for nine different deficiencies which appear to tally with the relevant number of defects in the Report of Inspection.[49]

The vessel was of 9,801 gt, was built in 1977 and had 53 identified defects.

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[33] The Merchant Shipping (Guarding of Machinery and Safety of Electrical Equipment) Regulations 1988 (hereafter "Guarding Machinery Regulations"), SI 1988 No. 1636.
[34] File MS 071/003/1825.
[35] Detention no. 102 on 6 December 2002 (Annex 10).
[36] Report of Inspection, p. 2.
[37] Action Code 30 (grounds for detention).
[38] Report of the Inspector, on file MS 071/003/1825.
[39] File MS 071/003/1823.
[40] Detention no. 105 on 17 December 2002.
[41] On file 1823.
[42] Of which there were two on file one of which appears to be incomplete and will not be discussed here. This conclusion appears to be justified by the detention report referring to "doc. 4". The relevant Detention Notice has been numbered by hand and was given number four.
[43] Report of the Inspector, on file MS 071/003/1823.
[44] File MS 071/003/1824.
[45] Detention no. 106 on 20 December 2002 (Annex 10).
[46] If I include a MNC which was not also given the Action Code 30 (grounds for detention), see Report of Inspection, p. 3.
[47] File MS 071/003/1826.
[48] Detention no. 4 on 6 January 2003 (Annex 11).
[49] Although p. 8 out of 11 pages of the Report of Inspection was missing on file.

(10) “World Trader”

The Panamanian flagged general cargo vessel “World Trader”[50] was detained[51] for eight deficiencies under four different sets of Regulations.

40 defects were found on the 1980 built vessel of 35,345 gt.

(11) “African Warrior”

The 12,030 gt Panamanian dry cargo vessel “African Warrior”,[52] which was built in 1978, was detained[53] with the highest number of deficiencies during the observed period.[54] The vessel was detained on 11 grounds but the Report of Inspection only shows nine reasons for detention. This appears to result from an unclear listing of defects on the face of the Detention Notice. The discrepancy is based on the first three grounds on the Detention Notice being clustered together under one defect in the report.[55]

(12) “Wisteria”

The Panamanian flagged refrigerated cargo vessel “Wisteria”[56] was detained[57] on five different grounds with 47 deficiencies being identified.

The 5,131 gt vessel was built in 1991.

(13) “Paloma C”

The Panamanian bulk carrier “Paloma C”[58] was detained[59] on seven grounds. Three MNCs were also recorded in the Report of Inspection together with which the report shows nine reasons for a detention. But in the report the MNCs were not addressed as grounds for the detention.[60] No single regulation the vessel was supposed to be in breach of had been identified on the Detention Notice.

A total of 43 defects was found on the 37,614 gt vessel built in 1982.

(14) “Vigo Stone”

The 5,365 gt Irish flagged general cargo vessel “Vigo Stone”, built in 1972,[61] was detained[62] on three different grounds with a total of 49 defects. No reference to UK legislation was made but instead relevant chapters of SOLAS were quoted.

(15) “Lobelia”

The Maltese flagged bulk carrier “Lobelia”[63] was detained[64] on one ground under the Load Line Regulations. A specific regulation was not quoted.

The total number of defects on this 16,490 gt vessel built in 1981 was 48.

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[50] File MS 071/003/1834.
[51] Detention no. 7 on 16 January 2003 (Annex 11).
[52] File MS 071/003/1837.
[53] Detention no. 11 on 28 January 2003 (Annex 11).
[54] The Report of Inspection shows a total of 83 as opposed to 80 defects on the MCA web page.
[55] Defect No. 1.
[56] File MS 071/003/2003.
[57] Detention No. 29 on 5 April 2004 (Annex 12).
[58] File MS 071/003/2007.
[59] Detention No. 35 on 6 May 2004 (Annex 12).
[60] They were recorded with action 19 (“rectify major non-conformity before departure”) but not with Action Code 30 (“grounds for detention”).
[61] File MS 071/003/2032.
[62] Detention No. 50 on 28 July 2004 (Annex 12).
[63] File MS 071/003/2049.
[64] Detention no. 66 on 20 September 2004 (Annex 12).

(16) “Balkan Future”

The 3,150 gt St. Vincent & Grenadines general cargo vessel “Balkan Future”[65] was detained[66] on three grounds, whereas the Report of Inspection shows six different reasons for the detention. A total of 35 defects were found on the 1984 built vessel.

(17) “Walili”

The Moroccan flagged dry cargo ship “Walili”[67] was detained[68] on six grounds. In no case was the specific regulation addressed in respect of which the 3,801 gt ship, built in 1980, was supposed to be in breach. The Report of Inspection differs from the Detention Notice and shows eight different defects for which the vessel was detained. The total number of defects recorded was 37.[69]

In addition the handwriting in this particular notice and report is not very legible which would make the reasons on the notice even harder to understand, particularly for a non-native English speaker.[70] In my opinion the physical presentation of the Detention Notice and the Report of Inspection will contribute to clarity and ease of understanding of the notice.

(18) “Berkhan B”

The 3,988 gt Georgian flagged general cargo vessel “Berkhan B”[71] was detained[72] on three grounds. 52 defects were recorded in the Report of Inspection of this 1981 built vessel.

In the next section I will examine the reasons for the detentions which were recorded on the face of the Detention Notice.

7.3. Analysis of Detention Notices of multi-defect detentions

For the purpose of this discussion I have structured the analysis by reasons given for detentions on the Notice of Detention rather than by ship or sequence of events.[73] In practice this required the dissection of the relevant Detention Notices and Reports of Inspection to discuss defects held to constitute breaches which had the same legal basis (i.e. a statutory instrument), but for different ships. Table 5, below, illustrates which legal instruments have most often been used as the legal basis for detentions.

Discussing the same legal instruments for different ships will, on the one hand, permit a comparison of Detention Notices and grounds on which ships were detained; on the other hand, such a structure prevents a consistent discussion of the detention of a particular ship. But as in the end the question is only whether or not the detention was justified this approach is probably more suited to help identifying the weak points of detentions. For the principle will always be the same in the case of a Detention Notice which is found to be defective in that all other defects would have to be taken into account before a decision about the validity of the detention in question can be reached.[74] On that premise an

[65] File MS 071/003/ 2108.
[66] Detention no. 19 on 21 March 2005 (Annex 13).
[67] File MS 071/003/2123.
[68] Detention no. 31 on 25 May 2005 (Annex 13).
[69] According to the Inspector’s detention report, on file MS 071/003/2123.
[70] All Detention Notices and Reports of Inspection were found to issued in handwriting. Computers and print outs are not yet, or only very rarely, used by the MCA’s Inspectors on board of ships.
[71] File MS 071/003/2158.
[72] Detention no. 62 on 5 September 2005 (Annex 13).
[73] Which would have meant looking at one ship after the other on the basis of when they were detained, thus beginning in 2001.
[74] See above, Chapter 6.3.1. and below, Chapter 8.

arbitrator would appear to have to analyse on a case by case basis whether or not the detention could be upheld.[75]

I am of the opinion that in any of the "high defect" cases discussed a detention would probably have had to be upheld even when the Detention Notice was faulty. The sheer number of defects which mainly carry an Action Code 17[76] would on balance appear to clearly tip the scale towards a detention.

I have chosen the approach to analyse by reason rather than by ship despite the minor disadvantage outlined as the comparison of the application of statutory instruments provides, in my opinion, a clearer picture of the practice of detentions.

Detentions without a legal basis in UK law will be discussed after all regulation-based detentions have been dealt with.[77]

Table 5: Application of statutory instruments in multi-defect detentions

No.	Regulations	No. of Instances
1	Fire Protection Regulations	22
2	ISM Regulations	19
3	Load Line Regulations	10
4	Port State Control Regulations[78]	9[79]
5	LSA Regulations	8
6	Survey and Certification Regulations	8
7	Radio Installation Regulations	7
8	Construction Regulations[80]	5
9	Safety of Navigation Regulations	4
10	Guarding Machinery Regulations[81]	1
11	Prevention of Collision Regulations	1
12	Pilot Transfer Regulations[82]	1
13	Training Regulations[83]	1
	SOLAS reference only	5
	No Statutory Instrument	1
	Total	102

It is immediately obvious from the table that out of some 200 different existing merchant shipping statutory instruments only 13 have been applied to detain vessels in the "multi defect detention"[84] cases. This picture is repeated when looking at the single defect detentions.[85] The only set of regulations applied in a single defect detention case which had not been used in the multi-defect detentions to detain a ship were the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997.[86] What also appears to be surprising is that in only three cases have the PSC Regulations been

[75] For detention appeals and arbitration see below, Chapter 8.
[76] Rectify before departure. See above Chapter 6, fn 24.
[77] See below in this Chapter 7.3.15.
[78] While the main discussion of the application of the PSC Regulations can be found under Chapter 6.4.3. the following discussion will focus on the outstanding detentions under the PSC Regulations.
[79] Including three defects recorded for the "Ocean Glory 1", see above, Chapter 6.7.
[80] The Merchant Shipping (Cargo Ship Construction) Regulations 1997, SI 1997 No. 1509 (hereafter "Construction Regulations").
[81] The Merchant Shipping (Guarding of Machinery and Safety of Electrical Equipment) Regulations 1988 (hereafter "Guarding Machinery Regulations"), SI 1988 No. 1636.
[82] The Merchant Shipping (Pilot Transfer Arrangements) Regulations 1999 (hereafter "Pilot Transfer Regulations"), SI 1999 No. 17.
[83] The Merchant Shipping (Training and Certification) Regulations 1997 (hereafter "Training Regulations"), SI 1997 No. 348.
[84] See the explanation of the term "high defect detentions" in Chapter 7.1.
[85] See below, Chapter 7.5., Table 7. See the explanation of the term "single defect detentions" in Chapter 7.1.
[86] SI 1997 No. 1320, hereafter "Safe Manning Regulations".

applied to detain a ship although all detentions came about as a result of a port state control inspection. These results seem to suggest that detentions, irrespective of the number of defects found on a vessel, will more or less be based on the same few statutory instruments identified in the high and single defect detentions.[87]

In determining the rank of the statutory instruments[88] in the above table I have added the numbers of applications of the relevant legislation for each vessel. The sum of those numbers then determined the sequence in the discussion,[89] i.e. the instrument which has been applied most often to detain a ship ranks highest and will be discussed first. Regulations which have been applied the same number of times have been ordered by alphabet.

In order to avoid undue repetition, I have arranged the sequence of the defects discussed (and thereby also the ships on which they were detected) under the relevant regulations so that I discuss new defects, giving grounds for detention, before considering other grounds which have been discussed earlier in relation to different ships.[90] A brief summary can be found in the last paragraph at the end of the discussion for each statutory instrument.

I will first discuss[91] the grounds given in the Detention Notices under the Fire Protection Regulations.[92]

[87] Although there is an indication that detentions in general may actually only be based on these few sets of regulations it could also be that other factors influence the application of a restricted number of statutory instruments. For example, it could be that Inspectors do not necessarily have all the standards of the other (around 200) statutory instruments in their minds, or that PSC inspections do not require as detailed an inspection as a survey. However, the latter argument would appear to be countered by the findings of the National Audit Office of the UK which more or less confirmed my findings (i.e. as to types of defect) addressed in Table 5, above, by its audit of the MCA: National Audit Office, *The Maritime and Coastguard Agency's response to growth in the UK merchant fleet,* 11 February 2009, Figure 14 on p. 26. That table compares "outcomes of Agency inspections of the principal seagoing vessels…with outcomes of Paris MoU Port State Control inspections of UK vessels", p. 25. It continues by stating that Figure 14 "shows that for most types of deficiency the Agency's inspections were much more likely to record deficiencies than Paris MoU Port State Inspections."
[88] Table 5.
[89] See Annex 24.
[90] See below, the example under the Fire Protection Regulations.
[91] I would like to thank Tony Bush, then (March 2008) Principal Surveyor in the MCA, for his comments on my discussion of technical points in the sections to follow in this Chapter. All judgments made, and views expressed, are mine, though.
[92] The Merchant Shipping (Fire Protection: Large Ships) Regulations 1998, SI 1998 No. 1012.

7.3.1. Detentions under the Fire Protection Regulations

The following table summarises the 12 cases discussed below under the Fire Protection Regulations. The table demonstrates that only relatively few defects[93] led to all the detentions under those Regulations and that a number of defects are also repetitive.

Table 6: Defects which led to a detention under the Fire Protection Regulations

Defect/Reg.	(1)[94]	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
Emergency fire pp[95]/16[96]	X											
BA[97] set/25	X			X								
Fire hoses/50	X	X	X									
QCV[98]/47	X	X										
Vents, casing,dampers/47							X	XX	X	X	X	
Fire main/50		X							X			
Isolating valves/38			X									
Paint locker CO2/23			X									
Portable extin[99]/50				X								
Drill/-					X							
CO2 hoses[100]/18						X						
unclear												X

(1) [101] The Detention Notice[102] in the case of the Turkish flagged "Gulser Ana"[103] recorded four grounds why the ship did not comply with the Fire Protection Regulations.

Defect (i)

The first recorded ground on the Detention Notice was "emergency fire pump not priming". The Report of Inspection did not describe the defect but stated that "emergency fire pump priming device to overhaul" which does not appear to add any information.[104]

A ship shall be liable to be detained in any case where it does not comply with the Fire Protection Regulations.[105] They also apply to foreign ships while they are in UK waters.[106]

By contrast with the PSC Regulations where the Inspector "shall detain" [107] the ship when defects are clearly hazardous, the wording "shall be liable" suggests that some discretion

[93] Which, as can be seen in table 3 were only 10, or, if also considering the unclear defect and the drill 12.
[94] Numbers in the top row correspond with the discussed grounds for a detention, e.g. (1) is "Gulser Ana".
[95] Emergency fire pump.
[96] Numbers in the first column refer to the relevant provision of the Fire Protection Regulations.
[97] Breathing Apparatus.
[98] Quick Closing Valves.
[99] Portable Fire Extinguishers.
[100] Hoses attached to CO2 cylinders in the ship's CO2 room (for the ship's fixed fire-smothering gas installation).
[101] Numbers (1) to (12) in this sub-section under the Fire Protection Regulations separate the different vessels on which defects were found. In some case there were several defects under the same set of regulations on the same vessel which were considered by the Inspector to be grounds for a detention. For example, under no. (1) of the Fire Protection Regulations four different grounds (defects nos. (i) to (iv)) for a detention had been identified.
[102] File MS 071/003/1347.
[103] Detention no. 72 on 16 October 2001 (Annex 9).
[104] Report of Inspection on file, defect no. 16.
[105] Fire Protection Regulations, reg. 106.
[106] *Ibid*., reg. 1(7)(a)(i)(bb).
[107] Regulation 9(2)(a).

is left for the Inspector to decide whether or not he will actually detain the vessel. But the decision is only open for the Inspector when a requirement of the Fire Protection Regulations is not complied with.[108] The Inspector cannot employ his own judgment as to whether or not he considers the situation to be hazardous. If no requirement of the Regulations is breached an option for a detention does not exist under the Fire Protection Regulations.[109]

As no discretion can be unfettered[110] it appears that the decision in favour of a detention where the ship "shall be liable" has to be subject to the application of the proportionality principle. In judging whether or not the limitation of rights is arbitrary or excessive, it should be asked

> "whether:
> (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
> (ii) the measures designed to meet the legislative objective are rationally connected to it; and
> (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".[111]

In my view (and translated to apply to the "Gulser Ana"), this means that the general legislative objective of the Fire Protection Regulations must be, and is to secure the safety of UK ships, passengers and crews;[112] this can probably considered to be one of the most important objectives a legislator can have because it is about protecting the lives of people.[113] The measure to meet that objective must be, and is, rationally connected to it as the objective requires the master/owner to have the ship comply with the safety regulations. If an emergency fire pump is not operationally ready[114] it is by definition a serious threat to life, and the means of detention appear appropriate to ensure compliance as it will thus be guaranteed that the pump will be repaired before the ship sails. The interference with the property right is temporary and is done to preserve life – one of the highest priorities in a modern democratic society.[115]

Thus, the material requirements[116] as set out in *Elloy de Freitas*[117] appear to be satisfied as long as the finding of the detaining officer can be sustained by relevant facts.

If a requirement of the Fire Protection Regulations is not complied with it would appear that the Inspector also has to have regard to the HRA 1998[118] when making his decision. The Inspector would have to weigh up the risk to life (or rather the public interest)[119] with the interference in the property right of the owner. He will then have to make a rational and reasonable decision.[120]

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[108] "In any case where a ship does not comply with the requirements…", Fire Protection Regulations, reg. 106.
[109] However, in theory a detention option would still be available for the Inspector under the PSC Regulations if he comes to the conclusion that a defect is clearly hazardous under reg. 9(2)(a).
[110] See above, Chapter 4.2.5. See also particularly *Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd.* [1988] AC 858, p. 872, "unfettered governmental discretion is a contradiction in terms".
[111] *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, p. 80, explicitly approved of by Lord Steyn in *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532, para. 27.
[112] MSA 1995, s. 85(1).
[113] Lord Bingham said in *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, para. 30, "A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it."
[114] See discussion below about the priming requirement.
[115] *R (Middleton) v. West Somerset Coroner* [2004] 2 AC 182, para. 5. See also discussion above under "Life boat drill".
[116] As there are: importance (i), being rationally connected (ii) and also necessary (iii).
[117] See above, Chapter 7, fn 111.
[118] See above, Chapter 3.3. This may seem to be a tall order for an Inspector, but as it is him detaining the vessel and signing the Notice of Detention, usually after consulting his Principal Surveyor though, the Inspector's discretion would appear to require the consideration of HRA principles. It would seem to be the duty of the MCA to ensure that relevant training has been given to PSC Inspectors.
[119] See Protocol 1 Art. 1 of the Human Rights Convention.
[120] This requirement would appear to be different from making a decision under the PSC Regulations which, when the relevant criteria are met, make it mandatory for the officer to detain the vessel. See the discussion above in Chapter 6.5.

If in a ship like "Gulser Ana"[121]

> "a fire in any one compartment could put all the fire pumps out of action there shall be provided, in a position outside the machinery spaces, an independently driven power-operated emergency fire pump and its source of power and sea connection".[122]

Whereas a dedicated fire pump must comply with specified provisions[123] no details appear to be regulated for emergency fire pumps unless the vessel is over 2,000 gt and has been constructed after 1 September 1984.[124] In that case the vessel has to comply with reg. 38(5).[125] Regulation 38(5) requires the emergency fire pump to comply with MSN 1665, Schedule 7. The MSN does not call for the emergency fire pump to be self priming.[126] It follows that if there is no such requirement the vessel cannot fail to comply with it and as a result cannot be detained on that ground.

But it is different when the pump, in its regular operational status, would be self priming and is now defective.[127] In such a case the pump would not be fully operational and this would be a breach of the Regulations. "Fire appliances carried in any ship shall be maintained in good order and shall be kept available for immediate use at all times."[128] An emergency fire pump with a deficiency is not maintained in good order and kept available for immediate use. Thus, it would have posed a risk to life because the emergency fire pump is the last fall back for a master and crew having to fight a fire on board, and on that basis the detention of the "Gulser Ana" would appear to have been justified.

Defect (ii)

The second reason for the detention under the Fire Protection Regulations was "Breathing apparatus not operationally ready".[129] The Report of Inspection does not provide any more detail as to what exactly was wrong with which apparatus.

The Regulations required "Gulser Ana" to carry four firemen's outfits.[130] All four have to include a breathing apparatus.[131] Each breathing apparatus can be a self-contained, or a smoke helmet, set.[132]

It would appear to have been a fatal flaw of the Detention Notice for it not only lacked specific information as to which regulation was not complied with, but in addition did not specify the technical problem encountered nor identify which of the sets was actually affected. A detention based on this wording of the notice leaves master and owner to guess what is wrong and does not, on its own, appear to be justifiable.

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[121] A bulk carrier of 23,602 gt built in 1985 – see Report of Inspection on file.
[122] Fire Protection Regulations, reg. 16(3)(a).
[123] Fire Protection Regulations, reg. 16(2)(a) refer to reg. 38 which in turn refers to "the conditions and at the pressure specified in Schedule 7 in Merchant Shipping Notice MSN 1665".
[124] Fire Protection Regulations, reg. 16(4)(d). According to the Report of Inspection "Gulser Ana" was built in 1985. SOLAS 74, Chapter II-2, reg. 10.2.2.3.1.2. requires emergency fire pumps for ships built on or after 1 July 2002 to comply with the Fire Safety Systems Code.
[125] Fire Protection Regulations, reg. 16(4)(d)(ii).
[126] What it requires in Schedule 7, para. 8(e), is that "if the ship was constructed before 1st February 1992, the total suction head of the emergency fire pump shall not exceed 4.5 metres under all conditions of list and trim likely to be encountered in service and the suction piping shall be designed to minimise suction losses". This, however, appears to be different from a self priming requirement.
[127] Which, when reading the Report of Inspection, appears to have been the case as "a priming device" existed.
[128] Fire Protection Regulations, reg. 50.
[129] Detention Notice on file MS 071/003/1347.
[130] Regulation 25(3).
[131] Regulation 25(4).
[132] Regulation 25(4).

Defect (iii)

The third ground for a detention was that "Fire hoses not operationally ready".[133] The Report of Inspection in this case provides more detail as to why the hoses were not operationally ready: "various fire hoses on main deck – mixed connections or missing".[134]

It would appear that hoses which cannot be connected due to "mixed connections" would not comply with the ready availability requirement of the Fire Protection Regulations[135] and would therefore constitute a ground for detention.

Defect (iv)

The fourth defect used to justify the detention was that "quick closing devices for the fuel tanks not operational".[136] According to the Report of Inspection the defect was that "2 quick closing valves HFO settling tank not operational".[137]

These valves are to "be capable of being closed from a readily accessible position outside the space in which the tank is situated".[138] If they could not have been closed and the fire risk could not have been eliminated a contravention of the Regulations was established, and a valid ground for a detention had been given.

(2) The Brazilian flagged bulk carrier "Lily"[139] was detained[140] on eight grounds according to the Detention Notice. Three of the grounds provided fell under the Fire Protection Regulations.

The three grounds were (i) "Accommodation fire hoses not operationally ready", (ii) "fire main holed" and (iii) "quick closing valves not operational".

(i) The Report of Inspection specified for the fire hoses that "accommodation hoses seals to replace". Although it is not clear why the Inspector thought that the seals needed replacement it may be safely assumed that they were damaged. Defective seals would appear to constitute a breach of reg. 50 and establish a ground for detention because they would prevent the efficient fighting of a fire on board.

(ii) A fire main which is holed does also not comply with reg. 50 and would again seem to constitute a ground for detention; and

(iii) likewise do inoperative quick closing valves.[141]

(3) The Detention Notice,[142] for the Marshall Islands flagged bulk carrier "Panagia Odigitria"[143] listed eight grounds for the detention three of which had been identified under the Fire Protection Regulations. These were (i) "isolation valves fire main engine room to deck seized open", (ii) "engine room fire hoses unsatisfactory condition" and (iii) "paint locker CO^2 cylinders empty".[144] Whereas defects (i) and (iii) specify what and why it was wrong, defect (ii) is just a general statement. The Report of Inspection complements the information for that defect on the Detention Notice with "many fire hoses are flat [and then

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[133] Detention Notice on file.
[134] Report of Inspection on file, defect no. 22.
[135] Regulation 50.
[136] Detention Notice on file.
[137] Report of Inspection on file, defect no. 24.
[138] Fire Protection Regulations, reg. 47(3).
[139] File MS 071/003/1764.
[140] Detention no. 53 on 26 July 2002 (Annex 10).
[141] See above, no. (1)(iv), "Gulser Ana".
[142] Of which there were two on file one of which appears to be incomplete and will not be discussed here. This conclusion appears to be justified by the detention report referring to "doc. 4". The relevant Detention Notice has been numbered by hand and was given number four.
[143] File MS 071/003/1823.
[144] Detention Notice on file.

something is added apparently with what appears to be a different pen which was used to sign off the defects at the end of the detention] & coatings flaked off [then the words "(2 tested no good)" are added with a different pen] these must be pressure tested".[145] No provision of which the vessel was said to be in breach had been specified.

The complementary information does not identify which and how many hoses were defective but at least provides more detail as to what was wrong. However, the details do not suggest why the hoses were unsatisfactory. Unless the coating which was flaking off made them useless because, for example, they would have been leaking there would be no evidence that they were not fit for purpose. Nothing to this extent had been stated in the Detention Notice or even the Report of Inspection. It is not clear why the hoses did not satisfy a requirement of the Regulations so as to conclude that a detention was justified. The coating which was flaking off may be considered a violation of the maintenance requirement,[146] but unless this breach can be considered on balance to interfere with the right to life, as opposed to the right for peaceful possession, a detention would hardly appear justifiable. Such evidence, however, was not available. It would appear that the Detention Notice is therefore defective.[147]

The two other defects (relating to (i) isolation valves[148] and (iii) the paint locker) were fairly straightforward. An isolation valve which cannot be used to isolate the relevant space is not fit for purpose, and a paint locker which has to be protected by an approved fire-extinguishing system[149] which is inoperative does not comply with the requirements. Both defects pose a clear risk to life and thus appear to justify a detention.

(4) The Algerian flagged bulk carrier "Nememcha" was detained[150] for seven different reasons.

Two grounds for detention were addressed under the Fire Protection Regulations. They were (i) "fire extinguisher nozzles found inoperative" and (ii) "SCABA set no alarm at low level".[151] Neither the exact fire extinguishers nor the relevant breathing apparatus had been identified.

Defect (i)

A fire extinguisher with an inoperative nozzle is not kept in good order and is also not immediately available.[152] As it was not fit for purpose it presented a considerable risk to life for those who relied and depended upon it. A detention for such defects appears to be justified.

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[145] Report of Inspection, p. 5, defect no. 12.
[146] The Fire Protection Regulations, reg. 50.
[147] The Detention Notice is defective in a sense that the specification of the provision was required to clarify what and why it was wrong; even though *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 29, suggests that a mere reference to the MSA 1995 is sufficient to address where the relevant powers of an Inspector are derived from, it would still appear to be required to specify the provision of the relevant legal instrument if the factual reasons given do not provide enough detail to the recipient. See above, Chapter 6.3.1.
[148] Isolation valves to separate the section of the machinery space which contains the main fire pump were required for ships constructed after 1 September 1984, see reg. 38(5) referring to MSN 1665, Schedule 7, para. 10(i). According to the Report of Inspection, p. 1, "Panagia Odigitria" was built in 1984 and for the purpose of this discussion I assume that the vessel is covered by the requirement to be equipped with isolation valves. If the latter were not the case a frozen isolation valve would be of no relevance unless it would affect the operation of the fire mains. An isolation valve which is seized open does not have an impact on the general usage of the fire main other than that it cannot separate the relevant machinery space in case of damage to the pipe work in that space. But according to the regulations and MSN 1665 this was not a requirement for ships built before 1984. It would appear that in a case like this the Report of Inspection ought to provide the exact date of the keel laying to ensure that the correct statutory provisions are applied.
[149] The Fire Protection Regulations, reg. 23.
[150] Detention no. 106 on 20 December 2002 (Annex 10).
[151] Detention Notice on file MS 071/003/1824.
[152] As required by the Fire Protection Regulations, reg. 50.

Defect (ii)

A vessel of the size and age of the "Nememcha"[153] has to carry a minimum of three firemen's outfits[154] each of which shall consist amongst other things also of a breathing apparatus (BA set).[155] Any such BA set has to comply with the requirements as stipulated in MSN 1665.[156] The alarm is not specified in the MSN which requires the BA set to come with a "Certificate of Assurance" issued by the HSE but in the relevant British Standard.[157]

Even though a ship which does not comply with the requirements "shall be liable to be detained"[158] an Inspector has discretion and needs to weigh up the interference his decision to detain would cause. It appears that a detention for a malfunctioning low level alarm which does not put the BA set out of operation would be a disproportionate measure.[159] Undoubtedly though, with the knowledge that the low level alarm is malfunctioning the master would have to take particular care that the wearer of the BA set is called back in time should the BA set come into use before a repair has been initiated. I would think that an Action Code[160] requiring the ship to carry out the repair before departure,[161] or at the latest in the next port,[162] provided it was not weeks away, would have sufficed. A detention based on such a ground alone would appear to give rise to the risk of the cancellation of the Detention Notice, as a modification would not seem to be possible because there is nothing to modify.[163]

(5) The Panamanian dry cargo vessel "African Warrior"[164] was detained[165] with the highest number of deficiencies during the observed period.[166]

One of those deficiencies for which the vessel was detained was "fire drill unsatisfactory".[167] More specific information was given in the Report of Inspection.[168] Fire drills are not regulated under the Fire Protection Regulations but under the Musters Regulations.[169] A detention on this basis can therefore not be justified by reference to the Fire Protection Regulations. Even though fire drills and their minimum contents are regulated under the Musters Regulations,[170] a right to detain a ship for an unsatisfactory drill is also not provided by them. For a detention on this ground to be legally justified it would appear that only the PSC Regulations or the MSA 1995, s. 95 could be applied. An arbitrator would have to modify the Detention Notice accordingly[171] to permit a detention of the ship. Such modification would seem to be appropriate as it would appear that an unsatisfactory drill constitutes a clear hazard to safety[172] or a "serious danger to human

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[153] "Nememcha", 16,013 gt, was built in 1977 according to the Report of Inspection, p. 1.
[154] Fire Protection Regulations, reg. 25(1).
[155] *Ibid*., reg. 46(1)(a).
[156] *Ibid*., require the BA set to comply with MSN 1665, Schedule 5.
[157] MSN 1665, Schedule 5, para. 2(a). The "Joint Testing Memorandum of the Health and Safety Executive, the Department of Environment, Transport & Regions and the Home Department" to which that paragraph refers has according to the MCA headquarters LSA policy officer been replaced by British Standards (BS). BS EN 137 (1993) requires BA sets to have a warning device (para. 5.18). If it is an audible warning device the sound levels are prescribed in para. 5.18.1. In its latest version BS EN 137 (2006) addresses the same requirement in para. 6.18.
[158] Fire Protection Regulations, reg. 106.
[159] Apart from the low level alarm a self contained breathing apparatus is also equipped with a pressure gauge so that the wearer can at all times check the remaining air quantity.
[160] See above Chapter 6, fn 24 and also Annex 19, reverse page of form MSF 1601A.
[161] Action Code 17.
[162] Which would have been Action Code 15.
[163] MSA 1995, s. 96(4), see also discussion in Chapter 6.3.1.
[164] File MS 071/003/1837.
[165] Detention no. 11 on 28 January 2003 (Annex 11).
[166] The Report of Inspection shows a total of 83 as opposed to 80 defects on the MCA web page.
[167] Detention Notice on file.
[168] On file, p. 17, e.g. "fitter and oiler return to engine room without breathing apparatus", "fireman on his own enters engine room", "fire man does not have a fire hose", "fire man did not have breathing set air valve open".
[169] The Merchant Shipping (Musters, Training and Decision Support Systems) Regulations 1999, SI 1999 No. 2722.
[170] Regulation 11.
[171] In accordance with PSC Regulations, reg. 11(4). See also below, Chapter 8.
[172] *Ibid*., reg. 9(2)(a).

life".[173] If the facts laid down in the Detention Notice and the Report of Inspection clearly convey to the master what and why it is wrong, using the wrong legal basis in the Detention Notice would not on its own appear to be fatal for the notice.[174] An arbitrator with the required shipping experience deciding a detention appeal ought to recognise the risk to the safety of life and modify the notice accordingly.[175] If it were only a question of the application of the correct law the PSC Regulations would not need to require that the arbitrator shall have regard to those other matters which are not specified in the Detention Notice.[176]

(6) The Panamanian bulk carrier "Paloma C"[177] was detained[178] on seven grounds.

The detainable defect identified under the Fire Protection Regulations was "engine room CO2 fixed fire fighting system 21 hoses to be replaced". Even though this leaves a clear instruction with the master, the deficiency as such has not been specifically clarified. In the Report of Inspection it was recorded "CO2 room 21 hoses to be replaced – as rubber is perishing".[179] It could be arguable that unless the detaining officer is an expert it should be left to the vessel and their repair firms to judge what is the best remedy for a defect.[180]

A fixed fire-smothering gas installation must be provided in a cargo ship such as "Paloma C".[181] A defective hose would appear not to comply with the requirements of the Regulations.[182] If the CO^2 system were leaking it would constitute a double risk. First, the CO^2 could collect in the storage room, and, as CO^2 does not smell, could cause death to any person who does not ensure proper ventilation before entering the room. Secondly, the gas would not be available when required to fight a fire. Both scenarios clearly constitute a risk to life. However, it appears from the identified defect that hoses were not leaking at the time of inspection, as otherwise the replacement of the gas would probably also have been required. If the hoses are not leaking they only pose a potential danger to human life, but an administrative action taken might not require a detention. It would seem that if the defect can be dealt with in a less invasive fashion, i.e. if the defect does not require immediate repair because the deterioration has not gone that far yet, a repair requirement for the next port or within 14 days might have been more appropriate. However, the lack of more detailed information in this particular case does not allow for an informed opinion. It would appear, though, that expert advice may have helped the Inspector to identify whether or not there was an immediate or only a potential risk.

(7) The Greek flagged "Spyros"[183] was detained[184] on nine different grounds one of which fell under the Fire Protection Regulations.

The defect recorded as a breach of the Fire Protection Regulations was "engineroom ventilators port and starboard accommodation corroded through".[185] According to the Notice of Detention this was in breach of reg. 47. This regulation requires ships to provide means for closing all ventilators serving machinery spaces.[186] A ventilator which is

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[173] MSA 1995, s. 94(1).
[174] See Chapter 6.3.1., particularly Lord Denning in *Ormston v. Horsham Rural District Council*, p. 108.
[175] As I do not consider the Detention Notice to be initially invalid the consequence outlined in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm), paras. 26 and 26, would not appear to apply.
[176] See also the discussion below, Chapter 8.
[177] File MS 071/003/2007.
[178] Detention No. 35 on 6 May 2004 (Annex 12).
[179] On p. 7.
[180] It is actually an unwritten policy of the MCA not say how a defect has to be rectified but only to record a deficiency.
[181] Fire Protection Regulations, reg. 18(1) in connection with MSN 1666, Schedule 4, para. 3.
[182] Regulation 50.
[183] File MS 071/003/1730
[184] Detention no. 21, 1 March 2002 (Annex 10).
[185] Detention Notice on file.
[186] Regulation 47(1)(b).

corroded through cannot meet such a requirement.[187] The relevant space cannot be made airtight and would therefore always let in air (oxygen) which would help to keep the fire going. As a fire is potentially dangerous to life, a vessel which does not comply with relevant protective structural requirements should therefore not be allowed to go to sea. A detention appears under such circumstances to be no more than is needed to achieve the objective of the Regulations.

(8) The Turkish flagged bulk carrier "Berrak N"[188] was detained[189] for nine different deficiencies two of which fell under the Fire Protection Regulations.

The latter defects were that (i) "engine casing corroded thru" and (ii) "port engineroom vent corroded thru below damper". The regulation the vessel was supposed to be in breach of was not specified in the Notice of Detention.

An engineroom casing and engine room ventilators which are corroded through would appear to have the same effect as ventilators or doors that cannot be closed.[190] A holed casing and ventilator constitute a significant fire risk and as such a risk to life, and a detention appears to have been justified.

The lack of referring to the correct provision should probably not stop the detention from going ahead.[191]

(9) The Panamanian flagged general cargo vessel "World Trader"[192] was detained[193] for eight deficiencies two of which came under the Fire Protection Regulations.

The recorded defects were (i) "fire main patched and leaking in 2 places" and (ii) "no 2 engineroom vent corroded thru below damper".[194]

Defect (i)

The Regulations do not prevent the patching of a fire main.[195] However, a fire main which is leaking would not allow efficient fire fighting and thus constitute a danger to life unless the output pressure at each hydrant would still be sufficient.[196] A patched up and leaking fire main will become a potential danger to life as it suggests that serious deterioration of the steel has occurred, and it would therefore appear to be a question of time when the fire main would fail. A PSC Inspector would have to consider the proportionality of his decision. If the fire main does still deliver the pressure despite it being leaking a detention could possibly not be reasonable. A repair request for the near future would then seem to suffice,[197] but without knowing the exact details of the case a judgment is difficult to make.

Defect (ii)

The corroded engine room damper posed a risk to life in that it could not be closed.[198] A detention would seem to be reasonably justified.

(10) The St. Vincent & Grenadines general cargo vessel "Balkan Future"[199] was detained[200] on three grounds.

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[187] Provided the ventilator is corroded through below the damper which is not clarified in either the notice or the report, see defect 15 in the report.
[188] File MS 071/003/1826.
[189] Detention no. 4 on 6 January 2003 (Annex 11).
[190] Fire Protection Regulations, reg. 47(1)(a) and (b).
[191] See discussion above under no. (5) – "African Warrior" and also Chapter 8.
[192] File MS 071/003/1834.
[193] Detention no. 7 on 16 January 2003 (Annex 11).
[194] Detention Notice on file MS 071/003/1834.
[195] Fire Protection Regulations, reg. 39(4) in connection with MSN 1665, Schedule 7, para. 10.
[196] The output pressure at every hydrant is defined in MSN 1665, Schedule 7, para. 9.
[197] See discussion above about alternative options, Chapter 6.4.3.
[198] Fire Protection Regulations, reg. 47(1). See also above, no. (7).

The ship was detained under the Fire Protection Regulations because "funnel fire dampers not closing properly". Funnel fire dampers which were not closing posed a clear breach of the requirements.[201] Such a breach entails a risk to life and a detention would seem to have been warranted.

(11) The Georgian flagged general cargo vessel "Berkhan B"[202] was detained[203] on three grounds and one of them was "engine room fans fire dampers seized".

As above, a damper which cannot be operated posed a significant fire risk and seems to provide enough substance for a detention.[204] Fire dampers which do not close pose a clear risk to life.

(12) For the Bahamian flagged "Pongo"[205] the following entry could be found on the Detention Notice under the heading "Statutory Requirement":[206] "UK MS LSA & Fire Fighting Regulations and others".[207] The reason why the ship did not comply was "see MSF 1600 & 1601 dated 30/09/2002".

It is not at all clear from the Detention Notice what was actually wrong with the vessel. Not only did the notice not specify the actual provision which the vessel is in breach of, but refers, by incorporating the Report of Inspection,[208] to all 26 defects recorded in it. Even if this would be legally acceptable it has to be noted that not all recorded defects came under the LSA, or the Fire Protection, Regulations.

The Detention Notice appears to have been wholly inadequate and would in my opinion not stand the test of clarity and specificity. A notice solely based on the given ground would, therefore, appear to be initially invalid and a modification would seem to be out of the question.[209]

General comments and summary

Out of a total number of 22 defects that led to a detention it appears to me that eight[210] notices were defective outright, or inadequate, and two[211] Detention Notices left enough doubt for them to run the risk of being treated as invalid. Although in a multi-defect detention the risk that the detention would become invalid is not as great as it would be for single defect detentions,[212] the identified inaccuracies would seem to make the Inspector and his detention vulnerable.

Next I will discuss the detention grounds under the ISM Regulations.[213]

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[199] File MS 071/003/ 2108.
[200] Detention no. 19 on 21 March 2005 (Annex 13).
[201] Fire Protection Regulations, reg. 47(1)(b).
[202] File MS 071/003/2158.
[203] Detention No. 62 on 5 September 2005 (Annex 13).
[204] See, for example, discussion above, Chapter 7.3.1 ((10) - "Balkan Future").
[205] File MS 071/003/1193.
[206] There were two copies of a Detention Notice on file, a handwritten copy which was hardly readable and the other one typed out. The copy I am referring to is the latter.
[207] The vessel will not again be referred to the LSA Regulations as the discussion would be the same, i.e. only eight defects will be discussed under LSA Regulations. But for the total count of reasons for a detention, see above, Table 2, the defect was counted under both Fire Protection Regulations and LSA Regulations.
[208] Which consists of forms MSF 1600 and MSF 1601.
[209] See above, Chapters 6.3.1. and 8.; *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm), para. 26.
[210] Numbers (1)(ii), (3)(ii), (4)(ii), (9)(i) and (12).
[211] Numbers (1)(i), (5), (6) and (8).
[212] See the examples of single defect detentions below, Chapter 7.5.
[213] The Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, SI 1998 No. 1561.

7.3.2. Detentions under the International Safety Management Code Regulations

The detentions in this sub-section are analysed in the light of the discussion of the ISM Regulations and the ISM Code below.[214]

(1) The Panamanian bulk carrier "Paloma C"[215] was detained[216] for three grounds under the ISM Regulations.

Those defects were (i) "emergency preparedness", (ii) "resources and personnel" and (iii) "maintenance of ship and equipment". The Report of Inspection[217] added in respect of the above sequence of defects (i) "substandard drills see comments", (ii) "crews require training" and (iii) "see deficiency list". The specific sub-section of the ISM Code which the PSC Inspector considered was breached had not been identified.

It appears to be only at the discretion of an Inspector to detain a vessel under the ISM Regulations if a *company*, and not the master or crew, does not comply with the provisions of the ISM Code.[218] A company does not comply when, for example, the safety management system (SMS) does not ensure compliance with mandatory provisions and does not take into account relevant codes and industry recommendations.[219] Other duties of the company are, e.g., (1) to establish programs for drills;[220] (2) to carry out internal safety audits; (3) to verify compliance with the SMS,[221] (4) to periodically evaluate the efficiency of the SMS,[222] and (5) to establish procedures which ensure the ship is properly maintained.[223]

Defect (i)

The first defect concerned "emergency preparedness". Unless (1) the SMS did not provide a program for drills, (2) the internal auditor during his last audit did not witness and report about a drill, (3) the audit frequency was not in compliance with the SMS, and (4) the company did not evaluate any report by the auditor or the master about drills,[224] it would appear that a failure by the crew to carry out an appropriate safety drill would not establish non-compliance with the ISM Code by the company. Any such deviation, however, was not identified by the detaining officer of the "Paloma C". The shortcomings recorded in the Report of Inspection all referred to technical and on-board management failures but not to deviations by the SMS from the ISM Code.[225] The wording "no checklist used" even

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[214] See below, Chapter 10.5.1.
[215] File MS 071/003/2007.
[216] Detention No. 35 on 6 May 2004 (Annex 12).
[217] On p. 10.
[218] I will for the discussion of the ISM based detentions not refer to this point anymore unless it appears to be relevant in the context of the particular case. The discussion will mainly focus on whether or not a major non-conformity had been established and properly conveyed to the vessel. The latter, however, is in my opinion in the end irrelevant for a decision as to whether or not a detention was valid if I am correct that a vessel can only be detained under ISM Regulations for a breach by the company, but not for a breach of the SMS by master or crew. For details see the discussion below, Chapter 10.5.
See also below in Chapter 10 the cases of "RMS Mulheim" and "RMS Ratingen", file MS 10/74/284, Sentencing Schedule, para. 25, where the company was fined by the Magistrates' Court because "the RMS Manual gave no specific instructions about watch keeping during periods of darkness or the equipment to be used." In those two cases no proper look-out was kept on board.
The ISM Code would appear not to focus on obligations of master and crew on board of vessels, but rather on the obligations of companies as to the establishment and the verification of the working of its safety management system on board.
[219] ISM Code, s. 1.2.3.
[220] *Ibid*., s. 8.2.
[221] *Ibid*., s. 12.1.
[222] *Ibid*., s. 12.2.
[223] *Ibid*., s. 10.1.
[224] For whom the company has to define that his responsibility is, amongst others, to review the SMS, ISM Code, s. 5.1.5.
[225] In the Report of Inspection, p. 11, the shortcomings are listed as (1) "fire man entered without fire hose, air supply to BA set not turned on", (2) "fireman's assistant did not wear protective equipment of BA set", (3) "no second fire man", (4) "chief engineer enters engine room with 4 crewmen – none wear protective equipment –

indicated that checklists existed which in turn suggested that they were part of the SMS. In my view, a detention would not be justified if it cannot be established that the defect identified constitutes a failure of the SMS for which the company is responsible. However, a conclusive opinion on whether or not the SMS was satisfactory cannot be formed due to the lack of information about the SMS on board the "Paloma C". However, it would appear to have been the duty of the Inspector to clarify whether or not the SMS was insufficient.

Defect (ii)

The second ground for a detention under the ISM Regulations was "resources and personnel", which was qualified by "crews require training". It is not clear what kind of training the Inspector had in mind. It might be that he intended to refer to training to operate an efficient maintenance operation, or training to carry out proper safety drills. The company has the obligation to ensure that the ship is manned with correctly certificated crew,[226] that procedures exist which ensure proper familiarization of crew[227] and that all crew have an adequate understanding of relevant rules and provisions.[228] It is also the duty of the company to identify required training.[229]

As in the case of safety drills, it is not clear whether or not the SMS was actually lacking the procedures required to be established by the company or whether the master and crew on board simply did not comply with the SMS. The latter would, in my view, only allow for a detention under the ISM Regulations if the company did not follow the requirements to verify compliance with the SMS[230] and to periodically evaluate its efficiency.[231] This does not mean that a blatant breach of SMS procedures on board could not establish a reason for detention,[232] but it would appear not to be allowed under the ISM Regulations unless a breach of obligations by the company could be established.

Defect (iii)

The last defect for which the ship was detained under the ISM Regulations was "maintenance of ship and equipment", qualified by "see deficiency list". It appears that the number and nature of defects[233] which were noted could have been caused by either an unsatisfactory maintenance system or an unsatisfactory application of the system on board. It is the company's obligation to establish procedures which ensure the vessel is maintained according to the legal requirements.[234] The maintenance system needs to ensure that inspections are held when appropriate,[235] deviations from the norm are reported,[236] remedial action is taken[237] and the steps taken are recorded.[238]

As above, it was not clear for the recipient of the Detention Notice (from the reasons given on the notice) whether the procedures were lacking or whether their implementation on board was unsatisfactory. Although it is not possible now to form an opinion on whether the former or the latter ground applied it can be said that the lack of clarity of the notice would not have caused a disadvantage for the recipient. It is, in my opinion, therefore appropriate to consider the three ISM grounds of detention as not complying with the

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they become casualties", (5) "engine room access hatch open, funnel door open, e.r. fire dampers open", (6) "bridge – no checklist used, no fire plan, no record of events, CO2 operations no head count, no pan pan ["pan pan" is a radio telephony signal that indicates urgency, as, e.g. when medical assistance is required or when a person fell over board], no command and control".

[226] ISM Code, s. 6.2.
[227] *Ibid*., s. 6.3.
[228] *Ibid*., s. 6.4.
[229] *Ibid*., s. 6.5.
[230] *Ibid*., s. 12.1.
[231] *Ibid*., s. 12.2.
[232] Such as under MSA 1995, s. 95(1) or under the PSC Regulations, reg. 9(2)(a).
[233] The total number of defects recorded was 43 and many of them point towards unsatisfactory maintenance.
[234] ISM Code, s. 10.1.
[235] *Ibid*., s. 10.2.1.
[236] *Ibid*., s. 10.2.2.
[237] *Ibid*., s. 10.2.3.
[238] *Ibid*., s. 10.2.4.

requirement that "the notice should be clear and easily understood".[239] If, in addition, the reasons for not complying with the ISM Code were solely based on the master and crew not following the SMS procedures, and no company fault could be established, a second reason would exist why the detention could not have been based on the ISM Regulations.[240]

(2) On the Brazilian flagged bulk carrier "Lily"[241] two detention grounds were identified under the ISM Regulations. They were (i) "Emergency preparedness unsatisfactory" and (ii) "maintenance of ship and equipment unsatisfactory". The Report of Inspection does not add any information to these two rather general comments.[242]

The statements were classified in the Report of Inspection as major non-conformities.[243] The ISM Code states

> "Major non-conformity means an identifiable deviation that poses a serious threat to the safety of personnel or the ship or a serious risk to the environment that requires immediate corrective action and includes the lack of effective and systematic implementation of a requirement of this Code."[244]

This ISM Code definition has been reproduced in a nearly identical version in the MCA instructions to Surveyors.[245]

The wording of the recorded major non-conformities did not appear to satisfy the requirement of "an identifiable deviation".[246] What appears to have been identified instead is a result which would have first required the identification of the individual non-conformity. It can possibly be a conclusion that the emergency preparedness or the maintenance of the ship was not satisfactory after having identified the relevant major non-conformity. But that was not done.

Section 8 of the ISM Code offers a variety of options which could lead to an identifiable deviation from the requirement of emergency preparedness, and thus to a major non-conformity.

> "8. Emergency Preparedness
>
> 8.1. The Company should establish procedures to identify, describe and respond to potential emergency shipboard situations.
>
> 8.2. The Company should establish programs for drills and exercises to prepare for emergency actions.
>
> 8.3. The SMS should provide for measures ensuring that the Company's organization can respond at any time to hazards, accidents and emergency situations involving its ships."[247]

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[239] Evans-Lombe J in *BT Fleet v. McKenna* [2005] EWHC 387 (Admin), para. 14, quoting Evans LJ in *The Borough of Bexley v. Gardner Merchant Plc,* unreported, 17th March 1993, Divisional Court. See above, Chapter 6.3.1.

[240] To avoid repetitions I will discuss the following deficiencies under numbers (2) through to (9) without making reference again to the fact that a detention can only be administered when a failure of the company under s. 4 or 5 of the ISM Code has been established. My reason for this is that even though a detention under the ISM Code might not be justifiable, a detention under the PSC Regulations still could be. As an arbitrator shall have regard to any other matters (PSC Regulations, reg. 11(4)) a detention would not necessarily be threatened when it is based wrongly on the ISM Code.

[241] File MS 071/003/1764.

[242] Defects no. 16 and 17 in the Report of Inspection on file.

[243] They were given the Action Codes 19 (major non-conformity) and 30 (grounds for detention).

[244] ISM Code, s. 1.1.10.

[245] MCA, *The ISM Code – Instructions for the guidance for Surveyors,* s. 4.9, on 3 January 2008, http://www.mcga.gov.uk/c4mca/mcga-guidance-regulation/mcga-dqs-ss_guidance_to_Surveyors/dqs-instuctions-ism/dqs-instructions-ism-chap4.htm. I cannot verify whether or not a similar instruction was already in place in 2002 when the "Lily" was detained.

[246] ISM Code, s. 1.1.10.

[247] *Ibid*., s. 8.

It is not clear where, with reference to the two recorded deficiencies, the detaining officer believed the major non-conformities occurred or what exactly established that there were major non-conformities. An identifiable deviation was not specified.

It would appear to follow that the detention was probably not justified on grounds of a violation of the ISM Code as the Detention Notice is not specific enough and does also not clearly convey to master and owner what and why it was wrong. A possible modification of the notice by an arbitrator could seemingly only be based on the other defects of the vessel. The latter, however, would only be of relevance if it was the company's fault that the ISM Code was not complied with.

(3) In the Detention Notice for the Panamanian dry cargo vessel "African Warrior"[248] three defects were recorded under the ISM Regulations and they were (i) "maintenance of ship and equipment", (ii) "emergency preparedness" and (iii) "resources and personnel". No section of the ISM Code of which the ship was supposed to be in breach had been specified, nor had any identifiable deviation been clarified in the notice. The only additional qualification were the words "(see below, master and crew require training/SMS on board, before departure designated person required to rectify)" recorded in the Report of Inspection. This appears to relate to an unsatisfactory emergency drill, but the master and owner should not have been left with guesswork when their ship was detained.

Whereas the rather vague wording of the ISM Code would appear to allow for non-conformities to be recorded under different sections of the Code, any detainable defect ought to be very specific. It would appear that it is irrelevant for the master and owner whether a major non-conformity is said to fall under, for example, s. 6.3[249] or s. 8.2[250] of the ISM Code. What is of crucial importance for the ship, though, is why exactly the Inspector is satisfied[251] that there was a failure to comply with the requirements of the ISM Code.[252] The recorded non-conformity ought to answer whether or not, for example, the crew was qualified, satisfactory programmes for drills existed or a lack of maintenance related to a lack of funds provided by the company. Only by specifying exactly what was wrong will the master and owner be in a position to rectify the particular defects.

It is not clear whether or not there was a deviation establishing a major non-conformity (MNC).

(4) The Marshall Islands flagged bulk carrier "Panagia Odigitria"[253] was detained, amongst others, on four ISM related defects which are specified in no more detail than (i) "maintenance of ship and equipment", (ii) "emergency preparedness", (iii) "documentation" and (iv) "resources and personnel". In the Report of Inspection, there was added directly under "Documentation" the words "old certificates in files" and something about the bosun which is unreadable.[254] The MNC "emergency preparedness" is complemented by "(below standard)" and "resources and personnel" by something [not all is readable] which reads "(…boat drill training…)".[255]

Apart from the fact that no identifiable deviation is specified[256] the MNC "documentation" does not appear to be a MNC but rather a non-conformity[257] or even an observation.[258]

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[248] File MS 071/003/1837.
[249] Company to ensure proper familiarization of crew with their duties.
[250] Company to prepare programmes for drills.
[251] ISM Regulations, reg. 16(2)(b).
[252] *Ibid*., reg. 4.
[253] File MS 071/003/1823.
[254] Report of Inspection, p. 2 on file 1823.
[255] *Ibid*., p. 11 on file 1823.
[256] See above, "Lily" and "Ist".
[257] "Non-conformity means an observed situation where objective evidence indicates the non-fulfilment of a specified requirement", ISM Code, s. 1.1.9.
[258] "Observation" means a statement of fact made during a safety management audit and substantiated by objective evidence, ISM Code, s. 1.1.8.

Outdated documents on file can hardly pose a serious threat to personnel or ship[259] unless the documents in question are expired ship's certificates and no new certificates are available, but that does not seem to have been found by the detaining officer.

It would appear that the Detention Notice does not comply with the requirements of clarity and specificity in respect of this defect. In addition, it would seem that old certificates on file would be in violation of the ISM Code,[260] but would not constitute a reason for detention. An arbitrator would not appear to be in a position to accept such a notice, unmodified. The only consolation for the Inspector would probably be the total number of 35 defects[261] which were a clear indication for the unsafe operation of the vessel. Thus the vessel could possibly have been detained under the MSA 1995, s. 95 for being a dangerously unsafe ship.[262]

(5) The Croation bulk carrier "Ist"[263] was detained[264] for three different reasons under the ISM Regulations only. Those grounds were (i) "Maintenance of ship and equipment", (ii) "Resources and personnel – training fire drill required", and (iii) "emergency preparedness (drills unsatisfactory)".

Whereas the first ISM major non-conformity completely lacked the necessary information about the "identifiable deviation"[265] an attempt to provide this information was made for MNCs number two and three. Still, even the added words on the notice[266] do not clarify where and how the deviation occurred.[267] The statutory instrument or international guideline from which the crew deviated[268] was not addressed and neither was it identified where the activities of the crew differed from the requirements laid down in those instruments.[269] As a consequence, the Detention Notice did not in any of its reasons appear to meet the requirements of "what" and "why"; the notice was not clear and cannot easily be understood.[270] Such a notice would have had to be modified to continue to be valid. A modification would probably have stood a good chance as the 37 recorded defects[271] and the detailed feedback on the fire drills clearly indicate the hazard to safety posed by the vessel.

(6) The Turkish flagged bulk carrier "Berrak N"[272] was detained under the ISM Regulations because "ISM maintenance procedures have failed to ensure compliance with SOLAS & Load Line Requirements". Neither the specific regulation nor the relevant section of the ISM Code had been addressed. In particular it is not stated where the procedures deviated from the requirements. It can only be assumed that reference was made to the other reasons for detention which fall under the Load Line, Radio, Fire Protection and Safety of Navigation, Regulations which are all statutory instruments implementing SOLAS[273] or the International Convention on Load Lines.[274] The Report of Inspection is of no help as the identifiable deviation was not recorded either. One would probably have

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[259] The ISM Code, s. 1.1.10.
[260] Section 11.2.3.
[261] According to the Report of Inspection on file 1823.
[262] Most defects carried an Action Code 17 (rectify before departure), see above, Chapter 6, fn 24. See also above the discussion in Chapter 5.2.
[263] File MS 071/003/1825.
[264] Detention no. 102 on 6 December 2002 (Annex 10).
[265] See discussion above under "Lily".
[266] For no. (ii) "training fire drill required" and for no. (ii) "drills unsatisfactory", see above.
[267] Neither can additional information to that effect be obtained from the recording of the defects in the Report of Inspection.
[268] These, what I call instruments, are all relevant documents which the ISM Code refers to in s. 1.2, beginning with the on board Safety Management System and extending to mandatory rules and regulations, applicable codes, IMO standards and recommendations etc.
[269] However, the Report of Inspection contains various findings why two fire drills were unsatisfactory, see report on file.
[270] *BT Fleet v. McKenna* [2005] EWHC 387 (Admin), para. 16.
[271] Many of which are Action Code 17 deficiencies, see Report of Inspection on file. For "Action Codes" see above Chapter 6, fn 24.
[272] File MS 071/003/1826.
[273] See the explanatory notes of the relevant statutory instruments.
[274] See the explanatory note of the Load Line Regulations.

expected a reference to have been made to specific elements of the safety management system identifying where it was non-compliant.

It appears that the safety management system was not working properly on board as otherwise such a high number of defects[275] could not have occurred. But it is still the prerogative of the master and owner to be provided with the detail of the breach and where it occurred. It would seem that such a notice was invalid unless it was established that the maintenance system failure was caused because the company did not comply with the ISM Code.

(7) The Panamanian flagged general cargo vessel "World Trader"[276] was detained[277] for eight defects one of which was a deficiency under the ISM Regulations.

The Regulations were supposed to be breached in so far as "ISM maintenance procedures have failed to ensure compliance with SOLAS and Load Line Requirements". A particular regulation or section of the ISM Code, and thereby a deviation, had not been specified. In a similar way as with the "Berrak N"[278] a detention without the relevant specification of an identifiable deviation may not constitute enough information for a master or owner.

(8) The Moroccan flagged dry cargo ship "Walili"[279] was detained[280] on six grounds one of which was under the ISM Regulations where it was succinctly stated, "number of deficiencies". In the Report of Inspection the same wording was used.[281] This is again[282] a ground for a detention which does not at all clarify on what basis the vessel has been detained. It has not been pointed out where the vessel does not comply with the ISM Code, where the identifiable deviation is or where the failure of the company is to comply with the requirements of the ISM Code.[283] Such a Detention Notice would seem to be invalid and as such could not be modified afterwards.[284]

(9) The Detention Notice[285] in the case of the Turkish flagged "Gulser Ana"[286] showed one ground for the detention of the ship under the ISM Code. It was "Company Input to Emergency Preparedness. Maintenance of Ship and Equipment – Items of LSA not provided".[287] This - rather fragmented – wording does not make it clear to a reader what actually was wrong. In the Report of Inspection two defects supporting this ground for a detention were recorded. Deficiency number 36 stated "emergency preparedness company input required" and under number 37 it said "maintenance of ship and equipment – items of LSA not provided on request". Whereas defect number 36 does not appear to make the case any clearer, defect number 37 seems to suggest that replacement or maintenance items for the life saving appliances (LSA) were not delivered to the ship despite them having been ordered. It was not specified which items exactly were not delivered.

A Detention Notice which does not specify the defect, and does not identify the deviation, so that guessing is required would in my opinion carry a fatal error. The master and owner ought to have been informed in very specific and clear terms which regulation of the ISM

[275] In total 53.
[276] File MS 071/003/1834.
[277] Detention no. 7 on 16 January 2003 (Annex 11).
[278] See discussion above, no. (6).
[279] File MS 071/003/2123.
[280] Detention no. 31 on 25 May 2005 (Annex 13).
[281] On p. 3.
[282] See above the point on LSA Regulations but more so Chapters 7.3.2. and 10.5.1.
[283] ISM Regulations, reg. 16(2)(b) in connection with reg. 4.
[284] See the discussion above in Chapters 6.3.1 and below in Chapter 8.
[285] File MS 071/003/1347.
[286] Detention no. 72 on 16 October 2001 (Annex 9).
[287] Detention Notice on file.

Regulations was actually violated, and how.[288] If that had been done the vessel could have been detained if the company did not comply with the requirements of the ISM Code.[289]

One can possibly assume the latter, but to justify an interference with the right to a peaceful possession[290] such an assumption would not appear to be enough. What would clearly need to be established is where exactly a major non-compliance[291] occurred so that the Inspector would then be able to carry out the required balancing act. It is only if my understanding of the wording of the notice is correct, and if the non-delivered items were actually essential to prevent a risk to life, that the detention on this ground would appear to have been justified. As it stands I would consider this ground in the Detention Notice to have been so flawed that the detention could not have been upheld and a modification of the notice would not seem to have been possible.[292]

Irrespective of the latter conclusion, a detention could not have been based upon ISM deficiencies as the ISM Code only applied to vessels such as "Gulser Ana" as from 1 July 2002. The date of the detention, however, was 16 October 2001.[293]

General comments and summary

What may be summarised from the aforesaid 19 reasons for detention is that there appeared to be a significant lack of understanding amongst the port state control Inspectors when it came to the application of the ISM Regulations. It would seem that the reasons for the invalid Detention Notices can be broken down into two groups.

In the first group are those detentions which assume an accountability under the ISM Regulations for master and crew in case of a breakdown of the SMS on board. In those cases it was not recognised that a vessel can only be detained when the company fails to comply with the requirements of the ISM Code.[294] In my view, non-compliance of master and crew cannot lead to a detention under the ISM Regulations.

In the second group are those Detention Notices which do not specify any major non-conformity and the question as to whether the company or the ship was responsible did not have to be asked.

The identified defects in the notices had the effect that possibly not one of the detentions was justified because no relevant breach of the ISM Regulations occurred or had been identified.[295]

The reasons provided for the detentions were all, but one,[296] maintenance,[297] emergency preparedness[298] and resources.[299]

I will next discuss the grounds for detention under the Load Line Regulations.[300]

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[288] The ISM Regulations, reg. 16(2)(b) allow a ship to be detained if there is a failure to comply with reg. 4 or 5.
[289] *Ibid*., reg. 4.
[290] Human Rights Convention, First Protocol, Art. 1.
[291] See below the discussion of major non-conformities under "Lily" and the ISM discussion below under "Paloma C".
[292] See the discussion above in Chapter 6.3.1. and below in Chapter 8.
[293] See Annex 9, detention no. 72.
[294] ISM Regulations, reg. 4. See also the discussion in Chapter 10.5.
[295] Regulation 16(2)(b).
[296] "Documentation", ISM Code, s. 11, but for the validity see above, no. (4).
[297] ISM Code, s. 10.
[298] *Ibid*., s. 8.
[299] *Ibid*., s. 6.
[300] The Merchant Shipping (Load Line) Regulations 1998, SI 1998 no. 2241.

7.3.3. Detentions under the Load Line Regulations

(1) The Greek flagged "Spyros"[301] was detained for two defects falling under the Load Line Regulations. The Regulations apply to foreign ships while in UK waters.[302]

In these two cases it was recorded that (i) "No 2 hold access corroded through" and (ii) "No 5 hold vent corroded through". The statutory requirement forming the basis for the detention in both cases was reg. 37(2).[303] The regulation requires that any ship which does not comply with the "conditions of assignment"[304] "shall be liable to be detained until it complies". Regulation 25(1) provides that every ship shall comply with the conditions of assignment as set out in MSN[305] 1752, Schedule 2. According to this Schedule both a hold access and a ventilator have to be weathertight.[306] When they are corroded through they are no longer weathertight.[307] But as the regulation does not provide an automatic right to a detention a detaining officer will still have to apply discretion.[308]

It would appear that whether or not there was a risk to life, would depend on the size of the holes in both ventilator and hatch access. If a slow successive flooding through corroded steel would not pose an immediate risk to life a detention would seem to be disproportionate.[309] If the objective to comply with the conditions of assignment could be achieved without the risk that the master, crew and ship might suffer due to the defects, requiring to have the repairs done at the next port or even within 14 days[310] may have sufficed. A balancing act by the PSC Inspector could thereby well lead to the decision not to detain the ship.[311] To comment on this particular decision would, however, require more information about both the actual damage on the vessel and its next port of call.

If a ship the holds of which are not weathertight poses both a serious risk to life and of damage to other property (e.g. cargo) a detention would have been justified. An interference with a property right for a temporary period of time through a detention appears under such circumstances to be a justifiable measure.

(2) The Algerian flagged bulk carrier "Nememcha"[312] was detained under the Load Line Regulations for two reasons.

First, there were a "number of ventilator closing devices seized on main deck" and secondly, "No. 1 hold stbd cargo hold vent spindle severely distorted and unable to close". The information about both defects is clear and specific and appears to justify a detention

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[301] File MS 071/003/1730
[302] Regulation 4(1).
[303] Load Line Regulations.
[304] The "conditions of assignment" stipulate the requirements a ship has to comply with which has been assigned its freeboard under the Load Line Regulations. According to reg. 25(1) every such ship must comply with the requirements set out in MSN 1752, Schedule 2. The Regulations apply to foreign flagged ships while they are in UK waters, reg. 4(1). MSN 1752, Schedule 2 is incorporated into UK law by reg. 25(1) of the Load Line Regulations.
[305] For the legal status of an MSN see above, Chapter 6, fn 255.
[306] Schedule 2, Part I, para. 4(2) (hatchways) and para. 9(4) (ventilators). "'Weathertight' in relation to any part of a ship other than a door in a bulkhead means that water will not penetrate it and so enter the hull of the ship in the worst sea and weather conditions likely to be encountered by the ship in service", Schedule 2, para. 1(1).
[307] The report (defect 21) does, again, not specify that the ventilator is corroded through below the damper. If that would not be the case it could be arguable that there is no contravention of the weathertightness requirement.
[308] See the discussion above, Chapter 7.3.1. ((1) "Gulser Ana").
[309] *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, p. 80.
[310] For Action Codes see above, Chapter 6, fn 24.
[311] A detaining officer could as a decision making help consider whether or not the vessel would be required to be detained if he would apply the PSC Regulations, see the discussion above on the reasons when a vessel must be detained, Chapter 6.4.3.
[312] File MS 071/003/1824.

because the condition of the ventilators do not meet the requirement for the devices to be weathertight and in addition pose a clear fire risk.[313]

(3) The Panamanian bulk carrier "Paloma C"[314] was detained for one defect under the Load Line Regulations. The deficiency was "securing arrangements for cargo hatch covers not satisfactory".

In the Report of Inspection[315] it is specified that a number of hatch cover securing cleats were defective. With a defective cleat a hatch cover is potentially no longer weathertight. The latter constitutes a breach of the load line requirements[316] and is a potential risk to life. A detention for such a defect appears to be justified.

(4) The Turkish flagged bulk carrier "Berrak N"[317] was detained for two defects under the Load Line Regulations. They were (i) "at least 6 ventilators on poop deck incapable of weathertight closure" and (ii) "no. 4 FOT[318] air pipe corroded thru at main deck level".

Defect (i)

A ventilator which is corroded through is no longer weathertight and thus does not any longer comply with the conditions of assignment.[319] Such a ship shall be liable to be detained until it complies.[320] As at least six holes breached the weathertight integrity of the vessel, which is potentially life threatening and also poses a fire risk, a detention for such defects appears to have been justifiable.

Defect (ii)

An air pipe leading to a fuel tank has to be weathertight as well.[321] A hole can potentially let seawater ingress into the fuel tank which would have an impact on the stability of the vessel and might damage the fuel. A holed air pipe is also a potential fire risk. A detention appears to have been appropriate without further balancing in detail the interference by a detention with personal rights.[322]

(5) The Panamanian flagged general cargo vessel "World Trader"[323] was detained for two deficiencies under the Load Line Regulations. The defects were (i) "aft peak stores hatch corroded thru" and (ii) "stbd rope store hatch corroded through".

The provision activated for the detention was reg. 37 and under the heading "statutory requirement" in the notice there was added "comply with condition of assignment". It appears that hatchways which cannot be closed weathertight do not comply with the "conditions of assignment".[324] When a ship does not comply it shall be liable to be detained until it complies.[325]

Whether or not there was a risk to life would probably depend on the method of construction of both the aft peak and the rope store. As above,[326] if the risk of flooding through a corroded hatch cover would not pose an immediate threat[327] to life a detention

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[313] See above, discussion of Load Line and fire deficiencies on "Spyros".
[314] File MS 071/003/2007.
[315] On p. 8.
[316] Load Line Regulations, reg. 25(1) in connection with MSN 1752, para. 9(4).
[317] File MS 071/003/1826.
[318] "FOT" probably means "fuel oil tank".
[319] Load Line Regulations, reg. 25(1) in connection with MSN 1752, para. 9(4).
[320] Load Line Regulations, reg. 37(2).
[321] MSN 1752, para. 10(2).
[322] See also above Chapter 7.3.1. ((7) "Spyros").
[323] File MS 071/003/1834.
[324] Load Line Regulations, reg. 25(1) in connection with MSN 1752, para. 9(4).
[325] Regulation 37(2).
[326] See no. (1), "Spyros".
[327] Such as that the stability requirements of the vessel would not have allowed for having those spaces flooded.

would seem to be disproportionate.[328] The PSC Inspector should possibly have considered requiring that the repairs were done at the next port or even within 14 days.[329]

(6) The Maltese flagged bulk carrier "Lobelia"[330] was detained[331] on one ground under the Load Line Regulations. A specific regulation was not quoted. The reason given for the detention was "extensive steel wastage in wing ballast tanks, ventilators and deck plating to for'castle".

The Load Line Regulations do not require a specific strength of the ship's steel but only that "its general structural strength is sufficient for the freeboards assigned".[332] Wastage in wing tanks and of the deck would appear to fall under the structural strength requirements. It is arguable, however, that the ventilators do not play a role in the structural strength of the vessel other than being of a build which ensures the vessel is kept weathertight.[333] The structural requirement for ventilators is to be "substantially constructed and efficiently connected to the deck".[334] Both (i) the ship's and (ii) the ventilators' failing structural strength, however, could pose a significant danger to human life. The former would entail the risk of (i) the ship developing cracks or even breaking in two and (ii) the ventilator no longer being weathertight. However, if the ventilator is not yet holed it would require the PSC Inspector to justify why on balance a detention is required as opposed to a less rigid measure. But if he still comes to the reasonable conclusion that the balance struck between the right of the owner and the risk to life requires an interference with the owner's right, the detention would probably appear to have been justified.[335]

Such a conclusion does not require the PSC Inspector to be a specialist structural marine engineer or naval architect as he would usually have immediate access to such expertise within the MCA or the relevant classification society. Even if the Inspector erred on the side of caution and were to reverse his decision to detain the vessel after a specialist has ascertained whether or not the vessel complies with the conditions of assignment,[336] the damage for the ship would be restricted to lost time, as no record of the detention will be kept on the Paris MoU database.[337] Even if the loss of time can be translated into pecuniary damage it would appear that no liability for the UK arises because the detention was not formalised and an arbitrator could therefore not have been called upon to make a decision.[338]

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[328] *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing,* p. 80.
[329] Including Action Code 17 (rectify before departure); these are the three main options an Inspector has available, see above, Chapter 6, fn 24.
[330] File MS 071/003/2049.
[331] Detention no. 66 on 20 September 2004 (Annex 12).
[332] Reg. 25(1) in connection with MSN 1752, Schedule 2, Part I, para. 2(1).
[333] *Ibid*., para. 9(4).
[334] *Ibid*., para. 9(1)(a).
[335] See *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532, para. 27.
[336] Load Line Regulations, reg. 37(2).
[337] See also above, discussion about the financial impact of a detention on an owner, Chapter 6.4.2.
[338] MSA 1995, s. 97(1). See also discussion below, Chapter 8.5. This would seem to be also the case at common law. In *Reeman v. Department of Transport* [1997] 2 Lloyd's Rep. 648, p. 679, the Court of Appeal found that "the relevance of these considerations is simply that, if there is insufficient proximity of relationship to give rise to a duty of care in respect of … economic loss directly caused to the owner of the vessel at the time of the certification, it is hard to accept that such proximity exists between the department and those who may rely on the existence of a certificate in relation to commercial transactions that involve the risk of economic loss." It would appear that the reverse conclusion to certification (i.e. the quasi removal of certification by preventing the ship from going to sea in accordance with an order of the PSC Inspector) falls into the same category. There does not appear to be a duty of care of the port State administration in respect of economic loss arising from stopping the ship to go to sea other than in the context of MSA 1995, s. 97 (see discussion below, Chapter 8.5. The purpose of preventing the ship from sailing is "the promotion of safety at sea", *Reeman v. Department of Transport,* p. 680.

General comments and summary

The detentions under the Load Line Regulations appear to have rested on more clear cut defects than those in the previous discussions. All but one[339] were about holes in hatches, ventilators or pipes or about inoperational ventilators. The deficiencies would seem to have been clearly described and the law to have been correctly identified. The only point which could have potentially led five[340] detentions to be invalid would seem to be whether or not the Inspector had properly applied his discretion in weighing up the danger to life with an interference with the property right of the owner. Such a decision, however, would appear only to be possible after the Inspector had had access to detailed evidence about the actual damage found on board.

Next I will discuss the detentions under the PSC Regulations.

7.3.4. Detentions under the Port State Control Regulations

The discussion in this sub-section is based upon the assumption that the wording of the Directive 95/21/EC, Art. 9(2) applies rather than the PSC Regulations, reg. 9(2). The different wording in the Directive[341] suggests that a vessel with defects which are clearly hazardous to safety, health and the environment can be detained under the PSC Regulations whether or not the defects are covered by a Convention enactment. When the Inspector applies his professional judgment he must follow the criteria of MSN 1775, Annex VI.

(1) The Panamanian flagged refrigerated cargo vessel "Wisteria"[342] was detained[343] on five different grounds. The only statutory instrument referred to was the PSC Regulations.

No specific regulation was quoted. The defects were (i) "fire damage", (ii) "em fire pump", (iii) "funnel dampers", (iv) "firemain holed" and (v) "ISM – s10."

Some more detail can be found in the Report of Inspection. The "fire damage" for which the vessel was detained refers to the general alarm but there is added (i) "cabling for lighting, fire detection". The additional words under (ii) "em fire pump – not able to pump", (iii) "firemain holed main deck" and (iv) "funnel dampers not fully closing" were the other clarifications. But there is no trace in the Report of Inspection of any recorded major non-conformity (MNC) for ground no. (v).

The Detention Notice was of rather poor informative value for the master and owner and does not appear to fully satisfy the requirements for such notices. Only with the additional information in the Report of Inspection do the recorded four technical defects become more understandable. All seem to be breaches of the Fire Protection Regulations which could cause a risk to life.[344] Under the PSC Regulations the two Inspectors did not have any discretion but had to detain the ship.[345]

The only defect whose description was completely unclear seems to have been the alleged breach of the ISM Code. As there is no information recorded on the Detention Notice, nor any word about it in the Report of Inspection, no identifiable deviation appears to be addressed. The mentioning of only s. 10 of the ISM Code in the Detention Notice gives an indication, but appears to be far from identifying a deviation posing a serious

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[339] "Lobelia", no. (6).
[340] Numbers (1)(i), (1)(ii), 5(i), (5)(ii) and (6).
[341] See above, Chapter 6.4.3.
[342] File MS 071/003/2003.
[343] Detention No. 29 on 5 April 2004 (Annex 12).
[344] See detentions of the vessels above.
[345] PSC Regulations, reg. 9(2)(a), according to which the Inspector shall detain the ship when defects are clearly hazardous to health, safety or the environment. See also the discussion about the Inspector's discretion above, Chapter 6.3.1.

threat to the crew[346] let alone establishing a failure of the company to comply with the Code.[347] This could possibly have constituted grounds which would have been cancelled in an appeal procedure. However, the poor recording of a defect under the ISM Code ought not to have affected the validity of the Detention Notice as it was only one out of five aspects which led to the finding that the ship was clearly hazardous.

(2) The Moroccan flagged dry cargo ship "Walili"[348] was detained under the Port State Regulations for "ILO 147 – no food, poor sanitary conditions". This defect consists of two elements which are (i) food and (ii) sanitary conditions. The Report of Inspection qualifies (i) "no food on board for voyage". As regards (ii), the sanitary conditions, no further information can be extracted from the report. It only states "crew + officers accom not as required".

The PSC Regulations require an Inspector to detain a vessel when deficiencies (plural) are clearly hazardous to health.[349] For UK flagged vessels it is the duty of the employer and the master to ensure that food of an appropriate quantity and quality is provided for the voyage.[350] The same requirements only apply indirectly to foreign flagged ships in UK ports. An Inspector may detain the ship when it does not conform to UK standards and when the conditions on board are clearly hazardous to safety and health.[351] It would appear that a vessel which does not carry sufficient provisions for the forthcoming voyage would clearly be hazardous to health on board.

The Provision Regulations seem to make it clear that insufficient provisions may constitute a reason for a detention independent of a port state control inspection. But if a situation is clearly hazardous to health under those Regulations it would appear to also be covered by the PSC Regulations. The difference seems to be that the PSC Regulations require more than one defect to be clearly hazardous to health[352] and an Inspector then does not have a choice but must detain the ship.[353]

Under the Provision Regulations, on the other hand, one defect would appear to be sufficient for a detention provided the Inspector applied his discretion and reasonably came to a balanced decision that a detention was a proportionate interference with the right of the owner.[354]

In the case of "Walili" the choice of legislation the ship was detained under appears to be somewhat unfortunate. The reference to the ILO Convention 147[355] does not seem to constitute a valid reason for a detention. First, it is a Convention which is not incorporated into UK law. Secondly, it addresses the parties to the Convention and not the individual citizen.[356] Thirdly, the Convention does not specify the conditions but only requires member States to have legislation in place which regulates the living conditions on board.[357] A UK detention based solely on the grounds of ILO 147 does not appear to be legally possible. Reference should probably have been made to the Provision Regulations. Instead the vessel was detained under the PSC Regulations which would not appear to have been possible for one clearly hazardous deficiency (the lack of food) only.

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[346] See the discussion in Chapters 7.3.2. and 10.5.1.
[347] *Ibid*.
[348] File MS 071/003/2123.
[349] PSC Regulations, reg. 9(2)(a). See above in this Chapter 6.4.3.
[350] The Merchant Shipping (Provisions and Water) Regulations 1989, SI 1989 No. 102 (hereafter "Provisions Regulations"), reg. 4(a).
[351] *Ibid*., reg. 9(1)(b)(ii).
[352] See the discussion above in Chapter 7.3.4.
[353] PSC Regulations, reg. 9(2)(a), "…the Inspector shall detain the ship…".
[354] In applying Lord Steyn's dicta in *R (Daly) v. Secretary of State for the Home Department,* para. 27, see above, discussion in Chapter 6.7.2. (*(a) health risk*).
[355] Ratified by the UK on 28 November 1980, see http://www.ilo.org/ilolex/english/convdisp1.htm (17 July 2008).
[356] See Art. 2 of the convention: "Each member which ratifies this convention undertakes-- …".
[357] Art. 2(a)(iii) "…to have laws or regulations laying down, for ships registered in its territory--shipboard conditions of employment and shipboard living arrangements,…". This appears to have been done to some extent by the Provision Regulations.

But as the reason contains two elements, i.e. food and sanitary conditions, the PSC Regulations actually required the Inspector to detain the vessel provided the sanitary conditions could be qualified as posing a clear hazard to health.

It is not apparent what sanitary conditions exactly the Inspectors thought would pose a clear hazard. The statement that the accommodation is not as required does not necessarily refer to sanitary conditions. But it would appear to be completely unacceptable to declare the detention unjustified for a lack of clarity of the notice in respect of sanitary conditions when, on the other hand, the ship did not carry sufficient provisions. Although the notice would appear to be defective in respect of the justification for a detention under the PSC Regulations,[358] a modification of the notice[359] could possibly have taken into account other defects affecting the living conditions which were not used to justify the detention. Evidence of these could be found in the Report of Inspection and they were, amongst others, "microoven not as required", cold room "dirty", "mess room chairs arm rest missing", "stove hood dirty", "no dedicated, marked FW[360] hose", "provision rooms – gratings to repair, further cleaning required" and "insulation below meat room door to repair". In my view the additional evidence would justify the requirement in the PSC Regulations to have more than one reason which must constitute a clear hazard to health and a detention would seem to have been justified. It would have been clearer, though, if the vessel would have been detained under the PSC Regulations referring to all the relevant defects.

General comments and summary

A detention under the PSC Regulations seems to provide the lowest risk level[361] for the detaining officer as long as two detainable defects have been identified.[362] As it is the professional judgment[363] of the Inspector which determines whether or not a ship is hazardous the threat of wrongly applying his discretion would appear to be lower than under any set of specific[364] Regulations. Under the latter he would have to apply the proportionality principle whereas under the former (PSC Regulations) only exercise his professional judgment in finding that the defect is clearly hazardous.

I will next discuss the detainable defects identified under the LSA Regulations.[365]

7.3.5. Detentions under the LSA Regulations

(1) Under the LSA Regulations the Turkish flagged "Gulser Ana"[366] was detained for "Starboard Lifeboat not operationally ready. Lifeboat davits to test load".[367] It had not been specified why the lifeboat was not operationally ready or why the boat should undergo a load test, and the Report of Inspection does not provide any additional information.[368] A ship shall be liable to be detained when it does not comply with the requirements of the Regulations.[369] The power to detain a vessel under the LSA Regulations is provided for in reg. 87 and gives the detaining officer some discretion.

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[358] Because of only referring to one defect which is clearly hazardous to health and safety.
[359] See below, Chapter 8.
[360] "FW" most likely stands for "freshwater".
[361] As appears to be the case in that only one detention ground ((1)(v)) would seem to be doubtful.
[362] See above, Chapter 6.4.3. *et seq.*
[363] See above, Chapter 6.4.2.
[364] Such as, for example, the LSA Regulations.
[365] The Merchant Shipping (Life-Saving Appliances for Ships other than Ships of Classes III to VI(A)) Regulations 1999, SI 1999 no. 2721.
[366] Detention no. 72 on 16 October 2001 (Annex 9).
[367] Detention Notice on file MS 071/003/1347.
[368] Recorded defect no. 11.
[369] LSA Regulations, reg. 87.

The discretion would appear to be subject to the proportionality principle.[370]
If a lifeboat is not operationally ready it is by definition a serious threat to life, and the means of detention seem appropriate to ensure compliance because a ship which does not sail cannot put its crew and passengers at the risk of losing their lives at sea. The interference with the property right is temporary and would appear to be of secondary priority only.

But without a clarification of what is, and why it is, wrong, the notice seems to have been defective and would appear to have provided a ground for cancellation. However, the total number of defects in this case might have outweighed the faulty notice.[371]

(2) Under the LSA Regulations the Brazilian flagged bulk carrier "Lily"[372] was detained for (i) "port lifeboat oar rowlocks seized and no other means of propulsion" and (ii) "numerous lifebuoy lines to renew".[373] I will deal with the lifeboat first.

Defect (i)

A lifeboat for a ship of this age[374] is defined as one which complies with the requirements of MSN 1677.[375] That Merchant Shipping Notice obliges a ship of this class[376] to be equipped with

> "a single-banked complement of buoyant oars, two spare buoyant oars and a buoyant steering oar; one set-and-a-half of crutches attached to the lifeboat by lanyard or chain; a boat hook;…"[377]

Regulation 87 states that a ship shall be liable to be detained when it does not comply with the requirements of the Regulations. They do not specifically require the equipment to be kept in a particular state of maintenance. It appears, therefore, that the LSA Regulations only support the decision of the detaining officer in so far as equipment which is not operational (i.e. the "crutches" or rowlocks) is equivalent to equipment which is not on board. Applying this interpretation still requires the detaining officer to balance the owner's conflicting interest in property with the risk to life for the crew.

It is not clear whether or not all crutches were seized or whether or not they were seized in the rowing position or being folded away, but it is arguable that even if all would have been folded away and seized it would not have posed a risk to life which would justify an interference on the scale of a detention. The degree of a risk to life needs to be "a real and immediate risk to life".[378] If there are fears for life they "must be objectively well-founded".[379] The seized crutches/rowlocks could hardly have generated any such objectively justified fears. It is possible to launch the boat and even move it away from the vessel to some extent without the crutches/rowlocks being operational. It might even be assumed with some credibility that seized crutches/rowlocks would have been moved by the time they were needed in the boat.[380] The real risk to life does not appear to be any seized crutches/rowlocks but the fact that open boats with no propulsion, other than oars, are still allowed under SOLAS to fulfil the role of a lifeboat.

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[370] See discussion above under Fire Protection Regulations, (1) "Gulser Ana".
[371] See the discussion above Chapter 7.3.
[372] File MS 071/003/1764.
[373] Detention Notice on file.
[374] Built in 1984, see Report of Inspection, p. 1.
[375] LSA Regulations, reg. 2(2) in connection with MSN 1677, p. 1. However, it is not stated explicitly, other than in the summary on the front page of MSN 1677, that this MSN and not MSN 1676 applies to a ship falling under Part II of the LSA Regulations. Part II of the LSA Regulations applies to ships built before 1 July 1986.
[376] "Lily" was a class VII vessel which means a dry cargo ship engaged on long international voyages, LSA Regulations, reg. 3.
[377] MSN 1677, Schedule 12, para. 2.1.1.
[378] Confirmed by *Chief Constable of the Hertfordshire Police v. van Colle* [2008] UKHL 50, para. 30.
[379] *In re Officer L* [2007] 1 WLR 2135, para. 20.
[380] Although, admittedly, freeing seized crutches forcefully could entail the slight risk of causing them or their mounting brackets to fracture.

In my opinion, it is not justified to detain a ship for seized crutches/rowlocks and I would have considered it to be sufficient to require the master to have the crutches/rowlocks "unseized" before departure.[381]

Defect (ii)

The second ground for detention under the LSA Regulations was the state of the lifebuoy lines. The detaining officer had not clarified why he wanted the lifebuoy lines to be renewed, which of them he actually meant, or which lines, lifelines or grablines he saw to be defective.[382] Any noted defect[383] in respect of a lifebuoy line would appear to be easily objectively verifiable[384] and the identification of the particular lifebuoy in question should also not have presented a problem considering the small number of lifebuoys required to be on board.[385] It appears that, without knowing what the defect was and which lifebuoy was affected, the notice was not specific enough particularly as the Report of Inspection did not add anything helpful.[386] Moreover it is arguable that it is not the role of the detaining officer to instruct the master and owner what to do.[387] His role appears to be restricted to pointing out what is wrong. Determining the actual means to fix it ought to be left to the vessel.[388]

On the other hand it could be argued that it had been very obvious for the PSC Inspector (and therefore also to the ship's officer who would have walked him around the ship) that the state of the lifebuoy lines was so bad that they had made the lifebuoys useless. This, however, had not been recorded either in the Report of Inspection or the Notice of Detention. If, therefore, the defect is not objectively verifiable, because it has not been described, it could become subject to a different interpretation by the master and crew of the vessel. In that case the notice is not "clear and easily understood".[389] The lack of clarity makes the notice if standing on its own, in my opinion, defective.

In my view, the defective notice could not be modified by an arbitrator with regard to the particular deficiency if such a case became subject to an appeal. Even though lifebuoy lines which are not fit for purpose[390] would appear to constitute a reason for detention an arbitrator could not, without more detailed information, establish that the latter was the case. But again, the total number of defects recorded in the Report of Inspection would probably have outweighed the defective Notice of Detention.[391]

(3) The Algerian flagged bulk carrier "Nememcha"[392] was detained for two defects under the LSA Regulations, which were (i) "lifeboat equipment missing, damaged and/or expired" and (ii) "pyrotechnics expired".[393]

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[381] Which could have been done by allocating a Action Code 17 to the deficiency. See above, Chapter 6, fn 24.
[382] The latter would appear to make a difference as the "Lily" (built in 1984) had to carry only a minimum of two lifebuoys fitted with a buoyant lifeline (LSA Regulations, reg. 24(2)(a)), whereas each lifebuoy had to have a grabline (MSN 1676, Schedule 8, Part 2, para. 1.5). A lifeline is a line the length of which is required to be "not less than twice the height at which it is stowed above the waterline in the lightest seagoing condition, or 30 metres, whichever is the greater" (MSN 1676, Schedule 8, Part 6, para. 1.5), and which is attached to the lifebuoy. If a lifeline was affected it would have been easy to fix immediately on board (assuming that appropriately sized rope was available). A defective grabline, however, would usually require a more complicated repair or even the replacement of the lifebuoy.
[383] Such as, for example, "grabline torn", "lifelines brittle", or "grablines torn off lifebuoy".
[384] With which I mean that master or crew could not but agree with the finding of the PSC officer.
[385] Neither SOLAS, Chapter 3, reg. 7 nor the LSA Regulations (which apply to foreign flagged ships in UK waters, reg. 4(1)), reg. 23, in connection with MSN 1676, define the number of lifebuoys to be carried on board. For the "Lily" the number would probably have been eight in total.
[386] "Lifebuoy lines to renew – various", defect no. 24.
[387] See also above, Chapter 7, fn 180.
[388] See discussion above, Chapter 6.3.
[389] *BT Fleet v. McKenna* [2005] EWHC 387 (Admin), para. 14.
[390] Which would be lines which would no longer comply with the requirements of MSN 1776, Schedule 8, Part 6, paras. 1.2 – 1.4.
[391] See the discussion above in Chapter 6.3.2.
[392] File MS 071/003/1824.
[393] Detention Notice on file.

Defect (i)

The lifeboat equipment which ought to have been carried in "Nememcha" appears to be regulated by MSN 1677,[394] and missing or expired items have been listed in the Report of Inspection.[395] Amongst those items are boat pyrotechnics, first aid kit and the torch – all items of the utmost importance if the boats were to be used during an abandon ship emergency. A detention on the ground of such defects appears to be completely justified.

Defect (ii)

A similar reasoning seems to apply to pyrotechnics in general. Every ship shall not carry fewer than 12 parachute distress rocket signals.[396] When they are expired they not only pose a risk that they may not go off when required but also constitute a serious risk to the operator as they may not function properly and cause him serious harm. A detention for such a defect seems also to be appropriate.

(4) The Panamanian bulk carrier "Paloma C"[397] was detained for "24 lifejackets to be replaced". The Report of Inspection qualifies this demand by "32 lifejackets condemned due to deterioration of stitching. V/L requires to replace 24 jackets to match number on Safety Equip. Cert."

A vessel is obliged to carry a lifejacket for every person on board[398] plus a number of additional lifejackets.[399] All lifejackets "shall be in working order and ready for immediate use before any ship commences a voyage"[400] otherwise a ship shall be liable to be detained.[401] Lifejackets which are not fit for purpose clearly pose a risk to life and thus appear to justify a detention.

(5) The Moroccan flagged dry cargo ship "Walili"[402] was detained under the LSA Regulations for "numerous deficiencies lifeboats". The Report of Inspection does not provide any more detail.[403] It is in my view unacceptable to present the master and owner with such a notice. Nobody apart from the Inspector will know what he considered to be deficient. It is impossible for any third person to verify whether or not the defects would justify a detention. A detention based on such unclear information alone would seem ripe for cancellation.

(6) The Georgian flagged general cargo vessel "Berkhan B" was detained under the LSA Regulations because the vessel was "unable to launch stbd L/B[404] for 15 minutes".[405]

The Regulations required all lifeboats on "Berkhan B"[406] to be launched in "the shortest possible time".[407] It is only for passenger ships and tankers that a specific time frame is laid down namely that the overall launching time for all boats shall not exceed 30 minutes.[408] The statement in the Report of Inspection is somewhat ambiguous as it could

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[394] MSN 1677, Schedule 12, para. 2.1, refers to ships of class VII although it would appear that the relevant regulation for a class VII ship does not contain a reference to the MSN, see LSA Regulations, reg. 10. Incorporations of Schedule 12 have otherwise been made for ships of class I (reg. 7(6)), class II (reg. 8(5)), class II(A) (reg. 9) and class VII(A) (reg. 11(6). It would appear that it was an omission not to address MSN 1677 within reg. 10.
[395] P. 7, defect 39.
[396] LSA Regulations, reg. 35(1).
[397] File MS 071/003/2007.
[398] LSA Regulations, reg. 10(15)(a).
[399] *Ibid*., reg. 10(15)(b).
[400] *Ibid*., reg. 84(1).
[401] *Ibid*., reg. 87.
[402] File MS 071/003/2123.
[403] "Several defects found in both boats", Report of Inspection, p. 3.
[404] "L/B" probably means "lifeboat".
[405] Detention Notice on file MS 071/003/2158.
[406] In that "Berkhan B" was not a class I, II, II(A) or VII(A) but a class VII vessel, see LSA Regulations, reg. 3.
[407] LSA Regulations, reg. 27(2).
[408] *Ibid*., reg. 27(2)(a) and (b).

mean either that (i) the crew did not get the boat ready to be launched within 15 minutes or that (ii) the whole launching operation took 15 minutes. If it meant a total of 15 minutes was required to launch the boat (alternative (ii)) the time used would not appear to be unreasonable.

Determining "the shortest possible time" affords the Inspector some discretion. It would seem that defining the available time as being less than 30 minutes would be unreasonable. If vessels posing a higher risk[409] such as passenger ships and tankers are required to launch their boats in 30 minutes, and no specification has been made for other vessels, it would appear to be unreasonable to have shorter periods applying to dry cargo ships.

It is not clear how long it actually took to launch the starboard lifeboat on the vessel and the time mentioned in the report would therefore have to be applied. As launching two boats does not necessarily require twice the time of launching one boat,[410] provided enough qualified crew are available, it would appear that 15 minutes for one boat is within reason. It seems to follow that a detention on a ground which is not reasonable would be an unacceptable measure and ought to be cancelled.

If, however, the boat was not launched within 15 minutes (alternative (i)) a detention would seem to become more of an acceptable option. In particular, if the delay were to have been caused by incompetent crew or other technical defects, the detention might have been sustainable, but probably not under the LSA Regulations.[411]

General comments and summary

Out of a total of eight detainable defects, five[412] appear to have been doubtful; this is a rather poor result. Apart from, what I would call, sloppy recording of two deficiencies,[413] in three cases the Inspector might not have used his discretion appropriately.[414] Whereas there is not really an excuse for the former[415] the latter may have resulted from (i) the 'heat of the moment' or from (ii) a misinterpretation of the legal requirements. Possibility (i) could have been triggered by the recognition of the Inspector that detaining of the vessel for such a defect would appear to support other reasons for a detention. Possibility (ii) could have come about by a lack of training in the interpretation of statutory enforcement requirements.

Next I will discuss the detentions under the Survey and Certification Regulations.[416]

7.3.6. Detentions under the Survey and Certification Regulations

(1) Four of the nine detainable deficiencies recorded in the Detention Notice for the Greek flagged "Spyros" were (i) "bridge bulkhead port corroded through", (ii) "accommodation deck port side funnel corroded through", (iii) "officers accommodation bulkhead aft corroded through" and (iv) "bulkhead front accommodation corroded through".[417] According to the notice this is in breach of the Survey and Certification Regulations, reg.

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[409] Because more people would be affected (passenger ships) and the operation is fraught with more dangers (tankers).
[410] In case of "Berkhan B" that could obviously not have been tested as the vessel was alongside with what appears to be port side.
[411] An alternative would be the PSC Regulations, reg. 9(2)(a) if the Musters Regulations, (e.g. reg. 10 and 12) were not complied with.
[412] Numbers (1), (2)(i), (2)(ii), (5) and (6).
[413] See no. (1) "Gulser Ana" and (5) "Walili".
[414] See no. (2) "Lily" for both defects and no. (6) "Berkhan B".
[415] Other than that it could be a training issue not understanding the legal requirements for a Detention Notice properly.
[416] The Merchant Shipping (Survey and Certification) Regulations 1995, SI 1995 No. 1210.
[417] Detention Notice on file MS 071/003/1730.

9. This regulation, however, only applies to UK flagged ships and other vessels which have been surveyed "pursuant to these Regulations".[418] It follows that the Regulations do not apply to a ship which is not a UK flagged ship or has not been surveyed under that statutory instrument. Accordingly such a ship cannot be detained for a breach of reg. 9 under the Regulations.[419]

Unless, therefore, the recorded defects had constituted a breach of a different statutory requirement which would have entitled an Inspector to detain the vessel, a ground for a detention would not exist. With the limited information available here that is not possible to establish.[420] Such a clarification by the Inspector would probably have been required during any arbitration, to ensure a minimal chance that the detention remained valid. The Inspector would, however, still have to face the problem that the arbitrator may follow the Court in the *Club Cruise* case and decide that because the Inspector did not have the correct legislation in his mind he cannot have applied the correct standard.[421]

Without further clarification it would therefore appear that an arbitrator would be obliged to cancel the Detention Notice as none of the four grounds meet the necessary requirements.[422]

(2) Three defects were recorded on the Panamanian flagged general cargo vessel "World Trader"[423] under the Survey and Certification Regulations. They were (i) "bulkhead on master's deck corroded thru in 2 places", (ii) "boat deck bulkhead corroded thru in 2 places" and (iii) "no 2 deck house corroded thru in several places". The ship was supposed to be in breach of reg. 8(a).[424]

The Regulations provide that where a ship does not comply it shall be liable to be detained.[425] According to reg. 8(1)(a)

> "the condition of the ship and its equipment shall be maintained to conform with the provisions of regulations 4 to 7 to ensure that the ship in all respects will remain fit to proceed to sea without danger to the ship or persons on board,...".

Regulation 7 makes a UK flagged cargo ship subject to a structural survey, but does not include a foreign flagged vessel. Even though the Regulations apply generally to UK and other flagged ships while they are in UK waters[426] reg. 7 appears to be specific to UK flagged ships.[427] It seems to follow that the Regulations do not cover the identified defects, and as a consequence the vessel could not have been detained under the Survey and Certification Regulations.

Unless other regulations would apply or the vessel could be considered a dangerously unsafe ship[428] the detention would not appear to be sustainable.

(3) The Survey and Certification Regulations were said to be affected on the Algerian flagged bulk carrier "Nememcha"[429] by the fact that the "safety equipment certificate expired".[430]

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[418] Regulation 9(3).
[419] See reg. 25(1) for the power to detain.
[420] The Report of Inspection does not provide additional information as to the hazard the corrosion holes pose to the immediate safety of the vessel.
[421] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm), para. 25.
[422] But see also the discussion about the requirement for the cancellation of a Notice of Detention above in Chapter 7.3.5. ((1) "Gulser Ana").
[423] File MS 071/003/1834.
[424] The regulation meant is probably reg. 8(1)(a) as there is no reg. 8(a).
[425] Survey and Certification Regulations, reg. 25(1).
[426] *Ibid*., reg. 2(1).
[427] Similar to reg. 9, see also above, "Spyros".
[428] Provided, again, that an arbitrator would accept that applying the wrong law is not an obstacle to a detention, see above Chapter 7, fn 421.
[429] File MS 071/003/1824.
[430] Detention Notice on file MS 071/003/1824.

No ship flying the flag of a SOLAS country shall be allowed to go to sea from the UK unless it holds a valid certificate which a UK vessel is required to carry.[431] A UK cargo ship has to carry a valid Cargo Ship Safety Equipment Certificate which documents that the required surveys have been carried out.[432] It would appear to follow that a foreign flagged ship would also have to carry such a certificate, and, if it does not comply, shall be liable to be detained.[433]

A vessel the certificate of which has expired is, by default, an unsafe vessel as the state of its safety equipment is unclear because the vessel has not been surveyed. Such a vessel would appear to pose a serious danger to human life and a detention would thus be justified.

General comments and summary

Out of eight recorded detainable defects on three vessels, seven seem not to be covered by the applied legislation. The application of the wrong legislation would appear to suggest that the correct use of the law was not clear to the Inspector and/or to his Principal Surveyor back in the office. This may be a consequence of a lack of training or a lack of access to merchant shipping legislation during the process of the detention.

Next I will discuss the seven grounds of detention under the Radio Regulations.[434]

7.3.7. Detentions under the Radio Regulations

(1) The Greek flagged "Spyros"[435] was detained, amongst others, under the Radio Regulations. The ship was said not to comply because "VHF[436] DSC[437] not responding to calls on Ch 70". According to the Detention Notice this would have been required by reg. 11(b). If I understand this defect correctly then it probably means that the DSC was not alerting to incoming calls. This would not have made the equipment capable "of maintaining a continuous DSC watch on channel 70".[438] Where a ship does not comply with the requirements of the Regulations it shall be liable to be detained.[439]

As already noted[440] the wording "shall be liable" suggests that some discretion is left for the Inspector to decide whether or not he will actually detain the vessel. A malfunctioning DSC decoder for incoming calls would not pose a safety risk for the people on board the vessel, but for those on board the other vessel transmitting the distress signal. As a VHF signal does not travel very far[441] it is of high importance that such a signal is received by the vessels in the vicinity as help could then normally be provided within a short time span due to the (relatively) close distance of the distressed ship. It appears, therefore, that a risk to life has to be weighed against the interference with property. The choice here would have been clearly made to reduce the risk to life.

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[431] Survey and Certification Regulations, reg. 21(2). SOLAS entered into force in Algeria on 3 February 1984, IMO, *Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions*, as at 31 December 2007, p. 16, hereafter "IMO Convention Status".
[432] Survey and Certification Regulations, reg. 5.
[433] *Ibid*., reg. 25(1).
[434] The Merchant Shipping (Radio Installations) Regulations, SI 1998 No. 2070.
[435] File MS 071/003/1730.
[436] VHF stands for "Very High Frequency".
[437] DSC stands for "digital selective calling". It is part of the GMDSS (Global Maritime Distress and Safety) System. When a DSC call is transmitted the vessel sending it can be identified by its nine digit MMSI (Maritime Mobile Service Identity) number.
[438] Radio Regulations, reg. 11(b).
[439] Reg. 49(1).
[440] See above the discussion in Chapter 7.3.1.
[441] An average range is about 30 nautical miles.

However, vessels which do not have an at-sea electronic maintenance capability for radio equipment on board have to carry a duplication of equipment.[442] The vessel will therefore most likely have had another VHF DSC unit available. On this assumption, and with the other radio equipment apparently being in order, the ship would always have been able to transmit and also to receive distress calls. A detention therefore appears to have been a measure which was unnecessary to accomplish the objective[443] of having the ship in a safe operational condition. A risk to life did not exist at any stage and a measure falling short of detention could have been applied.[444]

(2) The Marshall Islands flagged bulk carrier "Panagia Odigitria"[445] was detained under the Radio Regulations because "VHF display not operable". The Report of Inspection added "VHF DSC No 1 display inoperable (portside unit with [word unreadable] Ch 70 display blank)". The latter indicates a completely different defect from the one recorded on the Detention Notice. Whereas the Detention Notice suggests that the VHF display was not operational, which would have affected the selection of channels, it appears from the Report of Inspection that it was the display of the port side DSC unit which is blank. This is a completely different defect.

In any case, the vessel will most likely have had a duplication of equipment and thereby another VHF DSC unit available.[446] Under these circumstances a detention would appear to have been disproportionate to the result which it attempted to achieve.

(3) The Turkish flagged bulk carrier "Berrak N"[447] was detained for two defects under the Radio Regulations which were (i) "M/F HF[448] radio defective" and (ii) "radio battery reserve supply defective".[449]

(i) A defective radio cannot be used to transmit or receive distress messages. But a defective MF/HF radio which is used for medium and long distance radio transmissions does not pose a direct and immediate threat to life. An Inspector would particularly have to balance whether the forthcoming voyage would be a coastal voyage where VHF radio equipment for a vessel would usually suffice. In addition, the vessel will also have carried a second long distance radio or satellite communication equipment.[450] In such a case it would appear to be appropriate to have the radio repaired in ample time before the next non-coastal voyage. If it would be reasonable for the detaining officer to conclude that the objective of having the vessel operating with satisfactory radio equipment could be achieved through means other than a detention,[451] it would appear that he would have had to go down that route. Depending on the circumstances, a detention on this ground could therefore have been challenged.

(ii) Similarly, a detention on the grounds of a defective reserve supply for the radios[452] could constitute an unreasonable interference with the owner's property rights if the vessel was only be heading on a short coastal voyage. Under those circumstances, and as long as the batteries themselves are intact and the regular charger is operational, it would appear to be disproportionate to detain the vessel for such a defect. The objective could

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[442] The Radio Regulations, reg. 18(6) in connection with MSN 1690, s. 2 and 3. MSN 1690 superseded M-Notice 1475 which is still referred to in the Regulations. However, reg. 2 clarifies that a reference to a Merchant Shipping Notice includes a reference to any replacement notice.
[443] *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, p. 80.
[444] Such as requiring the vessel to have the defect repaired before departure or even in the next port of call by using Action Code 17 or 15. See Annex 19.
[445] File MS 071/003/1823.
[446] See discussion of "Spyros", Chapter 7.3.7. ((1)) above.
[447] File MS 071/003/1826.
[448] M/F stands for "Medium Frequency" and HF for "High Frequency".
[449] According to the Detention Notice on file MS 071/003/1826.
[450] See Radio Regulations, reg. 14. The vessel will usually carry a duplication of equipment, see reg. 18(6) in connection with MSN 1690, s. 2 and 3.
[451] E.g. use Action Code 17 or have the equipment repaired in the next port (Action Code 15) if it was just a short voyage away and the vessel would stay within coastal VHF range.
[452] Which is required according to reg. 17.

most likely be reached by allowing the vessel to have the reserve charger repaired before it is due to leave the next port.[453]

(4) The Moroccan flagged dry cargo ship "Walili"[454] was detained for two defects under the Radio Regulations which were (i) "MF/HF aerial defective" and (ii) "VHF aerial" defective. Both MF/HF and VHF radios are mandatory under the Regulations.[455] It is not clear from the notice or the report whether transmission and receiving was still possible and whether the aerial affected both sets of equipment.[456] If no transmission or receipt was possible the failure represents a clear risk to life and a detention would appear to have been justified.

If, however, transmissions and receipt of messages were still possible a detention would appear to be disproportionate.

(5) One of the detention grounds for the Georgian flagged general cargo vessel "Berkhan B"[457] was "one bank radio batteries faulty".[458] The Report of Inspection does not provide any more information but just reads "to be replaced 200 AHC 12 V". It is not clear how many of the batteries on board were affected, neither was it identified what effect the faulty batteries had on the emergency operation of the radio equipment. It had also not been stated whether or not the vessel had an operating emergency source of electrical power which might have powered the radio equipment in addition to the batteries.[459]

The requirement is that a reserve source of power for the radio equipment on ships with an emergency source of power[460] shall provide energy for one hour.[461] On ships without an emergency source of power the time shall be six hours. If the ship could have complied with either of the two options the detention would seem to have been clearly unreasonable. With the information on hand, however, it cannot be established what the situation on board was.

General comments and summary

It would appear that a general question mark can be attached to the discretion applied by the Inspector in each of the seven cases on the five ships. As the text in each of the Detention Notices and the Reports of Inspection does not provide sufficient facts to determine whether or not the defect is such that a detention was necessary, any doubts about the validity of the detention would probably have fallen on the side of the Inspector. As long as it is not demonstrated in either the Notice of Detention or the Report of Inspection that there is an immediate danger to life a detention on one of the above seven grounds alone would appear to be challengeable. It would seem that when the legal requirement offers several options for compliance a systematic approach, ruling out that any compliance is possible, would be required. If this cannot be delivered when the ship is being detained the Inspector would, at the latest, need to have the facts and the legal argument ready and prepared for any arbitration. However, by then it would appear to be

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[453] The use of Action Code 15 could therefore have been appropriate.
[454] File MS 071/003/2123.
[455] Radio Regulations, reg. 14, Alternative B (MF/HF) and reg. 11 (VHF).
[456] Considering that the vessel will most likely have a duplication of equipment, see the Radio Regulations, reg. 18(6) in connection with MSN 1690, ss. 2 and 3.
[457] File MS 071/003/2158.
[458] Detention Notice of file MS 071/003/2158.
[459] "Berkhan B" was built in 1981, see Report of Inspection, p.1. The Construction Regulations only require a vessel built on or after 1 September 1984 to have either a generator or an accumulator battery, see reg. 49(2) in connection with MSN 1671, Schedule 10, para. 1(b). However, it is required for "every ship" that "the electrical services essential for safety will be ensured under emergency conditions", reg. 46(1)(b). SOLAS in its version applying to a vessel of the age of "Berkhan B" also makes it clear that a "self-contained emergency source of power" is required on board, chapter II/1, reg. 26(a)(i).
[460] Which would be an emergency generator.
[461] Radio Regulations, reg. 17(2)(a).

difficult to provide any more factual information which had not been collected during the inspection.[462]

The following discussion will focus on the five defects which provided grounds for a detention under the Construction Regulations.[463]

7.3.8. Detention under the Construction Regulations

All five detainable grounds based on the Construction Regulations were recorded on the Panamanian dry cargo vessel "African Warrior".[464]

The defects were (i) "No 2 & 3 generators turbochargers to be overhauled (output from each less 50%)", (ii) "deck generator inoperable", "no 1 generator inoperable", (iii) "main engine heavy oil steam heater inoperable – leaking tubes. (main engine was run on diesel only last voyage)", (iv) "exhaust gas boiler heavy tube leaks", "auxi boiler tube leaks" and (v) "engine room tunnel 1 metre full heavy fuel".[465]

The first defect (i) is only clarified on the Detention Notice by the words added in brackets which should probably read that each turbo charger had an output of less than 50% of its regular capacity. The second defect (ii) appears to be directly linked with deficiency (i).

The requirement for ships is that when the

> "electrical power is the only power for maintaining auxiliary services essential for the propulsion or safety of the ship [the ship] shall be provided with two or more generating sets of such power that these services can be operated when any one of the sets is out of service."[466]

It is not clear how many generators were on board the "African Warrior", but it follows from the notice that there were at least three, plus the deck generator. It appears that an Inspector would have had to check whether or not the generators could provide the load required for propulsion and safety of the ship independent of the state of repair of the turbochargers before a Detention Notice can be issued. It would seem to be inappropriate to detain the ship when the objective of the repairs could be achieved with a less invasive measure. If, therefore, the generator capacity would have been sufficient for propulsion and safety, the detention would appear to have been disproportionate. However, the lack of information makes it difficult to reach such a judgment now.

The defective heavy oil steam heater[467] (defect (iii)) would merely appear to have been of relevance to a detaining officer if it was actually needed to be used. As the Inspector pointed out that the vessel was operated on diesel oil alone, it would therefore not have required a heavy oil steam heater. The single question of interest would be whether or not the vessel had bunkered enough diesel oil for the forthcoming voyage. It would appear to be the owner's choice which fuel he wants the vessel to run on. If, however, the steam heater was intended to be used in a defective state it would also have posed a health risk to engine room personnel. In the latter case a detention would appear to have been justified, whereas on the former grounds it would not.

The defects (iv) of the two boilers appear also not necessarily to be calling for a detention. If no steam would be needed for the heating of the heavy fuel oil the exhaust gas boiler would probably not be needed as long as the auxiliary boiler is still operational and

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[462] According to one Principal Surveyor (2 June 2008) "Inspectors are often at fault of not stopping to write clear notes in their notebooks. This leads, at the end of the inspection, to the drafting of poor inspection reports e.g. 'which lifebuoy did I see which was defective' or 'what specific items were missing from the lifeboats'".
[463] The Merchant Shipping (Cargo Ship Construction) Regulations 1997, SI 1997 No. 1509.
[464] File MS 071/003/1837.
[465] Detention Notice on file MS 071/003/1837.
[466] Construction Regulations, reg. 47(1).
[467] Which "shall be maintained in an efficient condition", Construction Regulations, reg. 30(1) tailpiece.

consequently there would be time available for its repair. According to the Regulations a boiler has to be maintained in an efficient condition,[468] but depending on the risk to health and safety which the tube leaks of the auxiliary boiler poses, a detention may be disproportionate to the objectives aimed at. However, more information as to the technical arrangements on the vessel, the use of the boilers and the danger they posed would be needed to make a judgment as to whether or not the detention was justified.

One metre of heavy oil in the engine room tunnel (defect (v)) poses a severe fire risk and thereby a risk to life. The oil is also a potential environmental hazard as it could be pumped over board through the bilge pumping system.[469] Although it is not clear how big the tunnel was and how much oil was at stake, the fact that a considerable quantity is sloshing around in the engine room tunnel appears to be sufficient information for master and owner to know the nature of the defect. However, the Construction Regulations do not appear to provide the correct legal basis for such a detention as no requirement of that statutory instrument had been breached. An appropriate legal instrument would have been the PSC Regulations under which a detention might have been justified.[470] This, however, leaves again the problem of whether an arbitrator would accept that the Inspector did not have to have the correct legislation in his mind.[471]

General comments

As with the discussion under the Radio Regulations it would appear that missing factual information could possibly lead to the conclusion that the Inspector did not apply his discretion appropriately in four[472] cases. For that to be avoided it would seem advisable for the detaining officer to add relevant information to his decision so that it becomes clear for the master and owner of the detained vessel that the Inspector had applied his discretion in compliance with the law. Trying to prove the relevant facts afterwards during an arbitration would appear to be rather difficult unless the information had been gathered during, and preserved after, the inspection was concluded.

The next sub-section will deal with the four detainable defects under the Safety of Navigation Regulations.[473]

7.3.9. Detentions under the Safety of Navigation Regulations

(1) The Greek flagged "Spyros"[474] was detained for "Several charts for arrival voyage out of date some 30 years old. All charts for voyage to Lisbon to be latest edition".[475]

The statutory requirement[476] of which the vessel was supposed to be in breach was taken from the Merchant Shipping (Carriage of Nautical Publications) Regulations 1998[477] which applied to foreign flagged ships in UK waters.[478]According to reg. 8 a ship which does not comply with a requirement of the Regulations shall be liable to be detained. The Regulations appear to have stipulated three conditions. First, ships shall carry such charts

[468] Construction Regulations, reg. 30(1) tailpiece.
[469] According to reg. 12(1) of the Construction Regulations in connection with MSN 1671, Schedule 1, para. 1, every ship shall be provided with an efficient bilge pumping system.
[470] See above discussion, Chapter 12.
[471] See above Chapter 7, fn 421.
[472] Numbers (1)(i), (1)(ii), (1)(iii) and (1)(iv).
[473] The Merchant Shipping (Safety of Navigation) Regulations 2002, SI 2002 No. 1473.
[474] File MS 071/003/1730.
[475] Detention Notice on file MS 071/003/1730.
[476] Regulation 8.
[477] SI 1998 no. 2647 (hereafter "1998 Navigation Regulations"). These Regulations have since (1 July 2002) been replaced by the 2002 Safety of Navigation Regulations (SI 2002 No. 1473). See also below, Chapter 7, fn 483.
[478] Regulation 3(1)(b).

as are necessary for the intended, i.e. the forthcoming and not the last, voyage.[479] Secondly, these charts had to be of the latest obtainable edition[480] and, thirdly, the charts had otherwise to be kept corrected and up to date.[481] As a consequence it seems that a violation of the Regulations would only occur when there are charts that will be used for the forthcoming voyage and which are not up to date. Charts which were not updated for the previous voyage are not covered by the Regulations, and the age of the chart would only be of relevance if a new edition has been published after that of the one on board.

It appears, therefore, that unless a chart for the forthcoming voyage was not corrected and existed only in a superseded edition[482] a valid ground for a detention was not given.[483]

(2) The Turkish flagged bulk carrier "Berrak N"[484] was detained for two defects amongst others under the Safety of Navigation Regulations. These defects were (i) "several charts for forth coming voyage out of date" and (ii) "pilot book [word unreadable] NP54 and for voyage NP 27 & NP 28 out of date".[485] The provision the vessel was said to be in breach of in both cases was reg. 27. That particular statutory instrument, however, only has 11 regulations. The reference therefore probably is to reg. 27 of the MCA SOLAS V Publication which the statutory instrument incorporated.[486] Regulation 27 requires charts and publications to be adequate and up to date for the forthcoming voyage.

Outdated and incompletely corrected charts and publications for the forthcoming voyage pose an obvious risk to life for people on board, and a detention for such a breach appears to be justified under the Regulations.[487]

(3) One detainable defect was recorded on the Moroccan flagged dry cargo ship "Walili"[488] under the Safety of Navigation Regulations. The vessel was detained for "no charts for area, N to M[489] not up to date".

It would appear that a vessel navigating with insufficient charts[490] and out of date publications poses a clear risk to life to persons on board and probably also to third parties. A detention seems to have been justified.

General comments and summary

Out of four recorded detainable defects one[491] appears to have been without a basis in law, unless the wording in the Detention Notice was chosen sloppily. It would seem that the Inspector misinterpreted the law when detaining the vessel for a breach which happened in the past.[492] This lack of understanding would seem to point towards a lack of training on his behalf.

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[479] 1998 Navigation Regulations, reg. 4(1)(a) and tailpiece.
[480] Regulation 5(c).
[481] Regulation 5(c)(ii).
[482] This information was laid down in the Notice of Detention or the Report of Inspection.
[483] The requirements in the 2002 Navigation Regulations are similar in that they only require the charts for the intended voyage to be adequate and up to date, see 2002 Navigation Regulations, reg. 5(2) in connection with the MCA SOLAS V Publication, reg. 19 and 27.
[484] File MS 071/003/1826.
[485] Detention Notice on file MS 071/003/1826.
[486] Safety of Navigation Regulations, reg. 5(2).
[487] Safety of Navigation Regulations, reg. 11.
[488] File MS 071/003/2123.
[489] Probably meaning "Notice to Mariners". Although a foreign flagged ship does not necessarily have to carry British Notices to Mariners it will have to carry the appropriate publications issued "by or on the authority of an authorised Hydrographic office or other relevant Government institution", Safety of Navigation Regulations, reg. 4(1) in connection with reg. 5(2) and the MCA SOLAS V Publication, Annex 3, guidance note 3(a)(ii).
[490] If the charts were insufficient on arrival they would also have been insufficient on departure (unless they were corrected) and thereby for the forthcoming voyage.
[491] Number (1).
[492] Out of date charts for the arrival voyage.

An analysis of a detention under the Guarding Machinery Regulations[493] will be discussed next.

7.3.10. Detention under the Guarding Machinery Regulations

The Brazilian flagged bulk carrier "Lily"[494] was detained for "unguarded machinery in A/C space" under the Guarding Machinery Regulations.[495] It is not clear how many pieces of, and which, machinery were affected.

According to the Regulations, the master and employer shall ensure that "every dangerous part of the ship's machinery is securely guarded".[496] An Inspector may detain a vessel "where conditions on board are clearly hazardous to safety or health".[497] The Regulations do not define what is clearly hazardous. However, they attempt to describe the opposite and lay down under what circumstances machinery could be considered safe.

> "For the purposes of these Regulations, machinery is securely guarded if it is protected by a properly installed guard or device of a design and construction which prevents foreseeable contact between any person or anything worn or held by any person and any dangerous part of the machinery."[498]

It would appear that the prevention of foreseeable contact by any person with a dangerous part of the machinery would make it safe. A dangerous part of the machinery would seem to be one which poses a risk to health. A risk to health was posed when injury had been suffered.[499] It seems to follow that conditions are clearly hazardous to health when a risk of injury exists.[500] This risk would have to be foreseeable.

It appears that any unguarded machinery could have such an impact. But before a decision about a detention can be made it is necessary to assess the proportionality of such a decision. If nothing is done to alleviate the risk and, for example, a person would run the risk of being seriously injured if the ship sailed, there could be no doubt that it should be kept in port for the installation of a guard. But if a person, for example, would only run the risk of slightly scratching his finger, such a decision would appear to be disproportionate even though it would appear to be clearly hazardous to health. Also, if the operation of the machinery could be stopped temporarily to get the repairs done while the ship is underway, a decision may be different when machinery is affected without which the ship could not safely sail.

Whereas I clearly understand that master and employer are responsible for ensuring the secure guarding of ship's machinery[501] I do not consider an interference as strong as a detention to be necessary[502] in such a case. The objective of having the machinery guarded could have been achieved with a less invasive measure. The airconditioning could have been turned off to facilitate repairs, but the ship could still have safely gone to

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[493] The Merchant Shipping (Guarding of Machinery and Safety of Electrical Equipment) Regulations 1988
[494] File MS 071/003/1764, SI 1988 No. 1636.
[495] The Regulations (SI 1988 No. 1636) were revoked by the Merchant Shipping and Fishing Vessels (Provision and Use of Work Equipment) Regulations 2006, SI 2006 No. 2183, reg. 1(2)(a).
[496] Guarding Machinery Regulations, reg. 3(1) which is – in a revised version – reg. 13 in the 2006 Regulations.
[497] *Ibid*., reg. 8(1)(b)(ii).
[498] *Ibid*., reg. 1(3).
[499] The nature and the existence of a risk of injury was, for example, proven where an employee had his hand caught between a sling and a skip, *Maersk Co. Ltd v. Alfred J. Vannet (Procurator Fiscal, Aberdeen)*, unreported, 11 March 1997, Scottish Appeal Court, High Court of Justiciary, LexisNexis Transcript.
[500] The risk resulting from a hazard is not qualified. It is not explicitly required to be serious. A serious risk is, for example, "when one approaches a heater with a surface temperature of up to 500°C when one's clothing is soaked in a flammable liquid", *Carmichael (Procurator Fiscal, Airdrie) v. Rosehall Engineering Works Ltd* [1983] IRLR 482, p. 484.
[501] Guarding Machinery Regulations, reg. 3(1).
[502] As it was in *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing,* p. 80.

sea. Only if this could have been foreseen as impacting unreasonably[503] on the persons on board would it not have been an option to shut down the airconditioning. However, repairing the guard for machinery will usually not be a very complicated, and thereby longlasting, task. The negative impact on persons on board of having to live for a short while without airconditioning would appear not to have been unreasonable. The operation of the vessel under such conditions can probably be considered to be inconvenient to persons on board,[504] but it would not even come close to a possible violation of the right not to be subjected to inhuman or degrading treatment.[505]

Thus, it seems that without more detailed information as to exactly what and how machinery was affected, and how long a repair would have taken, the detention would probably not have been justified.

General comments

The decision of the Inspector to detain the vessel for his finding of unguarded machinery suggests both a lack of understanding of the legal basis for a detention as well as a disproportionate application of his discretion. Again, it would seem that both shortcomings indicate a lack of training.

I will next discuss the only defect under the Prevention of Collision Regulations[506] for which a vessel was detained.

7.3.11. Detention under the Prevention of Collision Regulations

The St. Vincent & Grenadines general cargo vessel "Balkan Future"[507] was detained under the Prevention of Collision Regulations because "airline to whistle badly corroded and perforated".[508]

The Prevention of Collision Regulations apply to foreign ships while they are within the UK or its territorial waters.[509] The Regulations incorporate the International Regulations for Preventing Collisions at Sea 1972[510] including its Annexes I to III.[511] A ship of more than 12 metres in length shall be provided with a whistle.[512] The range of audibility of the whistle is defined in the Colregs.[513] There does not appear to be a requirement defining the state of maintenance of the whistle. What seems to follow is that as long as the whistle is operational the ship would not be in breach of the requirements.

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[503] For example for a longer period of several days if the vessel were to sail in the tropics.
[504] Airconditioning is mandatory on UK flagged vessels, see the Merchant Shipping (Crew Accommodation) Regulations 1997, SI 1997 No. 1508, hereafter "Crew Accommodation Regulations"), reg. 14(3)(b)(i). Internationally the ILO Convention C92 (Accommodation of Crews Convention (Revised), 1949) does not require airconditioning but only a sufficient ventilation system, Art. 7(2). The Crew Accommodation Regulations do not apply to foreign flagged ships while in UK waters, reg. 3, presumably because the construction of a ship is the flag State's responsibility (UNCLOS, Art 94(3)(a)). Under their responsibility flag States have "to conform to generally accepted international regulations" (UNCLOS Art. 94(5)). This would seem to suggest that as long as sufficient ventilation is provided on a foreign flagged ship it meets the international minimum requirements.
[505] Art. 3 of the Human Rights Convention, see Lord Hope in *R (Pretty) v. Director of Public Prosecutions* [2002] 1 AC 800, para. 90. As the Human Rights Convention does not give employees rights against their employer this point is only of interest in so far as the Inspector, being a State representative, would have caused the inconvenience on persons on board by letting the ship sail and requesting a repair to be done at a later stage.
[506] The Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996, SI 1996 No. 75.
[507] File MS 071/003/ 2108.
[508] Detention Notice on file MS 071/003/ 2108. The Regulations provide the option for a detention in case in which the vessel does not comply with a requirement of the Regulations, reg. 7.
[509] Reg. 2(1)(a). See also the discussion below, Chapter 11.
[510] Hereafter called "Colregs".
[511] Reg. 4(1).
[512] Colregs, rule 33(a).
[513] *Ibid*., Annex III, para. 1(c).

Whether the whistle was operational or not was not recorded on the notice or in the Report of Inspection.[514] A specific regulation which the vessel was supposed to be in breach of was not quoted on the notice either. A ship shall, however, only be liable to detention when it does not comply with the requirements of the Prevention of Collision Regulations. Should the whistle have been inoperable a requirement would have been breached. If, in addition, the vessel only had one whistle[515] a detention would appear to have been justified as an inoperable whistle would obviously prevent the ship from giving sound signals which is of utmost importance particularly in restricted visibility. Not being able to sound any signals would increase the risk of a collision and represent a serious danger to life. Under those circumstances the detention would appear to have been justified.

If, however, the whistle was still operational, or a second whistle existed, a detention would seem to be a disproportionate measure as no identifiable risk to life would have been present. The objective of a well maintained operational whistle ought under those circumstances have been achieved with a less invasive measure.[516] It would appear to have been sufficient to repair the airpipe before departure or at the next port.

General comments

The recorded defect does not address the legal basis for which the vessel could have been detained. The unsatisfactory state of maintenance identified by the Inspector ought to have triggered a test of the whistle. Only if the test failed would a reason for a detention have been established. The way the defect was recorded could suggest a lack of understanding of the relevant Regulations. However, without further information as to the functioning of the whistle it is not clear whether or not the Inspector was right to detain the vessel. It would seem that if such a case went to arbitration a decision would depend on whether or not the evidence for a functioning whistle was available.

The next item for discussion is the Pilot Transfer Regulations[517] which were applied in one case to detain a vessel.

7.3.12. Detention under the Pilot Transfer Regulations

One of the deficiencies for which the St. Vincent & Grenadines general cargo vessel "Balkan Future"[518] was detained was said to fall under the Pilot Transfer Regulations because "pilot ladder side ropes in poor condition and distorted".[519] However, these Regulations were revoked by the Safety of Navigation Regulations prior to the detention.[520] A detention under the Pilot Transfer Regulations was therefore not possible.

The transfer of pilots is now regulated by the Safety of Navigation Regulations[521] and a detention is possible for ships which do not comply with the requirements.[522] The general provision is that "all arrangements used for pilot transfer shall efficiently fulfil their purpose of enabling pilots to embark and disembark safely".[523] If the condition of the ladder would not have allowed a pilot to safely embark or disembark, a detention would appear to have

[514] Where the defect is recorded on p. 3. The Inspector could have simply recorded that the whistle was not operational. For this he would only have had to test it by pressing the relevant button on the bridge.
[515] There is no information about this question but as the vessel was relatively small, measuring only 3,150 gt, a second whistle might not have existed.
[516] See above, Chapter 6.4.2.
[517] The Merchant Shipping (Pilot Transfer Arrangements) Regulations 1999, SI 1999 No. 17.
[518] File MS 071/003/ 2108.
[519] Detention Notice on file MS 071/003/ 2108.
[520] The Safety of Navigation Regulations, SI 2002 No. 1473, came into force on 1 July 2002. On that day the Pilot Transfer Regulations were revoked by Schedule 1, para. 2(k) of the Safety of Navigation Regulations.
[521] Reg. 5(2) which incorporates MCA SOLAS V Publication, reg. 23.
[522] Safety of Navigation Regulations, reg. 11.
[523] MCA SOLAS V Publication, reg. 23.2.1.

been justifiable as an unsafe ladder would clearly constitute a risk to life. But the Safety of Navigation Regulations had not been applied.

Such a defect of the Detention Notice would, however, seem to be of secondary importance. In my mind there is no doubt that the master and owner will have had no difficulty in understanding why the pilot ladder posed a threat to life, provided its condition was as bad as stated.[524] There is a technical defect but, as it is unlikely that owner or master were misled, an arbitrator would almost certainly not have modified the Detention Notice other than to substitute the new Regulations.[525] The Pilot Transfer, like the Safety of Navigation, Regulations required the arrangements to be sufficient to embark and disembark safely. In addition, the *Club Cruise* judgment would not appear to prevent a valid detention in this case as the Inspector had the correct standard in his mind despite the fact that the actual Regulations were long repealed.[526]

General comments

As there is no material difference in the requirements it would not appear to be in the spirit of either set of Regulations to cancel a detention and endanger life because the correct statutory instrument had not been used. No disadvantage occurred to the recipient of the Detention Notice as the ship would have been detained under either set of Regulations. I therefore think that an arbitrator could have modified the Detention Notice to comply with the correct law and upheld the detention provided the ladder was a threat to the safe embarkation or disembarkation.[527]

Such a conclusion does, however, not justify the lack of understanding displayed by the Inspector. Applying Regulations which had been revoked for several years[528] suggests either a serious lack of training or a very sloppy way of working of the Inspector. The latter, though, would in my opinion not impact on the decision the arbitrator would have had to make.

The final set of Regulations which were used to detain a vessel were the Training Regulations[529] which I will discuss next.

7.3.13. Detention under the Training Regulations

The Panamanian bulk carrier "Paloma C"[530] was detained for "substandard fire and abandonship drills". The Detention Notice does not specify this reason for the detention any further, but more details are given in the Report of Inspection.[531] The Regulations referred to,[532] though, do not provide the right to detain a vessel nor do they cover fire, or abandon ship, drills.[533] They address the safety training requirements and the relevant certification for seamen.[534] A detention under this statutory instrument is therefore not possible. Only a modified Detention Notice would appear to have made the detention comply with the law on this matter.[535] The latter would seem not to pose a problem as long

[524] Neither the Detention Notice nor the Report of Inspection clarify why exactly the ladder was in a poor condition, see file MS 071/003/ 2108.
[525] However, in other circumstances, the naming of the wrong regulations could be significantly misleading.
[526] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 25.
[527] See discussion below, Chapter 8.
[528] For nearly three years, to be more precise. The detention was on 21 March 2005, see Annex 13, and the Safety of Navigation Regulations came into force on 1 July 2002.
[529] The Merchant Shipping (Training and Certification) Regulations 1997, SI 1997 No. 348.
[530] File MS 071/003/2007.
[531] On pp. 11 and 12.
[532] Training Regulations.
[533] Drills are covered by the Musters Regulations which, however, do not provide the power to detain, see the discussion above, Chapter 6.8.
[534] Regulation 10 *et seq.*
[535] See above, the discussion in Chapter 7.3.1. ((5) ("African Warrior").

as the standard of the drill could be considered clearly hazardous to safety and the PSC Regulations[536] could have been applied instead.[537]

General comments

This would again appear to be a case where the Inspector either displayed a lack of training or sloppy work. Applying the wrong set of Regulations would only appear to be justifiable (internally, i.e. within the enforcement agency) if the detaining officer did not, at the time of writing the Detention Notice, have any access to the relevant Regulations, or to either a principal Surveyor, another colleague in the office or to the relevant department in the MCA's headquarters. Externally (i.e. towards the master and owner of the detained vessel) the application of the wrong law, although rather embarrassing for the Inspector and the agency, should not have any impact other than that the arbitrator would have to judge whether or not a detention is still justified under the PSC Regulations. Whereas in my view there ought to be little doubt in the case of the "Paloma C"[538] that the risk remains for the enforcement agency that an arbitrator may still come to a different conclusion.[539]

I will now turn to detentions which were not based on merchant shipping legislation. At first there are the detentions for which reference was only made to SOLAS.

7.3.14. Detentions under SOLAS

(1) The Irish flagged general cargo vessel "Vigo Stone"[540] was detained[541] on three different grounds. No reference to UK legislation was made but instead relevant chapters of SOLAS were quoted. Even though this is probably of more use for a master of a foreign flagged vessel[542] who will usually have a copy of SOLAS on board, but no copies of UK Regulations, SOLAS does not provide any legal basis for a UK detention.[543] Moreover, SOLAS has not been directly incorporated into UK law, but the UK merchant shipping legislation has been written separately, albeit based on the requirements in SOLAS.[544] If this would lead to a difference of interpretation

> "the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statute."[545]

Because "treaties entered into by the sovereign do not confer rights under our domestic law"[546] it would appear that when the words are not reasonably capable of bearing the meaning of SOLAS the national legislation and its construction would prevail.[547] Basing a

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[536] Regulation 9(2)(a).
[537] This is again a case where the question would be whether the arbitrator would accept that substance can triumph over form. Flaux J in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 33, thought that it would "mean the triumph of form over substance" if a Surveyor would be required to know the exact section or regulation of a statute or statutory instrument. I think a similar result would be achieved if a clearly hazardous vessel cannot be detained because the wrong law has been recorded in the Detention Notice. See the discussion in Chapter 7, fn 421 and also Chapters 6.3.1 and 8.
[538] Where a total of 43 defects was identified, see detention report on file MS 071/003/2007.
[539] See the discussion below, Chapter 8.
[540] File MS 071/003/2032.
[541] Detention No. 50 on 28 July 2004 (Annex 12).
[542] SOLAS or rather Convention related information is also required by MSN 1775, Annex 10, s. III.3.
[543] Every Detention Notice particularly makes the detaining officer refer to the "exercise of power contained in the legislation listed below…because it [the ship] fails to fully comply with statutory requirements" when referring to the relevant points of the detention. See the sample of a Detention Notice in Annex 25.
[544] See, for example, the Construction Regulations, explanatory note No. 1.
[545] *J. H. Rayner (Mincing Lane) Ltd v. Department of Trade and Industry* [1990] 2 AC 418, p. 500.
[546] *R (on the Application of Gjovalin Pepushi) v. Crown Prosecution Service* [2004] EWHC 798 (Admin), para. 28.
[547] "Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United

Detention Notice on SOLAS alone would appear technically to be legally impossible. If such a case were to go to arbitration it would appear to be the arbitrator's choice as to whether he would modify the Detention Notice and apply the relevant UK legislation.[548] This would carry the risk for the detaining officer that national legislation would be applied which does not match the reasons for the detention and as a consequence results in a cancellation of the notice.[549] Although such a Detention Notice would be formally invalid a modification ought not to pose a problem as the Surveyor had all the relevant standards in mind as they are all transferred into Convention enactments.[550]

In the particular case of the "Vigo Stone" all three defects (i) "starboard lifeboat engine failed to start", (ii) "emergency generator failed to supply emergency switchboard" and (iii) "insufficient pressure on emergency fire pump"[551] would seem to have stood the test of being easily understood and clear. With the exception of the emergency fire pump defect (iii), they would also have been fairly easily subsumable under the relevant Regulations[552] and a detention, if imposed under the relevant legislation, would appear to have been justified because all the defects posed a clear risk to the lives of persons on board.

The emergency fire pump (defect (iii)), however, does not appear to be required to deliver a particular pressure.[553] The SOLAS version applicable to the "Vigo Stone" (due to her year of build) does not have a Chapter II-2 and also does not make any provision for the pressure of an emergency fire pump.[554] Unless the emergency fire pump was completely inoperable or the flag State had confirmed[555] that the jets of water did not satisfy their requirements, the detention on this point, therefore, seems to have been unjustified. That is true even if one considers that the reference to SOLAS would satisfy the requirements for a Detention Notice. There is, however, no indication that the pump was not working at all.[556]

(2) Two of the three reasons for which the Bahamian flagged "Pongo"[557] was detained were interestingly based on SOLAS only, whereas the other legal ground provided was "UK MS LSA & Fire Fighting Regulations and others".[558]

Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation", Lord Hoffmann in *R v. Lyons* [2003] 1 AC 976, para. 27.

[548] The latter would seem to be appropriate as the SOLAS references make it clear and understandable for a recipient as to what is wrong and why. In addition the master of a foreign flagged ship would probably have access to SOLAS which is routinely on board of ships, but not easily to UK legislation. See also the discussion below, Chapter 8.

[549] With consequent embarrassment and potential for compensation, see below Chapter 8.5.

[550] PSC Regulations, reg. 2(2). See also above Chapter 7, fn 537.

[551] Detention Notice on file MS 071/003/2032.

[552] The lifeboat engine would be covered by the LSA Regulations, reg. 84(1) and the emergency generator by the Construction Regulations, reg. 49(2) in connection with MSN 1671, Schedule 10, Part 1, para. 1 (for a ship built before 1984; "Vigo Stone" was built in 1972, see Report of Inspection, p. 1).

[553] The emergency fire pump is required by the Fire Protection Regulations, reg. 16(3)(a). Reg. 38 excludes emergency fire pumps from the provisions of MSN 1665 unless the ship is of 2,000 gt and over and has been built on or after 1 September 1984. "Vigo Stone" was built in 1972. Even if one would consider the fire pump to be covered by reg. 39(2) ("any fire pump required to be provided by these Regulations") reference would only be made to MSN 1665, Schedule 7. But Schedule 7, para. 8, only refers to the capacity of emergency fire pumps on ships built on or after 1 September 1984. It appears therefore that no specific requirement for the output pressure of a vessel built before 1 September 1984 exists in UK merchant shipping legislation. As a consequence no requirement for output pressure can have been breached and it would follow that a reason for a detention was not existing.

[554] It would seem that SOLAS 60 applies as SOLAS 74 entered into force only on 25 May 1980 (see www.imo.org). SOLAS 60, Chapter II, Part E, reg. 65(b)(ii), only requires that "This emergency pump shall be capable of supplying two jets of water to the satisfaction of the Administration". Administration in this context would be the flag state administration.

[555] In practice an Inspector can establish this by calling a Surveyor of the relevant Recognised Organisation (formerly know as Classification Societies) which issued the relevant certificate (here the Cargo Ship Safety Equipment Certificate) to attend the ship (provided, of course, that the certificate was not issued by the flag State).

[556] The Report of Inspection only provides the information "insufficient pressure".

[557] File MS 071/003/1193.

[558] See discussion above, Chapter 7.3.1. ((12) "Pongo").

(i) The statutory requirement section of the (typed) Detention Notice reads "SOLAS CHI. RII"[559] and the grounds were "As above. Ship not maintained to confirm with position at time of survey".[560] I could not detect any link to a defect recorded in the Report of Inspection.

If the first entry is to be understood as "SOLAS Chapter 1, Reg. 11" it would not refer to the correct legal basis. SOLAS is not incorporated into English law and therefore cannot be a statutory requirement.[561]

Even if one accepts that SOLAS represented the correct legal basis,[562] the evaluation of the ground did not provide a better result. SOLAS, Chapter 1, reg. 11 requires the "condition of the ship and its equipment" to be maintained so that the ship remains fit to proceed to sea. But it is absolutely unclear where exactly the vessel did not "conform with the provisions of the present regulations"[563] and why it was detained.[564] Thus, even if the SOLAS reference were accepted, the ground provided does not seem to sustain the detention either.

(ii) On another reason for the detention the Notice of Detention again did not provide the relevant statutory requirement where it referred to SOLAS "SOLAS CH IV. R7. R10".[565] However, the reason why the ship did not comply is spelt out in more detail on the notice "EPIRB[566] on board has been tested by radio Surveyor and found to be faulty". Even though this statement still leaves open what exactly is wrong[567] by addressing the EPIRB it at least specifies which item was not in compliance with the relevant SOLAS regulation.

If the defect identified would make the ship not comply with the Regulations[568] it "shall be liable to be detained".[569] Depending on the defect of the EPIRB and whether that constitutes a proportionately more important interference with a right of the owner than his property rights, the detention would have been materially justified on this ground - always provided that the arbitrator would be prepared to modify the notice. If the defect would be significant enough a modification would appear appropriate despite the application of the wrong law.[570]

What remains to be said is that the very poor state of the Detention Notice only provided the master with insufficient information. But this could possibly still constitute a case where an arbitrator may make modifications to the notice as he thinks fit[571] as, if the notice were cancelled, such a ship would have posed a significant risk to the lives of master and crew on board.

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[559] Roman numbers were used (probably in error) on the typed copy of the notice. The handwritten notice suggests that it means reg. 11. If it would mean reg. 2 it would seem not to make any sense at all as that regulation deals with definitions.
[560] Detention Notice on file MS 071/003/1193.
[561] See "Vigo Stone" (1), above.
[562] Because the master of a foreign flagged ship would probably have access to SOLAS and an arbitrator could still modify the notice, see also above, Chapter 7.3.14. ((1) "Vigo Stone").
[563] SOLAS, Chapter I, reg. 11(1).
[564] The Report of Inspection is not helpful as it only refers to one detainable deficiency. See point (ii) of this discussion.
[565] Detention Notice on file MS 071/003/1193.
[566] EPIRB stands for "Emergency Position Indicating Radio Beacon". An EPIRB transmits information regarding the vessel's name, type and location and indicates that it might no longer be on board of the ship. When the EPIRB floats free it will automatically send an emergency signal and thereby help identifying the position where the ship sank. It is the last resort for the crew of a vessel to send (or rather have sent) distress signals.
[567] The Report of Inspection does not provide any further information, see defect 20 which states "EPIRB tested by radio Inspector: found defective".
[568] The Radio Regulations, reg. 11(1)(f), require a ship to be provided with an EPIRB.
[569] Regulation 49(1).
[570] See above, Chapter 7, fn 537.
[571] MSA 1995, s. 96(4). See also below "Detention and Arbitration".

General comments and summary

The case of "Vigo Stone" would appear to be another example of the Inspector not being fully familiar with relevant legislation requirements and their application. Whereas there does not appear to be a question about the facts of the findings the application of the seemingly wrong version of SOLAS could have led to the detention on this ground being cancelled. Provided that the arbitrator would have modified the notice the detention would, however, not have been in jeopardy as the first two grounds and the total number of defects[572] seem to fully justify to have kept the vessel in port.

7.3.15. Detention without reference to any legislation

I will now turn to the last multi-defect detention to be discussed. In that case no legislation was specified.

The reason given for the detention[573] of the Bahamian flagged general cargo vessel "RMS Aramon"[574] is "see attached lists [word unreadable] MCA forms MSF 1600 (x1) and MSF 1601(x5)". No applicable legislation under which the ship was detained was specified. The Report of Inspection simply stated on page 6 "V/L [word unreadable] as dangerously unsafe – safety in general" and Action Code 30[575] was given.

It appears that this Detention Notice did not satisfy the formal requirements of having to be clear and understandable. The lack of a reference to any applicable legislation under which the vessel had been detained does not clarify for the receiving master what, nor why,[576] it was wrong.[577] One could possibly argue against this view that the total number of 32 recorded deficiencies[578] left no doubt as to what was wrong. However, that would be beside the point unless the number of defects constituted and were raised as an ISM major non-conformity which, according to the report, they were not.[579] There was also no reference to the PSC Regulations under which a detention is required when deficiencies are clearly hazardous to safety.[580]

Even if it were considered sufficient to refer, by implication, to the total number of defects, the information given to the master did not highlight the "why", as in "on what legal basis is the vessel detained". This is of importance as, for example, a detention under s. 95(1)[581] of the MSA 1995 requires the Inspector not only to establish that a risk to life exists, but also to balance this right against the right of peaceful enjoyment of possessions. But balancing instead a hazard to the environment[582] with the property right[583] might lead to a different result.[584] Thus, the legal basis[585] on which the ship was detained, is in my opinion, essential information which a master or owner would need if they would want to appeal the detention in this case.[586] It would appear, therefore, that the lack of specificity

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[572] 49 defects according to the Report of Inspection on file MS 071/003/2032.
[573] Detention no. 43 on 16 July 2001 (Annex 9).
[574] File MS 071/003/1654.
[575] This Action Code signifies "grounds for detention". See above, Chapter 6, fn 24.
[576] See above, Chapter 6.3.
[577] See discussion above under "The Detention Notice and the Report of Inspection".
[578] As per p. 6 of the Report of Inspection. The number that was listed on the website was 41 – see detention no. 43 in Annex 9.
[579] And , which might be added, would not have been possible anyway as the ISM Code only applied to vessels such as "RMS Aramon" as of 1 July 2002. The date of the detention, however, was 16 July 2001 (see above).
[580] Regulation 9(2)(a), see above Chapter 6.4.3.
[581] Power to detain dangerously unsafe ship, see discussion above, Chapter 5.2.
[582] As could be possible for a detention under the PSC Regulations, reg. 9(2)(a).
[583] Of the Human Rights Convention, First Protocol, Art. 1.
[584] See above, "Risk of pollution".
[585] Or at least a reference to an international Convention, see above, Chapter 7.3.14.
[586] For a discussion of appealing a detention see below "Detention and Arbitration".

would have been fatal for the notice[587] because there is no indication of what standard the Inspector actually had in his mind[588] other than the reference to "dangerously unsafe". That, however, would appear to require more of a qualification in that the relevant matters ought to be specified.[589] It would appear that to justify the total lack of any reference to any legal instrument the reasons for the detention would have to be specified in more detail to comply with the clarity requirement.

General comments

It would seem vital for the enforcement agency not to make such a significant procedural error as it might constitute an appeal ground of its own.

The failure of the Inspector to issue a Detention Notice which clearly addresses why the ship was detained, and which legal basis was applied to detain the vessel, points again either towards a lack of training or extreme sloppiness in carrying out the inspection. However, against the latter assumption would appear to go that the Inspector actually identified 32 different defects.[590]

7.4. Ships which were issued which single defect Detention Notices

Having discussed all multi-defect detentions I will now look at the opposite end of the detention spectrum and will analyse the single defect detentions for the same period.[591]

(1) The Antigua and Barbuda 1,567 gt general cargo vessel "Petra F", built in 1985, was detained for "Bridge visibility is obscured by cargo. Unable to see across bow from either bridge wing or sufficient range from conning position."[592]

(2) The Russian vessel "Mekhanik Kraskovskiy" of 2,487 gt and built in 1992, was detained because "vessel certification has expired".[593] The basis given for the detention are the Survey and Certification Regulations, reg. 21(2).

(3) The Cyprus flagged chemical tanker "Freyja" of 1,662 gt, built in 1974, was detained because "port and starboard lifeboat davits have corroded and distorted sheaves".[594] The statutory requirement referred to were the LSA Regulations, but no specific provision was quoted.

(4) The 2,230 gt Barbados flagged general cargo ship "Union Jupiter", built in 1986, was detained because "cargo hatch drains – non-return valves missing".[595] The legal basis referred to was "Loadline 1998 – 3241 – MSN 1701(M)".[596]

(5) The Georgian general cargo ship "Juta" of 1,503 gt, built in 1967 with a major conversion in 1994, was detained because "damage at bow has creased the hull and cracks have breached it in at least two places into the forecastle. The classification society has not been called to inspect and no repairs have been attempted".[597] No statutory basis

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[587] According to Evans LJ in the *Bexley* case (unreported – see Chapter 6.3.1.) quoted by Evans-Lombe J in *BT Fleet v. McKenna* [2005] EWHC 387 (Admin), para. 17.
[588] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 25.
[589] MSA 1995, s. 95(3)(b).
[590] Report of Inspection on file MS 071/003/1654.
[591] See also above, Chapter 5.3.
[592] Detention Notice on file MS 071/03/1684.
[593] File MS 071/03/1756.
[594] Detention Notice on file MS 071/03/1827.
[595] *Ibid*. on file MS 071/03/1839.
[596] *Ibid*. on file MS 071/03/1839.
[597] *Ibid*. on file MS 071/03/1873.

for the detention has been provided. Instead the notice reads "vessel to have full hull integrity".[598]

(6) The 1,898 gt Antigua and Barbuda flagged general cargo vessel "RMS Lagona", built in 2000, was detained because "The visibility from the conning position is obscured by 60º in the forward contrary to SOLAS Ch V Reg. 22.1.5".[599] The legal instrument referred to is the Safety of Navigation Regulations, but a particular provision is not given.

(7) The St. Vincent flagged (domestic) passenger ro-ro vessel "Admiral Bay II" of 365 gt, built in 1970, was detained because "no load line exemption issued for single international voyage".[600] The Report of Inspection referred to "ILL Convention, 1966 ATT. 1. Art 16."[601]

(8) The 1,593 gt German general cargo vessel "Leona", built in 1986, was detained because "Master's certificate of competency has not been revalidated – expired 09 May 2005".[602] The detention was based upon the Safe Manning Regulations, reg. 5(1)(a).

(9) The 3,127 gt Panamanian bulk carrier "Wyszkow", built in 1979, was detained because "emergency fire pump not supplying pressure to fire main".[603] The statutory requirement applied was the Fire Protection Regulations, Part III, reg. 16(3)(a).

(10) The 671 gt Russian general cargo ship "Vidyaevo", built in 1973, was detained because "EPIRB is inoperative and cannot be repaired locally".[604] The basis provided for the detention was the LSA Regulations, reg. 10(12)(a). SOLAS Ch. IV, reg 7.6 was also referred to.

7.5. Analysis of Detention Notices of single defect detentions

It is interesting to see that the same Regulations[605] which have been used for most of the multi-defect detentions have also been applied for single defect detentions.[606] The only statutory instrument which had not been utilised for a detention on a multi-defect vessel was the Safe Manning Regulations. The following table shows that even the rankings are very similar.[607]

Table 7: Application of Regulations for single defect detentions

No.	Statutory Instrument	No. of Instances
1	Load Line Regulations	3
2	LSA Regulations	2
3	Safety of Navigation Regulations	2
4	Fire Protection Regulations	1
5	Safe Manning Regulations	1
6	Survey and Certification Regulations	1

I will first deal with the detentions under the Load Line Regulations.

[598] *Ibid*. on file MS 071/03/1873.
[599] *Ibid*. on file MS 071/03/1921.
[600] Report of Inspection on file MS 071/03/1941. A Detention Notice was not found on the file.
[601] *Ibid*., p. 3.
[602] Detention Notice on file MS 071/03/2126.
[603] *Ibid*. on file MS 071/03/2154.
[604] *Ibid*. on file MS 071/03/2172.
[605] Even down to the fact that in one case no legal basis for the detention was provided at all.
[606] Even though the number of samples of detentions analysed during the relevant period may not allow for secure statistical conclusions they indicate that the applied legislation to enforce a detention is more or less the same whether or not a ship has one or multiple defects.
[607] Cf. Tables 7 and 5.

7.5.1. Detentions under the Load Line Regulations

(1) The "Union Jupiter" was detained under a rather unclear reference in the Detention Notice which simply stated "Loadline 1998 – 3241 – MSN 1701 (M)".[608] One can probably safely assume that the Inspector meant the Load Line Regulations[609] which, in their amended version of 2000, were in force at the time of the detention.[610] MSN 1701, however, had been replaced in September 2000 by MSN 1752. The Report of Inspection which is not clearly readable refers under the heading "Convention ref." to "LL [unreadable] AI [unreadable] 22".[611]

The defect recorded probably meant that the non-return valves for draining the hatch coaming were missing.[612] The Convention reference would appear to refer to the International Convention on Load-Lines 1966,[613] Annex 1, reg. 22. This regulation requires for discharges led through the shell of the vessel to be fitted with an automatic non-return valve.[614] Missing non-return valves in the hatch coaming could potentially make a vessel subject to flooding and would thereby pose a risk to life. A ship which does not comply with the conditions of assignment "shall be liable to be detained".[615]

But depending on, for example, whether or not all valves were missing and how many cargo hatchways were affected, what kind of valve the vessel uses, and what effort would be required to replace/repair the missing valves, a detention could have been an unreasonable measure. It would appear that the Inspector ought to have carried out a balancing act[616] considering also, for instance, where the vessel was bound for,[617] what weather it was about to expect, what cargo the vessel was carrying,[618] if any, and whether or not the vessel was expected to have water on deck during its forthcoming passage. In short, the detaining officer would seemingly have had to carry out a risk assessment, particularly as the vessel otherwise appeared to be in a completely satisfactory condition proven by the fact that no other defects were recorded. One can probably assume that a discussion to that extent took place with the master, but that the result of the risk assessment and the discussion has just not been written down.

(2) It seems that the hull of the "Juta" was holed in at least two places.[619] According to the Detention Notice[620]

> "Damage at bow creased the hull and cracks have breached it in at least two places into the forecastle. The classification society has not been called to inspect and no repairs have been attempted."

The Report of Inspection does not give any further details as to where the damage exactly was, but only states "asked to report to Class and have repairs made to Class satisfaction".[621] Whereas the Detention Notice does not refer to any legislation the Report of Inspection at least addresses "LL 66 + Amendments SI 1998 No. 2241 MS(LL) Regs + Amendments".[622] The reference seems to have been written in a real hurry, with a different pen and in a different handwriting, and no particular regulation was addressed.

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[608] Detention Notice on file MS 071/03/1839.
[609] That statutory instrument is from 1998 but its number is 2241.
[610] The date of detention was 31 January 2003, see Detention Notice on file MS 071/03/1839.
[611] Report of Inspection on file MS 071/03/1839, p. 3.
[612] In the Report of Inspection the defective item is described as "cargo hatchways", p. 3.
[613] Hereafter "Load Line Convention".
[614] A similar wording to that of reg. 22 of the Load Line Convention can be found in MSN 1752, Schedule 2 ("Conditions of Assignment"), Part I, para. 12. See also above, Chapter 7, fn 304.
[615] Load Line Regulations, reg. 37(2).
[616] See the discussion above, Chapter 6.7.2. (*(a) health risk*).
[617] Even though this can still change after the Inspector finished the inspection.
[618] Would limited ingress of water pose a risk to the vessel by affecting the consistency of, for example, a bulk cargo or make the cargo dangerous in other respects.
[619] Detention Notice on file MS 071/03/1873.
[620] On file MS 071/03/1873.
[621] Report of Inspection, p. 3, on file MS 071/03/1873.
[622] *Ibid*., p. 3.

A vessel which has holes in its hull would seem to "differ in a material respect"[623] from the "record of particulars",[624] and would thus cease to comply with the conditions of assignment.[625] The Regulations do not define under what circumstances a ship's alteration of the hull differs in a material respect from the record of particulars. But it would appear that holes which breach the watertight integrity of the hull or the vessel's superstructure would make the record of particulars,[626] which is about planned and identified hull and deck openings, a completely useless exercise.[627]

But a ship which ceases to comply with its conditions of assignment shall only be liable to be detained until it complies.[628] It is not mandatory for the Inspector to detain the vessel. An Inspector will have to use his discretion when making such a decision.

By weighing up the right of the owner against the risk to life for the master and crew the detaining officer would have to judge whether or not the holes actually pose a real or potential risk which would outweigh the rights of the owner.[629] If, for example, the holes had been high above the waterline just under the forecastle deck leading into a store room with no openings to the lower decks it would appear to have been unreasonable to detain the vessel. A repair would still have been required within a short period of time, but a detention would probably not have been necessary. As no more details about either the damage to the bow or the position of the holes is conveyed in the notice or the report a definitive conclusion cannot now be made. It would seem to be of importance, though, whether the damage had come about through corrosion, which would indicate that there may be a material weakness, or through physical impact of, for example, a collision with another object. In the former case a more detailed examination by an expert may have been necessary, and a detention to ensure such investigation may then have been justified.

(3) The Detention Notice for the "Admiral Bay II" cannot be analysed as it was not found on file. It follows that it is not clear whether or not any particular statutory provision was applied to detain the vessel. However, there is the information provided in the Report of Inspection[630] which would appear to refer to the Load Line Convention, Art. 16.[631]

The Load Line Convention applies to ships[632] registered in contracting States.[633] The "Admiral Bay II" has a size of 365 gt and St. Vincent and the Grenadines acceded to the Load Line Convention on 29 April 1986 with the Convention coming into force on 29 July 1986.[634]

A vessel which is not normally engaged on international voyages must be issued with an International Load Line Exemption Certificate.[635] A ship[636] shall not go to sea "unless it

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[623] Load Line Regulations, reg. 26(1)(a)(ii). The Regulations apply to foreign flagged ships in UK waters, reg. 4(1).
[624] *Ibid*., reg. 27 in connection with MSN 1752, Schedule 3. MSN 1752, Schedule 3 is incorporated into UK law by the Load Line Regulations, reg. 27(1). A "record of particulars" is required to provide, i.a., the name of the shipbuilders, the yard number, the date of build and the Classification organisation and also relevant diagrams or plans of the vessel's structures, see MSN 1752, Schedule 3.
[625] Load Line Regulations, reg. 26(1).
[626] Which shall be provided in a form given in Schedule 3 of MSN 1752.
[627] MSN 1752, Schedule 3, pp. 34 and 42 in connection with Schedule 2, para. 11(1) which reads: "Cargo ports and similar openings in the ship's side below the freeboard deck or in the sides or ends of superstructures which form part of the shell of the ship shall be compatible with the design of the ship and shall not exceed in number those necessary for the proper working of the ship."
[628] Load Line Regulations, reg. 37(2).
[629] See also the discussion above, Chapter 12.
[630] "ILL Convention, 1966 Att. 1. Art 16.", see Report of Inspection, p. 3.
[631] It is not clear what "Att." stands for, and if it was supposed to mean "attachment" or better "annex" it would not seem to make sense as Annex 1 does not have articles but regulations and in addition reg. 16 deals with hatchway covers.
[632] But not to ships of less than 150 gt, Load Line Convention, Art. 5(1)(c).
[633] Load Line Convention, Art. 4(1)(a).
[634] IMO Convention Status, p. 162.
[635] Load Line Convention, Art. 16(2) in connection with Art. 6(4).

has been surveyed in accordance with these Regulations".[637] When a ship does not carry a valid certificate an Inspector cannot verify that the vessel has been surveyed accordingly. A ship which has not been surveyed may be detained until it has been surveyed.[638]

It would appear that the detention of the "Admiral Bay II" was a reasonable use of discretion by the Inspector. Unless the vessel had carried evidence, other than a certificate, that it had been subject to a credible survey a detention would ensure that a survey was going to be carried out.

General comments and summary

It would seem that despite the rather poor paperwork a detention was justified in at least the third ("Admiral Bay II") but probably also in the second ("Juta") case. Whereas the technical judgment in the case of the "Union Jupiter" can seemingly not be faulted there is no evidence that a proper balancing act had been carried out. The unsatisfactory reference to relevant legislation in that case demonstrates either a lack of training on part of the Surveyor or a very sloppy attitude towards completing acceptable paper work. It would seem to require a very well informed arbitrator to uphold such a detention and an insight on his behalf that the Inspector had the relevant standards in his mind.[639]

Unsatisfactory documentation was also encountered in case of the "Juta". The lack of detail in the application of statutory provisions points again in the direction of a lack of understanding and thereby training. It furthermore appeared in that case that a balancing act was not carried out.

Sloppy paper work can also be attributed to the detention of the "Admiral Bay II". No reference to UK law, an unclear reference in the Report of Inspection under the heading of "Convention ref.", and an incomplete file do not give the impression of a properly executed job. On the legal analysis, however, it would appear that the detention for a missing load line exemption certificate cannot be criticised.

I will next discuss the detentions under the LSA Regulations.

7.5.2. Detentions under the LSA Regulations

(1) The "Freyja" was found to have corroded and distorted sheaves in both lifeboat davits. The Report of Inspection provides more details in that "davit sheaves corroded through and deformed on port and starboard davits".[640]

The LSA Regulations do not specify any particular condition for sheaves in lifeboat davits, but require that every lifeboat can be launched when it is fully loaded with its complement of persons and equipment.[641] In addition all LSA equipment has to be ready for use at sea at all times.[642] When a ship does not comply with the requirements of the Regulations it "shall be liable to be detained".[643] The latter gives the Inspector discretion.[644]

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[636] Including foreign flagged ships in UK waters, Load Line Regulations, reg. 4(1). The Load Line Regulations "apply the provisions of the International Convention on Load Lines, 1966 to all United Kingdom ships which go to sea, with certain exceptions. They also apply to all sea-going foreign ships within United Kingdom waters", Load Line Regulations, explanatory note para. 2.
[637] Load Line Regulations, reg. 6(1)(a).
[638] *Ibid*., reg. 37(1).
[639] In accordance with *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 25.
[640] Report of Inspection, p. 2, on file MS 071/03/1827.
[641] LSA Regulations, reg. 28(1).
[642] *Ibid*., reg. 84(1).
[643] *Ibid*., reg. 87.
[644] See discussion above, Chapter 7.3.1.

It follows that the question appears to be not whether the sheaves are corroded or distorted, but whether or not the boat can still be launched with its full complement of people and equipment. It is not possible to make that judgment without analysing the sheaves in the davits, but the finding of the Inspector that the sheaves had been "corroded through"[645] suggests that a launching operation could potentially fail and thereby put lives at risk.

A detention would therefore appear to have been justified.

(2) The Detention Notice of the "Vidyaevo" states clearly the basis on which the vessel was detained. Every ship like the "Vidyaevo"[646] must carry an EPIRB.[647] If this EPIRB is inoperative the vessel does not comply with the requirements of the Regulations. As an inoperative EPIRB clearly poses a risk to life a detention would seem to be fully justified.

General comments and summary

Despite the fact that in the detention case of the "Freyja" the Inspector did again not deliver fully satisfactory paperwork by not identifying the statutory provision the vessel was detained under, it would appear that the detention cannot be argued with. The recorded defect clearly suggests that the sheaves were no longer strong enough to have the lifeboats launched with their full complement. This conclusion can, however, only be reached when looking at both the Detention Notice and the Report of Inspection. The essential information that the sheaves were corroded through was contained in the Report of Inspection. The Detention Notice alone would have left open the question as to whether the corrosion was enough to reasonably conclude that the boats posed a potential risk to life.

The Detention Notice of the "Vidyaevo" satisfies all requirements for a Detention Notice in that it was clear and easily understandable.[648]

I will next discuss the detentions under the Safety of Navigation Regulations.

7.5.3. Detentions under the Safety of Navigation Regulations

(1) The "Petra F" was detained[649] under reg. 5(i)(a) and (b) of the Merchant Shipping (Navigation Bridge Visibility) Regulations 1998.[650] A ship that contravenes a requirement of the Regulations "shall be liable to be detained".[651]

It would appear to be a fully justified and reasonable decision to detain a vessel on the bridge of which a proper look-out cannot be kept because the requirements of the Bridge Visibility Regulations are violated.[652] Although the Detention Notice was generally clear and understandable it would have benefited from a statement by the Inspector as to exactly why the bridge visibility did not comply with the Regulations. Both the

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[645] Report of Inspection, p. 2.
[646] A ship of that size and age falls under the regulation identified in the Detention Notice, reg. 10(1) in connection with reg. 3.
[647] LSA Regulations, reg. 10(12)(a). For EPIRB see above, Chapter 7, fn 566.
[648] *BT Fleet v. McKenna,* para. 14.
[649] File MS 071/03/1684.
[650] SI 1998 No. 1419, hereafter "Bridge Visibility Regulations". The Regulations have been repealed by the Safety of Navigation Regulations, Schedule 1, para. 2(h). The new law, however, is the old law as the relevant SOLAS requirement (Chapter V, reg. 22) has been incorporated into UK law by the Safety of Navigation Regulations, reg. 5(2).
[651] Bridge Visibility Regulations, reg. 9.
[652] Due to a lack of more detailed information it cannot be verified here whether or not the Regulations were actually violated.

Regulations[653] and SOLAS[654] gave (and still give) precise distances and angles for the bridge visibility.

(2) The "RMS Lagona" was also detained for insufficient bridge visibility. In this case the Inspector specified the angle which was obscured but did not provide the precise provision under which the vessel was detained. However, the relevant SOLAS regulation was identified. It would seem that the detention was reasonable and thereby justified.

General comments

Both detentions seem to be good. The relevant statutory instrument had been identified and the description of the defect was, at least in the case of the "RMS Lagona", described in sufficient detail. As long as the lack of bridge visibility in case of the "Petra F" was correctly established there would appear to be no reason for an appeal. The lack of detail in the description of the defect was not such that it would have made the Detention Notice incomprehensible.

The failure to specify the detailed regulation under which the vessel was detained could possibly be criticised, but referring to the relevant provision in SOLAS probably benefited the master and owner more than having had identified the correct regulation of the UK statutory instrument.

Next I will discuss the detention under the Fire Protection Regulations.

7.5.4. Detention under the Fire Protection Regulations

The "Wyszkow" had to have an operational emergency fire pump on board.[655] When it is established that a pump does not supply any water to the fire main the pump is not operational. An inoperative emergency fire pump poses a clear risk to life and fully justifies a detention.

The detention was clear and understandable also providing the precise and correct statutory information.

I will next discuss the detention under the Safe Manning Regulations.[656]

7.5.5. Detention under the Safe Manning Regulations

The "Leona" was detained on 2 June 2005 and the master's certificate of competency had expired on 9 May 2005, i.e. it was no longer valid for nearly one month.

The Safe Manning Regulations under which the ship was detained stipulate in reg. 4 that it is the company's obligation to ensure that the master holds an appropriate certificate,[657] and that the documentation relevant to the master is maintained.[658]

> Responsibilities of companies, masters and others
>
> 4(1) This regulation applies only to United Kingdom ships.
>
> (2) Every company shall ensure that:

[653] Bridge Visibility Regulations, reg. 5.
[654] SOLAS, Chapter V, reg. 22.
[655] See the discussion above about "Gulser Ana", Chapter 7.3.1 ((1)(i)).
[656] The Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997, SI 1997 No. 1320.
[657] *Ibid*., reg. 4(2)(a).
[658] *Ibid*., reg. 4(2)(c).

(a) every master and seaman assigned to any of its ships holds an appropriate certificate or a certificate of equivalent competency in respect of any function he is to perform on that ship;

(b) every master and seaman on any of its ships has had training specified in the Training and Certification Regulations in respect of any function he is to perform on that ship; and

(c) documentation and data relevant to all masters and seamen employed on its ships are maintained and readily available for inspection and include, without being limited to, documentation and data on their experience, training, medical fitness and competency in assigned duties.
…[659]

According to the Notice of Detention, however, the vessel was detained under reg. 5(1)(a).[660] That regulation requires the company to ensure that a safe manning document is in force in respect of the manning of the vessel. The provision does not stipulate that the master's certificate has to be valid.

The power to detain is laid down in reg. 16 which authorises an Inspector to detain a foreign flagged vessel for a breach by the company of reg. 5, but not for a breach of reg. 4[661] which in addition only applies to UK flagged ships.[662] But the ship may be detained for

> "a failure to correct a deficiency of a kind specified in regulation 15(3) after notification to the master pursuant to regulation 15(2), and there is in consequence a danger to persons, property or the environment".[663]

According to reg. 15(2) an Inspector shall notify the master in writing of "any deficiency of a kind specified in paragraph (3)". Such a defect is, amongst others, when the master does not hold a valid appropriate certificate.[664]

It would appear that it is at the discretion of the Inspector to detain a vessel if each of the following three conditions is satisfied. First, the master's certificate must no longer be valid or is not appropriate.[665] Secondly, the Inspector after noticing the defect must inform the master in writing. Thirdly there has to be a danger to persons, property or the environment as a consequence of the invalid or inappropriate certificate.

Whereas the first and second conditions can be satisfied by factual judgments, the third requires the Inspector to balance the interference with the property right of the owner with the potential danger created by an invalid certificate.[666] If, for example, a master, holding an expired certificate not issued by the flag State, does not carry a valid endorsement of that State,[667] the Inspector would not be in a position to verify whether or not the master is permitted to be in command of that vessel. It would appear to be a reasonable judgment to err rather on the side of caution and detain the vessel instead of allowing it to sail with a master who may not have the competency required by the flag State. If, on the other hand, the master's certificate, which had been issued by a flag State the certificates of competency of which are recognised by the UK,[668] has just expired, and the master had been sailing on the vessel for quite some time there would not appear to be any danger

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[659] *Ibid*., reg. 4.
[660] Detention Notice on file MS 071/03/2126.
[661] Safe Manning Regulations, reg. 16(1)(b)(i). But a company which contravenes reg. 4(2) shall be guilty of an offence, reg. 17(1).
[662] *Ibid*., reg. 4(1).
[663] *Ibid*., reg. 16(1)(b)(ii).
[664] *Ibid*., reg. 15(3)(a).
[665] It would seem that a certificate is invalid when it is expired, and it is not appropriate when the master is not permitted to be the master of that particular vessel because, for example, the certificate is subject to a tonnage restriction.
[666] See the discussion above, Chapter 6.7.2. (*(a) health risk*).
[667] Which is required under the Safe Manning Regulations, reg. 14 in connection with STCW, Annex, Chapter I, reg I/2.5.
[668] See MGN 221, Annex 1 which provides a list of countries' standards of competency which are considered to be equivalent to UK arrangements for the purpose of issuing Certificates of Equivalent Competency. For the legal status of an MGN see below, Chapter 10, fn 307.

present, and a detention would seem to be disproportionate. Nonetheless, it would appear that the invalid certificate constitutes an offence of strict liability.[669] Under those circumstances the enforcement agency ought to prosecute the owner.[670]

Neither the Detention Notice nor the Report of Inspection of the "Leona" indicate that the Inspector actually carried out a balancing act. Both rather suggest the opposite. As the vessel was detained under a provision which did not apply in this case it would appear that the Inspector did not realise that he had to use discretion and make a reasonable decision taking into account both positions namely, that of the owner and that of the State.

General comments

It would appear that the detention of the "Leona" was invalid for two reasons. The Inspector did not apply the correct law and, more importantly, did not apply his discretion correctly to the situation found. The combination of these two reasons would seem to prevent an arbitrator from having the option of modifying the notice unless during an oral hearing it were to surface that the Inspector actually carried out a balancing act. The Detention Notice and the report do not suggest any sloppiness on the part of the Inspector, but rather suggests a lack of training in administrative law matters, knowledge of which are required when detaining a vessel.

I will now turn to the detention under the Survey and Certification Regulations.

7.5.6. Detention under the Survey and Certification Regulations

The "Mekhanik Kraskovskiy" was detained under reg. 21(2)[671] because "vessel's certification (all) has expired".[672] Ships registered in SOLAS countries must not proceed to see unless they carry those certificates which would be required for UK flagged ships.[673]

A vessel without valid certificates would appear to pose a potential hazard to life because no evidence exists which would verify that the vessel is said to comply with all relevant requirements. The detention[674] would seem to have been reasonable and fully justified.

General Comments

The Detention Notice is clear, precise and does not leave any doubts as to what the master or owner would have to do to free the vessel from the detention. It may only be added that it would have erased the last doubt, if any, if the notice would, like the report, have stated that actually "all" certificates had expired.

7.6. Detentions – conclusions

A total of 112[675] different reasons for detentions have been analysed. According to my judgment just under half (48%) of all Detention Notices were probably technically defective, 20% left some doubt and 32% seemed satisfactory. The picture is different for the single defect detentions where out of 10 Detention Notices seven appeared to have been completely valid, two potentially defective (doubtful) and one faulty. However, this

[669] See discussion below, Chapter 9.5.
[670] See discussion above, Chapter 9.7.
[671] Of the Survey and Certification Regulations.
[672] Report of Inspection on file MS 071/03/1756. The Detention Notice does not refer to "all" certificates.
[673] Survey and Certification Regulations, reg. 21(2). See also discussion above, Chapter 7.3.6. ((3) "Nememcha"). SOLAS is in force in Russia since 25 May 1980, IMO Convention Status, p. 18.
[674] Under the Survey and Certification Regulations, reg. 25(1).
[675] 102 reasons under multi-defect detentions and 10 under single defect detentions.

does not mean that a defective notice would have made the detention invalid. If the number of defects was sufficient, and the defects serious enough, even a faulty Detention Notice may become valid if it is modified during an arbitration.[676]

The following table demonstrates a comparison of four scenarios. In the first two rows the multi-defect detentions are calculated and their share of the total number of multi-defect detentions is given. Rows three and four show the multi-defect detentions without considering the ISM related deficiencies,[677] followed by only the single defect detentions in rows five and six, and lastly by the total of both multi and single defect detentions in rows seven and eight.

The table shows the number and percentage of Detention Notices which were, or were potentially, defective.

Table 8: Defective Detention Notices

	Detentions	total	valid	doubtful notice	defective notice
1	**multi-defect**	102	29	20	53
2	**multi-defect %**	100%	28%	52%	20%
3	**without ISM**	83	29	20	34
4	**without ISM %**	100%	35%	24%	41%
5	**single defect**	10	7	2	1
6	**single defect %**	100%	70%	20%	10%
7	**all**	112	36	22	54
8	**all %**	100%	32%	20%	48%

It would seem that even given the most favourable of interpretations[678] 41% of all multi-defect Detention Notices analysed still were defective (see row 4). Together with detentions where there is doubt about the validity of the notice the number increases to 65% (see row 4).

When attempting to categorise the reasons why the Detention Notices were defective three grounds appear to emerge, which are that:

(1) the law was incorrectly applied or there was no statutory provision identified,[679]
(2) not enough detail was provided to identify what was wrong, and/or
(3) the discretion applied was unreasonable and made the detention disproportionate.

The following Table 9 shows the detentions, which I consider to be defective, by statutory instrument and allocates the detentions to one of the three categories just identified.

[676] See below, Chapter 8.
[677] In the discussion above I have qualified all ISM Detention Notices discussed above to be defective (because, in my opinion, a ship cannot be detained for a failure of the master and crew to comply with the SMS of the vessel – see below, Chapter 10.5.1.). Without considering the ISM based Detention Notices to be defective the number (and percentage share) of all defective notices may become more objective.
[678] I.e. omitting the ISM deficiencies.
[679] In the sense which was explained above, Chapter 7, fn 147,; the lack of a statutory provision does not relate to the powers of an Inspector but to the description of a defect.

Table 9: Defective Detention Notices by Regulation

Statutory Instrument[680]	(1) Wrong or no legal basis	(2) Not enough detail	(3) Disproportionate	total
Fire	1(ii),[681] 5, 8(i)+(ii)	3(ii), 12	4(ii), 9(i)	8[682]
ISM	1(i)+(ii)+(iii), 4(iii)	2(i)+(ii), 3(i)+(ii)+(iii), 4(i)+(ii)+(iv), 5(i)+(ii)+(iii), 6, 7, 8, 9		19
Load Line				
PSC		OG[683] (2)+(3)		2
LSA		1, 5	2(i)+(ii), 6	5
Survey and Certification	1(i)+(ii)+(iii)+(iv), 2(i)+(ii)+(iii)			7
Radio			1,2	2
Construction	1(v)			1
Navigation	1			1
Guarding Machinery				
Collision Prevention				
Pilot Transfer	1			1
Training	1			1
Manning	1("s")[684]			1
SOLAS	1(i)+(ii)+(iii), 2(i)+(ii)			5
No Regulations	1			1
TOTAL[685]	**26**	**21**	**7**	**54**

The table suggests that the main reason for defective Detention Notices is a wrong or missing specification of the legal basis of the deficiency. This finding is closely followed by a lack of information in the Detention Notice as to what the defect was and why it was wrong whereas a smaller number of detentions suggest that the decision of the Inspector was disproportionate.

This picture changes slightly when analysing only the potentially defective Detention Notices where only two categories seem to exist. Those are that:

(1) not enough technical clarification was provided, and
(2) the discretion applied could potentially make the detention disproportionate.

The following Table 10 shows the detentions, which I consider to be potentially defective, by statutory instrument and allocates the detentions to one of the two categories just identified.

[680] This column lists all regulations which were effected to detain a vessel.
[681] These numbers list all individual detention grounds identified and numbered under the relevant discussion of the regulations in the sub-sections 7.3.1 to 7.3.15 above which I consider to be defective. E.g. "1(ii)" in row "Fire" means that the discussion of vessel no. 1, defect (ii) (breathing apparatus on the "Gulser Ana") concluded that the Detention Notice in that case was defective.
[682] The numbers in this column signify the total number of defective Detention Notices issued under the regulations of the relevant row – in this case the Fire Protection Regulations.
[683] "Ocean Glory 1" see above, Chapter 6.7.
[684] The letter "s" signifies that there was a detention of a single defect ship, whereas all others were multi-defect ship detentions.
[685] This row shows the total number of defective detentions in one of the three categories ("wrong or no legal basis" etc) identified.

Table 10: Potentially defective Detention Notices by Regulation[686]

Statutory Instrument	(1) Lack of technical clarification	(2) Disproportionate	total
Fire	1(i), 6		2
ISM			
Load Line	1 ("s"), 2("s")	1(i)+(ii), 5(i)+(ii), 6	7
PSC	OG[687] 1, 1(v)		2
LSA			
Survey and Certification			
Radio	4(i)+(ii), 5	3(i)+(ii)	5
Construction	1(i)+(ii)+(iii)	1(iv)	4
Navigation			
Guarding Machinery		1	1
Collision Prevention		1	1
Pilot Transfer			
Training			
Manning			
SOLAS			
No Regulations			
TOTAL	**12**	**10**	**22**

This table seems to suggest that the number of Detention Notices with potentially insufficient information is nearly equal to the detentions which were potentially disproportionate.

In my view the analysis of all the detentions between 2002 and 2005 allows the following conclusions to be drawn for the work of the MCA as an enforcement agency.

1. The technical clarification and specification of the defect, or rather clearly identifying what was wrong,[688] seems to emerge as one of the key problems. Detailed information is important for two reasons. First, the master or owner needs to be clear about the remedial measures they have to take, and, secondly, so that neither the master nor owner or, more importantly for the MCA, the potential arbitrator, has any doubts that the detention was justified. To achieve both objectives it would appear to be necessary that the master receives the correct and complete information, as it will be him who will have to explain and "translate" the written information to the owner. If this information requires the detailed reference to the violated provisions they ought to be recorded in the Detention Notice. This conclusion would seem to be in line with the *Club Cruise* decision where it was required that the Surveyor had to have the applicable standards in mind.[689]

2. The lack of understanding of the application of merchant shipping regulations is of equal concern. As long as the detention is based upon any of the regulations an Inspector must know (at a minimum) the applicable standards.[690] To achieve this, an Inspector will not only have to stipulate the relevant statutory instrument but,

[686] For the explanation of columns and rows see above, Table 9.
[687] "Ocean Glory 1", see above, Chapter 6.7.
[688] It must be easily and clearly understood by the recipient of the notice what is wrong, *The Borough of Bexley v. Gardner Merchant Plc* in *BT Fleet v. McKenna,* para. 14.
[689] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 25. It seems that the only detail an Inspector does after *Club Cruise* (para. 29) not have to record is the particular basis in law under which his powers are granted. See also the discussion above, Chapter 6.3.1.
[690] *Ibid.,* para. 25.

moreover, will also have to identify the correct provision to understand himself and convey to the master why something is wrong.[691] This is also closely linked with the third problem.

3. Misuse of discretion or, possibly, rather a lack of understanding of the limits of discretion, would seem to suggest a lack of understanding of the applicable legal and administrative procedures for detaining a ship.

It would appear that both the MCA and the Department for Transport ought to have an interest in demonstrating good practice and making detentions legally safe so that the objective of reducing substandard shipping[692] is not undermined by administrative and legal errors. Good practice would appear to require a sound assessment of the legal basis for the detention, an identification and clear understanding of the provisions setting the relevant standards and requirements, and a procedure which does not leave any recipient of a Detention Notice in any doubt as to what and why it is wrong and what action he therefore has to take to rectify the deficiency.[693] The vision to be "a world-class organisation that is committed to preventing loss of life, continuously improving maritime safety, and protecting the marine environment"[694] may otherwise run the risk of becoming blurred. For that reason some further mechanisms of quality control would seem to be appropriate when considering and executing a detention. I conclude that there are at least six such mechanisms.

1. Detaining officers seem to require training in the basics of public law and a more detailed tuition in the use and application of merchant shipping legislation. This would need particularly to address how an identified defect can be subsumed under relevant legislation. It would not appear to be sufficient to show what standard an Inspector had on his mind when the standard was wrong.[695] The relevant statutory provision will inevitably serve as an aid to verify whether or not what is believed to be a deficiency can stand the test of showing that the defect is covered by legislation.

2. It would probably be advantageous if the form of the Detention Notice were subjected to an overhaul. If the Inspector had to carry out a mandatory[696] check addressing the crucial administrative and legal aspects of a detention before the notice is prepared, the risk of a defective notice should be somewhat more limited. What the format of the Detention Notice ought to require before the notice is issued is a verification of whether or not it is precisely clear to everybody involved, but particularly the master and/or owner, what the defect is,[697] and why, what the Inspector considers to be a defect, violates a specific regulation or section[698] or leads to the conclusion that a detention is required. Good practice would despite the *Club Cruise* judgment[699] also suggest to identify which regulation or other legal instrument provides the basis for the detention. A master on a foreign flagged ship who will most likely not know the details of UK merchant shipping law ought to be entitled to be informed why and on exactly what basis his vessel is being detained.

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[691] Which is the second important requirement a Detention Notice must satisfy, *The Borough of Bexley v. Gardner Merchant Plc* quoted in *BT Fleet v. McKenna,* para. 14.
[692] Directive 95/21/EC, Art. 1.
[693] After the judgment in *Club Cruise* (para. 29) a "legally safe" detention would seem to require the same elements with the exception that as regards the legal basis only a reference in the Detention Notice to the MSA 1995 is necessary.
[694] MCA website www.mcga.gov.uk, 24 May 2008.
[695] Cf. *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 25.
[696] Which would be made compulsory internally only.
[697] This would include verifying that master and/or owner have a clear understanding of how to put right what is wrong, *BT Fleet v. McKenna,* para. 22.
[698] If applicable. If a detention is based upon the PSC Regulations it would seem to be necessary to instead explain what made the deficiencies clearly hazardous, see discussion above, Chapter 6.5.
[699] Stating that "the reference to 'MS Act 1995' is sufficient to encompass not only powers granted by sections of the Act, but powers granted under regulations which are made pursuant to other sections of the Act", para. 29.

The downside for the MCA with such an approach may be that more information provided may increase the risk of further errors. It might also be said that with only two appealed detentions so far[700] the system has proven to work very well. However, against this would, first, stand the argument that proper quality management and training ought to reduce and not increase the risk of mistakes. Secondly, a government department which knowingly continues bad (and in parts actually unlawful) practices not only runs the risk of becoming subject to a compensation claim, but would also appear to clearly violate the rule of law.[701]

3. The detention form ought to require the compulsory filling in of fields and therefore needs to provide the space on its face for the relevant details. It would be advantageous for a notice to provide fields not only for the identification of the relevant statutory instrument comprising the violated standards or requirements, and preferably also SOLAS,[702] but in addition[703] to clarify the requirement to address the specific provision under which the ship is going to be detained. Furthermore, space ought to be sufficient to be able to record the relevant defect properly and in satisfactory detail.

4. To avoid illegibility on the face of the Report of Inspection and on the Notice of Detention, and to provide more space for the description of the defect on the notice it would seem to be appropriate for the Inspector to be equipped with modern mobile office technology which allows the notice to be typed and printed *in situ*. Such technology, which ought to allow the accessibility of relevant databanks giving the opportunity to search legal requirements, would also serve the purpose of bringing more certainty to the legal judgment of the detaining officer.

5. For quality management purposes it would seem advisable to require the Inspector to verify, where possible, every detention with a senior colleague in his office or, if not available, in headquarters.[704] This would require sufficient trained and experienced staff and suitable working arrangements to cover any out-of-hours needs PSC inspections may trigger. Even though the current system has regional operations managers on call they do not necessarily have access to electronic data banks which may contain the information which is required. The practicalities of out-of-hours coverage would realistically probably only require one or two senior technical staff with access to necessary data and information to be on stand-by until about midnight of every day to cover the eventualities of port state control detentions which might extent into the late hours of the day.

6. A "streamlining" of merchant shipping regulations would make it easier for the individual Inspector to come to his decision, but would more so also offer clarity to the master and owner prior to any inspection which can potentially always result in a detention of the vessel. Of the Regulations discussed so far it is the provisions which leave it at the discretion of the detaining officer, in particular, which would benefit from identical wording. The biggest gap appears to exist between the PSC Regulations and the Fire Protection or LSA Regulations, to name but two. Whereas the PSC Regulations provide significant guidance as to when a defect is

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[700] The *Club Cruise* case, see above Chapter 5.2.3 and below Chapter 8.5.

[701] "In England it was established long ago…that the use of public power must be justified by law and not by the claim of state necessity", C Turpin, A Tomkins, *British Government and the Constitution,* p. 78. In *Entick v. Carrington* (1765) 19 St Tr 1029, p. 1063 the Lord Chief Justice stated that "if he [the Secretary of State] had no such jurisdiction [to seize the defendant's papers], the law is clear, that the officers are as much responsible for the trespass as their supervisor". On p. 1066, he went on to say that "if it is law, it will be found in our books. If it is not to be found there, it is not law". It would appear that within current law the position as to the execution of public functions under the rule of law has not changed. "It is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended", *R v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42, p. 62.

[702] Thereby requesting which version of SOLAS the Inspector exactly identified to contain the relevant requirement.

[703] For reasons of good practice as discussed above.

[704] In Southampton.

clearly hazardous by referring to assessment criteria[705] the Fire Protection or LSA Regulations do not assist the Inspector in deciding for what kind of violation of the Regulations a ship shall be detained.[706]

Another very complicated example of a detention provision which also leaves it at the discretion of the detaining officer to decide whether or not a detention is appropriate can be found in the Manning Regulations. There has been no attempt at all to define the concept of "danger".[707] It would have been beneficial to any reader to make the distinction between UK flagged and foreign ships more obvious and to provide guidance as to what categories of danger Parliament had in mind when agreeing to these Regulations. Considering that they are produced "in the interests of public safety",[708] and ought therefore to be easily understandable by people other than lawyers, more clarity would be very beneficial.

But changing the law and providing sensible guidance might prove to be impossible for practical legislative reasons. Alternatively the MCA could set out to create a databank of "approved" detentions, i.e. detentions which have been analysed in-house and found to constitute good practice. Even though this will not create law it could have a similar effect as MGNs which are accepted by the courts as valid guidance.[709] Over time such a databank[710] will probably cover most of the relevant issues. It might even be worthwhile to consider such a collection of information on an EU or even wider international level.

In summary, any measures adopted ought to focus on making it feasible for a PSC Inspector to make a correct decision on board and to properly fill in his Report of Inspection and the Notice of Detention if required. His training, tools and working arrangements ought to put him in a position to overcome the obstacles set by the hundreds of statutory instruments the contents of which he can impossibly know by heart.[711]

The recent *Club Cruise* judgment does not appear to affect detention requirements other than that the specification of the power to detain is not required in the Detention Notice. The Court did not discuss what information is considered relevant for a master or owner and how this information is to be conveyed to them. According to *Club Cruise* the Inspector must have in his mind the required standards, but this already was the case prior to *Club Cruise*. By having to inform the master of what and why it is wrong an Inspector always had to have a clear idea of the requirements of the relevant legislation. What the analysis of the above detention cases seems to suggest is that not much effort was put into ensuring that Inspectors were trained and equipped to satisfy the mentioned requirements. It would seem that whatever measures the MCA or the DfT may or, as the case will be, may not take, the existing case law suggests the following minimum requirements for detentions and Detention Notices with which an Inspector has to comply under the PSC regime.

1. At the time the Inspector is issuing the Detention Notice he has to have in his mind what standards the relevant statutory instruments require.
2. The Detention Notice must tell the recipient what is wrong and why.
3. The Detention Notice must be clear in that the recipient must understand what he has to do to rectify the identified defects.

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[705] PSC Regulations, reg. 9(3)(a).
[706] According to both the Fire Protection Regulations, reg. 106, and the LSA Regulations, reg. 87, like many other statutory instruments a "ship shall be liable to be detained" when it does not comply with the requirements of the Regulations.
[707] Safe Manning Regulations, reg. 16(1)(b)(ii).
[708] C Turpin, A Tomkins, *British Government and the Constitution,* p. 448.
[709] See below, Chapter 10, fn 307.
[710] I do not consider the collection of detention information which the MCA currently presents on its website to be a useful tool for its own Inspectors. The information may have a certain PR value, but, as can be seen in Annex 9 to Annex 13, is of little use as a bank of back-up information for PSC Inspectors.
[711] See also the discussion above, Chapter 6.2.

To close the loop on the findings of the significant number of unsatisfactory Detention Notices I will next discuss detention appeal procedures and refer to the only known arbitration case to which the MCA appears to have been subjected.[712] The section will then be closed by identifying the conditions an owner has to meet to be able to claim compensation from the MCA.

[712] See Annex 16, question 27.

Chapter [8] – Detention appeals and arbitration

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8.1. Introduction

If a challenge to a detention is contemplated a master or owner would appear to have three formal courses of action. First, a master or owner who doubts the legal basis for the opinion of the Inspector may take the issue to arbitration.[1] Secondly, a detention is an interference with a human right[2] by a public authority against which a person can bring proceedings.[3] Thirdly, the decision of a PSC Inspector appears to be subject to judicial review.[4] If a shipowner considers the informal option of contacting and negotiating with the MCA he has to be aware that the time bar of 21 days, laid down in the PSC Regulations, reg. 11(1), will apply as soon as the Detention Notice has been served on the master.

In this section I will only discuss the master's or owner's first remedy against an unjustified detention, namely, through an arbitration. This would appear to be the path which Parliament envisaged as it is particularly outlined in the PSC Regulations and the MSA 1995. This procedure would also appear to offer the broadest review of the detention as it is required that the arbitrator shall have regard to any other matters not specified in the Notice of Detention.[5] Such an approach would appear to go beyond a judicial review in which the Court ought not to substitute its own view for that of the Inspector.[6] Proceedings under the HRA 1998 against the public authority would not leave the master or owner better off either. A declaration of incompatibility would appear not to affect the validity of the detention.[7]

8.2. Detention appeals

A right to appeal against a detention is given[8] both by the MSA 1995, s. 96 and the PSC Regulations, reg. 11.

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[1] MSA 1995, s. 96(1), PSC Regulations, reg. 11(3).
[2] See above, Art. 1 of the First Protocol to the Human Rights Convention.
[3] According to s. 7(1) of the HRA 1998 a person can claim against an unlawful act of a public authority. Section 6(1) of the HRA 1998 provides that it is unlawful for a public authority not to act in compliance with the Human Rights Convention.
[4] See Chapter 8, fn 8.
[5] MSA 1995, s. 96(3) and PSC Regulations, reg. 11(3).
[6] *Banks v. Secretary for the Environment* [2004] EWHC 416 (Admin), para. 10. See also above the discussion in Chapter 6.7.2. (*(a) health risk*).
[7] A declaration by a court under s. 4 of the HRA 1998 would not affect the validity and continuing operation of the regulation in question and is not binding on the parties, see s. 4(6)(a) and (b). See also the discussion above, Chapter 4.2.8.
[8] Such a right does not appear to be an automatism. The Court of Appeal in *Quigly v. Chief Land Registrar* [1993] 1 WLR 1435, p. 1437, held that "a right of appeal to a court is entirely created by statute". Even though

> "11(1) Any question as to whether any of the matters specified in relation to a ship in a Detention Notice or access refusal notice in pursuance of a power of detention or refusal of access to which this regulation applies in connection with any opinion formed by the Inspector constituted a valid basis for that opinion shall, if the master or owner of the ship so requires by a notice given to the Inspector within 21 days from the service of the Detention Notice or access refusal notice, be referred to a single arbitrator appointed by agreement between the parties for that question to be decided by him."[9]

Regulation 11 of the PSC Regulations mirrors the MSA 1995, s. 96 which applies for appeals against detentions under ss. 94 and 95.[10] According to reg. 10(1) of the PSC Regulations, reg. 11 applies in respect of a detention under any Convention enactment other than the Survey and Certification Regulations.[11]

> "10(1) Regulations 11 and 12 apply in relation to the exercise of the power of detention or refusal of access in any Convention enactment which is contained in a statutory instrument, except the Merchant Shipping (Survey and Certification) Regulations 1995."[12]

According to both s. 96 and reg. 11, statutory arbitration is the means for a recipient to appeal a Notice of Detention, and Part I of the Arbitration Act 1996 applies to the arbitration.[13] Whereas under the previous legislation, the MSA 1894, a court would hear an appeal of the master against the detention,[14] the procedure began to be moved into the private sphere[15] in 1984[16] when a "single arbitrator"[17] was stipulated as the appropriate tribunal to hear an appeal against an "improvement" or "prohibition" notice. The MSA 1984 had introduced improvement and prohibition notices to the shipping industry. The requirements were modelled on the relevant provisions in the HSWA 1974,[18] save for the ability to appeal such a notice. Whereas the HSWA 1974 allowed an appeal to the established and experienced forum of an industrial tribunal[19] the 1984 Act introduced a sole arbitrator for conflict resolution.[20] Seemingly the only reason given for this procedural change was that

> "we believe this will provide a quick and more appropriate means of resolving the matter than by an appeal to an industrial tribunal, as is the practice under the Health and Safety at Work etc Act."[21]

The change from a public court to a private hearing appears never to have been questioned. The only concern which seems to have been raised publicly was whether an

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in this case the appeal is not to a court but to an arbitrator it obviously required a relevant statutory provision. However, it would appear that the decision of a PSC Inspector would also be open to judicial review, see above, Chapter 4.2.8. and *Quigly v. Chief Land Registrar*, p. 1438. But a court would probably stay legal proceedings if an application was brought under the Arbitration Act 1996, s. 9.

[9] PSC Regulations, reg. 11(1).

[10] And to appeals against an access refusal notice, PSC Regulations, reg. 10(2).

[11] These Regulations provide a right to appeal under reg. 25(2) which refers to the MSA 1984, ss. 4 and 5. Sections 96 and 97 of the MSA 1995 were derived from those sections. Sections 1 to 12 of the MSA 1984 were repealed by the MSA 1995, Schedule 12.

[12] PSC Regulations, reg. 10(1).

[13] Arbitration Act 1996, s. 94(1), in that Part I of the Arbitration Act 1996 applies to any statutory arbitration.

[14] According to MSA 1894, s. 459(1)(d) a master could appeal to the court of survey. A court of survey for a port or district then consisted of a judge and two assessors, see s. 487(1).

[15] That means a hearing in private which is referred to a single arbitrator who the parties are requested to agree to, PSC Regulations, reg. 11(1). "As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful", Sir George Jessel MR, *Russell v. Russell* (1880) 14 Ch D 471 at 474, quoted with approval in *Emmott v. Wilson* [2008] EWCA Civ 184, para. 60.

[16] Sub-sections 96(1) and (2) are derived from the MSA 1984, s. 4(1) and (2), Parliamentary Papers, 1994-95, Vol. VIII, Bill 109, p. 275.

[17] The term has been kept in the MSA 1995, s. 96(1). This probably means a "sole" arbitrator.

[18] According to the Minister Lord Lucas introducing the bill in the House of Lords, *Hansard*, House of Lords, Session 1983-84, Vol. I, p. 1375. see also the discussion in Chapter 2.5.

[19] Now an employment tribunal, HSWA 1974, s. 24.

[20] MSA 1984, s. 4.

[21] Lord Lucas in the House of Lords, *Hansard*, House of Lords, Session 1983-84, Vol. I, p. 1376.

arbitrator could invite assessors[22] "to help him dealing with complicated and specialised subjects."[23]

An arbitrator appears to have three options when he makes his Award.[24] He can either affirm the notice, cancel or modify it.[25] It would seem that he can only modify the Detention Notice when it was not initially invalid. In the *Club Cruise* case[26] the Court decided that an arbitrator could not have validated the notice retrospectively.[27] This was perhaps an unfortunate decision. It might have been better to decide that the crucial question was whether there existed, at the time of the detention, sufficient reasons which would have justified the opinion of the Inspector, whatever the reasons given by him,[28] as long as the master understood what was wrong.[29] As already noted,[30] Flaux J in fact accepted a minimal amount of detail in the Detention Notice as regards the specification of the relevant statutory provision, but required that the Inspector had to have the applicable standards in mind. In my view the latter is as impracticable as having to know the specific applicable provision. But, as discussed above,[31] the latter does not justify depriving the recipient master or owner of the relevant information as to what the Inspector considers to be wrong. If it is impossible for an Inspector to have both the relevant provisions and all standards and requirements in mind a system ought to be set up by the MCA which allows to identify those standards in time, i.e. before the vessel is due to sail.

That decision raises the question what it actually is an arbitrator can modify. If a notice, as in the *Club Cruise* case, is invalid for formal reasons[32] it would appear to exclude the option of taking into account all circumstances. Because, it seems that before the arbitrator can decide that a notice is invalid he has to consider all the circumstances of the detention and in particular the Report of Inspection.[33] If, however, taking into account all circumstances does not leave the recipient in any doubt as to what is wrong and what the grounds for the Detention Notice are, it would seem irrelevant whether the notice would have been bad on formal grounds.[34] As a result it would appear that the arbitrator ought to be able to modify a Detention Notice independently of whether it would have

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[22] According to CPR 61.13 "assessors" may also be used in the Admiralty Court when hearing collision claims (a) or other claims involving navigation or seamanship (b).

[23] MP Stephen Ross in the House of Commons on 23 February 1984, *Hansard*, House of Commons, Session 1983-84, Vol. 54, p. 1006. Arbitration in respect of a detention was eventually introduced by the Merchant Shipping (Registration, etc) Act 1993, Schedule 4, para. 12(3) which made the MSA 1984, ss. 4 and 5 apply in relation to a Detention Notice.

[24] I will refer on the PSC Regulations only as the relevant wording in the MSA 1995, s. 96(4) is essentially identical to the PSC Regulations, reg. 11(4).

[25] PSC Regulations, reg. 11(4).

[26] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm).

[27] *Ibid.,* para. 26.

[28] In *Thompson v. Farrer* (1881-82) LR 9 QBD 372, p. 382, Brett LJ held that "any other deficiency than the one stated in their notice of detention… could be given, subject, no doubt, to fair notice being given of it to the shipowner before the hearing".

[29] The agreement on the facts in this case, for example, clarified that all parties were fully aware of the circumstances, see *Club Cruise*, paras. 3 and 4.

[30] Above, Chapter 6.3.1.

[31] *Ibid*.

[32] In that case the Surveyor detained the vessel on the MSA 1995, ss. 94 and 95 as a dangerously unsafe vessel. However, the Court did not consider the vessel to be dangerously unsafe on the facts it had available, see para. 38 of the *Club Cruise* case (for the facts see above, Chapter 5.2.3.) It was left open, though, whether a detention could possibly have been valid under reg. 28 of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, SI 1997 No. 2962. But, the Court said, as those Regulations had not been on the mind of the Surveyor when he detained the vessel he cannot have had the relevant applicable standards in his mind, para. 25 of the judgment. I call the reasons "formal" because all parties involved knew what the factual reasons for a detention were. Those reasons, the ship being affected by norovirus, were there independent of what law the Surveyor applied to detain the vessel. See also the discussion above, Chapter 6.3.1.

[33] See Chapter 6.3.

[34] See above Chapter 6.3.1. Particularly also *Ormston v. Horsham Rural District Council* (1966) 17 P. & C.R. 105, p. 109-110, where Harman LJ decided that despite the notice charging the wrong offence it was good because "quite clearly the notice seems to me to tell him (a) what is complained of and (b) what he has to do. That is quite enough".

been invalid on its own as long as the circumstances clarify what is, and why it is, wrong. I am of the opinion that this result is justified despite the *Club Cruise* decision. The existence of a Report of Inspection, for example, was not mentioned in the *Club Cruise* case, nor does it appear were defects other than the infection with norovirus identified by the Surveyor.

It would seem that it is not only the arbitrator who has the option of modifying the Detention Notice. An MCA Inspector would appear to also be entitled to modify the notice after he issued it.[35] The only risk for the MCA there would be that if the first Detention Notice turns out to have been invalid the owner or master may be entitled to compensation for any loss incurred during the time between the issuing of the first and the second notice.[36]

Despite the availability of an arbitration appeal and notwithstanding the fact that a significant number of the Detention Notices discussed in Chapter 7 appear to be technically invalid, or at least in the need of modification, there is hardly any evidence of masters or owners ever challenging a detention.[37] One reason may be that owners fear being victimised afterwards.[38] If that did happen it would probably be cheaper for an owner in the long term to accept an unreasonable detention and get on with the required repairs, particularly when the loss of time is rather short, than getting into a long lasting dispute with a port State authority. This would be all the more interesting to owners as the uncertainty of the outcome of an appeal, the fear of constant future harassment, particularly in ports where their vessels are frequent visitors, could become a rather costly affair. An owner will in the end probably weigh up the risks involved with a certain short term loss versus an uncertain long term loss.[39] However, if the vessel is up for charter it may pay not to have her detained because a detention will be recorded on the port state control database. This information is publicly available.[40]

In discussing the option of taking the enforcement agency to arbitration it is necessary first to consider the somewhat startling possibility that this statutory scheme does not comply with human rights law.

8.3. Statutory arbitration and human rights in general

Regulation 11(1) of the PSC Regulations appears to give an arbitrator extremely wide powers to decide any question on any of the matters which led to the detention of the vessel. This would seem to include questions of fact and law as to whether or not the Inspector's decision had a valid basis. In coming to his decision the arbitrator must have regard to any relevant matters which are not specified in the Detention Notice.[41]

Despite the "private" nature of an arbitrator[42] it appears from *Austin Hall Building Limited v. Buckland Securities Limited*[43] that compulsory arbitration under law may make the

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[35] In the *Club Cruise* case, para. 30 *et seq*. the Court did not question the validity of a second notice on the grounds that it was a second notice.
[36] See also below, Chapter 8.5.
[37] The "Koriana", see below, Chapter 8.5.
[38] According to David Morter, deputy director of the Isle of Man ship registry, in Lloyd's List, 25 March 2008, p. 2, ship operators discouraged appeals against port state detentions [in general and not focusing on the UK] "because they thought they would be victimised in future".
[39] According to David Dingle, Chief Executive Officer of Carnival UK and ex president of the British Chamber of Shipping, 19 November 2008, "Whilst a detention may be technically invalid, such action will normally highlight technical deficiencies in a vessel which require correction. An appeal could be unattractive as it could identify further deficiencies."
[40] www.parismou.org and www.equasis.org, see the explanation above Chapter 5, fn 125.
[41] PSC Regulations, reg. 11(3).
[42] The arbitrator is appointed on agreement by the parties (Arbitration Act 1996, s. 16(1)), and it is not someone who holds the office permanently as a public function. See also above *Emmott v. Wilson,* para. 6.
[43] [2001] BLR 272.

arbitrator a public authority.[44] HHJ Bowsher QC based his conclusion that "particularly when arbitration is in a sense compulsory, the arbitrator may well be a public authority" on a decision of the European Commission of Human Rights[45] which stated that

> "If, on the other hand, arbitration is compulsory in the sense of being required by law (as in this case) the parties have no option but to refer their dispute to an Arbitration Board and the Board must offer the guarantees set forth in Article 6(1)."[46]

Arbitration for an appeal challenging a detention is compulsory,[47] and it would seem that the guarantees required by the European Commission of Human Rights can only be given by the State through statutory provision.

In this context it would appear that a distinction has to be made between voluntary and compulsory arbitration.[48] A voluntary agreement to arbitration does not in principle seem to violate Art. 6.[49] But the ECtHR also stressed that

> "in an area concerning the public order (*ordre public*) of the member-States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for particularly careful review."[50]

According to the Court of Appeal in *Halsey v. Milton Keynes General NHS Trust*[51] compulsory arbitration could possibly violate Art. 6.

> "If that [being subject to particular careful review and the claimant not being under constraint to waive the guarantees of Art. 6][52] is the approach of the European Court of Human Rights to an *agreement* to arbitrate, it seems to us likely that *compulsion* of ADR [alternative dispute resolution] would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6."[53]

In *Halsey,* however, the Court did not have to decide a question on statutory arbitration and the above statement can probably be regarded as *obiter*. That case was about whether the County Court was right to award costs to the defendant NHS Trust despite

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[44] *Austin Hall Building Limited v. Buckland Securities Limited,* para. 28, a case concerned with adjudicators appointed under the Housing Grants Construction and Regeneration Act 1996, whose position was compared with statutory arbitrators by HHJ Bowsher QC. That the arbitrator is a public body seems to be supported by *R v. Panel on Take-overs and Mergers, Ex parte Datafin Plc* [1987] QB 815, pp. 838 and 847. This would seem to follow from Lloyd LJ's finding in that case, p. 847, that "if the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review." If therefore, it seems to be arguable, the source of power is a statute, as in case of statutory arbitration, then clearly the arbitrator is subject to judicial review.

[45] *Bramelid and Malmström v. Sweden* (1986) 8 EHRR CD116. This was a decision by the European Commission on Human Rights. "On November 1, 1998 pursuant to Protocol No. 11, the, single permanent Court replaced the previous Convention organs, the European Commission of Human Rights ("the Commission") and the old Court. Both bodies had sat on part time basis. The Commission had acted as a quasi-judicial, fact-finding and filter mechanism, its files and hearings not open to the public. It had dealt with the bulk of applications, applying the admissibility criteria to decide which cases could eventually be referred to the Court which held public hearings and issued binding judgments, monitored by the Committee of Ministers of the Council of Europe. The new Court now examines both admissibility and merits", K Reid, *A Practitioner's Guide to the European Convention on Human Rights,* 2008, p. 7.

[46] *Austin Hall Building Limited v. Buckland Securities Limited,* para. 28, quoting *Bramelid and Malmström v. Sweden* (1982) 29 DR, p. 64, which is the same decision as referred to above under *Bramelid and Malmström v. Sweden* (1986). The quote referred to in *Austin Hall* can be found in *Bramelid and Malmström v. Sweden* (1986), para. 30.

[47] PSC Regulations, reg. 11(1).

[48] *Bramelid and Malmström v. Sweden* (1986), para. 30. See also *Stretford v. Football Association Ltd* [2007] All ER (D) 346 (Mar), para. 48.

[49] *Julius Deweer v. Belgium* [1980] E.C.C. 169, para. 49. See also *Stretford v. Football Association Ltd*, para. 48. For a discussion of Art. 6 see above Chapter 3.3. (right to silence of an accused) and Chapter 4.2.7. (right to silence – release of information by a third party).

[50] *Julius Deweer v. Belgium,* para. 49.

[51] [2004] 1 WLR 3002.

[52] For the latter see *Julius Deweer v. Belgium,* para. 50.

[53] *Halsey v. Milton Keynes General NHS Trust*, para. 9. See also *Stretford v. Football Association Ltd,* para. 48, "the general principle is thus that an arbitration agreement operates as a waiver of some at least of the requirements of article 6. The Strasbourg jurisprudence has, however, also made it clear that the arbitration agreement must be voluntary and not compulsory. By compulsory in this context is meant required by law."

the fact that the Trust had refused invitations to mediate by the claimant.[54] The Court gave some general guidance for cost issues raised by the appeal[55] and discussed the "general encouragement of the use of ADR".[56] The Court stressed that alternative dispute resolution is effective because it is entered into voluntarily.[57] In the decision of *North Range Shipping Ltd. v. Seatrans Shipping Corporation*[58] the Court of Appeal also emphasized that "parties to a consensual arbitration waive their Art. 6 rights in the interests of privacy and finality",[59] both seemingly principles that could constitute a conflict with Art. 6. Although the Court in *Halsey* was not concerned with, and did not comment on, whether or not statutory arbitration, when a human right is affected, would be incompatible with the Human Rights Convention, it would seem arguable that it is.[60] I will therefore discuss if, and to what extent statutory arbitration does or does not comply with Art. 6.

8.4. Statutory arbitration and Article 6

By contrast with mediation,[61] statutory arbitration under the MSA 1995 and the PSC Regulations is regulated in some detail by law,[62] although it is debatable whether the relevant statutory provisions[63] provide the guarantees required by Art. 6(1). To determine that, the questions for consideration, following from Art. 6(1), would appear to be

1. Is the arbitrator acting as an independent and impartial tribunal established by law?
2. Is statutory arbitration a fair and public hearing within Art. 6(1)? and
3. Does keeping the Award private comply with the requirement for judgments to be pronounced publicly?

As a fourth issue I will then address the possible consequences of an arbitration lost by the MCA and discuss

4. Remedies in case of a breach of Art. 6 for both a party and a member of the public when no public hearing is held.

The sequence of the questions appears to be logical because if the arbitrator is not a tribunal in the sense of Art. 6(1)[64] question two and three would not have to be answered provided that

> "even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6(1) in some respect, no violation of the Convention can be found if the

[54] *Halsey v. Milton Keynes General NHS Trust,* para. 3.
[55] *Ibid*.
[56] *Ibid.,* heading before para 4.
[57] *Ibid*., para. 9. *Halsey* was also applied in *Hickman v. Lapthorn and Fisher* [2006] EWHC 12 (QB), where one of the principles Jack J extracted from *Halsey* was that "A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights". In *James Carleton Seventh Earl of Malmesbury v. Strutt & Parker* [2008] EWHC 424 (QB) the same judge established that the same principles were cited to him without dissent, para 48.
[58] [2002] 2 Lloyd's Rep. 1.
[59] *Ibid*., para. 17.
[60] "It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court", *Halsey v. Milton Keynes General NHS Trust*, para. 9.
[61] The CPR 1.4(2)(e) only states that active case management by the court includes "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure". According to the CPR Glossary (47th update) alternative dispute resolution is the "collective description of methods of resolving disputes otherwise than through the normal trial process".
[62] Arbitration Act 1996, s. 94(1).
[63] Here the PSC Regulations or the MSA 1995 and for both the Arbitration Act which all came into force before the HRA 1998.
[64] The Arbitration Act 1996 also uses the term "tribunal", see, for example, s. 33 "General duty of the tribunal".

> proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)'".[65]

It would appear that the question in that case would be whether or not the subsequent control provides the guarantees of Art. 6(1).

8.4.1. Is the arbitrator acting as an independent and impartial tribunal established by law?

The *Austin Hall* case concerned the "application for summary judgment to enforce an Award of the adjudicator"[66] in the construction industry. In that case the Court concluded that

> "proceedings before an adjudicator are not legal proceedings. They are a process designed to avoid the need for legal proceedings."[67]

But an adjudicator is not an arbitrator. One difference to an arbitrator under the PSC Regulations or the MSA 1995 would appear to be that an adjudicator is not required by law to have any particular qualifications. In construction disputes as in *Austin Hall* the "Scheme for Construction Contracts" applies and according to its para. 2 a nomination must be done by a nominating body.[68] The nominating body, however, does have rules an adjudicator will have to satisfy,[69] but those rules are not set by statute. Another difference the Court established is that an adjudicator does not make a judgment or an Award.[70] An adjudicator appears to share with an arbitrator, however, that he "is only appointed when there is a dispute".[71]

The latter aspect also played a role in a case[72] before the ECtHR. In the opinion of the Court in *Ringeisen* a tribunal according to Art. 6(1) is constituted if

> "it is independent of the executive and also of the parties,[73] its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees".[74]

I will look at the three subjects of independence, term of appointment and the proceedings in turn.

(a) Independence

The independence of an arbitrator could pose a problem when considering another judgment of the ECtHR.[75]

> "In order to establish whether a body can be considered 'independent', regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."[76]

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[65] *Bryan v. United Kingdom* (1996) 21 EHRR 342, para. 40. But as will be seen below that is also of relevance if the arbitrator is an Independent and impartial tribunal.
[66] *Austin Hall Building Limited v. Buckland Securities Limited,* para. 4.
[67] Para. 40.
[68] The Construction Contracts (England and Wales) Regulations 1998 (SI 1998 No. 649), Schedule.
[69] See, for example, http://www.adjudication.co.uk/qualifications.htm, 11 June 2008.
[70] *Austin Hall Building Limited v. Buckland Securities Limited,* para. 35. An adjudicator makes a decision which is binding on the parties unless it is challenged by legal proceedings or arbitration, see the Construction Contracts (England and Wales) Regulations 1998 (SI 1998 No. 649), Schedule, para. 23(2).
[71] *Austin Hall Building Limited v. Buckland Securities Limited,* para. 34.
[72] *Ringeisen v. Austria (No. 1)* (1979-80) 1 EHRR 455.
[73] Which would appear to refer to the contesting parties.
[74] *Ringeisen v. Austria*, para. 95.
[75] *Langborger v. Sweden* (1989) 12 EHRR 416.
[76] *Ibid*., para. 32.

In that case the Court held that two lay assessors of a rent review board were not independent because they had an interest in the continued existence of terms the alteration of which the applicant sought.[77] The Court in *Langborger* found that the applicant

> "could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim".[78]

Whereas the impartiality and independence of the two professional judges on the board was not an issue[79] the decision appears to suggest that the balance of interests could potentially be upset if an arbitrator would have an interest in any way related to any of the parties. This aspect is strengthened by the point made in *Austin Hall* about the term of office. Arbitrators will only have a term of office when there is a case. They will only get paid when they are appointed as arbitrators. During the other time they will have to depend on other income. This could make them subject to outside pressures and could threaten the appearance of independence of an arbitration tribunal.[80] Whether in summary it includes "the possibility that their independence and impartiality may be open to doubt"[81] would seem to depend on each particular case.[82]

An arbitrator could also be biased[83] if he personally had had a bad experience with the MCA or its predecessors. As a master or chief engineer he may have failed an oral exam for his certificate of competency, he may have had problems as a result of surveys of his vessel, or may have been subject of a port state control inspection or even detention he did not agree with. It would seem to be impossible to verify any personal bias of the arbitrator in advance of his appointment.[84] This, however, would usually not work against the party taking the MCA to arbitration because the MCA represents the State and can therefore not claim a violation of its human rights. Thus any bias of an arbitrator to unfairly disfavour the MCA will most likely not affect the human right of the party to the arbitration.

> "But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[85]

But whether there is any bias would appear to be a question of the individual circumstances of the case.

> "Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."[86]

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[77] *Ibid*., paras. 10 and 35.
[78] *Ibid*., para. 35.
[79] *Ibid*., para. 31.
[80] An indication for a potential interest contrary to that of one of the parties in an arbitration may be considered to be the submission of three interest groups in alternative dispute resolution to the Court of Appeal in *Halsey v. Milton Keynes General NHS Trust,* para. 2. The Court had to decide "when should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution", para. 2.
[81] *Langborger v. Sweden*, para. 34.
[82] See also below, Chapter 8, fn 86.
[83] In the sense that "bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias", Lord Goff in *R v. Gough* [1993] AC 646, p. 659.
[84] Of course, the MCA could object to the appointment of an arbitrator if it was aware of potential bias.
[85] *R v. Sussex Justices* [1924] 1 KB 256, p. 259, a quote explicitly approved of by Lord Goff in *R v. Gough,* p. 659.
[86] *R v. Gough,* p. 670.

(b) Term of appointment

The second feature in *Ringeisen* raises the same problems as discussed in *Langborger*. Arbitrators depend on the income of their arbitrations unless they have additional sources of revenue. If a statutory arbitrator knows that he will only be appointed for one statutory arbitration, involving, for example, the MCA, he might become biased. As the private contestor is most likely a shipping company it is more likely that another (voluntary) arbitration involving that company may come up sooner than another statutory arbitration involving the MCA. Favouring the shipping company could possibly secure future commercial or detention arbitration appointments.

(c) Guarantees of the proceedings

The last feature mentioned in *Ringeisen* refers to the guarantees of the proceedings. For arbitrations these are regulated by the Arbitration Act. If, therefore, one considers the result achieved by the provisions of the Act to comply with Art. 6(1), a significant weight would have been put on the balancing scales in favour of arbitration being a tribunal in accordance with Art. 6. This, however, is the issue that I will examine in the next question.

8.4.2. Is statutory arbitration a fair and public hearing within Art. 6(1)?

The determination of whether a hearing is fair would appear not to be "the subject of a single, unvarying rule or collection of rules".[87] Arbitration would seem to provide a fair hearing more or less by default. Both parties are free to agree how their conflict should be solved,[88] they either agree on the arbitrator[89] or eventually a court may appoint the tribunal,[90] and the parties can decide on the jurisdiction of the tribunal.[91] Parties can usually choose to have representation and to present their case "under conditions that do not place [them] at a substantial disadvantage vis-à-vis [their] opponent",[92] and their proceedings are adversarial from the outset.[93]

Whether or not a hearing is public in the sense of Art. 6(1) would seem to require more of a discussion.

According to the ECtHR "the public character of court hearings constitutes a fundamental principle enshrined in Article 6(1)".[94] "The right to a public hearing implies a public hearing before the relevant court."[95] The issues at stake seem to be both the individual interest of each party as well as the public interest in general.[96]

Parties would appear to have waived their rights under Art. 6(1) if the option to apply for a public hearing had been open to them.[97] But any waiver "must not run counter to any important public interest"[98] as, it would appear, otherwise a public hearing is compulsory.[99] Art. 6 leaves the exclusion of the public at the discretion of the court, but only

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[87] *Brown v. Stott* [2003] 1 AC 681, p. 693.
[88] Arbitration Act 1996, s. 1(b).
[89] *Ibid*., s. 16(1).
[90] *Ibid*., s. 18(3)(d).
[91] *Ibid*., s. 30.
[92] *Werner v. Austria* (1998) 26 EHRR 310, para. 63.
[93] *Ibid*.
[94] *Schuler-Zgraggen v. Switzerland* (1993) 16 EHRR 405, para. 58
[95] *Martinie v. France* (2007) 45 EHRR 15, para. 40.
[96] *Schuler-Zgraggen v. Switzerland*, para. 58.
[97] *Ibid*.
[98] *Ibid*.
[99] This would seem to follow from *Schuler-Zgraggen v. Switzerland*, para. 58, as "the public character of court hearings constitutes a fundamental principle enshrined in Article 6(1)", ibid.

> "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".[100]

Within the meaning of "the interests of justice" there is included the idea that

> "the faculties of the justiciable ones, future potential clients of the applicant, [are] to be able to inform oneself as to the veracity of the allegations related to this case".[101]

Whether or not the requirements of Art. 6(1) are satisfied would thus appear to raise two points. First, do parties to an arbitration waive their rights to a public hearing, and, secondly, would a public hearing be necessary because the issue is of public importance and required in the interests of justice?

(a) Waiver of rights to a public hearing

The first point requires looking at the procedural requirements of the Arbitration Act because there do not appear to be in force any procedural requirements under either the Paris MoU,[102] the Directive 95/21/EC,[103] or the PSC Regulations. According to s. 34(1) of the Act the arbitrator is to decide all procedural matters subject to the parties agreeing any matter. "Whether and to what extent there should be oral or written evidence or submissions"[104] is one of the matters included in s. 34(1).

A waiver of the right to a public hearing may be inferred if none of the parties had asked for it.[105] Thus, in partly answering question two ("Is statutory arbitration a fair and public hearing within Art. 6(1)?") it would seem that the lack of a public hearing during the arbitration does not conflict with the first part of the requirement for such a hearing provided no party had asked for a hearing in public.[106]

(b) Public importance

The second point, i.e. whether or not the arbitration can take place without a public hearing, would appear to depend on whether or not it would prejudice the interests of justice. It would seem that a public hearing is necessary if without it Art. 6 would not be complied with. The wording of Art. 6 suggests that the default position is for a public hearing to take place.[107] But "holding proceedings, whether wholly or partly, *in camera,* must be strictly required by the circumstances of the case",[108] and must be decided by the court dealing with the case.[109] "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Art. 6(1)."[110]

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[100] Art. 6(1), last sentence, last option.
[101] *Hurter v. Switzerland* (2007) 44 EHRR 8, para. 31.
[102] The only reference in the Paris MoU appears to be that "the owner or the operator of a ship or his representative in the State concerned will have a right of appeal against a detention decision…", Paris MoU, s. 3.16, http://www.parismou.org/upload/pdf/MOU,%20incl.%2030th%20Amendment.pdf (18 November 2008).
[103] EU Directive 95/21/EC states in Art 10(1) that "the owner or the operator of a ship or his representative in the Member State shall have a right of appeal against a detention decision…", and in Art 10(2) that "Member States shall establish and maintain appropriate procedures for this purpose in accordance with their national legislation". This suggests that the choice of procedures is left to each Member State.
[104] Arbitration Act, s. 34(2)(h).
[105] *Austin Hall Building Limited v. Buckland Securities Limited,* para. 31.
[106] Such a decision would seem to have to be made, if at all, by the arbitrator (Arbitration Act s. 34(2)(a)) who would have to decide the question in the light of the "special features of the case" and "in accordance with the actual wording" of Art. 6(1). See for both quotes *Martinie v. France*, para. 40. See also *Hurter v. Switzerland*, para. 34. But as the arbitrator's decision is subject to approval by the parties it could probably become subject to an appeal. See below the discussion about such an appeal.
[107] "The publicity of legal proceedings constitutes a fundamental principle established by Art.6(1) of the Convention", *Hurter v. Switzerland*, para. 26.
[108] *Martinie v. France*, para. 40.
[109] *Hurter v. Switzerland*, para. 27.
[110] *Martinie v. France*, para. 39.

Where, for example, a hearing in private was accepted by the ECtHR the judgment of the court was restricted to an appeal on a point of law by the final appeals court.[111] All hearings prior to the last appeal had been heard in open court.[112]

The ECtHR has also held

> "that exceptional circumstances relating to the nature of the issues to be decided by the court in the proceedings concerned, may justify dispensing with a public hearing".[113]

In that case the Court referred to *Göc v. Turkey.*[114] The opinion was delivered by two concurring judges who would have preferred the Court to also reach a conclusion on the question of an oral hearing.[115] The two judges

> "note that in the instant case the only point which required a determination was the quantum of damages to which the applicant was entitled in respect of the period spent in detention. The applicant did not dispute either the length of his detention or the basis used for the calculation of damages. Furthermore, the applicant has not adduced any exceptional circumstances to the effect that the domestic courts should have held an oral hearing on the merits of the applicant's claim. Given the limited nature of the issues to be determined, the applicant's case could properly be dealt with on the basis of a written procedure".[116]

It would seem that

> "the public character of proceedings before the judicial bodies referred to in Art.6(1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained".[117]

However, as between the parties to a detention arbitration, the "protection of litigants" is less important as the parties will usually have chosen the judge and procedure, unless the arbitrator had been appointed by a court.[118] But Art. 6 may concern not only the parties to the immediate dispute, but also may arguably affect future recipients of Detention Notices. To what extent is this relevant to the public interest?

An arbitration following the detention of a ship would not suggest the type of exceptional circumstances to allow for a private hearing. To the contrary, it would seem that "future potential clients of the MCA"[119] would have a rather great interest in how the State fares in the context of restricting the use of ships which the MCA considers to be unsafe, and what requirements owners and masters actually have to comply with. The high public importance of an Award in a statutory arbitration under the PSC Regulations or the MSA 1995 would seem to be undoubted. This is particularly so because to date there is only one case known (to the corporate memory of the MCA) where a detention ever led to an arbitration;[120] and neither was the hearing held in public, nor was the result of this only existing case ever made public. But it would appear to be of great interest to the maritime industry to see how the detention practice of the MCA is interpreted and how the relevant law is applied. A private hearing does nothing to maintain public confidence in the courts[121] and thereby the legal system.

It would seem to follow that a statutory arbitration could possibly violate Art. 6(1) unless held in public. If this were so it would not only answer the point of public importance[122] but

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[111] *Axen v. Germany* (1984) 6 EHRR 195, para. 29.
[112] *Ibid*.
[113] *Martinie v. France*, para. 41.
[114] (2002) 35 EHRR 6, para. 47.
[115] *Ibid*., sub-para. OI-2.
[116] *Ibid*., sub-para. OI-4.
[117] *Martinie v. France*, para. 39, cited by the Court of Appeal with approval in *Mariam Aziz v. Aziz* [2007] EWCA Civ 712, para. 115.
[118] Arbitration Act 1996, s. 18(3)(b).
[119] In analogy to *Hurter v. Switzerland*, para. 31.
[120] According to the Head of the EnU, Annex 16, question 27.
[121] See *Hurter v. Switzerland*, para. 31.
[122] Point two made in Chapter 8.4.2: "would a public hearing be necessary because the issue is of public importance and required in the interests of justice?".

also, in answering question one above,[123] indicate that it could be doubtful whether an arbitration tribunal meets the requirement of Art. 6(1) to be "impartial and independent".

8.4.3. Does keeping the Award private comply with the requirement for judgments to be pronounced publicly?

If taken literally Art. 6 "might suggest that a reading out aloud of the judgment is required".[124] This, however, does not appear to be necessary. If a judicial decision is not announced publicly it would seem that compliance with Art. 6 is achieved when publicity can sufficiently be achieved by other means.[125] The easiest solution these days would probably be to publish both the information of a pending arbitration as well as the Award on the public website of the authority.

If that is not done, though, public access to the Award could still be achieved by utilising the Freedom of Information Act 2000,[126] and Art. 6 could probably considered to be complied with.[127] This argument would also not seem to be any different from the parallel example of justifying initially a hearing in private.[128]

The availability of the Award with the help of the FOI 2000 would, however, require the information about an ongoing arbitration to be accessible. By contrast with a public hearing where a judgment can be asked for by a party because the law to do so is in place,[129] the information about the ongoing arbitration would originally be available only to the parties. Thus, unless the information that an arbitration is (or is going to be) taking place is in the public domain,[130] there could be a doubt about compliance with Art. 6.

But it is arguable that this information does not have to be publicly available unless it is asked for under the FOI 2000. In following this line of the argument only a failure of the public authority to communicate the requested information[131] would seem to constitute a breach of Art. 6(1). It is, however, unlikely that an authority would not admit that it holds information about an arbitration. It is more likely that the authority would not want to disclose the result if it is not compelled to do so.

It seems to follow that the requirement of Art. 6(1) to pronounce the Award publicly would only have been violated if a member of the public would not be able to obtain the information that Art. 6(1) guarantees to be publicly accessible.[132]

It would appear, therefore, that a number of reasons are in favour of accepting that an arbitrator can be a tribunal complying with the guarantees required under Art. 6(1). The process of arbitration has been created by statute, an Award is made, and there is no final bar to holding the hearing in public. Against this is the argument that the arbitration

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[123] Question one in Chapter 8.4: "Is the arbitrator an independent and impartial tribunal established by law?"
[124] *Axen v. Germany*, para. 30, and also *Pretto v. Italy* (1984) 6 EHRR 182, para. 25.
[125] *Werner v. Austria*, para. 60. See also *Sutter v. Switzerland* (1984) 6 EHRR 272, para. 34.
[126] Because such "privacy" would appear to be in contravention of the objectives of the Freedom of Information Act 2000, about which the Information Commissioner said that "the law has not been a damp squib, nor has good government proved to be incompatible with transparency", in the foreword to J Wadham, J Griffiths, K Harris, *The Freedom of Information Act 2000,* p. v. It would not appear that the publication of the Award would fall under any of the exemptions of the Act. A private arbitrator would not appear to be a "public authority" in the sense of s. 3 and Schedule 1 of the FOIA. See also above, Chapter 9.4.
[127] By depositing the judgment in the court registry where anyone may obtain a copy it was considered sufficient for achieving publicity, *Pretto v. Italy*, para. 27.
[128] See above.
[129] This would appear to follow from the right of the parties to agree all procedural matters, Arbitration Act, s. 34(1).
[130] For example, on the MCA public website.
[131] The FOIA 2000 obliges a public authority to have the requested information communicated to the requesting person, s. 1(1)(b).
[132] To reduce the risk for a statutory arbitration to violate Art. 6 it would thus appear to be advisable to the authority to ensure that publicity, possibly through the website, is ensured for the whole arbitration process.

process is designed as one to be held in private,[133] with the consequence that the public will be excluded from the hearing. This could lead to the conclusion that the tribunal is not impartial and independent. Both the hearing in private and the possible result that the tribunal is therefore not impartial and independent could serve to support the view that there has been a violation of Art. 6. That the Award may only be obtained with some difficulty,[134] however, can possibly be overcome.

Thus, in my opinion, it is arguable that pronouncing the Award in private does not violate Art. 6(1) unless the public authority refuses on request to provide information about both whether an arbitration took place or what the Award was.

The only outstanding factor, which could also support the view that a statutory arbitration is potentially violating a guarantee of Art. 6(1), would seem to be the possibility that a party had asked for the hearing to be in public, but was denied their application. Although this would seem to be a rather rare occasion because the party taking the MCA to arbitration[135] would most probably not want to run the risk to be portrayed all over the shipping news as an organisation which operates substandard vessels unless the detention would be based on one or a very few defects only and the relevant owner was certain to win his case.

Even if such a violation were to happen it would not affect the human right of the party, provided that access to a court was guaranteed.[136] If

> "the matter can thereafter[137] be brought within a reasonable time before a court with jurisdiction to decide the matter both as to law and to fact"[138]

no breach would appear to have occurred.

The House of Lords[139] also seems to support the proposition "that a violation of an art 6 requirement at an early stage of criminal proceedings[140] is [not] necessarily irremediable"[141] even though the House interprets the ECtHR position in that "Article 6(1) primarily concerns courts of first instance."[142]

The remaining question is what remedies a party or a member of the public has when no public hearing is held.

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[133] "Parties who arbitrate in England expect that the hearing will be in private, and that is an important advantage for commercial people as compared with litigation in court", *Emmott v. Wilson* [2008] EWCA Civ 184, para. 62. However, the Arbitration Act does not stipulate privacy as a condition for arbitration. The Court referred to "the Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, 1996" saying "that privacy and confidentiality in arbitration had not been included in what became the Arbitration Act 1996 , because they were unsettled and better left to the common law to evolve", see *Emmott v. Wilson,* para. 61.

[134] The arbitration Award in the case of the "Koriana" was never published nor was it made public that an arbitration occurred, see below, Chapter 8.5.

[135] The MCA cannot claim a breach of a human right as it is a public authority, see Art. 34 of the Human Rights Convention.

[136] *Bryan v. United Kingdom*, para. 40. See also below, Chapter 8.

[137] "Thereafter" in this context refers to any proceedings following the arbitration, see p. 258.

[138] *Bramelid and Malmström v. Sweden* (1983) 5 EHRR 249.

[139] *R (on the application of Hammond) v. Secretary of State for the Home Department* [2006] 1 All ER 219.

[140] Even though the current discussion is not about criminal law it would appear that Art. 6 covers all court proceedings. "The key principle governing Art. 6 guarantees is fairness…While the "fairness" principle applies to both criminal and civil proceedings, a special importance is attached to the rights of the defence in criminal proceedings…", K Reid, *"A Practitioner's Guide to the European Convention on Human Rights,* 3rd ed. 2008, pp. 65-66.

[141] *R (on the application of Hammond) v. Secretary of State for the Home Department,* para. 14.

[142] *Ibid.,* para. 13.

8.4.4. Remedies in case of a breach of Art. 6 for both a party and a member of the public when no public hearing is held

The party, i.e. the owner or master[143] would appear to have two options if the arbitrator is considered to be a public body.[144] First, there is the option to bring proceedings against the arbitrator in an application for judicial review and claim that the arbitrator has acted unlawfully.[145] Secondly, the party would appear to use s. 69 of the Arbitration Act 1996 in the ordinary way to be able to appeal to the court against the decision of the arbitrator on a question of law.[146]

It could be argued that only the latter option can be open to the party as the arbitration tribunal is already seized with the claim against the detention. But against this argument stands the decision in *Customs and Excise Commissioners v. Newbury.*[147] In that case it was argued that the Court should not have any jurisdiction about the forfeiture of goods as the Customs and Excise Commissioners and the VAT Tribunal already have such jurisdiction.[148] Hale LJ (as she then was), who delivered the judgment of the Court, said that

> "Under section 7(1)(b) [of the Human Rights Act 1998] 'a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may ... rely on the Convention right or rights concerned in any legal proceedings .....' It is nothing to the point that another tribunal also has jurisdiction over the same subject matter. This is not a social or policy question which Parliament has left to an administrative body. Ownership and peaceful enjoyment of property is a straightforward civil right. A court which is concerned with that ownership has to determine the issue in the light of all the law, which now includes the rights 'brought home' by the 1998 Act."[149]

In para. 21 Hale LJ added

> "if section 7(1)(b) of the 1998 Act is to have any meaning, how can a court which is seized of the issue of whether property is liable to confiscation by the state not have a duty to consider whether such liability would be in breach of the owners Convention rights?"[150]

The result for the purposes of a claim against the arbitrator would appear to be that on the one hand the path via the arbitration appeals tribunal can be chosen,[151] but that, on the other hand, this does not stop the party to consider the application for judicial review.

In the case of a member of the public who is not a party to the arbitration only the first option (judicial review) would seem to be available because the right to challenge an Award is, according to s. 67(1) of the Arbitration Act 1996, only open to a party of the arbitral proceedings.

I will first deal with the two options of a party to the arbitral proceedings before discussing the right of a member of the public.

(a) Appeal to a court by a party to the arbitral proceedings

Before a party can have access to a court leave to appeal would appear to be required unless the other party (here it would be the MCA) has agreed.[152]

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[143] Which can always only be the owner or master but not the MCA, see above Chapter 8, fn 135.
[144] See above, Chapter 8, fn 44.
[145] HRA 1998, s. 7(1)(a) in connection with s. 7(3). This is based on the assumption that an arbitrator is also a public authority under the HRA 1998 according to s. 6(3)(b). For the general discussion on the arbitrator being a public body see above.
[146] HRA 1998, s. 7(1)(b) in connection with the Arbitration Act 1996, s. 69(1). Such an appeal would be subject to meeting the requirements of s. 70 and exhausting any available arbitral appeals process.
[147] [2003] All ER (D) 68 (Apr).
[148] *Ibid*., para. 18.
[149] *Ibid*., para. 20.
[150] *Ibid*., para. 21.
[151] Assuming that the appeal arbitrator, if any, falls under the definition in the HRA 1998, s. 7(2) of being a tribunal which has been "determined in accordance with rules".

For leave to appeal under s. 69[153] to be granted "the four cumulative requirements in s 69(3)(a) to (d) must be met".[154]

> "69 Appeal on point of law
>
> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an Award made in the proceedings.
> An agreement to dispense with reasons for the tribunal's Award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except—
> (a) with the agreement of all the other parties to the proceedings, or
> (b) with the leave of the court.
> The right to appeal is also subject to the restrictions in section 70(2) and (3).
>
> *(3) Leave to appeal shall be given only if the court is satisfied—*
> *(a) that the determination of the question will substantially affect the rights of one or more of the parties,*
> *(b) that the question is one which the tribunal was asked to determine,*
> *(c) that, on the basis of the findings of fact in the Award—*
> *(i) the decision of the tribunal on the question is obviously wrong, or*
> *(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
> *(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.* [emphasis added].
>
> (4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
>
> (5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.
>
> (6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.
>
> (7) On an appeal under this section the court may by order—
> (a) confirm the Award,
> (b) vary the Award,
> (c) remit the Award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
> (d) set aside the Award in whole or in part.
> The court shall not exercise its power to set aside an Award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.
>
> (8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.
> But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."[155]

Out of those four factors in s. 69(3) the two of relevance for this discussion seem to be (i) that the decision will have to "substantially affect"[156] the rights of any of the parties, and that the decision is "obviously wrong",[157] or instead of the latter (ii) "that the question is one of general public importance and the decision of the tribunal is at least open to serious doubt".[158] I will discuss the two factors in turn.

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[152] Arbitration Act 1996, s. 69(2)(a).
[153] Which is required for an appeal unless all parties agree, s. 69(2).
[154] *Royal & Sunalliance Insurance Plc v. BAE Systems (Operations) Ltd* [2008] EWHC 743 (Comm), para. 9.
[155] Arbitration Act 1996, s. 69
[156] *Ibid*., s. 69(3)(a).
[157] *Ibid*., s. 69(3)(c)(i).
[158] *Ibid*., s. 69(3)(c)(ii).

(i) "obviously wrong"

So far as the first factor is concerned the test whether or not a decision is obviously wrong appears to have been set[159] by Lord Diplock in *The Nema*[160] where he said that

> "leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave."

This test, which seems to have been developed for voluntary arbitration,[161] sets a very high threshold for an interference with both the process and the Award. Such a threshold would probably not meet the requirements of Art. 6(1) as it appears not to allow an appeal[162] although the arbitrator may be wrong in law. It seems to be that what is required to comply with Art. 6 is that the court has "full jurisdiction and does provide the guarantees of Article 6(1)".[163] In order to provide those guarantees when compliance is challenged it would seem that no such threshold could be imposed.[164]

(ii) "the question is one of general public importance"

This second factor would not seem to be less onerous on a person seeking leave to appeal. It not only requires an issue of general importance, but in addition also serious doubt over the decision of the tribunal. "Serious doubt" would seem to mean that there must be a "realistic possibility of success"[165] to win the appeal. This puts the access right to the court at the same level as an appeal to a court after an initial court hearing.[166] But in the appeal to the court the access would be to the initial and not to the appeal court.[167] Thus, doubt is left as to the compliance with Art. 6 when the second factor sets a threshold which would prevent a party from accessing a court.

Nevertheless, assuming that the threshold tests are compliant with human rights law in case of statutory arbitration the court would have to establish that not holding a public hearing has "substantially affected" the rights of a party and that the decision is "obviously wrong". Alternatively the test is that apart from substantially affecting the party, the question is of "general public importance" and the decision of the tribunal is as a minimum "open to serious doubt".

Neither combination should pose a significant obstacle for the party. First, the ECtHR has considered it to be essential that proceedings which are conducted in private can be requested as a public hearing.[168] If it is essential it would appear to substantially affect the party. Secondly, the breach of a human right by a public body would appear to be obviously wrong. Thirdly, the issue to be determined during the proceedings in private, is

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[159] *London Underground Ltd v. Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC), para. 55.
[160] *Pioneer Shipping Ltd v. B.T.P. Tioxide Ltd* [1982] AC 724, p. 742/743.
[161] Lord Diplock referred on the same page to the fact that the parties have chosen the arbitrator themselves and should therefore be left to accept the decision of the tribunal.
[162] An appeal in the sense of access to a court of first instance which would seem to be required, see *Bryan v. United Kingdom,* para. 40, and *Bramelid and Malmström v. Sweden* (1983), p. 258.
[163] *Albert and Le Compte v. Belgium* (1983) 5 EHRR 533, para. 29.
[164] "It is a principle of our law that every citizen has a right of unimpeded access to a court", *R v. Secretary of State for the Home Department, ex parte Leech* [1994] QB 198, p. 210. See also *R v. Lord Chancellor, ex parte Witham* [1998] QB 575, p. 585, where the Court quotes with approval de Smith, Woolf and Jowell on Judicial Review of Administrative Action, 5th ed. (1995), pp. 231-232, "it is a common law presumption of legislative intent that access to the Queen's courts in respect of justiciable issues is not to be denied save by clear words in a statute". Such clear words, however, do only exist as far as an appeal to an arbitration is concerned which is not an action brought to challenge the compliance with Art. 6.
[165] *CGU International Insurance Plc v. AstraZeneca Insurance Co Ltd* [2007] Bus. LR 162, para. 96.
[166] CPR 52.3(6)(a).
[167] This would seem to follow from *Bramelid and Malmström v. Sweden* (1983), p. 258.
[168] *Martinie v. France*, para. 44.

of high public importance. Fourthly, if the decision by the tribunal not to hold a public hearing is obviously wrong it is more than open to serious doubt.

(b) Application for judicial review by a party

An application for judicial review[169] would be based upon the party being the victim[170] of the act of a State authority[171] who has sufficient interest in relation to the act of that authority.[172] It appears not to be in doubt that the party is affected by the violation of not holding a public hearing on request.

(c) Application for judicial review by a member of the public

It would seem that a member of the public would have the right to an application for judicial review[173] claiming the right of access to the information for an upcoming arbitration as well as the right of access to the Award. The party external to the arbitration proceedings would be the victim if it was, or could potentially be, a future "client" of the MCA. If as such it had not had the opportunity to inform itself about "the veracity of the allegations"[174] against the relevant ship, it would appear to have clearly been affected by the decision not to hold a public hearing. But the basic problem for the third party remains in that knowledge of an upcoming arbitration hearing can only be obtained when such information is made public prior to the hearing. It would appear that the UK government has an obligation to comply with the publicity requirement of Art. 6 and has to establish measures which guarantee just that.

Conclusion on the compliance of statutory arbitration with Art. 6 of the Human Rights Convention

The overall result of this discussion would seem to be that a statutory arbitration under the PSC Regulations or the MSA 1995 could potentially violate Art. 6. Yet the rights, under Art. 6, of the party[175] to the Detention Notice arbitration, will probably not be affected by a statutory arbitration.

Compared to a rather straightforward appeal to a court, however, where the judge cannot be chosen, court procedures do not have to be agreed and public access to both hearing and judgment is usually not in question, a party has more influence on the set up of the proceedings as a whole. On the same token, though, the party has also more subjects to think about and decide before the proceedings actually begin. In addition, the legal qualification of a High Court judge is not in question, but as regards an arbitrator the party cannot be completely certain. As the arbitration process appears to be designed for voluntary arbitration, parties deliberately choose to accept the risk of being confronted with arbitrators who are not fully qualified lawyers, probably for reasons of speed in dealing with the dispute. In a commercial disagreement this may equally benefit or

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[169] See for a more general discussion above, Chapter 4.2.8.
[170] HRA 1998, s. 7(1)tailpiece.
[171] Human Rights Convention, Art. 34.
[172] HRA 1998, s. 7(3).
[173] See above, Chapter 4.2.8. For the right of standing of a third party see *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, for example Lord Diplock on p. 644 "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped… they [officers or departments] are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge".
[174] See *Hurter v. Switzerland*, para. 31.
[175] "Party" in this context is always only the owner taking the MCA to arbitration. As the MCA represents the State it cannot claim any violation of a human right. It is therefore irrelevant whether or not the MCA would be disadvantaged by a process which is not in compliance with requirements of the Human Rights Convention.

disadvantage both parties. In statutory arbitration about a detention which has to cover relatively uncommon problems of public law a (foreign) company may, however, run a risk of not being served properly unless it can ensure the arbitrator has relevant qualifications.[176]

The result would appear to differ for the wider public or, probably, for the wider shipping community. Unless the tribunal hears the appeal against a detention or a prohibition notice in public the requirement for a public hearing might have been breached save for the exclusions listed in Art. 6(1). It is difficult to see, however, how any of those exclusions could be applicable in a ship detention case.

Even if the final conclusion was that a statutory arbitration under the PSC Regulations (or the MSA 1995) did not in any way violate Art. 6(1), the concept of statutory arbitration does not appear to be right as a matter of policy. If one assumes that the outcome of any judicial process is that justice and fairness ought to prevail the State has a role to ensure that. When doubts remain, as they do for me, that the process of statutory arbitration may not be fair because one party to the proceedings may be disadvantaged, it would for the intended objective of a detention not really appear to matter whether that is the State's own organisation or the party instigating the arbitration proceedings. The eventual objective ought to be satisfactory compliance of the vessel in question with health and safety obligations. If there is a risk that statutory arbitration might not deliver such a result it could be advantageous for all parties involved, i.e. the State represented through Parliament, the MCA and the claimant to resort to proven ways of dealing with appeals against the decision of a public body.

Such proven ways seem to be appeals against prohibition notices under the HSWA 1974. Those appeals are dealt with by an employment tribunal,[177] and according to s. 24(4) one or more assessors may be appointed for the proceedings. This is similar to the former Court of Survey under the MSA 1894, s. 487(1) which consisted of a judge sitting with two assessors, and who were either "of nautical, engineering, or other special skills and experience".[178] In either of these two scenarios there would not be any question about independence, procedures or public hearings with publicly pronounced judgments. Irrespective of where the assessors are chosen from there will always be the independent chair with, if required, the casting vote. There may, however, be a greater difficulty in convening a panel as quickly as a sole arbitrator, although an acceptable compromise might be to have a permanent panel of, say, QC's who are Lloyd's arbitrators, and master mariner members of Trinity House[179] and/or, as the case may be, engineer members of, say, the Institute of Marine Engineering, Science and Technology (IMAREST). Given the experience to date (on arbitrations) there could hardly be a great burden on any system. But it is fair to say, so far, there has not been any widespread dissatisfaction with the current system which is, on the other hand, not really surprising as there has apparently only been one detention arbitration appeal. I will now turn to that case.

[176] The PSC Regulations in reg. 11(6) do not put any emphasis on the legal knowledge of an arbitrator.
[177] HSWA 1974, s. 24(2).
[178] MSA 1894, s. 487(3).
[179] Who, for example, sit as assessors in collision cases in the Admiralty Court, see CPR 61.13(a).

8.5. Arbitration case study[180]

The Greek vessel "Koriana"[181] was subjected to a port state control inspection on 16 February 2005.[182] According to the later arbitration reasons[183] (the reasons for the final Award), two Inspectors, one trainee Inspector and one radio Inspector carried out the inspection which resulted in a Detention Notice being issued on that day. The owners took the case to arbitration and the Award was decided on the papers alone without an oral hearing.[184] It took a total of more than eight months (16 February to 27 October) from the day of the detention before the arbitration was resolved. This does not suggest that the speed of the proceedings is actually of the essence.[185]

The Detention Notice[186] stated that the ship was detained on two grounds.

> "(A) Statutory requirement:-
> Release/float free arrangement for EPIRB
> SOLAS IV Reg 8.3.4 S.I. 1998/2070 Schedule 1
>
> Ship does not comply because:-
> Bracket fitted with steel bolt, HRU[187] not therefore operational.
>
> (B) Statutory requirement:-
> Operational lifeboat Solas III Reg 20.1 S.I. 1999/2721 Reg 84
>
> Ship does not comply because:-
> Lifeboat engine on starboard boat defective cooling arrangement."[188]

The arbitrator was a Master Mariner and qualified arbitrator, but apparently not a trained lawyer.[189] When analysing the PSC regime in the UK, he did not refer to the requirements of the EC Directive,[190] but explained that guidance on port state control was contained in the Paris MoU which was incorporated into MSN 1775.[191] He explained that

> "My task has been to decide if the detention of the ship was reasonably justified by the existence of one or both of these deficiencies and whether or not the circumstances surrounding these deficiencies should have affected the decision to detain the ship. It has been necessary to examine the evidence surrounding each deficiency."[192]

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[180] I must disclose in this context that I was one of the four PSC Inspectors who detained the vessel "Koriana", and the Detention Notice was signed by me. As the Award in effect criticised the Inspectors, there is a risk that my analysis of the Award becomes an exercise in self-justification. But even considering that there is such a danger, it does not seem appropriate, as a result of this risk, to omit all reference to this significant Award, which is the only one which has taken place and is to date unpublished. I have endeavoured to remain objective. My comments will be restricted to my interpretation of the law as I may have a different recollection of events and do not want to allow my memory to get in the way of the assessment of the evidence.
[181] The vessel has since changed name and registered owner and is now called "Ocean Korian", see www.equasis.org.
[182] File MS 071/003/2094.
[183] *Neda Maritime Agency v. Maritime & Coastguard Agency*, reasons for arbitrator's final Award (hereafter "the reasons") of 27 October 2005, para. 5. File MS 071/003/2094, see Annex 27.
[184] *Neda Maritime Agency v. Maritime & Coastguard Agency* , the "Final Award" (not to be confused with "the reasons" for the final Award, see Annex 27), para. 5, from which it can be concluded that only written witness statements were exchanged. In the light of *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm), para. 35, where the judge expressed his concerns over reaching a conclusion on a documentary basis alone, it would suggest that full proceedings in front of a court with full evidence been given might increase the chances of reaching a fair result.
[185] See the discussion above in Chapter 8.2. where it was highlighted that apparently the only reason provided for moving detention appeals away from a court to arbitration was the anticipated speed of the arbitration proceedings. It should probably be added in this context that even if an owner gives notice that he wants to take the detention to arbitration "the giving of the notice shall not suspend the operation of the detention notice", the MSA 1995, s. 96(2).
[186] The Detention Notice is attached in Annex 28.
[187] HRU stand for "hydrostatic release unit". A HRU is activated at a certain water depths and will cut a bolt or a rope. A steel bolt, as in this case, cannot be cut by the unit.
[188] The reasons for the final Award, para. 5.
[189] This is a conclusion that follows from his introduction, Final Award, para. 1.
[190] Directive 95/21/EC; see above, Chapter 6.4.2.
[191] The reasons for the final Award, para. 11.
[192] *Ibid*., para. 15.

In dealing with the issues the arbitrator stated on issue (A)

> "Clearly, the presence of a metal bolt, instead of a plastic bolt, rendered the release mechanism of the apparatus useless. This was a major deficiency and it was necessary to replace the bolt with the correct type."[193]

He then went on and accepted the evidence of the port captain, a company representative, that the Inspector wanted to see the bolt fitted before he left and concludes that this implies that the officer "at that stage…did not see the absence of the proper bolt as a detainable item".[194] Before moving to the second issue the arbitrator confirmed that he had seen a copy of the Report of Inspection. He commented as follows:

> "It is clear that the original entry [on the Report of Inspection] under the heading 'Action Taken' for the EPIRB item was 17, which denotes *'rectify deficiency before departure'.* The original entry has been crossed out and the figure 30 put alongside. This denotes *'detainable deficiency'.* There have been other alterations to some of the entries on the same page of the form, including the entry referring to a lifeboat engine exhaust manifold. This too has been altered to 30 *('detainable deficiency').*[195]

When coming to reason (B) he discussed at some length whether or not the Inspector had used a hammer without reaching any conclusion on the subject.[196] What the arbitrator appeared to accept, though, was that the manifold[197] was defective.

> "It seems that by that stage, the defect was something more serious than a 'potential' item for detention. However, I do not believe that it could actually have become a detainable deficiency by that time."[198]

The arbitrator then put again emphasis on the fact that the original entry on the Report of Inspection was not denoting a detainable item,[199] and stressed that the alterations were made after the Inspector had a telephone conversation with a person in the MCA office.[200] The arbitrator also found that "the alterations to the form were made after it became clear that that [sic] repairs to the manifold were in hand".[201]

Under the heading "Other Factors" the arbitrator then focused on a "crucial period in this matter"[202] and put emphasis on the fact that a second check by an Inspector which found that no steps had been taken was down to "delay or a breakdown in communication between the master and others",[203] before he concluded that "the evidence is that a repair was in hand."[204]

Further on he accepted the evidence of the master "that he was first given to understand that the ship would not be detained". The arbitrator established that

> "the general rule must be that unless some discovery is made that means that a deficiency is worse than at first thought, it is un-acceptable [sic] to alter the Action Code on a particular deficiency after the master had been told that none of the deficiencies recorded in the Report were detainable."[205]

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[193] *Ibid*., para. 16.1.
[194] *Ibid*., para. 16.2.
[195] *Ibid*., para. 16.3.
[196] *Ibid*., paras. 17.1, 17.2 and 17.3. Whereas the Chief Officer accused the Inspector of having caused a hole in the manifold the Inspector insisted that he did not even have a hammer with him.
[197] A cooling water manifold is a chamber attached to an engine which has a number of inlets and outlets for the cooling water for and from the engine.
[198] The reasons for the final Award, para. 17.3. The arbitrator appeared to have referred to a passage from the witness statement of the Inspector which he quoted under para. 17.2: "It was made clear that in the absence of a suitable demonstration, the observed poor condition of the starboard lifeboat engine was a potential item for detention of the vessel." See also para. 23 where he appears to accept that a repair of the manifold was necessary.
[199] The reasons for the final Award, para. 17.5.
[200] *Ibid*., para. 17.6.
[201] *Ibid*.
[202] *Ibid*., para. 18.
[203] *Ibid*., para. 20.
[204] *Ibid*.
[205] *Ibid*., para. 23.

He formed this rule because he accepted the evidence of the master that it was "only after a telephone call between [the Inspector] and someone, presumably at MCA, that [the Inspector] altered the codes".[206]

The arbitrator then acknowledged that other "deficiencies or considerations" played a role in the decision to detain.[207] His conclusions on reason (A) were that he accepted the evidence that the

> "deficiency was rectified before the Inspectors left the vessel. I find no useful purpose was served by maintaining it as a detainable deficiency after the bolt was replaced and the Inspectors had the opportunity to see it."[208]

On reason (B) he concluded that

> "I have not felt it necessary to decide whether or not the Inspector played any part in the creation of the problem, but I have had in mind that there may not have been a serious problem before the manifold was removed. All things considered, I find that this was a situation that could have been satisfactorily dealt with without the necessity of it becoming a detainable deficiency."[209]

He continued in the next paragraph that

> "It was not reasonable for Respondents to detain a ship without making it absolutely clear why they are doing so. Where a detention is warranted because of the combined effect of a number of deficiencies, I see no reason why this should not be stated on the Notice of Detention."[210]

The overall conclusions of the arbitrator were "that the Notice of Detention dated 16 February 2005 was unreasonably issued and is to be cancelled forthwith".[211] The MCA accepted and did not appeal the Award. In the following seven points I suggest with some diffidence why doubts could be raised whether the arbitrator had properly applied the law. I will then analyse the Detention Notice and the grounds provided for the detention before discussing the seven issues in turn.

1. It appears that in the Award it was not fully realised that MSN 1775 not only gives guidance but also states that those of its annexes which are incorporated into the PSC Regulations have become part of UK law and are thereby mandatory.[212] There also seems to have been a considerable lack of clarity about the difference between the requirements of the PSC Regulations and the provisions applied for the detention.[213]

2. The Award was based on the PSC Regulations, but the ship was not detained under them.[214] It would appear, therefore, that the arbitrator incorrectly determined that his task was to "decide if the detention of the ship was reasonably justified".[215] He did not apply the relevant wording of the PSC Regulations under which he was supposed to decide "that in all the circumstances the matter did not constitute a valid basis for the inspector's opinion".[216]

3. The arbitration Award does not seem to have fully appreciated the requirement that the arbitrator "shall have regard…to any matters not specified in the detention notice".[217] When the arbitrator defined his task he only referred to "the existence of

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[206] *Ibid*.
[207] *Ibid*., para. 25.
[208] *Ibid*., para. 28.
[209] *Ibid*., para. 29.
[210] *Ibid*., para. 30.
[211] The Final Award, para. 5.
[212] See above, Chapter 6.4.3 for the annexes which have been incorporated.
[213] The reasons for the final Award, para. 11 *et seq.* The Regulations under which the vessel was detained were the Radio Regulations and the LSA Regulations, see the statement in the Notice of Detention, the reasons for the final Award, para. 5.
[214] The vessel was detained under the Radio, and the LSA, Regulations.
[215] The reasons for the final Award, para. 15.
[216] Reg. 11(4).
[217] PSC Regulations, reg. 11(3).

one or both of these deficiencies and whether or not the circumstances surrounding these deficiencies should have affected the decision to detain the ship".[218]

4. Deciding emphasis was put in the Award on when the detention decision was made instead of why it was made.[219]

5. The Award suggests that rather then apply the wording of the statutory requirements as to when a ship has to be detained, he created a new "general rule".[220]

6. It is possible that the arbitrator misinterpreted the PSC Regulations by considering that the vessel was unduly detained or delayed.[221]

7. Although it was identified that the wrong bolt in the HRU was a "major deficiency",[222] "no useful purpose"[223] was seen in detaining the vessel on that ground.

8.5.1. The grounds for the detention

The first reason given for the detention[224] was that a steel bolt prevented the HRU from being operational. This in turn means that the EPIRB[225] would not have floated free if the ship would have sunk. The Radio Regulations require an EPIRB to be capable of floating free.[226] An EPIRB which cannot float free clearly puts the life of master and crew in jeopardy.

According to the Regulations a ship "shall be liable to be detained"[227] when she does not comply with the requirements.[228] Despite the fact that the legal requirement has not exactly been specified[229] the notice would seem to be clear enough to identify where and how the vessel was in breach of the relevant legislation (or what and why it was wrong).[230] It appears to follow that the detention seems to have been justifiable because there was enough reason for the Inspector to conclude in his professional judgment that the defect was clearly hazardous to health and safety.[231]

The second reason for the detention was that the lifeboat engine had a defective cooling arrangement.[232] The engine represented a risk to the life for the boat crew as it is not clear for how long the engine could have been operational. It is, however, clear that the duration of the engine's operation would have been significantly reduced without an operational cooling system.

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[218] The reasons for the final Award, para. 15.
[219] *Ibid*., para. 18, where the arbitrator refers to "the crucial period in this matter…after the inspection".
[220] The reasons for the final Award, para. 23, "the general rule must be that unless some discovery is made that means that a deficiency is worse than at first thought, it is un-acceptable [sic] to alter the Action Code on a particular deficiency after the master had been told that none of the deficiencies recorded in the Report were detainable".
[221] *Ibid*., para. 29.
[222] *Ibid*., para. 16.1.
[223] *Ibid*., para. 28.
[224] See above, Chapter 8.5.
[225] "Emergency Position Indicating Radio Beacon", see also above, Chapter 7, fn 566.
[226] Schedule 1, para. (4).
[227] This wording suggests that discretion is left for the Inspector, see above, Chapter 7.3.1.
[228] Radio Regulations, reg. 49(1).
[229] The Detention Notice refers to the statutory instrument and the relevant schedule but not to the particular paragraph (no. 4) in Schedule 1.
[230] Schedule 1 of the Radio Regulations is fairly short and only consists of six short paragraphs. See the discussion above in Chapter 6.3.1.
[231] See the discussion above, Chapter 6.4. See also the discussion below about time related issues under item (7).
[232] The arbitrator seems to have accepted that there was a defect, para. 17.3 of the reasons.

The LSA Regulations require for a ship like the "Koriana"[233] that "at least one of the lifeboats carried on each side of the ship" is a motor lifeboat.[234] It can be fairly well assumed that the vessel only carried one lifeboat on either side.[235] When the ship does not comply with the requirements of the Regulations she "shall be liable to be detained".[236]

An inoperative engine cooling system does not comply with the requirements and presents a risk to life. The detention on this ground appears, therefore, also to have been justified.

8.5.2. Critique of the tribunal decision

I will now discuss the seven grounds which would seem to allow doubt as to the correct application of the law by the tribunal.

(1) Applicable Law

The port state control law in the UK is based on the European Directive on port state control[237] which is incorporated into the national law by the PSC Regulations.[238] An Inspector has to follow the law, and MSN 1775 is part of it in so far as its annexes are incorporated into the PSC Regulations.[239] According to the assessment criteria and the PSC Regulations a vessel must be detained when more than one clearly hazardous defect has been found.[240] As at least two such defects were found according to the Detention Notice and the Report of Inspection[241] it would seem that the Inspectors did not have a choice but to detain the vessel[242] if they were to apply the PSC Regulations (which the arbitrator believed they had).[243] In my view, it was wrong in law to hold that MSN 1775 was only guidance. The decision ought to have considered the mandatory criteria which MSN 1775 provides[244] and the relevant consequences for both vessel and Inspectors.

The vessel was not detained under the PSC Regulations, but under the Radio Regulations and the LSA Regulations.[245] The detention form heading also refers to "failure to comply with merchant shipping legislation".[246] As a consequence it would appear that the tribunal misled itself by not considering the correct statutory instruments.

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[233] A tanker of more than 1,600 gt, see www.equasis.org.
[234] LSA Regulations, reg. 12(5).
[235] The Detention Notice refers to the starboard lifeboat. If the vessel had carried two lifeboats on either side the notice would most likely have referred to the number of the boat or to the forward or aft lifeboat.
[236] LSA Regulations, reg. 87.
[237] Directive 95/21/EC; see above, Chapter 6.4.2.
[238] For the discussion see in more detail above, Chapter 6.4.2 *et seq*.
[239] See the discussion about the incorporation of annexes above, Chapter 6.4.3.
[240] See above, Chapter 6.5.
[241] Annex 26, p. 4.
[242] See also above, the discussion about an unfair advantage for vessels which are not detained despite the existing requirements, Chapter 6.4.2.
[243] The detention was only discussed under the PSC Regulations, see para. 11 *et seq*. of the reasons for the final Award.
[244] MSN 1775, p. 20.
[245] See above, the wording of the Detention Notice; see also the discussion above under Chapter 7.3.
[246] MSF 1701, see Annex 25.

(2) Reasonableness[247]

If one assumes that the detention was effected under the PSC Regulations, their wording does not appear to have been applied appropriately. The law does not ask the arbitrator to decide whether or not the detention was reasonable,[248] but whether or not "any of the matters specified…in the detention notice…constituted a valid basis" for the opinion of the Inspector.[249] It would seem that a matter constitutes a valid basis when a defect in breach of a statutory requirement has been identified which is clearly hazardous[250] and makes the ship subject to a detention. The question for the tribunal to decide would not seem to have been whether the decision of the Inspectors was reasonable, but whether in their view at the time there was a valid basis for their opinion. The correct question to ask would therefore appear to have been:

"Did any of the matters specified in the Detention Notice constitute a valid basis for the opinion of the Inspectors that the defects were clearly hazardous?"

The question of reasonableness may under certain circumstances follow, but only in so far as the objectivity of the opinion of the Inspectors is concerned. It is not required by the PSC Regulations (reg. 11(1)) to determine "if the detention of the ship was reasonably justified by the existence of one or both of these deficiencies".[251]

I come to this conclusion for a number of reasons and despite the decision in the preliminary trial in *Club Cruise* where the judge had to decide the validity of a detention under the MSA 1995, ss. 94 and 95.[252] In that case, in a similar way to the arbitrator's Award in the case of the "Koriana", the judge's decision was made about the existence of a dangerously unsafe ship and not about the justifiable opinion of the Inspector. It appears to me that there is now a conflicting body of law where one side would seem to support my view that for the opinion of the Inspector to be justifiable he does not eventually have to be right. By contrast *Club Cruise,* without having considered those relevant administrative law cases, decided that because the Inspector was not right he could not have justifiably have come to his opinion.[253] It is also my view that *Club Cruise* was not exactly answering the relevant question of Aiken J who did not seem to have asked whether the ship was actually dangerously unsafe.[254] Moreover, the preliminary trial in *Club Cruise* was not based on full evidence and can therefore only provide an indication of what is right if the facts were as assumed. By contrast the other non-maritime cases were full hearings.[255]

In addition the question of reasonableness ought to affect any decision in so far as a breach for which the vessel shall be liable to be detained ought to be analysed as to whether it posed a risk to life or was otherwise in the public interest.[256] It would not appear that the arbitrator's task was to establish whether the defect was clearly hazardous.[257]

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[247] See also the discussion below, Chapter 8.6. which deals with the requirements for a compensation claim following an invalid detention. I dealt with the issue of reasonableness in two places because the current discussion focuses on the understanding of the arbitrator as to his role whereas the discussion below covers the interpretation of the legislation about compensation. Although the arguments are similar the legal basis for the discussion is different. I did not want to confuse the two issues.
[248] In para. 15 of the reasons the arbitrator states that "my task has been to decide if the detention of the ship was reasonably justified by the existence of one or both of these deficiencies and whether or not the circumstances surrounding these deficiencies should have affected the decision to detain the ship".
[249] PSC Regulations, reg. 11(1); similarly the MSA 1995 in s. 96(1).
[250] PSC Regulations, reg. 9(2)(a).
[251] See above Chapter 8, fn 248.
[252] See the discussion above in Chapter 5.2.3.
[253] *Ibid*.
[254] *Ibid*.
[255] *Ibid*.
[256] See the discussion above in Chapter 3.3.
[257] However, that the EPIRB defect was clearly hazardous appears to have been accepted by the arbitrator in para. 16.1 of the reasons: "This was a major deficiency and it was necessary to replace the bolt with the correct type".

The tribunal made the finding that the manifold defect "could have been satisfactorily dealt with without the necessity of it becoming a detainable deficiency".[258] If the arbitrator meant that there could have been an agreement between the master and the PSC Inspectors he would appear to have been wrong in law as such an agreement would seem to violate European law.[259]

It would appear that defects cannot "become" a detainable deficiency but constitute a detainable deficiency when found.[260] If it were otherwise, there would in many cases in which ships are detained[261] be a situation which could be handled without a detention.[262] It would appear that the only questions to be answered were whether or not the defect was clearly hazardous to health and safety or if the deficiency was in breach of any of the requirements of the LSA Regulations,[263] and if the PSC Inspectors correctly applied their discretion.[264]

The arbitrator's task was not to decide that a measure to repair a defect was appropriate, but only whether or not that defect recorded in the Detention Notice constituted a valid basis for the Inspector's decision. What in the arbitrator's opinion constituted a satisfactory handling of the repairs on board would seem to be of no relevance for whether or not a detention was justified. If the arbitrator has to apply the law correctly he would appear to be under the same obligation as a court which cannot substitute its own view for that of the PSC Inspectors.[265]

In my conclusion, therefore, the arbitrator answered the wrong question[266] and did not correctly apply the relevant Regulations.[267]

(3) Regard to other matters

Again, if it is to be assumed that the vessel was detained under the PSC Regulations the arbitrator "shall have regard, in coming to his decision, to any other matters not specified in the Detention Notice".[268] The requirement "to have regard" to other matters seems to mean that those matters will not only have to be considered, but must become an important part of the decision on whether the Inspector's view constituted a valid opinion. I will illustrate this with some examples.

In an application for judicial review,[269] challenging a permission to develop a distribution depot, Mitting J discussed the significance of a policy statement of a public body.[270] The basis for his discussion was a case from 1985[271] in which the possibility of the relevant Inspector having departed from the departmental policy was discussed.[272] In that context Woolf J[273] considered s. 29 of the Town and Country Planning Act 1971 and stated that

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[258] The reasons for the final Award, para. 29.
[259] See the discussion above, Chapter 6.4.2.
[260] See the discussion below about time and detention under item (7).
[261] See particularly above, Chapter 7.5.
[262] Many answers of the Surveyors suggest that other options work as satisfactorily as detentions, see answers to questions 3, 6 and 7, Annex 15.
[263] LSA Regulations, reg. 87.
[264] See discussion above under Chapter 7.3.5.
[265] *Banks v. Secretary for the Environment* [2004] EWHC 416 (Admin), para. 10, see also above Chapter 6.7.2. (*(a) health risk*) and Chapter 5.2.3.
[266] See above Chapter 8, fn 248.
[267] Which ought to have been the Radio, and the LSA, Regulations.
[268] PSC Regulations, reg. 11(3). See also the discussion above, Chapter 6.4.3.
[269] *The Queen on the Application of Buglife — The Invertebrate Conservation Trust v. Thurrock Thames Gateway Development Corporation* [2008] EWHC 475 (Admin), 22 February 2008, unpublished, Westlaw transcript.
[270] *Ibid*., para. 12.
[271] *Gransden & Co. Ltd v. Secretary of State for the Environment* (1987) 54 P. & C.R. 86.
[272] *Ibid.,* p. 93.
[273] As he then was.

> "it would be an improper attempt to curtail the discretion which is provided by the Act, which indicates that in determining planning applications regard is not only to be had to the provisions of the development plan so far as material, but also to any other material considerations."[274]

He then concluded that

> "section 29 lays down what matters are to be regarded as material, and the policy cannot make a matter which is otherwise a material consideration an irrelevant consideration."[275]

If that policy was a lawful policy then the authority "must have regard to the policy."[276]

> "…the fact that a body has to have regard to the policy does not mean that it needs necessarily to follow the policy. However, if it is going to depart from the policy, it must give clear reasons for not doing so…"[277]

This understanding of "having regard to" would seem to be backed by the House of Lords' understanding of the term.[278] In the opinion of Lord Hoffmann, supported by the other four Law Lords, "to have regard to the reasons for delay …requires …to give due weight to evidence".[279]

The statutory provision applied in *The Queen on the Application of Buglife — The Invertebrate Conservation Trust v. Thurrock Thames Gateway Development Corporation* goes even a step further. According to s. 70(2) of the Town and Country Planning Act 1990 "the authority shall have regard to the provisions of the development plan".[280] Section 38(6) of the Planning and Compulsory Purchase Act 2004 then provides

> "If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Act the determination must be made in accordance with the plan unless material considerations indicate otherwise."[281]

In the case of the "Koriana" the demonstrated understanding would appear to suggest that "shall have regard to" required the arbitrator not only to give due weight to the evidence presented by the other matters, but also to make those matters an essential part of the decision, particularly when they affect the safety of master, crew and ship. If other defects suggested that the vessel was unsafe the tribunal ought to have modified[282] the Detention Notice and ordered the detention of the vessel for the other serious deficiencies. As an arbitrator is required to hold one of the qualifications enlisted in the PSC Regulations[283] and in the MSA 1995[284] he ought to be able to judge the relevance of other matters[285] within the context of the safety of the ship.

In the "Koriana" case a total of 13 defects were identified. They fell into the categories of fire safety measures (2), food and catering (1), ISM related deficiencies (2), LSA (3), MARPOL annex I (1), Radiocommunications (1), Safety of Navigation (2) and structural safety (1).[286] The defects included, to name but a few, "BA set masks found

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[274] *Gransden & Co. Ltd v. Secretary of State for the Environment,* p. 93.
[275] *Ibid.,* p. 93-94.
[276] *Ibid.,* p. 94.
[277] *Ibid*.
[278] *A v. Hoare* [2008] 2 WLR 311.
[279] *Ibid*., para. 49.
[280] See *The Queen on the Application of Buglife — The Invertebrate Conservation Trust v. Thurrock Thames Gateway Development Corporation*, para. 4.
[281] *Ibid*., para. 5.
[282] "Where on a reference under this regulation the arbitrator decides as respects any matter to which the reference relates, that in all the circumstances the matter did not constitute a valid basis for the inspector's opinion he shall either cancel the detention notice …, or affirm it with such modifications as he may in the circumstances think fit", PSC Regulations, reg. 11(4).
[283] Regulation 11(6) and (7). An arbitrator has to be a master marine, a marine engineer, a naval architect, a person with special experience in shipping matters or a solicitor or barrister with at least 10 years of practice.
[284] Section 96(6) and (7) which is identical to PSC Regulations, reg. 11(6) and (7).
[285] Which would include "any other matters not specified in the Detention Notice", PSC Regulations, reg. 11(3).
[286] See www.equasis.org, number of deficiencies per category, and particularly the Report of Inspection in Annex 26.

with loose face inset. Focsle BA set not fully charged; BA bottles/cylinders not tested at last service", "MOB[287] light at stbd gangway inoperative", "Stand by portable fire extinguisher at stbd manifold discharged", "safe all stbd storage tank corroded + holed at deck level", "AIS 100 degrees off course", "Oil leaks from emergency operating valve gear" and "Several of defective items are recorded in ISM/PM[288] system as being inspected and found satisfactory in last month – systems are not providing assurance that equipment is operational and correctly maintained".

All of these defects seem relevant to health, safety and the environment, and all of them but one[289] had been issued with a Action Code 17[290] attached to it[291] which required them to be closed out before departure of the vessel. It would seem that the arbitrator ought not to have weighed these defects against the detention decision[292] merely because they were not mentioned on the face of the Detention Notice, but rather to have used them in support of it. None of the "other matters not specified in the Detention Notice" were mentioned,[293] and the Award did not discuss whether those matters were of relevance for the safe operation of the vessel. In fact, the arbitrator did not seem to have regard to other matters as he stated "I do not think the ship owner need look beyond those reasons for the cause of the vessel being detained".[294]

Furthermore, it would seem that the statement that it was not "absolutely clear"[295] why the vessel was detained[296] does not really have a strong basis. The grounds would appear to have been clearly addressed in the notice and the report, and a Detention Notice only needs to show one valid reason. All the other identified defects then served as additional evidence supporting the detention. The arbitrator could have considered modifying[297] the notice[298] if he thought the recorded detention items were not sufficient, and adding those matters which required to be closed out before departure unless he considered them to be irrelevant for the safe operation of the vessel.

It appears that the Paris MoU would actually support the Inspectors to consider the inspection as a whole.

> "In taking a decision concerning the rectification of a deficiency or detention of a ship, the port state control officer will take into consideration the results of the detailed inspection…".[299]

Such consideration, however, ought probably to be visible to the ship's management. It would seem that it can be held in support of the tribunal's decision[300] that it would have been beneficial for the detention if the Inspectors had made it explicitly clear on the face of the Detention Notice that the vessel was clearly dangerous to health and safety.[301] This would have meant detaining the ship also under the PSC Regulations and would then not have left much doubt about the reasons for the Inspectors' decision.[302] A revised Detention Notice form which would more clearly guide an Inspector as to the information required to be spelled out, provide the necessary space

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[287] "MOB" stands for "man over board".
[288] "PM" stands for "planned maintenance".
[289] The AIS deficiency was issued with a code 10 (deficiency rectified), see p. 3 of the Report of Inspection.
[290] See above/below Chapter 6, fn 24.
[291] Which can be safely assumed at least for fire safety measures and LSA defects.
[292] Which he did, the reasons, para. 30.
[293] PSC Regulations, reg. 11(3).
[294] The reasons for the final Award, para. 26.
[295] *Ibid*., para. 30.
[296] *Ibid*.
[297] See PSC Regulations, reg. 11(4).
[298] An option which the arbitrator has under the PSC Regulations, reg. 11(4) or the MSA 1995, s. 96(4).
[299] Paris MoU, Annex 1, s. 9.1.
[300] The arbitrator commented on this in the reasons for the final Award, par. 30.
[301] See PSC Regulations, reg. 9(2)(a).
[302] It would appear that the Inspectors could have modified the Detention Notice at any time before the vessel was released. In *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm), para. 34, the Court appears to accept that more than one Detention Notice may be served upon the vessel.

for explaining in more detail the reasons for the detention, and particularly prompt a statement about the hazard to health, safety or the environment, would probably be advisable to ensure full compliance with requirements for such a notice.[303] This, however, would not appear to have made a relevant difference to the grounds of the detention as the number and importance of all defects would neither have changed, nor would they have been significantly more visible to the master and owner as all defects where clearly spelled out in the Report of Inspection which was issued together with the Detention Notice.

(4) The right point in time to make the decision

It would appear to be of no relevance whether the Inspectors made the decision to detain the vessel before they wrote the Report of Inspection (ROI), while or after one of the Inspectors "had a conversation on his mobile phone with someone at the MCA office",[304] or after they wrote down all the defects. The ROI and the decision of the Inspectors only became relevant to the master and owner after it had been signed, stamped and handed over to the master. Any alteration on the face of the report has no relevance other than showing that the person who wrote it may have changed his opinion, identified an error or wanted to correct a typographical mistake, none of which impacts in any way on whether or not the vessel was complying with merchant shipping legislation.

Furthermore, whether or not a vessel will be detained would not only seem to depend on the defects identified, but also on the co-operation experienced on board.[305] It would appear that the Inspector's attitude changed when they realised during the closing meeting that the on board management of the vessel had not undertaken any steps to rectify the situation with the lifeboat engine cooling water manifold.[306] The arbitrator commented on that somewhat ironically by stating that "it seems that by that stage, the defect was something more serious than a 'potential' item for detention".[307] If that was the case it would appear to be fully justified in the light of the other 11 defects which were not recorded on the face of the Detention Notice. If after several hours[308] nothing had been done to repair the manifold it must inevitably have suggested to the Inspectors that they could not trust that the vessel's on board management would deal with all defects within the required timeframe, i.e. for most of the deficiencies before departure. Therefore, the Inspector's co-operative attitude[309] will probably have changed to ensure they were in a position to verify that before the vessel were to sail all deficiencies had been dealt with properly.[310]

What the arbitrator should also have held in the Inspectors', rather than in the ship's, favour, is that the Inspectors carried out their inspection independently, and also recorded the defects independently, of each other.[311] This can inevitably bring with it two initial individual judgments that the vessel would not be required to be detained. Only when all the defects are seen together, and it is realised that hardly any action

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[303] "The question is this: does the notice enable the recipient to know what is wrong and why it is wrong?", Lord Denning quoted in *BT Fleet v. McKenna,* para. 14.
[304] The reasons for the final Award, para. 17.6.
[305] See also Surveyors' answers, Annex 15, question 5, particularly nos. 5.9, 5.11 and 5.16.
[306] The reasons for the final Award, para. 17.3. The inaction was put down to a breakdown of communication by the arbitrator (para. 20), and he accepted "that a repair was in hand" (para. 20).
[307] *Ibid*., para. 17.3.
[308] This was a "mandatory expanded inspection" which usually lasts longer than a "detailed inspection". As the latter will have on average a duration of six hours, see above Chapter 6, fn 17, it can be safely assumed that several hours had gone by since the defect was identified.
[309] Which, I believe, they were legally not entitled to have in the first place, as their task is to objectively assess whether or not any defect is clearly hazardous. If that is so they must detain the vessel, see above, Chapter 6.4.3.
[310] MSN 1775 stresses that "the need for the Inspector to return to the ship is a measure of the seriousness of the deficiencies", Annex VI, s. 1 (Criterion).
[311] Which was noted by the arbitrator in The reasons for the final Award, para. 16.3.

had been initiated[312] to rectify the very important defects, will they probably have realised that it was necessary to detain the vessel.

One may hold against this view that the arbitrator came to the conclusion "that a repair [of the cooling water manifold] was in hand".[313] The tribunal had not considered it important that nothing had been done about the manifold until that was verified and questioned on a second visit during the inspection. The Award only states that this "may indicate little more than a delay or a breakdown in communication between the master and others". Under those circumstances an Inspector, however, is in a dilemma. If the evidence, as found on the "Koriana", is that the safety system is not complied with,[314] he will need assurances that essential repair work is to be carried out. If the evidence on board does not provide these assurances he can only get it from visiting the vessel again before she sails. Under those circumstances, however, an Inspector does not have a choice, but to detain the vessel.[315]

Basing the decision on the fact that the Inspectors altered their entries in the report before handing it over would appear not to be backed by any statutory provision, and I am therefore of the opinion that the arbitrator was wrong in law to hold that against the Inspectors.

(5) The tribunal as a rule maker

It is questionable how far an arbitrator can create, as in this case, what he called a "general rule"[316] as to how deficiencies have to be recorded in the Report of Inspection, where the relevant rules are laid down in the Regulations.[317] As long as the Report of Inspection is not in conflict with that Regulation it would appear to be appropriate and justified.

The existing requirements do not state that Action Codes[318] cannot be altered. In fact it is not even obligatory to record Action Codes. What is required is that the report contains the "nature of the deficiencies"[319] and the "measures taken".[320] Nowhere does the Award say that that was not the case.[321]

This would seem to support the view that it was incorrect to base the decision on the fact that Action Codes had been altered.[322]

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[312] Which the arbitrator accepted, but apparently considered to be of no real relevance because it "may indicate little more than a delay or a breakdown in communication between master and others", the reasons, para. 20.
[313] The reasons for the final Award, para. 20.
[314] See above under point (4) the finding that the ISM records did not provide assurance that the SMS was complied with.
[315] MSN 1775, Annex VI, para. 1, Criterion, "The ship is detained if its deficiencies are sufficiently serious to merit an Inspector returning to satisfy himself that they have been rectified before the ship sails." The PSC Inspector had to return to the vessel two days after the initial inspection for a re-inspection and to release the ship from detention, see the reasons for the final Award, para. 6. See also the discussion above, Chapter 6.2.
[316] The reasons for the final Award, para. 23.
[317] The PSC Regulations, reg. 8 and MSN 1775, Annex X. In addition *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* , para. 29, would now seem to have set a new rule which would allow an Inspector to specify his powers by simply referring to the MSA 1995 in the Detention Notice.
[318] See above Chapter 6, fn 24.
[319] MSN 1775, Annex X, para. II(4).
[320] *Ibid*., para. II(5).
[321] The argument that it is unacceptable to alter Action Codes during the writing of the Report of Inspection would seem to fall under the heading of "triumph of form over substance". Flaux J concluded in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 34, that the latter were the case if there "was some invalidity in the detention notice served on the shipowner" and the detention was thereby invalidated.
[322] The reasons for the final Award, para. 29.

(6) Unduly detained or delayed

The arbitrator stated that he had "not been persuaded that there was good cause to turn it [the defective manifold] into a detainable deficiency".[323] He arrived at this conclusion because he had "in mind the requirement that Inspectors shall make all possible efforts to avoid a ship being unduly detained or delayed".[324] In making that link he had applied the PSC Regulations under which, however, the vessel was not detained. For the following discussion I will again assume that those Regulations did apply in this case.

For a ship to be "unduly detained or delayed"[325] it would appear that there would need to be no justifiable statutory reason to interfere with the departure and thereby with private property.

If the arbitrator thought that there was no statutory basis to detain the vessel his reasoning may be questioned because the vessel seems to have been clearly in breach of the Radio, and the LSA, Regulations.[326] It would appear that by balancing the need for a detention with the requirement not to unduly delay the ship, appropriate emphasis ought to have been put upon the clearly hazardous findings of the Inspectors. Those defects would seem not to have left the Inspectors with a choice but to detain the vessel.[327]

(7) No useful purpose

It appears to be arguable whether the tribunal was correct in finding

> "that no useful purpose was served by maintaining it as a detainable deficiency after the bolt was replaced and the Inspectors had the opportunity to see it".[328]

If the statement was to suggest that a Detention Notice could not be issued because the defect was rectified after some hours, but while the Inspectors were still on board, it could be argued that that decision was wrong in law.[329]

The decision whether or not a ship is to be detained would seem to have to be made independently of any time related factors. It would appear that when a ship at the point of inspection poses a clear hazard to health and safety it must be detained.[330] The PSC Regulations[331] in conformity with the European Directive[332] do not refer to time as a decisive, or even any, factor. If a time factor can play a role, different ships with defects which have in common that all represent a risk to life would potentially not experience equal treatment. If they do not experience equal treatment the measure could potentially distort competition and would appear to be in contravention of the requirements of Art. 92 of the Treaty of Amsterdam.[333] This appears to follow from the

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[323] *Ibid*.
[324] *Ibid*.
[325] PSC Regulations, reg. 9(7) "When carrying out inspections under these Regulations, the inspector shall make all possible efforts to avoid a ship being unduly detained or delayed". The question of whether there was a delay is of no relevance in this case as the vessel was released from detention before it finished discharging, the reasons for the final Award, para. 6. The discussion of this aspect will only be used for clarification purposes.
[326] See above, Chapter 8.5.1. As outlined above, in that Chapter, both grounds for a detention provided a justified reason under the relevant statutory instruments (Radio and LSA Regulations respectively).
[327] See the discussion above in Chapter 6.4.3.
[328] The reasons for the final Award, para. 28.
[329] Assuming, again, that the PSC Regulations are the statutory instrument under which the vessel had been detained.
[330] See discussion above, Chapter 6.4.2.
[331] In reg. 9(2)(a).
[332] "In the case of deficiencies which are clearly hazardous to safety, health or the environment, the competent authority of the port state where the ship is being inspected shall ensure that the ship is detained,…", Directive 95/21/EC, Art. 9(2).
[333] See discussion above about "operating aid", Chapter 6.4.2.

quite important fact that the record of the detention filed on the Paris MoU database, particularly in case of a tanker, can have a severe impact on the ship's ability to trade within European waters.[334]

One could argue, though, that the Paris MoU does not contemplate a vessel being detained after the "hazard is removed before the ship is allowed to proceed to sea".[335] But the Paris MoU when addressing the details of rectification and detention does not require a time factor to be observed, and leaves the decision about a detention to the port state control officer who "will exercise his professional judgment in determining whether to detain the ship until the deficiencies are corrected".[336] What the arbitration then has to decide is whether "the matter did not constitute a valid basis for the inspector's opinion".[337] The arbitrator is not asked to judge the Inspector's opinion. He is asked whether "the matter" constituted a valid basis for that opinion. The matter, however, would appear to be the item which was found to be defective, and on the basis of which the vessel was detained.[338]

Thus, it would seem, the arbitrator had to decide whether the defect, including "all the circumstances",[339] constituted a breach of a legal requirement which justified an interference with the property right of an owner. "All the circumstances" seem to relate to "the matter", i.e. the defect, and not to a question of time because the PSC Regulations, reg. 9(2)(a), require that in a case of defects which are clearly hazardous the vessel must be detained.[340] It would seem to follow that the "circumstances" refer to any other defects found and thereby to the condition of the ship. For if the circumstances would relate to time it would be irrelevant whether or not the defect were to constitute a breach of a legal requirement because it could be argued that, independent of the seriousness of the defect the vessel arrived with, the timing circumstances could be used to overrule that. This, however, would not appear what the Paris MoU is saying. It seems to suggest that the time between identifying the defect and rectifying it is irrelevant for the decision to detain, as

> "ships which are unsafe to proceed to sea will be detained upon the first inspection irrespective of the time the ship will stay in port".[341]

The European Directive would appear to support this view. Its purpose is, i.a. to "drastically…reduce substandard shipping"[342] and to increase compliance with relevant legislation.[343] A ship has to be detained when it is clearly hazardous to safety and shall not be released "until the hazard is removed".[344] A ship is clearly hazardous when the defect has been found until it has been rectified. If time should play a role a detention decision would appear to depend on when exactly the Inspector finds the defect, and whether or not he has the opportunity to talk about his findings with the master before he issues his detention report.[345]

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[334] See above the discussion about access refusal, Chapter 6.4.2. In addition the information will be publicly available and could deter potential charterers from signing a charter agreement for that vessel.
[335] Paris MoU, s. 3.10.1.
[336] *Ibid*., Annex 1, s. 9.1.
[337] PSC Regulations, reg. 11(4).
[338] *Ibid*., reg. 11(1), "any of the matters specified in relation to a ship in a detention notice".
[339] *Ibid*., reg. 11(4), "that in all the circumstances the matter did not constitute a valid basis for the inspector's opinion".
[340] This would appear to override reg. 9(1), see the continuing discussion below in this sub-section and also the discussion above in Chapter 6.4.3.
[341] Paris MoU, Annex 1, para. 9.3.2.1.
[342] Directive 95/21/EC, Art. 1.
[343] *Ibid*., Art. 1, first hyphen.
[344] *Ibid*., Art. 9(2). See also the discussion above, Chapter 6.4.2.
[345] It would seem that the PSC Officer would have to pass the information about his findings on to the ship as soon as he detects a detainable deficiency to comply with the requirement to make any effort to avoid unduly detaining or delaying the vessel. Any "undue delay" in such a case would not be the result of a detention, but of the delayed information which may have served to begin the work on the rectification of the defect those few hours later which it took to inform the vessel. However, the information will usually be with ship's staff on finding of the defect as the Inspector will always be accompanied by ship's staff.

If, when finding the defect, he makes up his mind to detain the vessel, and does not prepare a Detention Notice before he finishes his inspection several hours later, it would seem that time becomes only relevant in so far as he might have to issue a release notice directly after issuing the Detention Notice.[346] Were the Inspector not to do that it would seem the result of pure chance whether or not a ship will be detained.

On the one hand an Inspector who finds a detainable defect at the beginning of his inspection, which might last six hours or more, may at the end of the inspection find that the defect has been rectified, and would, if time would play a role, not be allowed to detain the vessel. On the other hand, an Inspector may find the same detainable defect at the end of his inspection because he looked at items in a different sequence and will have to detain the vessel because he reached the end of the working day, and any later rectification could only be verified the next day. In both scenarios the defect was the same, the risk to life was the same and the time required to rectify the defect was the same, and still one vessel would be detained whereas the other would not have to suffer the same (administrative) consequences.[347] Such different treatment can surely not have been the objective of any of the PSC governing instruments.

The irrelevance of the time factor in case of the "Koriana" can, in my opinion, also be illustrated by the following. A defect such as the steel bolt in the EPIRB release bracket on the "Koriana" was not of less danger to master and crew than, for example, a defective EPIRB the repair or replacement of which could take days. In both cases the use of the EPIRB is impossible, unless in the first scenario it is released manually. However, that is not the point in question as the requirement against which the use has to be verified is the free floating of the EPIRB. It would appear to be of importance to the risk of life of master and crew that it is not a question of time needed to rectify the defect but rather the severity of risk involved with the defect identified.[348] The threat to life does not depend on how long a repair would have taken, but what, and how big a risk the defect posed if it was not detected.

If the "Koriana" defect had been identified on a day when the relevant spare part was not available it would appear to have been out of the question not to see a "useful purpose" in keeping the vessel in port. I suggest that it therefore ought to be the "quality" of the deficiency which sets the parameter for a detention of a vessel. The "quality" of a defect would seem to be defined by the risk it poses to the life of people. But it will possibly also weigh against the vessel[349] when there is an indication that intent or negligence was part of causing the defect.[350] The latter would seem to have played a role in the "Koriana" case as the placing of a steel bolt in the release bracket had to be a deliberate action. This fault, however, ought to have been detected by the ship's crew as the ability of an EPIRB to float free is required to be determined once a month.[351]

If time to fix a defect were to play a role for a detention then the one who coincidentally needs a longer time to fix a hazardous defect, or to purchase a spare part which is out of stock in the particular port, will be disadvantaged over the one whose defect can be rectified in a short period of time. As it is the responsibility of master and owner to

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[346] Assuming for this discussion that the detention was justified at the point of identifying the defect because it established a breach of the relevant law which was clearly hazardous and required the ship to be detained.
[347] The former, as opposed to the latter, vessel would neither loose time nor be recorded as a detained vessel.
[348] A similar approach, only for prosecutions, appears to have been taken by the HSE, see HSE, *Enforcement Policy Statement,* p. 6, para. 12, where it is the extent of the risk in addition to how much the duty holder fell short of the legal requirement which the Inspector will have to take account of when considering a prosecution.
[349] See answers in "Questions for Surveyors", question two, Annex 15.
[350] Although, it would appear that neither the Paris MoU nor the Directive or the PSC Regulations expressively state that the vessel's crew or the company should be blamed or punished for the defect. It would therefore seem that a decision whether or not to detain would have to be based only on the factual finding that the defect identified poses a serious hazard. Yet, the effect of a detention usually contains elements of punishment as a loss of time for a vessel may also mean a loss of revenue for the owner.
[351] Radio Regulations, Schedule 2, para. 3(a). See also the ISM defect "Several of defective items are recorded….", Report of Inspection, p. 5.

make the ship safe it would not seem right if they were rewarded for any intentional, sloppy or negligent breaches of testing, and maintenance, requirements which endanger lives - independent of how long it takes to fix the defect. This is different from considering a detention to be a particular punishment for intent or negligence,[352] as the decision would still be based on factual findings only. But this approach would seem to serve the purpose of the Directive 95/21/EC in that operators do not get rewarded for having their vessel in a poor condition.[353]

Vessels might, however, be affected whether or not the defect was the fault of owner, master or crew. But the latter should be rather the exception as a proper safety management system and its satisfactory implementation ought to ensure compliance of a ship with rules and regulations.

The detention in case of a defect which can, in the extreme, be rectified on the spot, would not have to last longer than the repair takes. It would be a formality and not cause the vessel any loss of time at all, but would serve as a tool to record and highlight the serious violation of the Regulations.

Applying this risk based standard gives certainty where uncertainty can already cause an Inspector, and in consequence an owner, enough problems. Certainty is achieved because it is clear to all parties involved that when a relevant defect is found a detention will be the consequence.

Also, if time were the issue at stake it would not have been understandable why the owners of the "Koriana" went to arbitration. The vessel did not lose any time due to the detention. The ship completed discharging five hours after it had been released from detention.[354] Appealing such a detention would actually appear to stress the importance of it as an incentive for the owner in the future to comply with legislation, not only after a PSC Inspector has found a defect but before he even enters the vessel. It could be said that if the defect was so serious a prosecution should have been contemplated. However, following the argument that "the primary purpose"[355] of such a prosecution would be deterrence, it would seem to be in the public interest to apply a quicker, cheaper and simpler method which guarantees the same result.[356]

A deviation from the area of the Paris MoU seems to provide some additional support for the conclusion that the question of time is not an issue for the decision to detain a vessel. The Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MoU)[357] covers port state control of 18 countries one of which is Australia.[358] The text of the relevant provision in the Tokyo MoU is closely modelled on the Paris MoU.[359]

> "3.7. In the case of deficiencies which are clearly hazardous to safety, health or the environment, the Authority will, except as provided in 3.8, ensure that the hazard is removed before the ship is allowed to proceed to sea. For this purpose appropriate action will be taken, which may include detention or a formal prohibition of a ship to continue an operation due to established deficiencies which, individually or together, would render the continued

[352] See also above, Chapter 8, fn 350.
[353] It will serve to increase compliance with international legislation and will also harmonise procedures (Art. 1 of the Directive) as there will be less room for different Inspectors (in different countries, or even the same country) to come to different conclusions. An investigation into the differences in Paris MoU States as to whether a vessel ought to be detained is beyond the scope of this thesis.
[354] The reasons for the final Award, para. 6.
[355] N Gunningham, R Johnstone, *Regulating Workplace Safety,* 1999, p. 187. See also above, Chapter 9.4.
[356] "The ultimate purpose of the enforcing authorities is to ensure that duty holders manage and control risks effectively, thus preventing harm", HSE, *Enforcement Policy Statement,* para. 1. See also the answers of Surveyors, Annex 15, question 2.
[357] See http://www.tokyo-mou.org/ (4 December 2008).
[358] *Ibid*.
[359] The Tokyo MoU only came into effect on 1 April 1994 whereas the Paris MoU was in force from July 1982, see Z O Özcayir, *Port State Control*, pp. 184 and 122 respectively.

> operation hazardous…"[360]

On the website of the Australian Maritime Safety Authority (AMSA) the detention record for every vessel is broken down in quite some detail.[361] The detention period of vessels is recorded down to the minute. In one example the vessel was detained for one hour, [362] and in a second case for one hour and 45 minutes.[363] In another case the Panamanian bulk carrier "Melodia" was detained for one hour and 36 minutes because the "emergency fire pump [was] defective".[364] I would maintain that it was more or less obvious that the defects could possibly have been resolved in a very short period of time, and that if time would have been of any relevance the Inspector could have waited without detaining the vessel. This appears to support the view that time is not a relevant factor for the decision by the Inspector to detain a vessel, because if it were, none of the three vessels ought to have been detained.[365]

Neither the Tokyo MoU in s. 3.7[366] nor the Australian legislation appear to require the mandatory detention of a ship, but leave it at the discretion of the relevant Inspector.

> "If it appears to the Authority that a ship is unseaworthy or substandard, the Authority may order the ship to be provisionally detained."[367]

It would appear, though, that it was sufficient to establish that the three vessels mentioned were substandard or unseaworthy[368] to tip the balancing scale in favour of a detention.

Doubting the relevance of the link made by the arbitrator between the detention and time would thus seem to be justifiable. It would appear acceptable to argue that the arbitrator failed to recognise the objective of port state control, did not pay sufficient attention to the particular provisions of the PSC Regulations, and consequently came to an incorrect conclusion. This would appear of particular importance when considering that the tribunal had actually accepted the presence of the steel bolt to be "a major deficiency".[369]

Conclusion

I have raised doubts about many aspects of the Award. As to the Inspectors and the Notice of Detention it would seem to have been in their favour had they actually detained the vessel using the PSC Regulations.[370] Stating on the face of the Detention Notice that the vessel constituted a clear hazard to health, safety or the environment would appear to have found the approval of the arbitrator.[371]

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[360] The Memorandum of Understanding on Port State Control in the Asia-Pacific Region (hereafter also "Tokyo MoU"), s. 3.7.
[361] http://www.amsa.gov.au/Shipping_Safety/Port_State_Control/Ship_Detention/.
[362] The Vietnamese tanker "Dai Minh" was detained for one hour on 18 March 2008 because the engine room fire dampers for and aft on both port and starboard could not be closed, see http://www.amsa.gov.au/Shipping_Safety/Port_State_Control/Ship_Detention/200803.asp (4 December 2008).
[363] The Panamanian vehicle carrier "Positive Leader" was detained on 16 April 2008 for one hour and 45 minutes because the "Emergency fire pump [was] unable to pressurise fire main", http://www.amsa.gov.au/Shipping_Safety/Port_State_Control/Ship_Detention/200804.asp (4 December 2008).
[364] http://www.amsa.gov.au/Shipping_Safety/Port_State_Control/Ship_Detention/200808.asp (4 December 2008).
[365] See also Annex 31, answers by David Anderson, Principal Marine Surveyor, AMSA.
[366] See above.
[367] The [Australian] Navigation Act 1912, s. 210(1).
[368] Probably the former: "A ship is, for the purposes of this Act, substandard if the ship is seaworthy, but conditions on board the ship are clearly hazardous to safety or health", The Navigation Act 1912, s. 207A(1).
[369] The reasons for the final Award, para. 16.1.
[370] Regulation 9(2)(a).
[371] "Where a detention is warranted because of the combined effect of a number of deficiencies, I see no reason why this should not be stated on the Notice of Detention", the reasons, para. 30.

The MCA decided not to take the case any further (i.e. on appeal). This is understandable because s. 69, and it appears more so s. 68,[372] of the Arbitration Act pose such a high obstacle to changing an arbitration decision.[373] On the other hand, it would seem to have to be considered in favour of an applicant for an appeal that the arbitration process was not chosen but imposed onto the parties by statute.[374]

As there is no court decision concerning an appeal against a detention of ships[375] it would probably have been in the public interest to establish more certainty in respect of some of the issues I have raised, in particular the extent to which the arbitrator should impose his own opinion in place of that of the Inspectors dealing with the detention.

If there is a successful appeal of a detention by an owner who has lost time due to the detention, he might wish to recover damages. I will therefore now discuss the right to claim compensation for the loss suffered due to an invalid detention and the quantum of the relevant damages.

8.6. Compensation for an invalid detention

If an arbitrator has decided that a Detention Notice was invalid he may award the owner of the ship damages "in respect of any loss suffered by him in consequence of the detention of the ship".[376] The fact that an owner may be awarded compensation appears to be an exception to the rule when considering land based enforcement standards.[377] The HSWA 1974 seems only in s. 26[378] to refer to compensation claims against health and safety inspectors, but "the language of section 26…neither demonstrates nor supports the viability of any particular cause of action against an inspector".[379] It seems that because

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[372] Which requires not only a "serious irregularity" but also that it has caused "substantial injustice" to the applicant, s. 68(2). See also *Lesotho Highlands Development Authority v. Impregilo SpA* [2006] 1 AC 221, para. 27, approving the Departmental Advisory Committee on Arbitration Law that s. 68 "is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".

[373] And see *Pioneer Shipping Ltd v. B.T.P. Tioxide Ltd* [1982] AC 724, p. 742.

[374] See for example *ABB AG v. Hochtief Airport GmbH* [2006] 2 Lloyd's Rep. 1, para. 63, where the Court quoted with approval the Departmental Advisory Committee on Arbitration Law, para. 280, that "Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice." Similarly also *Hussman (Europe) Ltd v. Al Ameen Development & Trade Co.* [2000] 2 Lloyd's Rep. 83, para. 49. Conversely, it would appear that the hurdle for a complaint would have to be significantly lower when arbitration was imposed by statute.

[375] Apart from the old cases referred to above, Chapter 5.2.1., and the most recent decision in *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794 (Comm), although strictly speaking that was not an appeal under the MSA 1995, s. 96(1), but a preliminary ruling about a claim for compensation under a "tort of conversion".

[376] MSA 1995, s. 97(1) tailpiece. According the PSC Regulations, reg. 10(3), s. 97 shall apply in relation to a detention with the modifications reg. 10(3) requires.

[377] *Harris v. Evans* [1998] 1 WLR 1285, p. 1298, "This point [to postpone making a decision until concrete facts have been obtained] is one which, in my view, has strong implications in the present case. The duty of enforcing authorities, whether inspectors or local authorities, is to have regard to the health and safety of members of the public. If steps which they think should be taken to improve safety would have an adverse economic effect on the business enterprise in question, so be it. A tortious duty which rendered them potentially liable for economic damage to the business enterprise caused by the steps they were recommending to be taken would, in my judgment, be very likely to engender untoward cautiousness and the temptation to which Lord Browne-Wilkinson referred."

[378] "Where an action has been brought against an inspector in respect of an act done in the execution or purported execution of any of the relevant statutory provisions and the circumstances are such that he is not legally entitled to require the enforcing authority which appointed him to indemnify him, that authority may, nevertheless, indemnify him against the whole or part of any damages and costs or expenses which he may have been ordered to pay or may have incurred, if the authority is satisfied that he honestly believed that the act complained of was within his powers and that his duty as an inspector required or entitled him to do it."

[379] *Harris v. Evans,* p. 1295-1296.

the purpose of the HSWA 1974 is preventative[380] there is a rather reluctant approach by the courts to award damages.[381]

> "It is implicit in the Act of 1974 that improvement notices and prohibition notices may cause economic loss or damage to the business enterprise in question. It would, in my view, be seriously detrimental to the proper discharge by enforcing authorities of their responsibilities in respect of public health and safety if they were to be exposed to potential liability in negligence at the suit of the owners of the businesses adversely affected by their decisions. The Act of 1974 itself provides remedies against errors or excesses on the part of inspectors and enforcing authorities. I would decline to add the possibility of an action in negligence to the statutory remedies."[382]

It is therefore not surprising that before the arbitrator can make an award two conditions, in addition to a loss suffered by the owner, have to be satisfied. First, an arbitrator has to decide that "any matter did not constitute a valid basis for the Inspector's opinion".[383] Secondly, it must have appeared to an arbitrator "that there were no reasonable grounds for the Inspector to form that opinion".[384]

8.6.1. The basis for compensation

I will now analyse what the valid basis is for a claim for compensation and what, in this context, would constitute that the Inspector did not have reasonable grounds.[385]

(a) Valid basis

It would seem that the first requirement refers to the statutory provision which would give the power to an Inspector to interfere with private property.[386] The provision would seem to have to explicitly provide the option for a detention.[387] If the detention is not based upon any statutory provision an arbitrator would, in my opinion, not have to go any further as it would appear to be irrelevant whether or not there were reasonable grounds on which the Inspector formed his opinion. But it would appear that if only the reference to the MSA 1995 is referred to, granting the relevant powers to the arbitrator,[388] the Inspector would as a minimum have to demonstrate that he had in mind the applicable standards which were calling for a detention.[389] Otherwise, when the requirement of (a)[390] is not satisfied, (b) does not have to be considered as the two conditions are not alternatives, but are conjunctively joined by the word "and".

(b) No reasonable grounds

For the second condition to be satisfied it has to (i) appear to the arbitrator that (ii) the Inspector did not have reasonable grounds for his opinion.

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[380] *Ibid.,* p. 1297, "The purpose [of health and safety legislation] 1974 was to enable inspectors to require steps to be taken to reduce risks and thereby to avoid accidents".
[381] See also *Reeman v. DOT* [1997] 2 Lloyd's Rep. 648, p. 680, "one can say that the purpose of issuing certificates is the promotion of safety at sea", and on p. 683 that "to impose on the Department of Transport the duty [of care] for which Mr. Ullstein contends would be neither fair, just nor reasonable".
[382] *Harris v. Evans,* p. 1301-1302.
[383] MSA 1995, s. 97(1)(a).
[384] *Ibid*., s. 97(1)(b).
[385] See also above, Chapter 5.2.3.
[386] Such as, for example, regulation 106 of the Fire Protection Regulations. See also the discussion and examples above in Chapter 5.2.
[387] See Art. 1 of Protocol to the Human Rights Convention. See also discussion above, Chapter 6.7.3.
[388] Club *Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 29.
[389] *Ibid*., para. 25.
[390] Of MSA 1995, s. 97(1).

(i) it appears to the arbitrator

For it "to appear" to the arbitrator it would seem that he needs to think that it is right for him[391] to hold that there were no reasonable grounds. It must be likely that there were no such reasons.[392] He would seem to have to be in possession of information which leads him to that conclusion,[393] and any limitation in his evaluation of available information can only stem from the limited material he has access to.[394] However, it would seem that the arbitrator does not have to consider all circumstances as it has to be assumed that otherwise s. 97[395] would have made that a particular requirement.[396] But he would appear to have to consider those matters not specified in the Detention Notice which appeared relevant to him when he came to his decision about the validity of the Detention Notice.[397]

It follows, in my view, that the arbitrator has to be fairly convinced that there were no reasonable grounds which would have led him to a different conclusion.

(ii) no reasonable grounds for the opinion

When judging whether or not the Inspector had reasonable grounds to be of the opinion which led him to detain the vessel, the arbitrator is not to decide whether or not the Inspector was wrong to do so. "It is quite unacceptable … to proceed from 'wrong' to 'unreasonable'."[398]

> "Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. The question in any given case is whether a [person's] veto comes within the band of possible reasonable decisions and not whether it is right or mistaken. Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgment with his own."[399]

The arbitrator must rather ask himself "could any reasonable [PSC Inspector] act in the way in which this [Inspector] has acted…"?[400] For an Inspector to act unreasonably "it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."[401] The Inspector only had to be of the "opinion"[402] he did not have to be right.[403]

It would appear that the arbitrator can particularly not rely on facts which came to light after the Detention Notice had been issued.

> "I would not however subscribe to the view that facts subsequently brought forward as then existing can properly be relied upon as showing that the proposals were not unreasonable unless those facts are of such a character that they can be taken to have been within the knowledge of the department [Inspector]."[404]

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[391] Lord Walker in *Sadler v. General Medical Council* [2003] 1 WLR 2259, para. 66.
[392] Lord Woolf CJ in *R v. Sekhon* [2003] 1 WLR 1655, p. 1661.
[393] Lord Hope in *In Re Pantmaenog Timber Co Ltd v. Meade-King* [2004] 1 AC 158, para. 11.
[394] *The Queen on the application of London Fire and Emergency Planning Authority v. The Secretary of State for Communities and Local Government* [2007] EWHC 1176 (Admin), para. 45.
[395] Of the MSA 1995.
[396] For example, s. 78 of PACE 1978 requires that "if it appears to the court that, having regard to all the circumstances" the court may come to the relevant conclusion.
[397] Because according to the PSC Regulations, reg. 11(3), he "shall have regard…to any other matters…which appears *[sic]* to him to be relevant…" before he is going to make his decision.
[398] Lord Russel in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014, p. 1075/1076.
[399] Lord Hailsham in *In Re W. (An Infant)* [1971] AC 682, p. 700.
[400] Lord Salmon in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*, p. 1070.
[401] *Ibid*., p. 1064.
[402] MSA 1995, s. 97(1)(b).
[403] See also above, Chapter 5, fn 103.
[404] Lord Russel in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council,* p. 1076.

Thus my conclusion is that if there is no statutory provision on which the detention is based and the Inspector were to have acted completely outside of what other Inspectors in his place would have done, the conditions of s. 97(1)(a) and (b) would be satisfied. His activity would have had to be irrational.[405] Simply making a mistake would not have been enough to be seen as unreasonable. Particularly when the Inspector carried out his inspection carefully and thoroughly, left a detailed report, but has made a mistake during his inspection and/or the evaluation of its result, there would not appear to be an indication of unreasonableness.[406]

Only when there is no legal basis and, in addition, the Inspector acted unreasonably may the arbitrator then award compensation.[407]

8.6.2. Quantum

(a) Statute

The MSA 1995 leaves at large the method of calculating any compensation.[408] Section 97 seems to suggest that there is no automatic right of an owner to receive compensation even though he may have suffered a loss.

> "S. 97(1) If on a reference under section 96 relating to a detention notice in relation to a ship—
> (a) the arbitrator decides that any matter did not constitute a valid basis for the relevant inspector's opinion, and
> (b) it appears to him that there were no reasonable grounds for the inspector to form that opinion,
> the arbitrator may award the owner of the ship such compensation in respect of any loss suffered by him in consequence of the detention of the ship as the arbitrator thinks fit."[409]

This provision would appear not to define the quantum with any certainty. Given that daily hire rates could be enormous, the issue will be probably be of acute concern to the MCA.[410] Both the MSA 1995 and the PSC Regulations merely provide that the arbitration "may award…as the arbitrator thinks fit". It is thereby apparently at the discretion of the arbitrator whether or not to award compensation. The discretion the arbitrator is given would have to be exercised reasonably, i.e. irrelevant matters have to be excluded.[411]

It is submitted that determining the quantum cannot simply be a matter of applying private law solutions derived, e.g., from contract or probably rather from tort,[412] But first it is necessary to consider some general principles about the liability of public bodies.

(b) Liability of public bodies

Some guidance for the exercise of the arbitrator's decision may be derived from the law in respect of liability of public bodies in general. Lord Browne-Wilkinson[413] lists four categories for private claims for damages,[414] the fourth category of which I will not deal

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[405] The decision must be so outrageous in its defiance of logic that no sensible person would have arrive at it, see above, Chapter 6, fn 304.
[406] See also *R (On the application of Yvonne Hossack) v. Kettering Borough Council* [2003] N.P.C. 105, para. 47.
[407] MSA 1995, s. 97(1) tailpiece.
[408] There does not appear to have been any arbitration in which the quantum of compensation has been at issue.
[409] MSA 1995, s. 97(1).
[410] For example, in 2008 rates for Capesize bulk carriers varied from as high as $230,000 to $1,000 per day, see http://www.shippingtimes.co.uk/item_10133.html, Shipping Times of 27 November 2008 (31 December 2008).
[411] See discussion above in Chapter 4.2.5.
[412] A PSC inspection is an enforcement measure which is not based on a contract made between the port state control authority and the vessel.
[413] In *X (Minors) v. Bedfordshire County Council* [1995] 2 AC 633.
[414] *Ibid.,* p. 730-731.

with as it assumes bad faith.[415] The three remaining categories are (1) a breach of a statutory duty which causes damage to the claimant,[416] (2) a negligent breach of a statutory duty which does not allege that the officer had a common law duty of care,[417] and (3) that a common law duty of care was owed or brought about by the authority or officer.[418] Otherwise

> "the basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action."[419]

It would appear that category three would not provide a suitable approach for the arbitrator. As a Surveyor does not owe a duty of care to an owner when carrying out a survey which the owner asked and paid for[420] it would seem to follow that such a duty of care can definitely not be considered for an inspection which is an enforcement measure for which the owner does not have to pay.[421]

But it would seem that category (1) and (2) both provide the arbitrator with a better comparison. Whether or not the breach of the statutory duty of the Inspector was carried out negligently, it would appear that Parliament has decided to make an option of compensation available for an owner who suffered loss due to an invalid detention.[422] If the option of compensation would not have been appropriate no provision for it would have had to be made.[423] In my conclusion, therefore, an arbitrator ought to award compensation when each of the following four conditions is satisfied:

1. none of the matters specified in the Detention Notice had a valid statutory basis,[424]
2. the arbitrator must have good grounds to believe that it is right for him to decide that the Inspector did not have reasonable grounds for his opinion,[425]
3. the decision of the Inspector was irrational,[426] and
4. the owner has suffered a loss as a consequence of the detention.[427]

However, a claim by the owner apparently must be brought within the 21 day period an owner has from the day of the service of the Detention Notice until an appeal against the notice would become time barred.[428]

The decision in *Club Cruise*[429] dealt with this problem and clarified that an owner cannot alternatively sue the MCA in tort under a tort of conversion. The problem in that case was

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[415] See the listing of ingredients for a tort claim against a public body under common law in *Three Rivers District Council v. Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, p.191 and para. 44 of the second judgment.
[416] *X (Minors) v. Bedfordshire County Council,* p. 731.
[417] *Ibid.,* p. 732.
[418] *Ibid.,* p. 735.
[419] *Ibid.,* p. 731.
[420] *Reeman v. Department of Transport* [1997] 2 Lloyd's Rep. 648, p. 683 and 685.
[421] See *Brooks v. Commissioner of Police of the Metropolis* [2005] 1 WLR 1495, para. 30, where Lord Steyn held that "such legal duties [of care] would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim" and "would have detrimental effects for law enforcement."
[422] This option has been taken from the MSA 1894 and has been confirmed by the introduction of liability for the wrongful introduction of improvement and prohibition notices, see Lord Lucas in Hansard, Parliamentary Debates, House of Lords, Session 1983-84, Vol. II, 17 November 1983, p. 1381. Parliament created such liability in the MSA 1984, s. 5.
[423] "The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action", Lord Browne-Wilkinson in *X (Minors) v. Bedfordshire County Council,* p. 731.
[424] The MSA 1995, s. 97(1)(a). See also above Chapter 8.6.1.
[425] The MSA 1995, s. 97(1)(b). See also above Chapter 8.6.1.
[426] In the sense addressed above, Chapter 8, fn 405.
[427] The MSA 1995, s. 97(1) tailpiece.
[428] PSC Regulations, reg. 11(1). For comparison, for a standard action founded in tort the time limit is "six years from the date on which the cause of action accrued" (the Limitation Act 1980, s. 2.), and the time bar for claims against the owner for loss caused by a ship is set at two years (the MSA 1995, s. 190(3)).
[429] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport* [2008] EWHC 2794.

that the 21 day time bar applied.[430] For this reason the Cruise Company tried to argue that there was an alternative common law remedy based on the tort of conversion. This point was roundly dismissed on the basis that there was no dealing with the ship by the MCA denying the right of the disponent owner, e.g. by an assumption of ownership or dominion over the ship. By reference to *Kuwait Airways Corporation v. Iraqi Airways Co*[431] Flaux J pointed out that

> "the Detention Notice did not involve a sufficiently extensive encroachment on the Claimant's rights to constitute conversion, rather it was a lesser act of interference".[432]

The decision on this point is undoubtedly sound, in particular as there was an attempt to replace Parliament's choice for compensation procedures. Time bar provisions are well known in health and safety law,[433] so shipowners and operators must be aware that this time bar has been set deliberately short, in order that disputes can be sorted out quickly.

But the judge in *Club Cruise* was willing to assume that compensation could have been payable as (i) a detention under ss. 94, 95 would have been invalid as the ship was not "dangerously" unsafe, and (ii) a detention under the H and S Regulations would have been invalid as they were not in the mind of the Surveyor at the time of the detention.[434]

If a claim is brought in time there will be familiar issues of causation, remoteness, and measure.

(c) Causation[435]

Loss as a consequence of a detention could occur for, e.g., the shipowner, the time charterer, the voyage charterer, the bareboat charterer, the cargo owner or bill of lading holder, passengers, the mortgage lender, the master and crew, or anybody who would be affected by the ship's loss of time caused by the detention. However, the statutory right to be awarded compensation by the arbitrator is restricted to the owner.[436] All other potential claimants would have to sue the owner (e.g. in contract or tort) directly and the owner's claim would seem to rest solely upon the loss the detention has caused him.[437]

Although the situation after an invalid detention appears to be different to that after an invalid prohibition notice[438] the fact that Inspectors enforce detentions to improve safety, which may inevitably have an adverse economic effect on a company,[439] would seem to require an arbitrator to consider aspects other than considerations purely related to economic loss. An example for such a consideration is indicated by Flaux J in the *Club Cruise* case where he said that

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[430] Which is clearly addressed on the leaflet which was in fact provided with the Detention Notice (Arbitration on Detention of Merchant Ships and Fishing Vessels), see *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 12.
[431] [2002] 2 AC 883.
[432] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 58.
[433] The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004 No. 1861, Schedule 4, rule 4(1) also requires an appeal to be brought within 21 days from the date of the service of the notice.
[434] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 26.
[435] In the sense addressed by Lord Hoffmann, *Causation*, LQR 2005, 121(Oct) 592, p. 603: "One decides, as a matter of law, what causal connection the law requires and one then decides, as a question of fact, whether the claimant has satisfied the requirements of the law."
[436] MSA 1995, s. 97(1) tailpiece.
[437] An example of a similar loss is the loss of a time-charter, which the charterer terminated, as a result of the vessel having been off-hire due to the interference of a Class surveyor who imposed a condition of Class on the vessel which forced her to abandon her route as instructed by the charterers, *TS Lines Ltd v. Delphis NV (The TS Singapore)* [2009] EWHC B4 (Comm), paras. 4 and 40.
[438] Because the MSA 1995 by contrast to the HSWA 1974 particularly provides for the option to obtain compensation.
[439] See the discussion above, Chapter 8.6.

> "if the matter were being arbitrated, the arbitrator might take account of the fact that an invalid detention purportedly effected under Sections 94 and 95 could in fact have been validly issued under Regulation 28, in determining how much compensation to award the claimant".[440]

As

> "there is no special rule of the Admiralty Court [arbitrator] governing the question, … the law there administered in relation to such a matter [the detention] is the same as prevails at common law."[441]

If the test as applied by the courts is "ultimately a matter of common sense"[442] the question would appear to be whether the loss has occurred as a result of the detention.[443]

(d) Remoteness[444]

It would appear that the loss an owner can suffer is pure economic loss.[445] The Court of Appeal stated that "as a general rule a claim in tort cannot be founded upon pure economic loss".[446] But this would not seem to be the case for damages that may be claimed for an invalid detention because the MSA 1995 explicitly provides the statutory basis for a compensation claim.[447] The issue is the *extent* of any loss resulting from the detention. The basis for this discussion would appear to be the rule that "the law has to draw a line somewhere".[448]

> "The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes,' or consequences of consequences."[449]

To establish the cut-off line it may be helpful to compare the loss caused by a detention with the (tortious) loss caused by the delay of a vessel after a collision.

Bowen LJ in *The Argentino* said

> "the question is not what would have been the damage that might have been anticipated in the case of other ordinary ships, but what was the direct and actual damage done in the case of the *Argentino*. We have not to consider, in other words, whether sea-going ships ordinarily have such engagements as the *Argentino* had at the time of the collision [detention], but what was the direct and natural consequence of a collision to a ship [a detention of a ship] which in fact enjoyed such prospects of employment."[450]

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[440] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport,* para. 26.
[441] *The Argentino* (1889) LR 14 App. Cas. 519 (HL), p. 522.
[442] *Calvert v. Hill Credit Limited* [2008] EWHC 454 (Ch), para. 196, referring to *Galoo Ltd v. Murray* [1994] 1 WLR 1360, p. 1375. *Calvert v. Hill* was approved by the Court of Appeal in [2008] EWCA Civ 1427.
[443] "The usual rule for causation [is] that, in order to recover damages for negligence, a claimant must prove that but for the defendant's wrongful conduct he would not have sustained the harm or loss in question", *Environment Agency v. Ellis* [2008] EWCA Civ 1117, para. 21.
[444] In so far as foreseeability is the effective test, see *The Wagon Mound (No. 1)* [1961] AC 388, p. 426. In a tort claim for compensation something is said to be reasonably foreseeable even though it may be very unusual or not likely to occur, see *The Achilleas* [2008] UKHL 48, para. 31. As an example a numeric illustration of what is reasonably foreseeable may be taken from *Bolton v. Stone* [1951] AC 850, p. 859, where Lord Porter said that it might be anticipated (and, I conclude, would therefore appear to be foreseeable) that a cricket ball may be hit out of the cricket ground into the road, but not that it may injure a person. It had been proven that a ball left the ground six times in 28 years which appears to deliver a chance of ca. 1 in 1700, and on the same calculation basis an injury would occur with a chance of ca. 1 in 10,000. Considering that Lord Hoffmann, *Causation,* p. 602, already considers a chance of 1 in 37 to be small the requirements for foreseeability of harm seem to be rather stringent. The reason for this appears to be that "in tort there is no opportunity for the injured party to protect himself in that way [i.e. by contract], and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing", Lord Reid in *The Heron II* [1969] 1 AC 350, p. 386.
[445] "Economic losses suffered by the claimant will be regarded as 'pure' if they do not flow from any personal injury to the claimant nor from any physical damage to his or her property", J Steele, *Tort Law,* p. 339.
[446] *Tesco Stores Ltd v. Constable* [2008] EWCA Civ 362, para. 14.
[447] In s. 97(1).
[448] *Compania Financiera Soleada S.A. v. Hamoor Tanker Corporation Inc (The Borag)* [1981] 1 WLR 274, p. 281.
[449] *Owners of Dredger Liesbosch v. Owners of Steamship Edison (The Liesbosch)* [1933] AC 449, p. 460.
[450] *The Argentino,* CA, p. 203.

If a loss, which is not too remote, has occurred it is then necessary to determine the measure of the damages.

(e) Measure

The standard approach to the tortious measure of damages was formulated by Lord Blackburn, namely that

> "in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation".[451]

This rather straightforward principle has to be applied to compensation for a wrongful detention.

A good starting point again appears to be the principles applicable to the detention of ships after a tortious collision.

According to *Marsden* the principle was stated in *The Argentino*[452] by Bowen LJ.

> "A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision [invalid detention] seems to me to be, what is the use which the shipowner would, but for the accident [invalid detention], have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident [invalid detention], would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair [invalid detention] in addition to the cost of the repairs themselves."[453]

In a very recent case Sir Anthony Clarke MR referred to the underlying principle in that

> "the question for decision in every such case is simply what, if any, loss of profit was incurred as a result of the collision [detention]. The underlying principle is of course that the claimants are entitled to *restitutio in integrum*, no more and no less. How their loss of profit is to be calculated will depend upon the facts of the particular case: see eg per Bowen LJ in *The Argentino* (1888) 13 PD 191 at page 203".[454]

(f) Conclusion on compensation claims for invalid detentions

Considering that an initial conclusion that the Inspector acted unreasonably will already have had to be made by the arbitrator[455] the total amount of compensation would still seem to be the result of a balancing exercise he has to undertake by weighing up foreseeability and causation with the difficulties an Inspector is operating under when making his decision to detain a vessel for the sake of protecting lives and the environment. There would appear to be an essential difference between loss that resulted from profit-orientated actions as compared to actions that were executed under legal requirements to protect the public.[456]

Parliament could have issued a provision which made it clear that damages were to be paid in full in accordance with standard common law principles. As that was not done it would appear to be part of the financial risk of operating a vessel that a compensation

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[451] *Livingstone v.The Rawyards Coal Company* (1879-80) L.R. 5 App. Cas. 25, p. 39.
[452] (1888) LR 13 P.D. 191. The cost of the repairs addressed in the last part of the sentence would not seem to apply unless the ship was required to carry out repairs which the Inspector could not have legally asked for.
[453] *The Argentino,* CA, p. 201.
[454] *The Vicky 1* [2008] EWCA Civ 101, para. 61.
[455] See above, Chapter 8.6.1.
[456] This approach seems to be in line with the decision in *Reeman v. DOT* [1997] 2 Lloyd's Rep. 648 where Phillips LJ on p. 683 concluded that a duty of care for the DOT Surveyor was not established. Gibson LJ concluded similarly "that it would not be fair, just and reasonable to impose a duty of care on a body like the department charged with the duty of certifying with a view to promoting safety at sea", p. 685.

claim for loss due to an invalid detention ought not to be judged by the rather strict compensation rules of any claim for damages in tort or in contract. Apply, for example, the indication given by the judge in *Club Cruise*[457] to a case like that of *The TS Singapore*[458] assuming that the vessel was instead erroneously required by an MCA PSC Inspector to undergo repairs. Even though the arbitrator will at this stage already have decided that the Inspector had acted unreasonably, he would seemingly have to consider whether or not the Inspector had at least some reason to believe his decision was correct. The distinction to be made would be between the rather objective finding of the arbitrator that the Inspector's decision was unreasonable and the subjective decision of the Inspector which in his mind made him believe that his decision to detain the vessel was correct. If that was the case the compensation to be awarded ought then to be influenced by that fact and be proportionately less than what the owner incurred as an actual loss.

Guidance for the arbitrator may be derived from the HSWA 1974, s. 26.

> "Where an action has been brought against an inspector in respect of an act done in the execution or purported execution of any of the relevant statutory provisions and the circumstances are such that he is not legally entitled to require the enforcing authority which appointed him to indemnify him, that authority may, nevertheless, indemnify him against the whole or part of any damages and costs or expenses which he may have been ordered to pay or may have incurred, if the authority is satisfied that he honestly believed that the act complained of was within his powers and that his duty as an inspector required or entitled him to do it."[459]

There is, of course, no provision in the MSA 1995 which would consider legal (compensation) action being taken against a Surveyor, and the claim for compensation for an invalid detention under the MSA 1995 is not directed at the Surveyor but at the Secretary of State. However, what s. 26 of the HSWA 1974 seems to suggest for the relationship between employer and Inspector is not that the reasonableness of the Inspector's decision is to determine his personal liability, but that the question of whether the Inspector "honestly" believed he was right would become the decisive factor.

My analogue suggestion is that a Surveyor's decision, which he honestly believed was right but which was still unreasonable, would then not trigger a full right for compensation. Instead it would appear to force an arbitrator to weigh up the public interest for protection with the loss of the individual owner and the consequence of a potential Surveyor's loss of confidence in making crucial safety decisions involving private property. The factor the full claim ought to be reduced by would then seem to depend on the relevant circumstances.

If, for example, in the *Club Cruise* case the Inspector honestly believed that he was right and the vessel could have been detained using a different legal basis,[460] it might well have been just for the arbitrator not to award any compensation at all.

It seems, therefore, that compensation for any future loss might be very hard to come by, and that damages could as a maximum be restricted to the direct loss the owner has suffered.[461] Whether the arbitrator ought to consider such a claim would seem to depend on the particular circumstances of the case. This would appear to be in line with the position of the Court of Appeal in *Harris v. Evans* ("so be it")[462] which seems to suggest that some loss has to be accepted as part of a system which is set up to protect the members of the public.

In conclusion, although it is possible that the award of damages is completely at large, in my view it may be very difficult for an owner to justify a compensation claim even though the detention was found to be invalid. After overcoming the initial obstacle of convincing

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[457] *Club Cruise Entertainment and Travelling Services Europe BV v. The Department For Transport*, para. 26.
[458] See above, Chapter 8, fn 437.
[459] The HSWA 1974, s. 26.
[460] See the discussion above in Chapter 5.2.3.
[461] For example, loss of daily charter rates and also costs related directly to the detention such as fees and unnecessary repairs.
[462] Above, Chapter 8, fn 377.

the arbitrator that the decision of the Inspector was irrational it might also prove problematic for the owner to justify his demand for the total loss he incurred.

Part C Criminal proceedings

The IMO General Secretary has in the past expressed his concerns about criminal treatment of seafarers.

> "There can be no doubt, also, about the increasing trend to initiate criminal proceedings following maritime mishaps. The thinking among those who advocate such an approach must surely be that a harsh punitive climate results in a greater deterrent effect and, consequently, a reduction in the type of incidents that we are all seeking to prevent."[1]

He went on by making the point that

> "the IMO conventions have not been drafted with the aim of requiring criminal sanctions for non-compliance and, therefore, any move to criminalize polluters, particularly for negligence, would constitute a significant departure from the established philosophy in their formulation."[2]

The International Journal of the Nautical Institute published an article on criminalisation in 2005. Its author, after briefly reporting, amongst others, the story of a grounding in Japanese waters without any pollution, personal injury or damage to the cargo, asks

> "what justification is there to detain shipmasters pending an accident investigation?"[3]

The same magazine, six months later, published the results of a survey to which 576 people from the industry (33% seafaring and 67% non-seafaring returns) responded. The survey suggested that 84% of all respondents agree or strongly agree with criminalisation being

> "the most significant professional issue that may affect mariners during the next 5 years."[4]

Criminalisation ranked third after concerns over "inspections" (85%) and "competence" (92%).[5]

In the UK the topic also found its way into the 2005 TUC conference in Brighton where the NUMAST[6] deputy general secretary Peter McEwen asked the conference:

> "What job could put you in prison for 70 days for possessing prescribed sleeping pills? What job could see you deported for carrying out a safety check? – The answer to each is the same – seafaring."[7]

The NUMAST Telegraph[8] further reported that the motion seeking action to stop seafarers being treated as scapegoats was overwhelmingly carried by the conference.[9]

In the same edition of the trade union monthly journal the chairman of the "London P&I Club" is quoted as calling the trend to penalise seafarers "disturbing".[10] The title page of the September 2005 issue of the Club's news is also used to campaign against criminalisation of seafarers.[11]

That there was a "risk of self-incrimination and the need for seafarers to have access to legal advice" was also established by the Comite Maritime International.[12]

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[1] http://www.imo.org/Newsroom/mainframe.asp?topic_id=1028&doc_id=4710 (17 July 2008), speech of Efthimios E. Mitropoulos, Secretary-General of the International Maritime Organization (presented by Dr. Rosalie Balkin), London, 17 February 2005, at "The 1st International Conference on the Criminalisation of Masters and Seafarers" of IFSMA (International Federation of Shipmasters' Associations).
[2] Speech by IMO General Secretary, no. 2, above.
[3] R MacDonald, *Criminalisation in Shipping*, Seaways, March 2005, pp. 5-7 (6).
[4] *The President's Questionnaire 2005*, Seaways, September 2005, pp. 3-7 (4).
[5] Seaways, September 2005, p. 4.
[6] NUMAST, now (30 June 2008) Nautilus UK, commonly known as the ship masters' and officers trade union "is the voice of more than 19,000 maritime professionals working in all sectors of the shipping industry, at sea and ashore", NUMAST Telegraph, October 2005, p. 39.
[7] *Ibid*., October 2005, p. 11.
[8] Since October 2006 the "Nautilus UK Telegraph".
[9] NUMAST Telegraph, p. 11.
[10] *Ibid*., October 2005, p. 32.
[11] The London P&I Club, Club News, September 2005, Issue 43.
[12] CMI Newsletter, No. 3, September-December 2007, p. 5.

Whereas administrative measures do not seem to feature high in the minds of the public[13] criminal measures appear to raise attention more frequently.[14]

Criminalisation of the master has developed to become a major point of contention in recent years as shown by the sinking of the oil tanker "Erika" on 12 December 1999 and the subsequent measures taken by the EU.[15] The subject received a particular boost after the tanker "Prestige" broke in two, subsequently sank on 19 November 2002, and her master was imprisoned by the Spanish authorities. He was only released in 2003 after the London P&I Club put up the bail money of € 3 million.[16]

Any measure taken by a flag or port state authority will mostly affect masters and/or owners as criminal sanctions mainly focus on those two groups.[17] That the master is affected appears to be the logical consequence of the common understanding that he

> "remains responsible for the safety of the vessel, her crew and cargo."[18]

[13] This can probably be said despite the fact that shipmasters have been invited by the National Audit Office to "contribute to the public spending watchdog's study" which wants to establish "whether the Agency is managing its regulatory activities to maintain and improve the safety and environmental record of the growing UK fleet", for both quotes see Nautilus UK Telegraph, July 2008, *Spending Body in MCA Inquiry*, p. 10.

[14] On a local level administrative measures may reach the general media when a relatively high profile incident occurs, see, for example, The Daily Echo, 12 June 2008 about the investigation into the death of a crew member in a tank on board the cruise vessel "Saga Rose", http://www.dailyecho.co.uk/search/display.var.2336647.0.saga_rose_departs_after_crewmans_death.php (30 June 2008).

[15] The "Erika I package" introducing an approved inspection regime, and the "Erika II package" establishing the European Maritime Safety Agency (EMSA), see http://ec.europa.eu/transport/maritime/safety/2000_erika_en.htm (30 June 2008).

[16] E.g. see Nautilus UK Telegraph, *Detained Master in Human Rights Case*, January 2007, p. 10.

[17] See, for example, the Merchant Shipping (Prevention of Oil Pollution) Regulations 1996, SI 1996 No. 2154, hereafter Oil Pollution Regulations, reg. 36(1).

[18] *Whistler International Ltd v. Kawasaki Kisen Kaisha Ltd, (The Hill Harmony)* [2001] 1 Lloyd's Rep. 147, p. 160 (a commercial case).

Chapter [9] – Criminal law issues

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9.1. Introduction

In this chapter I will begin to introduce the discussion about prosecution as an enforcement measure.

Looking back at the chapters dealing with detentions it is rather astounding that, out of the more than 500 combined national and foreign flag vessel detentions, only one detention appears to have triggered a prosecution in the UK. The master of the UK flagged "Kronborg" was found guilty in having breached both Rule 10(c) and Rule 5 of the Colregs and was fined £1,000 plus £2,000 in costs.[19] However, the conviction was not linked to the grounds for the detention[20] which were related to nautical publications being out of date and the gyro compass and oily water separator being inoperative.[21] It appears, therefore, that no detention of any vessel during the observed period led to a prosecution on grounds for which the vessel was detained. This is the more surprising as questions of evidence do not appear to have been a problem. In cases where owners did not appeal against the detention it can arguably be assumed that they accepted the identified defects.[22] In addition most[23] Merchant Shipping Regulations establish strict criminal liability.[24] Such a feature in the HSE context is one "which suggest[s] to Inspectors that the

[19] Conviction 36/2004 (Annex 5).
[20] Which demonstrates the same approach towards national as it does to foreign flagged ships. This appears also to be verified by the answers Surveyors gave to question "Would you rather detain a vessel or prosecute the master and owner?" (Annex 15, question 2). The option of all Surveyors would rather be detention than prosecution. See also the next paragraph.
[21] Annex 8, "Detentions of UK flagged Ships", p. 3.
[22] However, it could be that owners only accepted the detention as they calculated it to be cheaper to accept the detention instead of having to go through an arbitration process with an unkown result followed by a compensation claim which could well end up in court. For the discussion of the arbitration process see above, Chapter 8.
[23] As I have not checked the exact wording of all 200+ Merchant Shipping Regulations I considered a rather careful wording, but believe that it is probably the case that practically all Regulations make a company, owner and/or master subject to strict criminal liability.
[24] See, for example, the Merchant Shipping (Life-Saving Appliances for Ships other than Ships of Classes III to VI(A)) Regulations 1999, SI 1999 no. 2721 (hereafter "LSA Regulations"), reg. 86(1); the Merchant Shipping (Fire Protection: Large Ships) Regulations 1998, SI 1998 no. 1012 (hereafter "Fire Protection Regulations"), reg. 105(1); and the Merchant Shipping (Load Line) Regulations 1998, SI 1998 no. 2241, hereafter "Load Line Regulations", reg. 35(1).

case may be one to prosecute".[25] Strict criminal liability does away with the requirement to prove the personal culpability of the master or owner. Once it is established that a requirement of the relevant regulations is not complied with the question of whether or not the master or owner is personally culpable no longer arises.[26]

The majority of Surveyors tend not to go for a prosecution.[27] The reasons vary slightly but can be summarised in that detention "is a quick fix",[28] "has an immediate effect on the earning ability of the ship"[29] or is a "financial penalty to the owner … and would be preferred rather than sanctions against the Master".[30] Prosecution is seen "as a last resort to drive a message home to the particular Master/Owner, and others who have deliberately or repeatedly transgressed".[31] Decisions by Surveyors not to go for a prosecution based on such views do not usually ever get to the Enforcement Unit let alone senior management in the MCA.[32]

Detention is covered in the enforcement manual of the MCA under the trigger of "jumping detention".[33] Although no file about jumping a detention was found one relevant conviction was identified.[34]

The particular ship had been detained for not carrying valid certification and was allowed one voyage to Greenock to go to dry-dock and get the certificates re-issued. However, the owner/master apparently decided that he would rather go to Germany and left both without permission and a pilot. HM Coastguard managed to convince the master to return to Greenock rather than being banned from entering any port in Europe. The master was fined £500 for sailing while still under detention and for breaches of other unspecified merchant shipping legislation and it was pointed out to him that a maximum fine of £50,000 could have been imposed.[35]

The issue of "jumping detention" does not therefore appear to be of much practical relevance and would also seem to give rise to a rather straightforward prosecution. Other examples of a prosecution for a failure to comply with merchant shipping legislation were not found.

I will therefore focus on those "enforcement triggers" which "delivered" a number of prosecutions. To begin with, however, I will discuss aspects of criminal law which affect the prosecution of defendants by the MCA. There is first the process of a prosecution, secondly the introduction of strict criminal liability and thirdly the question of who actually is the right defendant in cases of strict liability.

9.2. Prosecution

When the Enforcement Unit[36] considers prosecuting it "will always seek to follow"[37] *The Code for Crown Prosecutors.*[38]

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[25] K Hawkins, *Law As Last Resort,* p. 399.
[26] See also below, Chapter 9.5.
[27] See answers to question 2, Annex 15.
[28] Annex 15, answer 2.7.
[29] *Ibid*., answer 2.5.
[30] *Ibid*., answer 2.15.
[31] *Ibid*., answer 2.6.
[32] See also Annex 16, answer 11 that "the local MO [Marine Office] will do an initial fact finding investigation to establish whether the matter should be referred to the Enforcement Unit."
[33] MEM, p. 1-2-9, s. 2.4.
[34] Conviction 3/2001 (Annex 2), "Nord Star".
[35] *Ibid*.; see MSA 1995, s. 284(2B)(a) which limits the fine on summary conviction to £50,000.
[36] Cf. Chapter 2.2.
[37] MEM, chapter 2, s. 4.2.1.
[38] See http://www.cps.gov.uk/victims_witnesses/code.html (1 June 2008), hereafter also called the *"Prosecutors' Code*". The Prosecution of Offences Act 1985*,* s. 10(1), provides for the Director of the CPS to issue a Code giving guidance to prosecutors. The *Prosecutors' Code* was first introduced in 1986, see JA

If a case is not closed off after the investigation is completed by exercising one of the other options listed in the enforcement manual,[39] all the efforts of the enforcers or prosecutors – whether or not they are under the obligation to be fair[40] - will be to get the defendant convicted and sentenced; for, by default, the Enforcement Unit's (EnU) opinion must be that the defendant is guilty as otherwise he would not have been charged in the first place.[41] A prosecution

> "is pursued when there is clear and sufficient evidence of a breach of Merchant Shipping Safety or Pollution Regulations to bring the case to court and it is in the public interest to do so."[42]

The *Prosecutors' Code* suggests that with its help the Crown Prosecution Service "play(s) its part in making sure that justice is done."[43] But the *Prosecutors' Code* does not go on to explain what this "justice" is and what actually drives or ought to drive a prosecutor to want to have a suspect prosecuted.[44] This question appears to be of particular importance when considering the application of strict criminal liability which is frequent in Merchant Shipping Regulations.[45] Why, for example, should a master from whose ship oil is discharged into UK waters without his knowledge be "guilty of an offence",[46] and "shall be liable…on summary conviction, to a fine not exceeding £250,000"?[47] If it is true that

> "the only legitimate purpose of bringing a prosecution against someone can be that it is thought that he ought to be punished, if found to be guilty as charged",[48]

some sort of personal culpability or morally unacceptable conduct would be expected. When strict criminal liability applies, however, the criminal justice system does not exactly seek that. In that case potential criminal sanctions are not only applied to masters and seafarers when their action was blameworthy, but also for their bad luck, or negligence of others.[49]

Strict criminal liability is said to create "schemes designed to reduce the chances of violation, … by helping to promote certain values".[50] In that context I would question what particular chances the master has, for example to reduce the spillage of oil when, following the usual practice in the industry, he is not at all involved in the work that goes on in the engine room, let alone in selecting the crew that sails on his ship. Not being able to influence any of those decisions would appear to leave him at the mercy of his fate. If he is lucky enough to work with conscientious, well trained and skilled crew his chances of committing an offence would appear to be somewhat smaller than having to work with sloppy and badly trained staff.

It can only be assumed that the reason for the creation of such offences is

> "to announce to society that these actions are not to be done and to secure that fewer of them are done. These are the common immediate aims of making any conduct a criminal offence..."[51]

Fionda, A Ashworth, *The New Code for Crown Prosecutors: Part 1: Prosecution, Accountability and the Public Interest*, p. 894.

[39] See above, Chapter 2, fn 216.

[40] *The Code for Crown Prosecutors*, p. 1, s. 1.1.

[41] *Ibid*., p. 8, particularly s. 5.9.a.

[42] MEM, chapter 2, s. 2.4.1.v.

[43] *The Code for Crown Prosecutors*, p. 1, s. 1.2.

[44] J Rogers, *Restructuring the Exercise of Prosecutorial Discretion in England*, OJLS 2006 26 (775), p. 778-779, suggests that "the key question in *every* resolution of the 'public interest' element must be *why* the prosecutor should want to have the (guilty) defendant punished".

[45] See above, Chapter 2.5.

[46] MSA 1995, s. 131(3)(a).

[47] *Ibid*. It would appear that other than under the Oil Pollution Regulations a prosecution of the person who might really be culpable is not possible under this section. See also below the discussion in Chapter 12.2.4. (*(b) The Prosecution and the Chief Engineer of the "Borden"*).

[48] J Rogers, *Restructuring the Exercise of Prosecutorial Discretion in England,* p. 778.

[49] See below the discussion in Chapter 12.2.4. (*(b) The Prosecution and the Chief Engineer of the "Borden"*).

[50] G Lamont, *What is a Crime?*, OJLS 2007 27 (609), p. 631, who, however, also criticises that "the current use of strict liability…goes well beyond the role outlined".

[51] H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 1968**,** p. 5. An example of an announcement to society is the press release by the MCA on 10 January 2008, quoting the Head of the EnU that "this matter [intoxicated master] came to light when problems with the vessels hours of work records were

It would seem to me that the "common immediate aims" may also be called the "public interest", which "must be considered in each case where there is enough evidence to provide a realistic prospect of conviction."[52]

Verifying that there is a "public interest" constitutes the second stage of the two stage test in *The Code for Prosecutors*[53] which has to be passed before a prosecution goes ahead.[54] The public interest must be considered when there is "enough evidence to provide a realistic prospect of conviction".[55] In cases of strict criminal liability enough evidence is provided when it is established that the relevant act has happened.[56] The only question of relevance would then be whether or not a prosecution would be in the public interest. This would be in line with the general philosophy of *The Prosecutors' Code* which is based upon the statement by the Attorney General of 1951 that

> "it has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution."[57]

9.3. Public interest in general

The conclusion as to whether or not there is a public interest and a prosecution ought to be brought is made by the prosecutor or, in case of the MCA, by the Enforcement Unit. The EnU works in accordance with the MCA internal procedure for enforcement action (MCA 300)[58] and the guidance given in the MEM.

Any incoming information[59] will have to be considered by the Principal Enforcement Officer who has to be convinced that "the matter satisfies the definition of a 'significant breach'" before it will be taken any further.[60]

> "A significant breach is defined as a contravention of Merchant Shipping or MARPOL legislation which could, or has caused loss of life, serious injury, significant pollution or damage to property or the environment."[61]

The EnU will begin to investigate after, first, this requirement is met and, secondly, it has assessed which Regulations have been breached and by whom and, thirdly, whether or not the MCA is the appropriate authority.[62]

> "The purpose of any investigation is to uncover the truth surrounding an incident as far as possible and make a recommendation for an appropriate response."[63]

A response can reach from "no further action"[64] at one end, to a prosecution at the other.[65] Options in between are "passing file on to another body"[66] (e.g. police, where the other

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discovered. This case is the second such offence in the Southampton area in the last month. Seafarers should be aware that if found to be under the influence of alcohol when on duty onboard a ship, then they face arrest and being brought before the courts….", www.mcga.gov.uk, 26 May 2008.

[52] *The Code for Crown Prosecutors*, s. 5.7.

[53] *Ibid*., s. 5.1.

[54] *Ibid*., s. 4.1.

[55] *Ibid*., s. 5.7.

[56] For example, when oil has been discharged as is required under the MSA 1995, s. 131(1).

[57] Cited in *The Code for Crown Prosecutors*, s. 5.6.

[58] See above, Chapter 2.3., fn 103.

[59] According to the Head of the EnU, "From any appropriate sources, which includes, CG [Coastguard] stations, Surveyors, headquarters sections, particularly seafarers standards, individuals involved in incidents, witnesses, other agencies including the police", Annex 16, question 6.

[60] MCA 300, para. 4.3.1.

[61] The Marine Enforcement Manual (MEM), chapter 1, s. 1.1.

[62] MEM, chapter 2, s. 2.1.1.

[63] *Ibid*., chapter 3, s. 1.2.

[64] *Ibid*., chapter 2, s. 5.2.1, and discussed in more detail in MEM, chapter 3, s. 1.

[65] *Ibid*., s. 5.2.4.

[66] *Ibid*., chapter 3, s. 2.1.

body is more appropriate to deal with the case than the MCA, such as in manslaughter cases), "Notification of Concern",[67] "Formal Caution"[68] and the "Conditional Caution".[69]

When "no further action" is taken it must be as defensible as taking a decision to prosecute because

> "the MCA may be under pressure to act over certain incidents and it must be clearly shown that this course of action [no further action] is correct."[70]

"No further action" is taken, for example, when the conclusion is reached that no offence has been committed, that the offence was less serious and the offender has made a "serious effort to remedy the problem", or that there is insufficient evidence.[71] The reasoning of the MCA for such (in)action is that

> "the number of cases reported to the Enforcement Unit has increased every year since the Unit established [sic], so it is important that finite resources of the Unit are correctly targeted.[72]

However, the EnU does not consider taking no action "an easy option for closing off difficult cases".[73]

As a next step up from taking no action a "notification of concern"[74] is used to point out "areas where the MCA has concerns about their [the recipients] operational practices".[75]

Before a caution can be administered or, eventually, a prosecution be brought

> "the public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction."[76]

This virtual "public interest" (as there is usually no "public" expressing an interest) is addressed in *The Code for Crown Prosecutors*,[77] which lists "some common public interest factors in favour of prosecution,"[78] and also factors against it.[79]

When considering a formal caution the MCA gives the following advice to its enforcement officers.

> "4.1.4 Public Interest Considerations
>
> 3 If the first two of the above requirements[80] are met, consideration should be given to whether a caution is in the public interest. The police should take into account the public interest principles described in the Code for Crown Prosecutors.

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[67] *Ibid*., s. 3. A "notice of concern" is sent when there is "not sufficient evidence to warrant a prosecution or a formal caution but there is still good reason to suspect that someone is or has been operating in breach of Merchant Shipping legislation", MEM, chapter 3, s. 3.1.2. For a sample of a NOC see Annex 27.

[68] The significance of a caution is, "that a record will be kept of the caution, that the fact of a previous caution may influence the decision whether or not to prosecute if the person should offend again, and that it may be cited if the person should subsequently be found guilty of an offence by a court", MEM, chapter 3, s. 4.1.3.2., Note 2D.

[69] MEM does not yet comment on a "conditional caution" because "although section 22 of the CJA is now in force, the Home office has not yet permitted the role out of the use of Conditional Cautions by authorities other than the Police", see MEM, chapter 3, s. 5 (amendment 3 of September 2007). A "Conditional Cautioning enables offenders to be given a suitable disposal without the involvement of the usual court processes", Conditional Cautioning Code of Practice, para. 1.2. http://www.cps.gov.uk/publications/others/conditionalcautioning04.html (3 June 2008). A conditional caution can be administered when the offender admits the offence and the prosecutor is convinced to have enough evidence to otherwise charge the offender, see the Code of Practice, para. 2.1.

[70] MEM, chapter 3, s. 1.1.

[71] *Ibid*., s. 1.1.

[72] *Ibid*., s. 1.2.

[73] *Ibid*.

[74] Also called "notice of concern" or NOC.

[75] Head of the EnU, Annex 16, question 10.

[76] *The Code for Crown Prosecutors*, p. 7, point 5.7.

[77] According to A Lower, Deputy District Crown Prosecutor in North Hampshire, 3 June 2008, the Crown Prosecution Service provides their prosecutors with additional internal, but confidential, guidance.

[78] *The Code for Crown Prosecutors*, s. 5.9.

[79] *Ibid*., s. 5.10.

Note 3A There should be a presumption in favour of not prosecuting certain categories of offender, such as elderly people or those who suffer from some sort of mental illness or impairment, or a severe physical illness. Membership of these groups does not, however, afford absolute protection against prosecution, which may be justified by the seriousness of the offence.

Note 3B Two factors should be considered in relation to the offender's attitude towards his offence: the wilfulness with which it was committed and his subsequent attitude. A practical demonstration of regret, such as apologising to the victim and/or offering to put matters right as far as he is able, may support the use of a caution.

Note 3C The experience and circumstances of offenders involved in group offences can vary greatly, as can their degree of involvement. Although consistency and equity are important considerations in the decision whether to charge or caution, each offender should be considered separately. Different disposals may be justified."[81]

This advice appears to say that a prosecution is not the automatic consequence even when facing a guilty defendant who has admitted the offence and has enough evidence against him for a conviction to be likely.[82] Yet, it seems from the *Prosecutors' Code* that the usual starting point for any consideration of actions to be taken is that a prosecution would be appropriate unless public interest reasons stand against it.[83] But the prosecutors at this stage may instead slip into the judge's robe and "convict" the defendant with a caution,[84] thereby administering the "guilty verdict" and the sentencing decision, provided the public interest allows this.

In addition to the advice given about the public interest in *The Prosecutors' Code*, the individual circumstances of the defendant listed under Notes 3A – 3C would also appear to need taking into account. According to these Notes elderly people, people with a mental illness or a severe physical illness are less likely to be prosecuted unless the offence is considered "serious enough" (Note 3A).[85] Guidance as to what is "serious enough" is not available. The prosecutor, furthermore, will have to find a way to measure "wilfulness" and "subsequent attitude" (Note 3B), and the only help given is that an apology may point in the right direction. Consistency and equity which would appear to point towards similar decisions in the past, however, should not be decisive factors in the choice whether a caution or a prosecution is more appropriate (Note 3C).

Only when the public interest and the additional factors listed under MEM, s. 4.1.4.3,[86] suggest that a caution is not sufficient, should a defendant be prosecuted. A prosecution apparently will be the option

> "when there is clear and sufficient evidence of a breach of Merchant Shipping Safety or Pollution Regulations to bring the case to court and it is in the public interest to do so".[87]

MCA files hardly ever address the public interest expressly, but during the decision making process consideration is usually given as to what action is deemed to be the most

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[80] These requirements appear to be threefold:
"- there must be evidence of the offender's guilt sufficient to give a realistic prospect of conviction;
- the offender must admit the offence;
- the offender (or, in the case of a juvenile, his parents or guardian) must understand the significance of a caution and give informed consent to being cautioned", MEM, chapter 3, s. 4.1.3.2.

[81] MEM, chapter 3, s. 4.1.4.3.

[82] *Ibid*., chapter 2, s. 4.4 in effect states that "it should be understood that prosecution is not a "default" option - a case will only go to court if the circumstances require it. The Enforcement Unit will always recommend other courses of action if prosecution is not correct."

[83] "The basic presumption [is] that a case, where there is sufficient evidence, will usually proceed unless there are public interest factors that clearly outweigh those tending against [for the statement to make sense "against" appears to be an error and should probably read "in favour of"] prosecution", K Macdonald, *The New Code for Crown Prosecutors*, p. 13.

[84] Although "a caution is not a form of sentence", MEM, chapter 3, s. 4.1.2.1, Note 1A.

[85] This point is also made in the *Prosecutors' Code* under s. 5.10.g.

[86] Which has been directly copied from "Home Office Circular 18/94", MEM, chapter 3, s. 4.1.1. The text has not been adapted to MCA needs (as can be seen from the use of the word "police" in s. 4.1.4.3).

[87] MEM, chapter 2, s. 2.4.1.v.

appropriate.[88] I will in the next sections discuss how the determination of the public interest might affect the decision within the MCA to prosecute or not to prosecute.

9.4. Public interest in MCA investigations

Although the MCA will always seek to follow *The Prosecutors' Code*[89] the Agency has chosen a limited number of factors which it considers will have a substantial influence on the decision to prosecute.

> "The following criteria will figure strongly in the final decision:
>
> - the seriousness of the offence;
> - a conviction is likely to result in a significant sentence;
> - the defendant was in a position of authority or trust;
> - there is evidence that the offence was premeditated;
> - the defendant's previous convictions or cautions are relevant to the present offence;
> - if not prosecuted, the defendant may continue to pose a danger to the seafaring community or to the general public."[90]

All but the last factor are taken from the *Prosecutors' Code*. I will now discuss them in turn in the context of the public interest.

9.4.1. "the seriousness of the offence" (5.9)[91]

This introductory factor[92] referred to by the *Prosecutors' Code* under which a prosecution is likely to be needed is the "seriousness of the offence". It does not address the increased seriousness of the offence which makes it more likely that prosecution is needed.[93] What is a serious offence? Is the seriousness defined by the result of the offence itself, the potential outcome of the act in question or the average sentence given for similar breaches? Is it the mental state of the defendant which makes the offence serious? Is it the perception the public might have that makes it serious?

To answer these questions it would seem that the "seriousness of the offence" in merchant shipping health and safety terms could more easily be defined when resort is had to the fundamental right of people, the right to life.[94] Any act which shows disrespect for life, independent of its outcome, ought then to qualify as serious.[95] If

> "the primary purpose of [occupational health and safety] prosecution is deterrence, which is premised on the notion that punishment will discourage the individual or corporate wrongdoer",[96]

then the degree of seriousness would appear to be measured by the expected punishment for the committed act. But then

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[88] When files have been properly kept they usually carry a minute outlining a proposal for the decision maker as to what action should be preferred and why.
[89] MEM, chapter 2, s. 4.2.1, See also above, Chapter 9.2.
[90] *Ibid*., s. 4.3.1.
[91] The number refers to the relevant factor listed in *The Code for Crown Prosecutors*.
[92] *The Code for Crown Prosecutors* refers in para. 5.9 in a general introductory sentence to "the more serious offence" before listing a total of 17 factors in letters (a) to (q).
[93] *Ibid.,* s. 5.9. See also above, Chapter 9.3 where the term "seriousness of the offence" is also used in Note 3A as a guiding element to determine whether or not a caution is a sufficient enforcement measure.
[94] Art. 2 of the Human Rights Convention with all its "offsprings", such as, for example, liberty, the exclusion of torture and the right of freedom of thought. The seriousness of a threat to life is illustrated in merchant shipping by the MSA 1995 defining a "dangerously unsafe ship" as one which is "unfit to remain at sea without serious danger to human life", s. 94(1A)(a). I would also include the right to a clean environment which can seriously impact on the right to life. The latter is also illustrated in the PSC Regulations, reg. 9(2), where the environment is *en par* with safety and health.
[95] Because the right to life is one of the "highest priorities of a modern democratic state", *R (Middleton) v. West Somerset Coroner* [2004] 2 AC 182, para. 5. See also the discussion above, Chapter 6.7.
[96] N Gunningham, R Johnstone, *Regulating Workplace Safety,* p. 187.

> "it would be simpler if the Code were instead to list such factors as being relevant towards the seeking of a particular purpose of punishment…, and to drop the notion of 'seriousness' altogether".[97]

As the *Prosecutors' Code* is a generic tool to determine the need for a prosecution the factor of seriousness would probably have benefited from a greater adaptation to the needs of the MCA and the specifics of the shipping industry and merchant shipping legislation.[98] For example, the fact that most merchant shipping offences are covered by strict criminal liability,[99] and are within the same framework of possible penalties, does not require a prosecutor to put the same emphasis on the mental state of a defendant as in offences where *mens rea* needs to be proved. It would, however, appear that the intentionally committed violation of the law deserves a stricter punishment than a breach which is based on bad luck.[100] Considering the rather low[101] total number of convictions per year[102] it would also seem to have been advantageous if within this factor the need for general deterrence was stressed.

In the following sub-sections I will discuss factors in the light of merchant shipping which are suggested in the *Prosecutors' Code* to be considered for the establishment of a public interest in favour of a prosecution. The discussion can only be partial because I understand that "deciding on the public interest is not simply a matter of adding up the number of factors",[103] and I would really have to discuss several complete cases to provide a comprehensive overview of the application of the *Prosecutors' Code*. That is obviously not feasible within the context of this thesis. I have therefore settled for the analysis of the remaining factors of the MCA bullet point list in the light of examples from the files which provide an indication of the usefulness of each of the discussed factors.

9.4.2. "a conviction is likely to result in a significant sentence" (5.9.a.)

Most offences under Merchant Shipping Regulations constitute offences of strict criminal liability and the inspected files and prosecutions suggest that hardly any conviction resulted in a prison term.[104] The standard wording of a penalty provision is

> "shall each be guilty of an offence in respect of each case of non-compliance and liable on summary conviction to a fine not exceeding the statutory maximum or on conviction on indictment, to imprisonment for a term not exceeding two years and a fine".[105]

Courts appear to be using the term "significant sentence" in a variety of circumstances from long prison sentences[106] to considering a custodial sentence of four months as being significant.[107] In the latter case the defendants considered were 11 and 12 years old.[108] The New Zealand Court of Appeal even considered seven days of cell confinement to be

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[97] J Rogers, *Restructuring the exercise of prosecutorial discretion in England,* 2006, p. 784.
[98] In addition to the last bullet [danger to the general public] point addressed and discussed above in the introduction to this subsection.
[99] See below, Chapter 9.5.
[100] As can be the case if a master is prosecuted for the negligence of another crew member who pumped oil overboard, see below, Chapter 12.2.4. It would seem that the MCA policy is already to apply an approach at the outset which takes into consideration the need for punishment. "A minor offence arising from a genuine oversight by an otherwise conscientious seafarer may be technically eligible for prosecution but if the seafarer concerned is suitably contrite, and, in the judgement of the investigation officer, merely someone who made a genuine error but who is not likely to repeat the offence, the most appropriate action would be to recommend a formal caution. No useful purpose would be served by bringing such a defendant to court and to do so would only represent a considerable waste of MCA resources and the Court's time", MEM, chapter 2, s. 4.3.1.
[101] In comparison, for example, to detentions. See Annexes 2-6 (a total of 65 convictions) and Annexes 9-13 (a total of approx. 500 foreign detentions).
[102] See Annexes 2–6.
[103] *The Code for Crown Prosecutors*, s. 5.11.
[104] See Annexes 2 to 6.
[105] As in this example taken from the Merchant Shipping (Fire Protection: Large Ships) Regulations 1998 (hereafter "Fire Protection Regulations"), SI 1998 No. 1012, reg. 105(1).
[106] As, for example, 14 years in *R v. Bilgi* [2007] EWCA Crim 3042, para. 18 and 21.
[107] *R v. Brace* [2004] EWCA Crim 1882, para. 15.
[108] *Ibid.,* para. 14.

significant.[109] It therefore seems that "significant sentence" denotes a relative term referring to the circumstances of each case, but would most likely always appear to include a custodial sentence.[110] However, at the other end of the spectrum is the nominal sentence, which, if expected, constitutes a factor which should make a prosecution less likely.[111]

Applying this to merchant shipping terms would suggest that for the expected sentence to be significant it would at least have to be high on the summary scale if not justifying an indictment with the likelihood of a prison sentence. The parameters against which the significance would have to be determined would seem to be the sentencing frame of the relevant statutory provision as well as the experience with similar breaches of the law.

Going by the judgments reported[112] the minimum sentence passed in any MCA case was as low as £300,[113] and, in addition, because it was tried in Scotland without costs being awarded,[114] would hardly qualify as a "significant sentence".

By taking guidance from the expectation for a significant sentence the decision is very much based upon past penalties having been passed by a court. The likelihood can realistically only be based on known judgments and does not appear to present too high an obstacle to be forecasted. *The Prosecutors' Code*, however, does not provide any additional guidance.

The MCA files are usually silent on the expectation. What is commented on by the enforcement officers in odd cases, however, is when the sentence was found to be either very tough or very lenient.

> Owners were prosecuted for a vessel losing approximately 100 litres of lubrication oil due to negligence of the crew and were fined £100,000 by the Magistrates Court,[115] a fine which was reduced to £30,000 on appeal to the Crown Court. Initially the master had denied the fact when his ship was subject to a port state control inspection but owners later admitted the pollution. Surprise was expressed in the MCA report of the Magistrates' trial about the size of the first fine,[116] and disappointment vented for the reduced fine on appeal.[117]

Dissatisfaction about the fine which "was probably a bit light"[118] was also recorded when a defendant, who had forged a Certificate of Competency and an ENG1[119] and made use of them, was fined £1,000 plus £1,000 in costs in the Crown Court. Commenting on the problem the enforcement officer stated that

> "the CPS presentation of the case was not good and the barrister presenting the case kept stumbling through lack of knowledge of how the certification system works."[120]

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[109] *Drew v. Attorney General* [2002] 3 LRC 380, para. 32.
[110] "He however found, rightly, in our view, that the offence was so serious that only a custodial sentence could be justified, not only to punish but also to indicate to others, thinking of committing such offences, that if they did so, they faced significant sentences", *R v. Ineson* [2001] EWCA Crim 423, para. 9.
[111] *The Code for Crown Prosecutors*, s. 5.10.a.
[112] See Annexes 2 – 6.
[113] "At about 10.00 a.m. on Wednesday 27 December, the "Poole Scene" had left Princes Pier in Greenock with 41 passengers and 3 crew onboard for a cruise to Kyles of Bute. Visibility at the time was about 70 yards. About 15 minutes later the "Poole Scene" was in collision with the container vessel "Nord See" that was making its approach to Clydeport Container Terminal. The "Poole Scene" returned to Princes Pier where the emergency services were waiting. Sixteen passengers and one crewman were injured and taken to hospital. All except one passenger were released following treatment later that evening however one passenger was later re-admitted to hospital for observation overnight. An investigation into the incident showed that the vessel had set out in dense fog and that, despite the poor visibility, the skipper was alone in the wheelhouse while the two crewmen were assisting the caterers at the ship's bar." Annex 2, Convictions 9/2001.
[114] "Cost [sic] are not awarded in Scotland", MEM, chapter 3, s. 6.2.
[115] MCA file MS 10/74/238.
[116] "To say all were surprised at the size of the fine is an understatement", minute of 18 March 2003, para. 1, on file MS 10/74/238.
[117] "Although the final result was disappointing…", minute of 18 June 2003, para. 3A, on file MS 10/74/238.
[118] Minute of 11 November 2004, para. 2, on file MS 10/74/303.
[119] A medical fitness certificate which each seafarer must carry.
[120] MCA file MS 10/74/303.

Such disappointment suggests that a higher fine was expected, and it appears that the actual significance of the sentence is judged against the expected outcome.

The expectation of a significant sentence thereby becomes a self-fulfilling prophecy. For when the expectation of the prosecutor is correct the next sentence will confirm his view, and any case "won", independent of the sentence, will cement the significance of it. A "light fine" is, for example, not considered a poor prosecutor's decision which asks for an approach different from a prosecution the next time, but rather suggests that the pre-trial preparation should be improved to achieve a higher sentence in the next case.[121] Significance is thereby reduced to the fact that there is a sentence at all, independent of whether an individual may qualify it as nominal.

I can see, however, that this approach (that there is a sentence at all) may have to be taken from time to time unless, of course, alternatives to a prosecution would seem to be a more sensible remedy.[122] Even though a fine of £300 in relation to endangering the lives of 44, and injuring 17, people, and jeopardizing the property of a small passenger craft appears to be relatively nominal,[123] the enforcers should probably not be put off by such a judgment when considering a similar case in the future.[124]

It would appear to be a general problem for Magistrates' Courts that there is no policy document for merchant shipping offences as there is for sentencing in general. The "Sentencing Guidelines"[125] cover most land based offences, but there is no reference to merchant shipping. Accepting that the sector is tiny compared to land based offences it would still seem to serve fairness and consistency in Magistrates' Courts trials if, for example, a central UK data bank would be available for the courts which would hold data about trials, convictions and sentencing in the shipping industry.

In summary it would seem that this factor of the *Prosecutors' Code* does not contribute much to the identification of a public interest in a merchant shipping case.

9.4.3. "the defendant was in a position of authority or trust" (5.9.e.)

The master (or officer in charge of a navigational watch (OOW) as it may happen) would always appear to be in a position of authority or trust. The owner has demonstrated this by hiring him and entrusting him with the ship and its operation. He has deliberately chosen to do so after usually having gone through an application process, or after having promoted him from chief officer. The responsibility for selecting a person as master of a ship lies completely with his employer and in the end with the owner of that ship.

The State, issuing the Certificate of Competency, has also chosen to express its trust in the master, at least regards his competence for the job. The master had to pass all his exams under supervision of the State (represented in the UK by the MCA) and became only qualified for his certificate after a final oral exam carried out by an examiner of the MCA.

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[121] "VOSA do all their own prosecutions for forgery of vehicle documents including licenses. They are able to get their point over. We may wish to follow their example." Minute of 11 November 2004, para. 4b, on file MS 10/74/303.

[122] An alternative measure could be a conditional caution obliging a defendant to undergo additional training. "The key to determining whether a Conditional Caution should be given - instead of prosecution or a simple caution - is that the imposition of specified conditions will be an appropriate and effective means of addressing an offender's behaviour or making reparation for the effects of the offence on the victim or the community", see Conditional Cautioning Code of Practice, para. 1.2.

[123] See for the facts above and Annex 2, Convictions 9/2001.

[124] Other cases involving injury or death of a person seem to have attracted custodial sentences, see, for example, conviction 29/2003, 60/2005 and 61/2005 (although quashed on appeal in the Court of Appeal).

[125] The latest (May 2008) version can be found on http://www.sentencing-guidelines.gov.uk/docs/magistrates_court_sentencing_guidelines_update.pdf (9 November 2008).

The crew, which is actually closest to the master, is trusting him by default. A crew member does not have a contract with the master but with the owner or his representative. Choice is only involved in so far as a crew member would be able to terminate the contract of employment to leave the ship. The crew, and, when on board, the passengers, also run the highest personal risk when a master neglects his primary duty of keeping them safe.

Also charterers, shippers and other business partners of the owner do usually not have a choice as to the person of master. They do not only not have any contract with him but are even physically more distant to the master than any crew member. Their choice of trust or lack of trust in the master can only be substantiated post any event, and they can as a rule not end their commercial link with the owner immediately.

Trust is difficult to measure but should be a crucial element for any MCA investigation as so much depends on the master's competence and reliability, particularly when at sea and everybody not being involved in the navigation of the ship is at the master's or his watchkeeper's mercy.[126]

I will now look at a number of examples within this third factor used by the MCA which would suggest that the master or OOW has actually broken the trust invested in them. The first group highlights cases where the watchkeeper was asleep. In the second group the bridge was left unattended, and the third group deals with watchkeepers intoxicated by alcohol.

(a) Sound asleep

A total of seven files were found where the master, skipper or OOW was assumed, found or proven to be asleep while on watch on the bridge. Out of these seven cases only one led to a prosecution and ended with a conviction of the owner.[127] The detection of sleeping watchkeepers poses an obvious problem particularly when in addition no look-out is present either. If the vessel is not involved in any incident or accident it usually requires a third person to report such a fact. Out of the seven cases five involved fishing vessels.

> (i) The skipper of a fishing vessel was found asleep on board by the crew of a fisheries patrol vessel which had prior to the boarding tried to contact the boat. The procurator fiscal in Scotland had concerns about the available evidence and the skipper was sent a Notification of Concern (NOC) by the MCA enforcement unit.[128]
>
> (ii) A fishing vessel ran aground and 22 tons of diesel oil were spilled because the OOW fell asleep. The prosecution was abandoned because the spill happened close to the base line and the investigation ran out of time, probably also because the skipper was found to be uncooperative. An NOC was sent to the OOW.[129]
>
> (iii) Grounding was again the reason why the sleeping skipper of a fishing vessel became known to the MCA. He was sent an NOC despite "a serious breach of MS Legislation". The skipper was said to be full of self-criticism and "there is little to be served by prosecuting someone who has learned from his mistake".[130]
>
> (iv) The second mate of a cargo ship fell asleep on watch while sailing in a traffic separation scheme in the Baltic. The defendant only responded to the MCA letters after seven attempts and returned his discharge book and Certificate of Competency unprompted. No further action was taken as the defendant had returned his licence and also expressed remorse. It was stated that he can no longer sail without any papers.[131]

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[126] See above, Chapter 9, fn 102.
[127] MCA file MS 10/74/284. This case will be discussed in more detail in Chapter 10.
[128] MCA file MS 10/74/244.
[129] MCA file MS 10/74/254.
[130] MCA file MS 10/74/294.
[131] MCA file MS 10/74/345.

(v)The skipper of a fishing vessel was allegedly asleep when the ship had a close encounter with another boat. There was no corroborating evidence and an NOC was sent for not keeping a proper crew record and for concern over the safe operation of the ship.[132]

(vi) The OOW of the watch was asleep and only woke up when his fishing boat ran aground, catapulting him out of his chair with the chart table collapsing over him. Prior to the grounding he only had a total of 12 hours sleep in intervals during the last 72 hours. As all crew were co-owners the hours of rest directive did not apply to them.[133] An NOC was sent about the missing look out and the fatigue of the OOW.[134]

(b) Remote control

Probably slightly worse than falling asleep on watch is the completely conscious decision[135] of a watchkeeper to leave the bridge unattended. In cases where watchkeepers fall asleep one would assume that they do not consciously go to the bridge for a nap.

Four cases of an unattended bridge were found in the files and none of them triggered a prosecution.

(i) Two fishing vessels were pair trawling when one of the skippers decided to leave the bridge and talk to the crew. His boat collided with the other vessel and subsequently sank. The skipper kept silent during the investigation. It was alleged that the boat had problems with its autopilot, which is said was confirmed in the MAIB report. The evidence in this case was thought to be insufficient. A caution was suggested but not found on the file. The file was inconclusive as to any action taken.[136]

(ii) A fishing vessel collided with an angling boat during daylight despite the angling boat using VHF, its horn and the people on board shouting. The skipper was at the stern passing water and the bridge was unattended for about four minutes. The skipper was not prosecuted but cautioned because he was remorseful, will soon hand over to his son and “this single incident was a result of a misjudgement”.[137]

(iii) Another collision with a bulk carrier at anchor happened when the skipper of a fishing vessel went into the engine room because a bilge alarm went off. The skipper had received a previous NOC over entering a prohibited area. After some internal MCA disagreement over a prosecution it was finally decided to caution the skipper. The reasoning against a prosecution was that he had lost boat and catch and that a caution would be without cost for the MCA.[138]

(iv) The last identified case concerns a fishing vessel, which grounded because the autopilot failed and the skipper was below deck to get a fuse. He was sent an NOC because he was not seen to be a criminal but “a bit stupid”.[139]

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[132] MCA file MS 10/74/433.
[133] MCA file MS 10/74/441, minute of 19 July 2004, para. 3.
[134] MCA file MS 10/74/441. See also below, Chapter 10.4.
[135] However, it would appear that falling asleep on watch comes close to an intentional act. In the dangerous driving case *Attorney General's Reference No. 56 of 2002 (Nnamdi Megwa)* [2003] 1 Cr. App. R. (S.) 90, para. 26, the CA treated falling asleep at the wheel as an aggravating factor in that “falling asleep is not generally something that happens in a moment. It is normally the end product of a process of feeling tired and people do have the opportunity to stop and avoid an accident when they start to feel that they are falling asleep”. This would seem to suggest that it is considered that there is a strong element of a deliberate decision present in the driver when he does not stop his vehicle when realising that he is feeling tired.
[136] MCA file MS 10/74/237.
[137] MCA file MS 10/74/296.
[138] File MS 10/74/299.
[139] File MS 10/74/309.

(c) Drunken sailor[140]

Several cases involve drunken watchkeepers. Five cases were found amongst the files,[141] but the MCA record of convictions[142] shows seven cases of intoxicated watchkeepers. Of these seven convictions four[143] were OOW or masters[144] of cargo, and three[145] OOW or skippers of fishing, vessels.

(d) Conclusions

The significant difference between the two categories of unattended bridges and sleeping watchkeepers on the one hand, and the intoxicated watchkeeper on the other, is that in all but one case[146] the intoxicated watchkeeper was – successfully – prosecuted. In that one case there was a lack of evidence.[147] It can probably be safely assumed that had the evidence been considered sufficient a prosecution would also have gone ahead.

It is not clear why a drunken watchkeeper appears to be seen as more of an offender than a sleeping or deliberately missing watchkeeper. This is particularly puzzling since in all but one[148] of the alcohol related cases no accident, material damage or even injury occurred, whereas the sleeping watchkeepers caused three groundings and one close encounter, and the missing watchkeepers caused three collisions and one grounding. A slightly mitigating factor in favour of the sleeping watchkeeper may be the above mentioned fact that he did it without intention, whereas voluntary intoxication

> "supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent...The drunkenness is itself an intrinsic, an integral part of the crime,..."[149]

But leaving the bridge unattended also requires intention. Falling asleep on watch, although not necessarily immediately representing "an enormous danger"[150] if the ship is not in densely populated waters or near a coast, may actually create a worse risk as there might not be anybody else awake on board. If in addition the Working Time Regulations[151] are breached it would appear to add an aggravating factor to the offence.[152]

The files are silent as to the different approach between the categories but a consideration of a master being in a position of trust does certainly not seem to be the driving element

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[140] See Annex 7. The position of the MCA on intoxication of seafarers is that "there are prescribed limits for professional seafarers that reflect the levels accepted on the roads. Suspected breaches of these levels will be reported by the MCA to the police, who ultimately decide whether to attend and whether to administer a test. Subsequent actions, i.e. arrest, further testing and prosecution is a matter for them and the CPS", Captain Smart, Head of the MCA Enforcement Unit (hereafter Head of the EnU), Annex 16, question 17. Out of 11 convictions documented in Annex 7 eight came about because the relevant master or mate was under the influence of alcohol.

[141] Files MS 10/74/275, 364, 456, 464 and 317 (a case which was not prosecuted).

[142] For an overview see Annex 7, s. 10.

[143] Annex 7, s. 10, convictions number 40, 49, 50 and 59.

[144] It would appear that an intoxicated master was, in the cases examined, either found to be below or above the limits prescribed by the Railways and Transport Safety Act 2003, s. 81. The Act, s. 78(2), stipulates that a master commits an offence if he is impaired by drink when carrying out his duties. This, according to s. 78(3), is the case when the prescribed limit of s. 81 is exceeded. But a point in question could be whether or not the master is also covered by s. 79 which applies to personnel off duty but does not specifically mention a master but only a seaman. The term "seaman", however, excludes a master: see s. 89(2)(f) in connection with the MSA 1995, s. 313(1). But in my opinion a master, when on board (which he could not be when the vessel is in port), will always be on duty. It would have helped, though, if this would have been clarified in the Railways and Transport Safety Act.

[145] Annex 7, s. 10, convictions number 24, 33 and 54.

[146] File MS 10/74/317.

[147] See file 317 in Annex 1, trigger 1 (groundings).

[148] Annex 5, conviction 40/2004.

[149] *Director of Public Prosecutions v. Majewski* [1977] AC 443, p. 475/6.

[150] Which falling asleep presents to other users of the road, *Attorney General's Reference No. 56 of 2002 (Nnamdi Megwa)*, para. 25.

[151] For ships the Merchant Shipping (Hours of Work) Regulations 2002, SI 2002 No. 2125.

[152] *Attorney General's Reference No.146 of 2006 (Yvan Vandermeulen)* [2007] 2 Cr. App. R. (S.) 74, para. 19.

for a prosecution. It is rather likely that alcohol related cases present no obstacle for the introduction of convincing evidence when it has been proven that the defendant's blood alcohol level was above the permitted limits.[153] A question would seem, though, why alcohol offences seem to always be prosecuted. It is, of course, without doubt that intoxicated drivers, traindrivers or masters present a risk to passengers and other drivers. However, whereas on land a drink driving conviction will entail both a penalty and an obligatory disqualification[154] the latter does not follow for a seafarer.

A disqualification of the holder of a Certificate of Competency issued by the UK is only possible after an inquiry has been caused by the Secretary of State.[155] A certificate issued by a foreign maritime authority cannot be suspended in the UK. The result is that the fine will be paid, but that the relevant master will continue to sail his ship as he did before[156] unless the owner terminates the contract of employment or takes any other measures.[157] If a conviction would entail other measures such as informing the flag State or rather the State which issued the certificate, and that State would be required to look into a disqualification or compulsory rehabilitation measure, a conviction could possibly make sense. However, that does not even appear to be the case in the UK.[158]

As doing nothing would not seem to be an option when a master or watchkeeper is found to be intoxicated on board, a prosecution appears, under the current rather unsatisfactory conditions, to be the only realistic option to take for an enforcement agency. However, the MCA ought (in my view) to be considered by regularly to inform the State issuing the certificate and to push at the IMO for international measures to be established aiming to disqualify (but also rehabilitate)[159] drunken masters or watchkeepers.

It may be concluded that the factor of the *Prosecutors' Code* referring to a position of authority or trust does also not seem to play a significant role in establishing the public interest for a prosecution under merchant shipping law.

9.4.4. "there is evidence that the offence was premeditated" (5.9.g.)

Judging whether an offence was "premeditated" requires clarity about the meaning of the word. An adequate starting point would be a dictionary definition, according to which something is premeditated when it is "thought about or planned beforehand".[160]

The Court of Appeal has demonstrated a similar understanding and thus to do anything premeditatedly it would have to be done "with significant preplanning".[161] Any premeditated action would therefore appear to require an intention as it is impossible to plan something without choosing to do so.[162]

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[153] Captain Smart, Head of the MCA Enforcement Unit, said about prosecutions for intoxication with alcohol that "There are prescribed limits for professional seafarers that reflect the levels accepted on the roads. Suspected breaches of these levels will be reported by the MCA to the police, who ultimately decide whether to attend and whether to administer a test. Subsequent actions, i.e. arrest, further testing and prosecution is a matter for them and the CPS." See Annex 16, question 17. Adrian Lower, Deputy District Crown Prosecutor for North Hampshire, confirmed on 3 June 2008 that drink driving offences on land are rarely not prosecuted.
[154] Road Traffic Offenders Act 1988, s. 9 in connection with Schedule 2, Part 1.
[155] MSA 1995, s. 61 in connection with s. 47.
[156] And probably continue to drink as the likelihood to get caught is rather slim.
[157] See, for example, conviction 49/2004 where the owner allegedly intended to claim damages from the master.
[158] It would seem that only one inquiry in accordance with s. 61 took place in the UK since the year 2000. The master's Certificates of Competency was withdrawn for 14, and that of the chief engineer for 8, months because of their intoxicated state, see MCA press notice 385/00 of 29 September 2000.
[159] Assuming that the intoxicated state was not a one off.
[160] *The New Shorter Oxford English Dictionary*, Vol. 2, p. 2334.
[161] *Attorney General's Reference No.113 of 2006 (L)* [2007] 2 Cr. App. R. (S.) 29, para. 11.
[162] H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 1968, p. 118, intention in the sense of Hart's third option with regards to a crime. Hart distinguishes three aspects of intention: first, doing something which fits the definition of a crime with the intention to achieve the obtained result (e.g. firing a gun at somebody and killing him with the intention to do so); second, doing something with a further intention (e.g.

It follows that planning itself requires intention and precedes the crime.[163] Planning becomes important in criminal law in the very moment the initial intention is followed by the preparation of a plan, and then, to make the activity a crime,[164] followed by the execution of the act.

It would appear that the term "premeditated offence" is fairly settled in that courts use the term in a like manner. To be premeditated pre-planning is always required before carrying out the offence.[165] Intention or intent, [166] however, would seem to pose more of a problem. "The fact that the main cases defining intention are all murder cases, with the difficult policy issues that offence entails, exacerbates inconsistency and uncertainty".[167]

The term is addressed in s. 8 of the Criminal Justice Act 1967.

> "Proof of criminal intent.
>
> A court or jury, in determining whether a person has committed an offence,--
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reasons only of its being a natural and probable consequence of those actions; but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."[168]

It is not surprising that the current interpretation of intention seems to be close to the wording of the statute and is said to be that

> "(1) A result is intended when it is the actor's purpose to cause it.
> (2) A court or jury *may also find* that a result is intended, though it is not the actor's purpose to cause it, when
> (a) the result is a virtually certain consequence of that act, and
> (b) the actor knows that it is a virtually certain consequence."[169]

It would seem that the prosecution of a premeditated offence is high on the list of the public interest because the offence or crime, which is planned and then carried out intentionally, would appear to show a stronger disrespect for the law than the act which is executed with intent but without any planned preparation.[170] Even though thinking or planning about the offence beforehand does not appear to be time related (i.e. thought about for at least a minimum time span or planned for sometime),[171] planning usually

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getting into somebody's home with the intention of stealing something, where the intention was not to break in but only to steal); and third, intending to do something in the future without actually doing anything about it at the time of the intention, Hart pp. 117-118.

[163] This would satisfy Hart's second aspect of "intention", p. 118.

[164] "As everyone knows, a bare intention to commit a crime is not punishable by English law", H L A Hart, *Punishment and responsibility: essays in the philosophy of law,* p. 127.

[165] See, for example, *R v. Daniel Zebulton Merchant* [2005] EWCA Crim 1195, para. 35, where a fire arm was taken to a premises to carry out a robbery. In *R v. Unity Sandasi* [2005] EWCA Crim 505, paras. 2 and 20, the offender had bought a kitchen knife, went to the victim's flat and stabbed him. Or in *R v. Robert Fenn* [2004] EWCA Crim 297, paras. 5 and 8 the burglary was considered to be premeditated because the defendant purchased a car prior to the offence.

[166] *intent: "*the act or fact of intending; intention, purpose. Formerly also, inclination, will; what is willed, one's desire", *The New Shorter Oxford English Dictionary*, Vol. 1, p. 1389.

[167] D Ormerod, *Smith & Hogan Criminal Law*, 12th ed., 2008, p. 97, fn 14.

[168] Criminal Justice Act 1967, s. 8.

[169] D Ormerod, *Smith & Hogan Criminal Law*, p. 98. Similar also J Herring, *Criminal Law*, p. 88, and Law Commission, *Partial Defences to Murder,* 2004, para. 2.47.

[170] See also G Lamont, *What is a crime?*, p. 618, "Consider the central case of intentional crimes, i.e. those where the defendant deliberately engages in some prohibited conduct. What marks out these acts from other wrongs is the fact that the defendant acts in *defiance* of the law. The defendant knows that what they are doing is prohibited by the law of the community, but they choose to go ahead in any case, rejecting the claim of the law on them. The seriousness of the wrong involved in criminal behaviour lies in this: that the criminal is unwilling to submit to the authority of the law, and hence unwilling to submit to the authority of the community whose law it is."

[171] As can probably be concluded from the cases above, Chapter 9, fn 166. Purchasing a car would probably require more time than buying a kitchen knife.

requires more time than, for example, an intentional reaction to a triggering incident,[172] and would thereby appear to be potentially more dangerous to society. Planning something or thinking about something requires an intentional occupation of the mind, which in itself is different from intentionally committing the *actus reus* and thereby constituting a crime.

Thus the decision as to whether an offence was carried out premeditatedly would appear to require the finding that there was an intention not only to plan but also to execute the plan.[173]

The term "premeditated" cannot be found in the reported merchant shipping convictions. But a reference to "intention" or "intent" can at least be found in three of the reported MCA triggered convictions, but only in one quote of a judge.

> In the case of the Portuguese vessel "Storman Asia"[174] the Italian master advised the Coastguard "of his intention to cross the SW bound lane"[175] followed by a stretch of 14.5 miles during which he sailed against the traffic flow instead of crossing the lane.
>
> In the second case the owner of the sailing yacht "Scintilla" is said to have offered his uncertificated boat on a skippered charter basis with intent despite his knowledge that such action would violate safety regulations.[176] The knowledge in this particular case could be assumed as the owner had been issued with a prohibition notice for the same violation of safety regulations already in 2002.[177]
>
> In the third case a Ro-Ro vessel had pumped oil overboard. It transpired later that at the time a fuel transfer into the settling tank was in progress and the high level alarm was activated, acknowledged and cancelled. The chief engineer had mistakenly believed that the alarm was for a high bilge level alarm, which was sited next to the settling tank alarm. Approximately 80 litres went overboard.[178]

On sentencing the company in this third case to a fine of £5,000 and costs of £4,379.70 the chairman of the Magistrates is quoted as saying

> "this act although not intentional, did have an element of negligence and the resulting pollution could have an effect on the environment."[179]

In a pollution case which is based upon strict criminal liability[180] and which therefore does not require any negligence or intent on part of the defendant master or owner to establish criminal liability,[181] the distinction between "intent" and "negligence" will only be of real interest for the sentencing process. But in the MCA such a distinction would appear to be of importance for the decision to prosecute in that

> "the investigation of any alleged significant breach will try and determine the mental attitude (the legal term *mens rea*) of the person responsible at the time of the incident."[182]

Furthermore, a distinction is made between a deliberate act, an avoidable, and an unavoidable, accident.[183] What is called an "unavoidable accident" would thereby appear

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[172] For example, boasting to be able to knock someone down and then picking the next person and doing it was not considered to be premeditated, *Attorney General's Reference No.113 of 2006 (L),* paras. 3 and 11.
[173] Even if a prosecuting officer in the MCA would not make any detailed deliberations he would under the MCA's own policy seem to be required to assess whether or not the accused planned the violation and intended to achieve the outcome – independent of whether the offence is one of strict criminal liability or not.
[174] MCA file 10/74/344.
[175] Annex 5, Convictions 41/2004.
[176] *Ibid*., Convictions 47/2004.
[177] MCA file 10/74/148.
[178] Case summary on MCA file MS 10/74/475.
[179] Annex 6, Convictions 62/2005.
[180] MSA 1995, s. 131(1): If any oil or mixture containing oil is discharged as mentioned in the following paragraphs into United Kingdom national waters which are navigable by sea-going ships, then, subject to the following provisions of this Chapter, the following shall be guilty of an offence, that is to say— (a) if the discharge is from a ship, the owner or master of the ship,...
[181] See the discussion below, Chapter 9.5.
[182] MEM, chapter 2, s. 4.1.2.
[183] An unavoidable accident means that "no-one is actually to blame for the purposes of Merchant Shipping legislation", and an avoidable accident means "one which as been allowed to happen as the result of a person or company neglecting their duties", MEM, chapter 2, s. 4.1.2.

not to trigger a prosecution.[184] Whether or not the offence is one of strict liability would then not seem to matter.[185]

If one accepts the above definition for intention,[186] in a pollution case, the charged owner (or master as the case may be) would have had to be virtually certain (barring some unforeseen intervention) that pollution would occur as a result of the owner's or master's action, and that the owner or master appreciated that such was the case. Even if such an intent was assumed by the prosecution it would not constitute a premeditated activity unless the intent to discharge oil was also planned in advance.

Under any of the fourteen triggers for significant breaches applied by the MCA[187] "jumping detention" and "pollution" would probably seem the only obvious groups of offences which would/could be done in a premeditated way assuming that the vessel in question is operated in a "normal" way, i.e. to make profit by trading. Acts under these headings would actually require some forethought to avoid already being caught when the lines are slipped, or when pumping oil in a densely populated shipping area during day time when it is likely to be easily detected.

The intentional operation of a charter yacht without certificates[188] is only premeditated when the act as such was planned. But knowledge of a possible offence after having obtained several warnings may also suffice as evidence to rightfully assume that the act was done premeditatedly.

Lack of knowledge and incompetence, however, may allow a planned or premeditated violation of the law, but can hardly be subsumed under the term intention as the defendants "appreciation" of the outcome will usually be lacking.

Negligence in the operation of a vessel cannot be a premeditated activity even when the activity was intended. It would appear that negligence[189] can by default not be planned, for in that case it would become intentional.

The following paragraphs will also suggest that it is difficult to justify a prosecution of a Colreg violation as a "premeditated offence".

The definition of an intentional Colreg violation would appear to be that where the charge is that any of the Colregs is contravened, it would have had to be virtually certain that as a result of the action of the owner, master or the person for the time being responsible for the conduct of the vessel,[190] the Colregs would be breached, and that the defendant also appreciated that such was the case. Even when the knowledge about the breach is present, and the course laid off on the chart or the voyage plan should be considered sufficient evidence for a planned violation, it would still be required to surmount the obstacle of intention. It would not be enough to prove that the master, for example, wanted to take the shortest route but also that as a result of his choice he was aware of, and appreciated his action leading to, a contravention of the Colregs. As intention is

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[184] "In any incident we will always look at the actions of the owners, in short to establish if the ships officers were working in a "safe" environment. This will cover many aspects e.g. hours of work, maintenance programmes, etc. The individuals are only prosecuted if they are personally culpable, e.g. if they were given sufficient rest time but chose not to take it and subsequently fell asleep", Captain Smart, Annex 16, question 16.

[185] However, this appears to be only partly the reality as can be seen by the case of the "Borden", see chapter …(pollution), s…(Prosecutions – part 1). In that case the negligence of the chief engineer caused the pollution but only the owner was prosecuted.

[186] "A result is intended when it is the actor's purpose to cause it" etc, D Ormerod, *Smith & Hogan Criminal Law*, p. 98.

[187] See above, Chapter 1.6.

[188] See above, "Scintilla".

[189] Or better in MCA terms the "avoidable accident".

[190] Collision Regulations, reg. 6.

defined through murder cases[191] an analogy based on the understanding of the term intention will illustrate this.

> A breach of the Colregs is committed when the defendant contravenes the Colregs in circumstances where he intends to contravene them. The defendant intends to breach the Rules when it is his purpose to do so. [192]

The interest of a master is hardly ever to breach the Colregs, but rather to take the shortest or most comfortable route. It would appear that the contravention of the Colregs could be categorised as either a result of, or a means of achieving, what was set out to be accomplished, but not as the primary objective. It seems, though, that the latter distinction only matters if the defendant was not "virtually certain"[193] that to achieve his purpose of sailing the most comfortable route he also had to violate the Colregs.[194] In such a scenario intent on part of the master can probably be established by analogy with *R v. MD*[195] and applying the question "could it be inferred from all the evidence that the master's intention was to violate the Colregs?"

However, a master who announced his intention to cross a lane in a traffic separation scheme but instead sailed against the traffic flow, will only have done his act premeditatedly if he intended to, and also planned to,[196] violate the Colregs, and subsequently committed his offence.

It is therefore probably not a surprise that in none of the recorded 18 Colreg convictions has intent ever seemed to play any role.[197]

Defining whether or not a public interest is triggered by a premeditated breach appears not to be a very viable option unless it is in cases where the planning is clearly an element of the offence, e.g. jumping detention, pumping of oil over the side or forging certificates.

9.4.5. "the defendant's previous convictions or cautions are relevant to the present offence" (5.9.m.)

This factor would appear to present a fairly objective and straightforward approach. However, if taken literally "notices of concern" (NOC)[198] as sent by the EnU would not necessarily support the justification of the public interest in a prosecution under this factor as only previous convictions and cautions are addressed. A recipient of a "notice of concern" would not necessarily know that

> "it does serve as an warning that the operation in question has been brought to the attention of the MCA and investigated and even though no legal action is to be taken at the conclusion of the current investigation, the clear implication is that the activities of that company or individual are known to the MCA and will be subject to further investigation if additional incidents are reported."[199]

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[191] See above, Chapter 9, fn 168.
[192] In analogy to the Law Commission Report, *Partial Defences to Murder*, p. 20/21, para. 2.47, "Murder is committed when the defendant unlawfully kills the victim in circumstances where he intends either to kill him or cause him grievous (i.e. really serious) bodily harm. The defendant intends to kill or cause grievous bodily harm when it is his purpose to cause it."
[193] *R v. Woollin* [1999] 1 AC 82, p. 96.
[194] "But a person may not know that he cannot achieve his purpose, A, without bringing about some other result, B. If he is to bring about A, he knows he must also, at the same time or earlier, bring about B. It may be that, in any other circumstances, he would much rather B did not happen, indeed its occurrence may be abhorrent to him. But, the choice being between (i) going without A and (ii) having A and B, he decides to have A and B. It seems fair to say that he intends to cause B as well as A", D Ormerod, *Smith & Hogan Criminal Law*, p. 101-102.
[195] [2004] EWCA Crim 1391, para. 11.
[196] Of which the course laid off on the chart would probably be evidence.
[197] As only fragments of the judgements are reported by the MCA on its website it is impossible to say whether intent ever played a role in any case; I counted 18 Colreg related convictions by the end of 2005.
[198] See a sample "notice of concern" under Annex 27.
[199] MEM, chapter 3, s. 3.1.2.

The word "warning" is not used in the NOC and the latter might be read, particular by non-native English speakers, as absolving them from any wrongdoing. The "clear implication" is not necessarily that the "activities of the company or individual are known to the MCA", but that whatever had been done was not enough to get prosecuted. Also, the above text of the Marine Enforcement Manual (MEM) is not publicly available on the MCA website although it is not an internally restricted document and would provide a wealth of useful information to any interested reader. Unless it is publicised voluntarily by the MCA, access to the manual would appear to require a request for information backed by the Freedom of Information Act 2000 (FOIA 2000). If such a request did not fall under a qualified exemption as defined by s. 31[200] it would appear that the MCA would have to disclose the contents of the MEM.

Such qualified exemption could probably be related to both criminal investigations and proceedings[201] or law enforcement.[202] It would appear, though, that neither s. 30 nor s. 31 of the FOIA 2000 would be applicable to prevent any person from having their request for the publication of the MEM complied with. It would seem to be difficult to justify how the public interest for maintaining the exemption would outweigh the public interest for disclosure.[203] Section 30(1) would only appear to cover

> "information relating to specific investigations or proceedings. It will not therefore apply to information of more general application such as statistics on reported crime or on the effectiveness of particular investigation bodies."[204]

Section 30(1) "covers particular investigations",[205] and s. 30(2) would not seem applicable in this context.

> S. 30 Investigations and proceedings conducted by public authorities
>
> (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—
> (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—
> (i) whether a person should be charged with an offence, or
> (ii) whether a person charged with an offence is guilty of it,
> (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
> (c) any criminal proceedings which the authority has power to conduct.
>
> (2) Information held by a public authority is exempt information if—
>
> (a) it was obtained or recorded by the authority for the purposes of its functions relating to—
> (i) investigations falling within subsection (1)(a) or (b),
> (ii) criminal proceedings which the authority has power to conduct,
> (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
> (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
> (b) it relates to the obtaining of information from confidential sources.
> …….

The MEM is not a document which covers particular investigations. If a section would have any relevance it would seem to be s. 31(1)(c) which exempts information the disclosure of which is or would be likely to "prejudice the administration of justice".

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[200] "Section 31 [of the FOIA 2000] is a qualified exemption", Information Commissioner's Office, *Awareness Guidance No. 17,* p. 5, and so is s. 30, Information Commissioner's Office, *Awareness Guidance No. 16,* p. 2.
[201] FOIA 2000, s. 30.
[202] *Ibid*., s. 31.
[203] *Ibid*., s. 2(2)(b).
[204] J Wadham, J Griffiths, K Harris, *The Freedom of Information Act 2000,* p. 120/121.
[205] Information Commissioner's Office, *Awareness Guidance No. 17,* p. 1.

S. 31 Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the prevention or detection of crime,
(b) the apprehension or prosecution of offenders,
(c) the administration of justice,
(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
(e) the operation of the immigration controls,
(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
(i) any inquiry held under the [1976 c. 14.] Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,
(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
(e) the purpose of ascertaining the cause of an accident,
(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
(g) the purpose of protecting the property of charities from loss or misapplication,
(h) the purpose of recovering the property of charities,
(i) the purpose of securing the health, safety and welfare of persons at work, and
(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
…….

This, however, "covers a wide variety of matters that surround any type of judicial body and its administrative support".[206] Advice and guidance for enforcement officers as to the correct legal application of procedures, which the MEM represents, would not seem to be covered by this exemption as it is not administrative support.[207]

It is not clear why the MEM is not yet publicly available[208] as knowledge about the procedural matters would rather be of benefit for the enforcement agency because it can prevent requests or manoeuvres by the defendant which would unnecessarily delay the outcome of investigations or prosecutions. Therefore I cannot see how any other provision of s. 31, including s. 31(1)(g)[209] and as a consequence s. 31(2), could be argued to prevent the disclosure of the contents of the MEM. Clarification about procedures and interpretations of the relevant law which both directly affect the public cannot really be

[206] *Ibid.,* p. 3.
[207] Administrative support "will include the administrative arrangements of the courts and tribunals, the appointment of magistrates and judges and the requirement to conduct proceedings fairly. It will cover arrangements for the care of witnesses, the transport of defendants in custody and the service and execution of process and orders in civil cases", Information Commissioner's Office, *Awareness Guidance No. 17,* p. 3.
[208] Particularly when considering the House of Lords in *Common Services Agency v. Scottish Information Commissioner (Scotland)* [2008] UKHL 47, para. 4, in that "as the whole purpose of FOISA is the release of information, it should be construed in as liberal a manner as possible" which can probably be said similarly of the FOIA 2000, see para. 2 of the judgment addressing the corresponding provisions of that Act. And even when "that proposition must not be applied too widely, without regard to the way the Act was designed to operate in conjunction with DPA 1998", *ibid.*, para. 4, there does not appear to be a reason not to publicise the MEM.
[209] Section 31(1)(g), "the exercise by any public authority of its functions for any of the purposes specified in subsection (2)".

considered of a nature which would stop the MCA from fulfilling its purpose. Therefore, it is my view that the MEM ought to be publicly available.

The factor of taking into account the defendants' previous convictions or cautions would appear to help the execution of justice. Considering the offenders' history of violations would thereby be in the public interest. Administrative measures taken by the MCA such as sending a "notice of concern" would also seem to fall into the same bracket provided the wording clearly addresses the purpose and consequence of any such measure to any potential defendant.

9.4.6. "if not prosecuted, the defendant may continue to pose a danger to the seafaring community or to the general public"

The Code for Crown Prosecutors does not contain this MCA factor. It would appear to come closest to s. 5(9)(q) of the *Prosecutors' Code.* That factor reads "a prosecution would have a significant positive impact on maintaining community confidence". Although the MCA factor is expressed in the negative, i.e. stating what would happen if no prosecution is brought, both factors focus on the impact on the community. It would seem that the criteria mainly differ in the way that the MCA criterion also addresses the defendant.

The MCA version stresses that the defendant may pose a danger to the community without a prosecution, whereas the *Prosecutors' Code* only indirectly refers to the threat by highlighting the positive impact of a prosecution. The inherent threat addressed in the MCA criterion would seem to focus on two potential outcomes dealing with the offender. One would appear to be the (albeit temporary) removal of the defendant from the industry through a custodial sentence whereas the second would seem to focus on discouraging the individual to repeat his wrong ("specific deterrence").[210]

As custodial sentences are rather rare[211] the deterrence element in this factor would seem to have the highest significance when considering the public interest.

9.4.7. Summary

In summary it can be said that the MCA files and prosecutions do not indicate that much relevance in determining the public interest can be, or was, attributed to the factors listed in *The Code for Crown Prosecutors*. The only factor that seems to be of specific relevance is whether or not the defendant continues to pose a danger to the community when not prosecuted, and this factor has been added by the MCA.[212]

9.5. Strict criminal liability[213]

For the purposes of this thesis, statutory strict criminal liability is of particular significance where the relevant criminal provisions are laid down in merchant shipping legislation.[214]

> "Parliament creates an offence of strict liability because it regards the doing or not doing of a particular thing as itself so undesirable as to merit the imposition of criminal punishment on anyone who does or does not do that thing irrespective of that party's knowledge, state of mind, belief or intention."[215]

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[210] N Gunningham, R Johnstone, *Regulating Workplace Safety,* p. 187.
[211] See Annex 7, Categorised Prosecutions.
[212] See above Chapter 9.4.
[213] Strict criminal liability will only be addressed to the extent it appears necessary for the purposes of this thesis; a general analysis can be found in relevant textbooks, e.g. D Ormerod, *Smith & Hogan, Criminal Law,* Chapter 7 or J Herring, *Criminal Law,* Chapter 6.
[214] See the discussion below, Chapter 10.3.
[215] Lord Bingham in *R v. Milford Haven Port Authority* [2000] 2 Cr. App. R.(S.) 423*,* p. 432-433.

Still, strict criminal liability is not defined in any statute.

> "'Strict liability' is the phrase used to refer to criminal offences that do not require *mens rea* in respect of one or more elements of the *actus reus*."[216]

An offence usually requires, as an essential ingredient, a mental element or *mens rea*.[217]

> "By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief. To the extent that an overriding objective limit ("on reasonable grounds") is introduced, the subjective element is displaced."[218]

But it seems that the *mens rea* presumption can only be displaced in statutory provisions which are an "issue of social concern, and public safety is such an issue".[219] Yet, the presumption of *mens rea* stands unless it can

> "be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."[220]

It appears that the presumption that *mens rea* is required[221] is displaced "if this is clearly or by necessary implication the effect of the statute".[222]

> "Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence."[223]

But when an offence is one of strict liability

> "it is complete when the specified elements of the offence are established. To adduce evidence which goes beyond proof of those elements is not an optional extra, it is to adduce inadmissible evidence and to adduce inadmissible evidence which is prejudicial to the interests of the accused must in our judgment be objectionable."[224]

Evidence would only seem to be admissible when it is relevant to determine the appropriate penalty.[225]

But strict liability in merchant shipping regulations is not absolute because limited defences may usually be relied upon by the accused.[226]

Breaches that trigger strict liability are "acts which…are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty."[227]

There does not appear to be a common understanding of what would constitute a "quasi-criminal" or a "truly criminal" act.[228] Yet, an offence punished by a maximum of two years' imprisonment is "an offence of some significance, but not one of the utmost seriousness".[229] According to the Court of Appeal, it is clear that the less serious the

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[216] J Herring, *Criminal Law,* p. 109; according to D Ormerod, *Smith & Hogan Criminal Law*, p. 150, such crimes do not require "intention, recklessness or even negligence".
[217] *Sweet v. Parsley* [1970] AC 132*,* p. 149.
[218] Lord Nicholls in *B v. DPP*, p. 462.
[219] *Gammon (Hong Kong) Ltd, Yee Chin Teo, Chak Shing Mak v. Attorney-General of Hong Kong* [1985] AC 1, p. 14, point 4.
[220] *Ibid.,* p. 14, point 5.
[221] *Sweet v. Parsley,* p. 148.
[222] *Gammon,* p. 14, point 3.
[223] Lord Nicholls in *B v. DPP,* p. 464.
[224] *R v. Sandhu*, 10 December 1996, p. 4 of the *LexisNexis* transcript (Font: Arial 11).
[225] *Ibid.*
[226] See also D Ormerod, *Smith & Hogan Criminal Law*, p. 152, who distinguishes between strict and absolute liability in that in cases of absolute liability the defendant "is precluded from relying on defences".
[227] *Sherras v. De Rutzen* [1895] 1 QB 918*,* p. 922, confirmed by *Gammon*, p. 12.
[228] *R v. Muhamad* [2003] QB 1031*,* para. 14.
[229] *Ibid.,* paras. 14 and 16.

offence the less *mens rea* is required for the defendant to be punished.[230] More recently this approach has been applied and explicitly confirmed by Clarke and Jack JJ.[231]

It appears[232] that the following four main aspects would constitute a sound approach to consider whether or not an offence is subject to strict liability. First, there is the language of the statute. Secondly, the nature of the offence (prevention of mischief) seems to be of relevance. Thirdly, the objective of the provision has to be considered, and, fourthly, any other circumstances which may assist in determining the intention of Parliament.

In order to establish whether Parliament intended to make a contravention of merchant shipping regulations an offence of strict liability I will analyse the Prevention of Collision Regulations and the Watchkeeping Regulations which apply in the "RMS Ratingen/RMS Mulheim" case[233] in Chapter 10.3. under those four aspects. Both sets of Regulations would appear to be representative for most merchant shipping regulations. The key elements of these two sets of Regulations seem to be strict liability for owner and master, a defence clause and a provision regulating detention. However, to set the scene for that discussion I will first address the problem of the correct defendant.

9.6. The correct defendant

For this discussion I will use the Hours of Work, the Watchkeeping, and the Prevention of Collision, Regulations which all affected the outcome in the "RMS Ratingen/RMS Mulheim" case. The general question for these sub-sections is whether it would have been opportune to commence proceedings under the first two statutory instruments and whether the master should have been charged under all three of them.

9.6.1. The correct defendant and the Hours of Work Regulations 2002

The Hours of Work Regulations distinguish expressly between contraventions by the master, employer, a person authorised by the master, i.e. usually a ship's officer, or the company, and are subject to a maximum fine of level five on the standard scale.[234]

The following Table 11[235] shows the possible defendants under reg. 20(1)(a)-(d) and (2).This regulation deals with penalties for breaches of the Hours of Work Regulations. The table does not address the employer's obligations to ensure that no young person shall work at night[236] and that a seafarer is entitled to paid annual leave.[237] Interestingly,

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[230] *Ibid.,* para. 15.
[231] In 2003, *The Queen on the Application of Grundy & Co Excavations Ltd and Sean Parry v. Halton Division Magistrates Court, The Forestry Commission* [2003] EWHC 272 (Admin), para. 46.
[232] See *B v. DPP* [2000] 2 AC 428, p. 464; the test was also applied in *Muhamad,* para. 17 *et seq*.
[233] File MS 10/74/284. For the facts of the case see Chapter 10. I have chosen to analyse this case in more detail as it (1) may be considered a "paradigm" case for breaches of merchant shipping legislation (one owner/manager of whom two of his vessels have similar accidents in the same country more or less at the same time) which clearly illustrates the implementation of MCA prosecution policy, (2) is a case which combines legislative breaches of considerable importance for the industry (fatigue, Colregs, ISM) and (3) is an example well documented in the MCA files. However, this case also addresses Regulations which are not "paradigms" in so far as the charging options are more confusing than in other merchant shipping statutory instruments, see Table 11 (Chapter 9.6.1.) and Table 12 (Chapter 9.6.2.) below. The case of "Ratingen/Mulheim" will be discussed under various different aspects throughout Part C and will play a role under the subjects of look-out (Chapter 10.2.), fatigue (Chapter 10.4.), ISM (Chapter 10.5.) and the prosecution for look-out offences (Chapter 10.2.). The same three sets of Regulations will be discussed under the aspect of strict criminal liability when the specific trigger for the prosecution (the trigger "grounding" - for enforcement triggers see above Chapter 1.6.) in the case of the "RMS Ratingen" is addressed.
[234] Reg. 20(1) tailpiece; the standard scale as introduced in the Criminal Justice Act 1982, s. 37(2); the maximum statutory fine is £5,000.
[235] This Table together with Table 12 illustrates the complicated nature of these particular Regulations. Not all merchant shipping regulations are like this as in most cases the charging options are not that plentiful and confusing.
[236] Laid down in reg. 10 and subject to a penalty under reg. 20(3).
[237] Laid down in reg. 12 and subject to a penalty under reg. 20(4).

the master, who bears the sole responsibility for most of the requirements[238] cannot be subject to a penalty under the regulations when failing to observe that a seafarer under the age of 18 shall not work at night[239] even though it would be him who has direct control over the allocation of work to any of the crew.

Table 11: Breaches subject to a penalty, Hours of Work Regulations, reg. 20(1) + (2)

Breach of Regulation	**4**	**5(3)**	**5(4)**	**7(1)**	**8(3)**	**9(1)**	**9(4)**	**9(5)**	**11**
Subject	Responsibility	Drills	On call	Table posted-up	Rest after drill	Records of daily hours	Records endorsed	Regulations accessible	Info to MCA
Master	**yes**	**yes**	**yes**	**yes**	**yes**	**yes**	**yes**	**yes**	no
Employer	**yes**	no	no	No	no	no	no	no	no
Officer	no	no	no	**yes**	no	**yes**	**yes**	no	no
Company	**yes**	no	no	No	no	no	no	**yes**	**yes**

Breach of Regulation = breach of the relevant regulation which is subject to a penalty under reg. 20;
Subject = subject dealt with in the relevant Regulation;
Master = yes denotes criminal liability of the master;
Employer = yes denotes criminal liability of the employer as defined by reg. 2(1);
Officer = yes denotes criminal liability of the person authorised by the master;
Company = yes denotes criminal liability of the company as defined by reg. 2(1).

The number of potential criminal liabilities of the master suggests that he holds the key role under the Regulations. The company and employer, on the other hand, seem to share their general duty with the master. According to reg. 4

> "it shall be the duty of a company, an employer of a seafarer and a master of a ship to ensure that a seafarer is provided with at least the minimum hours of rest".

Regulation 20 makes a contravention of reg. 4 an offence by master,[240] employer[241] or company.[242]

> "20(1) Any contravention by –
>
> (a) the master of a ship of regulation 4, 7(1), 8(3) or 9(1), (4) or (5);
> (b) an employer of regulation 4;
> (c) a person authorised by the master of a ship of regulation 7(1) or 9(1) or (4); <u>or</u> *[emphasis added]*
> (d) a company of regulation 4, 9(5) or 11,
>
> shall be an offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale."[243]

By using "or", reg. 20 suggests that criminal liability for a breach of reg. 4 could rest with any of the three duty holders. The Master, employer and company are not addressed in the same sub-paragraphs but are subject to penalties for separate contraventions which are only relevant to them individually. They find themselves thereby in a situation different from the facts in *Federal Steam Navigation Co. Ltd. v. Department of Trade and Industry*.[244] In that leading case[245] there was a prosecution for discharges "of a quantity of a mixture of oil and water into the sea at a point off Nova Scotia".[246] The House of Lords

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[238] Regulation 20(1) and (2).
[239] According to reg. 20.
[240] Reg. 20(1)(a).
[241] Reg. 20(1)(b).
[242] Reg. 20(1)(d).
[243] The Hours of Work Regulations (SI 2002 no. 2125), reg. 20; in force since 7 September 2002; hours of rest requirements were prior to coming into force of SI 2125 regulated by the Watchkeeping Regulations, reg. 9(5)(c), which established the same ten hour rest period as reg. 5 of the Hours of Work Regulations.
[244] *Federal Steam Navigation Co. Ltd. v. Department of Trade and Industry, (The Huntingdon)* [1974] 1 Lloyd's Rep. 520, Lord Reid and Lord Morris dissenting.
[245] For a more detailed discussion see below, Chapter 12.2.4. (*(a) The prosecution and the owner and the master of the "Borden"*).
[246] *Federal Steam Navigation,* p. 521.

held, with two members of the panel dissenting, that "owner or master" was held to mean "owner and master" [emphasis added] on the basis that the Act did not

> "state either some qualification by which the affected person may be determined, or… name a third person by whom the choice may be made."[247]

Lord Wilberforce did not consider having to give the same meaning to "owner or master" throughout the statute in question, but simply stated that what the House of Lords was construing was the whole phrase in which the words were used.[248] The meaning in any other sentence would always depend on the context in which they are used.[249] Lord Salmon made the additional point that if "or" would be read disjunctively it would be impossible to give the relevant sections an intelligible meaning as it would either be the owner or the master who would be guilty, "but not both, without giving any indication to show which is guilty."[250] In conclusion it was found that both the master and the owner should each be guilty of an offence.[251]

Even though there is no qualification in reg. 20, as such, helping to determine the guilty person, the separation of master, employer and company in different sub-paragraphs addressing different contraventions suggests that despite the breaches being offences of strict liability, the three possible suspects are not to be treated as sharing joint criminal liability. The context of reg. 20(1) of the Hours of Work Regulations and the differentiation between different acts in paragraphs (a) to (d) rather suggests that each of them should be looked at separately based on the results of their individual actions, and as an indication of their individual liability.

Where such an indication is given it appears to be justifiable to distinguish the interpretation from that of *Federal Steam Navigation*.[252] Moreover, reading "or" as disjunctive also gives the sub-paragraphs a completely intelligible meaning as each of the persons mentioned could be guilty, but only of offences directly related to them.

However, company and master[253] are both subject to a penalty when violating reg. 4. In this regulation "and" appears on a first reading to be used to establish the duty of both company and master.

Even though the use of "and" suggests that company and master share the same duty, and appears to be putting them both on an equal footing, I argue in the following paragraphs that it seems to be at least doubtful that Parliament attempted to do so despite the fact that a breach of reg. 4 is an offence of strict liability.[254]

The different offences of which the master and company may be guilty clearly indicate that master and company are to be treated differently, and take account of the different roles of master and company and their different individual responsibilities. Whereas, on the one hand, the master appears to be held responsible for actions on board ship,[255] the company, on the other hand, appears to be responsible for actions based ashore. This

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[247] Lord Wilberforce in *Federal Steam Navigation,* p. 530.
[248] *Ibid.,* p. 531.
[249] *Ibid.*
[250] *Federal Steam Navigation,* p. 532.
[251] *Ibid.,* p. 533, "What I am quite certain Parliament could not have intended is to have provided that either the master or the owner should be guilty of an offence--but not both--without giving any clues as to which was to be guilty".
[252] See *Docherty v. Stakis Hotels Ltd* 1992 S.L.T. 381, p. 383.
[253] The "employer" will be omitted in the further discussion as it would not contribute to the clarification of the addressed problem; in addition the comparison between master and company would equally apply to master and employer; also the "Schedule Information" for "RMS Ratingen" and "RMS Mulheim" addresses "Rhein-Maas und See Schiffahrtskontor GmbH" as being at all material times "the manager of and as such the person responsible for the conduct of the vessels 'RMS Mulheim'" (and "RMS Ratingen"), on all four charges; it therefore appears to be sufficient for the current discussion to only mention company and master; any conclusion will always include the employer unless stated otherwise.
[254] However, I would not exclude that there might be circumstances where it could be appropriate to prosecute both company and master.
[255] See in the table above the list of responsibilities the breach of which may constitute an offence.

seems to acknowledge the master's role of having overriding authority for safety on board[256] and the right and obligation of the company for any shore based operation.

The master, other than when being the owner himself,[257] "is the agent of the owners"[258] and "can easily be grafted on to an existing agency[259] apparent or usual authority or ostensible authority".[260] But the master is usually not the employer of the crew or the budget holder for the ship and does not have a direct influence on the manning or overall operation of the vessel. He is depending on the financial resources the company provides for the wages and subsistence of crew and for maintenance and operation of ship and equipment on board. This is also reflected in the responsibility under reg. 11 which obliges a company and not a master to provide information to, and as specified by, the MCA on watchkeepers and other seafarers working at night.[261]

To make any violation of reg. 4 an offence, of which both the company and master would always be guilty, would be doing away with what appears to be the deliberate distinction made between them for the other offences listed.

It is therefore submitted that the company's general duty as addressed in reg. 4 is comprised of three main tasks. First, the duty covers the provision of sufficient resources (e.g. seafarers, equipment, maintenance service) to allow an on board organisation to be run within the parameters of the minimum hours of rest set by reg. 5. Secondly, the company will have to advise the flag State administration, and therefore also the master as he would otherwise not know what the company has got in mind, as to the system it envisages to be applied. Thirdly, the implementation and proper working of the system will have to be monitored. The latter requirement is a consequence of the duty imposed on a company. For without monitoring that the system is working properly a company cannot, "consider or appreciate, as their duty and function required, the problems"[262] that may arise from the implementation and inappropriate application of a failing time management system.

Conversely, the general duty of the master appears to be somewhat less prominent. In my view, his general duty under reg. 4 only comprises of the obligation to make the on board system work within the factual conditions set by the company. This is particularly reflected in the master's duty to maintain a record of a seafarer's daily hours of rest and his obligations to ensure adequate information possibilities for his crew.[263] As can be seen from the table above, the latter duty[264] is again twofold and covers master and company. It is suggested that the main burden of providing relevant documentation to the ship is on the company whereas the practical access to the documentation on board is within the master's area of responsibility.

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[256] ISM Code, s. 5.2.
[257] As may be the case on smaller cargo and also fishing vessels. Working time for fishing vessels is regulated by The Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004, SI 2004 No. 1713.
[258] *Steamship "Beechgrove" Company Limited v. Aktieselskabet "Fjord" of Kristiania* [1916] 1 AC 364, p. 386.
[259] It appears that a comma is missing after the word "agency".
[260] *Industrie Chimiche Italia Centrale and Cerealfin S.A. v. Alexander G. Tsavliris & Sons Maritime Co., Panchristo Shipping Co. S.A. and Bula Shipping Corporation, (The Choko Star)* [1990] 1 Lloyd's Rep. 516, p. 520.
[261] It appears that if the master is also the owner, both the obligations for the master and for the company would have to be met by him.
[262] In analogy to LJ Seller's judgment in *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335, in the Court of Appeal, p. 340, referring to the judge in *The Lady Gwendolen* [1964] 2 Lloyd's Rep. 99 in the Admiralty Court. Lord Hoffman in *Meridian Global Funds Management Asia Ltd. v. Securities Commission* [1995] 2 AC 500, p. 510, approved of the CA ruling in *The Lady Gwendolen* and stated that "The court found that a reasonable shipowner would have realised what was happening…".
[263] Posting-up of scheduled hours of rest (reg. 7(1)) and carrying all relevant documentation on board in an easily accessible place (reg. 9(5)).
[264] Regulation 9(5).

In conclusion it is suggested that company and master do not necessarily[265] share the same criminal liability for a breach of reg. 4 even though both are allocated the duty to ensure that a seafarer is provided with the minimum rest period. For liability to attach to a company or a master it would appear necessary to decide on who is, or rather is more, in control of an action or activity, and whose duty it actually is to implement the relevant obligation.[266] A master would only appear to be violating the Regulations when the time management system applied on board is in reality not complying with the legal requirements and he does not do anything about it.[267] It seems that in such a case the master must inform the company and suggest remedies to make the system work. When necessary, he should even stop the ship to allow himself and the other seafarers on board adequate rest.[268] It is accepted, though, that in cases where seafarers are not in permanent employment this may prove to be a tall order for a master who might risk his next contract when asking for more crew or even stopping the ship.

In the case of the "RMS Mulheim" no violation of the minimum hours of rest was established. But it appears that the company did not comply with its duty under reg. 4 as "timesheets were not monitored by RMS". [269] This was not followed up by the prosecution.

Breaches that emerged on the "RMS Ratingen" were more prominent, and both company and master appear to have attracted criminal liability. Violations of minimum hours of rest in more than 1/3rd of a month for the chief officer plus missing timesheets for the master seem to constitute contraventions by the company as well as the master. None of them complied with their duty under reg. 4, nor did the master comply with reg. 9(1) requiring him to maintain his own records. Arguably, though, the company's violation of the Regulations was more serious as it was the company, and not the master, which could have sent additional crew on board. Even if the master has not informed the company about hours of work in excess of the maximum permitted, it was the company's duty to check the records and thereby establish the need for different time-management or more crew for the ship. The different level of personal culpability ought in such a case to be reflected in different sentences.

If, as it appears, fatigue plays such an important role for shipping safety, not prosecuting the company for a breach of the Hours of Work Regulations seems to be rather inappropriate and not in the public interest.[270] But this does not only apply to the company. Unless the master could have shown that he had taken all reasonable steps to ensure compliance with the Regulations and could thereby avail himself of the only permitted defence[271] he should also have been charged. Reasonable steps that could have been taken by the master would appear to have been the provision of evidence that the company has been specifically informed by the master about the workload which did not allow him and the crew staying within the hours of rest limits. A plausible explanation should also have been at hand for why no hours of work records were available for the master.

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[265] It would appear that they could both be liable under reg. 4 if there was some kind of "collusion" between company and master in that both were aware and actively supporting a breach of the hours of rest requirements by master and/or crew.

[266] For example, a company would have to provide the number of watchkeepers it considers appropriate to comply with merchant shipping legislation whereas a master would have to allocate the watchkeepers time slots during which he wants them to stand a watch.

[267] If the master could also violate the regulations when he does not have actual responsibility for the relevant activity or omission it would not be understandable why reg. 20 has not been structured by offences rather than, as in its current format, by potential defendant. If, for example, it would have been envisaged that the master was guilty whenever reg. 4 has been violated it would have been more logical to have, say, reg. 20(1)(a) stating that for any offence of reg. 4 master and company shall be punishable.

[268] In analogy to *Federal Steam Navigation*, p. 533, where Lord Salmon states that the master "should refuse to put to sea unless his ship is properly equipped".

[269] Sentencing Schedule, para. 29.

[270] It is, for example, a public interest factor in favour of prosecution if "the offence, although not serious in itself, is widespread in the area where it was committed", *The Code for Crown Prosecutors,* para. 5.9.p.

[271] Regulation 20(5).

Without a reasonable defence it seems to be inappropriate for the master not to be addressed as one of the official culprits. If the master has "the overriding responsibility for the safety of his ship"[272] he should not only be required but also be allowed to stand up for his actions. By not holding him responsible the prosecution "fails to address the actor as a moral agent",[273] meaning that overall responsibility without accountability lacks the justification for such a role. A master who is not accountable for his actions, as opposed to a company which is responsible for its actions or omissions, poses the question as to whether he really is in a position of overriding responsibility or whether his position is merely a (paper) front which can be pushed aside at will to reveal a more politically appropriate culprit. If it would be so, it would not only sooner or later affect the social, and particularly the financial, standing of a master but would in general question the legal role a master plays within the maritime health and safety system.

It appears that the master was not prosecuted because the MCA stuck to its policy "to prosecute owners and managers rather than seafarers".[274]

9.6.2. The correct defendant and the Watchkeeping Regulations 1997

Under these Regulations, which were similarly not used to charge either master or company in the "RMS Ratingen" case, a master bears the sole criminal responsibility for ensuring that the watchkeeping arrangements to keep a safe navigational watch are kept at all times.[275] He is specifically required to direct the OOW in accordance with the provisions of Part 3-1, section A-VIII/2 of STCW Code.[276] No duty as regards the organisation of watchkeeping appears to be imposed on the company. Regulation 4(4)[277] requires that

> "The company shall provide written instructions to the master of each of its ships setting out the policies and the procedures to be followed to ensure that all seamen who are newly employed on board the ship are given a reasonable opportunity to become familiar with the shipboard equipment, operating procedures and other arrangements needed for the proper performance of their duties, before being assigned to those duties."

The policies and procedures to be followed appear to be those which ensure that new crew are given the opportunity to familiarise themselves with ship, equipment and its operation including watchkeeping procedures and arrangements.[278] The company is to guarantee the allocation of a reasonable period of time for new crew and not to give written instructions to the master about watchkeeping arrangements. The making of such arrangements appears to be the task of the master who has to ensure that they are at all times adequate for the ship.[279] The sole responsibility of the master for watchkeeping under this statutory instrument also follows from the fact that he and not the company is subject to a penalty when watchkeeping arrangements for the ship are not at all times adequate.[280]

The following table illustrates the distribution of criminal liability under the Watchkeeping Regulations and shows that again the master appears to run the biggest risk of violating the law.

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[272] *Whistler International Ltd v. Kawasaki Kisen Kaisha Ltd, (The Hill Harmony)* [2001] 1 Lloyd's Rep. 147, HL, p. 155.
[273] Quoted in analogy to A von Hirsch's discussion on general prevention, in: *Proportionate Sentencing*, 2005, p. 15.
[274] File 284, minute of 11 January 2005, para. 2(b). For the original policy statement see MEM, chapter 2, s. 2, Annex C. See also below, Chapter 9.8.1.
[275] Regulation 11(1).
[276] Regulation 11(2).
[277] Of the Watchkeeping Regulations (SI 1320).
[278] Regulation (5)(a)(ii).
[279] Regulation 11(1).
[280] Regulation 17(2) which makes a contravention of reg. 11(1) a contravention of the master and not the company.

Both, penalty[281] and defence option[282] suggest that violations of the Regulation have to be treated as offences of strict liability.[283]

Table 12: Breaches subject to a penalty, Watchkeeping Regulations, reg. 17

Breach of Regulation	**4(2)**	**4(4)**	**4(6)**	**5(1)**	**5(2)**	**5(3)**	**11(1)**	**11(2)**	**11(3)**	**12**	**13**	**14**
Subject	Docs	Written instruct.	Follow instruct.	SMD	Not sail	Info to MCA	Watch-keeping bridge	Directions to OOW	Watch-keeping ER	Port	Haz. cargo	Docs
Master	no	no	**yes**	no	**yes**	no	**yes**	**yes**	no	**yes**	**yes**	**yes**
Crew	no	no	**yes**	no	no	no	no	no	no	no	no	no
Chief Eng.	no	no	no	no	no	no	no	no	**yes**	no	no	no
Company	**yes**	**yes**	no	**yes**	no	**yes**	no	no	no	no	no	**yes**

Breach of Regulation = breach of the relevant regulation which is subject to a penalty under reg. 17;
Subject = subject dealt with in the relevant regulation;
Master = yes denotes criminal liability of the master;
Crew = yes denotes criminal liability of a crew member;
Chief Eng. = yes denotes criminal liability of the Chief Engineer;
Company = yes denotes criminal liability of the company as defined by reg. 2(1).

The only shared liability, as it appears, of master and company is the requirement to ensure that at all times valid crew certificates of competency have to be carried,[284] which is not relevant for the current discussion.

It is my view that by not charging the master under reg. 17(2) for breaching reg. 11(1), and probably also 11(2)[285] in not ensuring that a proper look-out was kept at all times, the prosecution did not pay enough respect to the position a master holds on a ship. In addition the master would not have any incentive next time actively to push the company for additional crew as the responsibility for a safe operation seems to have been taken from him by the prosecution. I think this is a case where, in MCA policy terms,[286] the master has attracted personal culpability. If that is so he ought to have been charged. In light of the discussion in the introduction of Part C about criminalisation this conclusion may appear to be ironic. However, I think that a seriously negligent approach[287] does not deserve protection. Who deserves protection are all those seafarers and members of the society who would suffer and are potential victims of a criminal approach to the operation of a ship.

9.6.3. The correct defendant and the Prevention of Collision Regulations[288]

In the "Mulheim/Ratingen" case the company, but not the master, was charged under the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996. Regulation 6(1) makes owner, master and any person for the time being responsible for the conduct of the vessel subject of a possible penalty for a breach of the Regulations.

> "6(1) Where any of these Regulations is contravened, the owner of the vessel, the master and any person for the time being responsible for the conduct of the vessel shall each be guilty of an offence,

[281] Ranging from a maximum of a level three fine (for a crew member under reg. 17(3)) to six months' imprisonment for company or master under reg. 17(1) and (2) respectively. The maximum penalty suggests that it is a less "serious" crime, see the discussion in Chapter 10.3.1.
[282] According to reg. 17(9) it is a defence to prove that all reasonable steps have been taken to avoid commissioning the offence.
[283] See above, Chapter 9.5.
[284] Regulation 14.
[285] According to reg. 11(2) the master has to give directions to the OOW to navigate the ship safely in line with STCW Code requirements.
[286] MEM, chapter 2, s. 2, Annex C.
[287] See Chapter 15.
[288] SI 1996 No. 75.

> punishable on conviction on indictment by imprisonment for a term not exceeding two years and a fine, or on summary conviction:…"[289]

Any offence under this statutory instrument appears to be an offence of strict criminal liability as was shown below,[290] and unless the accused can show that he took all reasonable precautions[291] he will therefore be liable.

The use of "and" as the link between owner, master and any other person suggests a number of options for construction. First, it could be that all three shall be guilty of an offence when the Prevention of Collision Regulations are contravened. Secondly, it could be argued that holding everybody accountable would make no sense. The owner is not directly conducting the vessel and as there can only be one person at the time in charge of the conduct of the vessel, it will either be the master or the OOW.[292] If this would be the case, "and" would have to be read as "or". Such an option would be acceptable when the use of "and" would lead to an unintelligible or absurd result.

> "it is equally well settled that if so to construe those words leads to an intelligible[293] or absurd result, the Courts will read the word 'or' conjunctively and 'and' disjunctively as the case may be; or to put it another way, substitute the one word for the other."[294]

A third way of reading the provision is to construe "any other person" as addressing a person who is either replacing the owner or the master as the case may be.[295]

As the current case law appears to be silent on the construction of reg. 6, a look into its development may help the interpretation.

The current wording of reg. 6(1) was introduced in statutory instrument 1983 No. 708 in reg. 5(1).[296] Prior to this, the general "civil obligation"[297] to observe the Collision Regulations was regulated under the Merchant Shipping Act 1894.[298]

> "All owners and masters of ships shall obey the collision regulations, and shall not carry or exhibit any other lights, or use any other fog signals, than such as are required by those regulations."[299]

Penalties for misdemeanours were stipulated under s. 680 and

> "If an infringement of the collision regulations is caused by the wilful default of the master <u>or</u> *[emphasis added]* owner of the ship, that master or owner shall, in respect of each offence, be guilty of a misdemeanour."[300]

By contrast with the current Prevention of Collision Regulations the 1894 Act used "or" as a link between master and owner and created criminal liability only if a breach was caused by wilful default.[301]

To contravene the Colregs by wilful default meant violating them deliberately,[302] or consciously,[303] i.e. by knowing what one was doing.[304] The requirement for a deliberate

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[289] The Prevention of Collision Regulations, reg. 6(1).
[290] See below, Chapter 10.2.
[291] Reg. 6(2).
[292] STCW Code, Part A, s. A-VIII/2, Part 3-1, para. 23.3.
[293] This is probably a typographical error and it is suggested that the word should read "unintelligible" instead, to give the statement an intelligible meaning…
[294] *Federal Steam Navigation*, HL, p. 532.
[295] See the discussion below in Chapter 9.7.
[296] The Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1983, SI 1983 No. 708, hereafter the "1983 Collision Regulations".
[297] *Bradshaw (acting on behalf of the Secretary of State for Trade) v. Ewart-James, (The N.F. Tiger)* [1982] 2 Lloyd's Rep. 564, p. 567. It is not clear what Lord Cane meant by qualifying the obligation to comply with the Colregs as a "civil obligation" because s. 419(2) makes it clear that non-compliance was an offence (or misdemeanour in the language of MSA 1894, see s. 680(a)).
[298] The 1983 Collision Regulations, reg. 1(4)(a) repealed s. 419 to the extent it related to ships.
[299] Merchant Shipping Act 1894, s. 419(1).
[300] Merchant Shipping Act 1894, s. 419(2).
[301] *The N.F. Tiger,* p. 568.

breach followed the "established common law presumption that a mental element, traditionally labelled *mens rea*, is an essential ingredient"[305] of a criminal offence. Such mental element in a crime is "by definition … concerned with a subjective state of mind, such as intent or belief."[306]

Section 419(2) of the 1894 Act contained a mental element in that "wilful default" was required to attract guilt. Accordingly an offence was not committed under s. 419(2) unless the master consciously breached the Colregs.[307] The offence was thereby not one of strict liability because it required *mens rea*.[308] It would seem to follow that to have consciously or deliberately committed an offence under s. 419(2) of the 1894 Act the master had to know what his duty was.

Masters are considered to be aware that their duty is to know[309] and to follow the Colregs.[310] Matters to be left to the master are "the general day-to-day incidents of navigation".[311] This would seem to include the correct application of the Colregs.

It appears that in his comments in *The Lady Gwendolen,* Willmer LJ[312] condoned the judge's differentiation in the Admiralty Court of duties of owner and master when it comes to observing the Colregs.[313]

> "For my own part, I find it difficult to see how the owners are in a position to obey all of the Collision Regulations or to see that they are obeyed if they are not on the ship, and manifestly they cannot be on board every ship at the same time. This section must be read with some regard to reality. Some of the collision rules must be observed and performed by the owners, or in part performed by the owners; some by the masters and, in some, performance is apportioned between the two, such as the provision of adequate and proper lights by the owners and the exhibition of them at proper times by the master."[314]

It follows, in my view, that despite the use of "and" in the MSA 1894 s. 419(1) a different position of owner and master as regards their statutory duties appears to have resulted under that sub-section,[315] and this also applies when (criminal) liability is to be determined.

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[302] Tuckey LJ in *CP (a child) v. Royal London Mutual Insurance Society Ltd* [2006] 1 C.L.C. 576*,* para. 12, seemingly agreeing with Bowen LJ in *In Re Young and Harston's Contract* (1886) LR 31 Ch. D. 168*,* p.175.
[303] *The N.F. Tiger,* p. 567. The interpretation of s. 419 was applied by the Divisional Court in *Taylor v. O'Keefe (The Nordic Clansman)* [1984] 1 Lloyd's Rep. 31*,* p. 36.
[304] Bowen LJ in *In Re Young and Harston's Contract,* p.175. Even though this case is not a criminal case Bowen LJ pointed out that the word "wilful" is familiar in every branch of law and as used in a court of law implies "that what has been done arises from the spontaneous action of his [the person whose action is in question] will".
[305] *B v. DPP,* p. 460.
[306] *Ibid.,* p. 462.
[307] *The N.F. Tiger,* p. 567, confirmed and applied in *The Nordic Clansman,* p. 35.
[308] *The N.F. Tiger,* p. 569, "There is no clear indication with regard to s. 419 (2) of the Merchant Shipping Act, 1894, that Parliament intended that a master could be convicted although he personally had no mens rea."
[309] Which can be deduced from *The Nordic Clansman,* p. 36, where Webster J giving the judgment for the Court said "for, in the latter case, his [the master's] mistake is as to the construction of part of the statutory provision creating the offence with which he is charged… every citizen is taken to have performed his duty to ascertain what acts are prohibited by law"; a master will therefore have to know what acts are not permitted under the Colregs.
[310] *The Lady Gwendolen,* Adm. Court, p. 103. Although *The Lady Gwendolen* is not a criminal case its interpretation of s. 419(1) appears to be equally applicable in criminal as in civil law cases; see, for example, *The N.F. Tiger,* p. 567, where Lord Lane finds comfort in the interpretation of MSA 1894, s. 419 (1) by the Court of Appeal in *The Lady Gwendolen* supporting that s. 419(1) created an absolute obligation for the master to comply with the Colregs.
[311] *The Lady Gwendolen,* Adm. Court, p. 113.
[312] *The Lady Gwendolen,* CA, p. 347.
[313] The Admiralty Court's decision in *The Lady Gwendolen* was upheld in the CA and Hewson J's interpretation of the MSA 1894, s. 419 has not been challenged in the CA; this understanding was confirmed by Lord Lane, CJ, in *The N.F. Tiger,* (a criminal case), p. 567.
[314] Hewson J in *The Lady Gwendolen,* Adm. Court, p. 103.
[315] "If it reasonably comes to the knowledge of the owner that the master is disobeying such an important rule, he should tell him and remind him to obey the rules. It goes without saying, of course, that he should certainly never tell the master or infer to him that he should disobey this rule or any of them. If he failed in such a

This can be concluded despite *The Lady Gwendolen* being a civil, and not a criminal, case for "this interpretation of s. 419 (1) [that a breach of the Colregs was an violation of an absolute obligation of a master under s. 419] is consistent with the judgments of the Court of Appeal in *The Lady Gwendolen".*[316] It would seem to follow that if a breach of the Colregs was an absolute obligation for the master it was also an absolute obligation for the owner.[317] As a consequence an owner would thereby be committing an offence for any breach of duty of a master if the use of "or" in s. 419(2) would have to be read conjunctively. But this is exactly what the Admiralty Court in *The Lady Gwendolen* did not agree with in that not all rules must be performed by the owner (and also not by the master).[318] As s. 419(2) did not make the offence an offence of strict liability[319] a different treatment would therefore have resulted for a master, or an owner, when any of them breached their duty in a way which the other could not have influenced.

This view is strengthened by the fact that neither in *The N.F. Tiger*[320] nor in *The Nordic Clansman*[321] did the owner become a defendant.[322] "Or" in s. 419(2) therefore appears to have been read disjunctively.

In the current statutory instrument[323] Parliament has decided to replace "or" by "and".[324]

According to the rules of construction the literal reading of a penal statute which is "intelligible"[325] is supposed to reflect the intention of Parliament.[326] It is submitted that reading "and" as "and" and not as "or" in reg. 6(1) does not make the result "unintelligible or absurd".[327] Although nothing has changed as to what an owner can directly influence, the Court of Appeal's decision in *The Lady Gwendolen* in 1965 clearly established that, in general, good management[328] requires proper supervision over the manner in which a vessel is being navigated.[329] What is urgent and important "should have been instilled in him [the master] from the highest level."[330] This particular duty under the Colregs, as is discussed above, applied both in civil and in criminal law.

In the light of this approach it is, first, intelligible and, secondly, makes sense to hold an owner criminally responsible for actions of a master which the owner could not influence other than by "instilling" a sense of urgency and importance about Colreg compliance in the master.[331] The current Prevention of Collision Regulations do not specifically address the individual duty of an owner (or master), but instead require that the Colregs have to be complied with by all vessels to which the Regulations apply.[332] What the Prevention of Collision Regulations have also changed[333] is the application of strict criminal liability for

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matter, then, of course, he would be in breach of his duty under Sect. 419.", *The Lady Gwendolen,* Adm. Court, p. 103.

[316] *The N.F. Tiger,* p. 567.

[317] "All owners and masters shall obey the collision regulations…", MSA 1894, s. 419(1).

[318] See above.

[319] *Ibid.*

[320] [1982] 2 Lloyd's Rep. 564.

[321] [1984] 1 Lloyd's Rep. 31.

[322] It appears that *The N.F. Tiger* and *The Nordic Clansman* are the only decisions dealing with the MSA 1894 s. 419; see *The Nordic Clansman,* p. 35, where the judges stated that up to then (July 1983) *The N.F. Tiger* was the only decision they were referred, and before that decision, on 1 June 1983, statutory instrument 1998 No. 708 had replaced MSA 1894 s. 419, *The Nordic Clansman,* p. 37.

[323] The Prevention of Collision Regulations.

[324] *Ibid*., reg. 6(1): "…the owner of the vessel, the master and any person…".

[325] *Federal Steam Navigation,* HL, p. 532.

[326] *Oakes,* p. 354 and confirmed by Lord Salmon in *Federal Steam Navigation,* p. 532.

[327] In reference to *Federal Steam Navigation*, HL, p. 532, see above, ….

[328] Here, it is submitted, of relevance to the owner's duty under MSA 1894, s. 419(1) to comply with the Colregs.

[329] *The Lady Gwendolen,* CA, p. 346.

[330] Willmer LJ in *The Lady Gwendolen,* CA, p. 347.

[331] See also *The Roseline* [1981] 2 Lloyd's Rep. 410*,* p. 411: "It is the duty of the owners to make sure that their masters understand their duties and understand that they are expected to run an efficient ship."

[332] Reg. 4(1).

[333] Or rather taken over from the 1983 Prevention of Collision Regulations, reg. 5(1), SI 1983 No. 708.

an offence[334] which now applies to owner and master. It appears therefore that any breach of the Regulations will constitute an offence by both owner and master. In the absence of any additional wording suggesting that this was not the intention of Parliament "and" should therefore be read in its literal meaning as conjunctive.[335] Hence it is suggested that a breach of the Colregs by a vessel would always make both owner and master (and also any other person for the time being responsible for the conduct of the vessel) guilty of an offence unless any of them can invoke the defence of reg. 6(2).

Thus the question appears to be whether or not it was in principle correct or, indeed, lawful for the prosecution only to charge the company but not the master and/or the OOW on "RMS Mulheim".[336] This will be discussed in the following section.[337]

9.7. The lawfulness of the prosecution's choice

Considering the question posed it seems that the problem is twofold. First, it may be asked whether or not, on given facts constituting an offence of strict liability, the prosecution has the choice to prosecute or not to prosecute. Secondly, the question seems to be that when it has been decided to prosecute, does the prosecution actually have the choice as to who to prosecute under given statutory provisions? As regards the "RMS Ratingen" and the "RMS Mulheim" the question is whether, after the decision to prosecute had been made, it was lawful for the prosecution to choose to prosecute neither the master on the "RMS Ratingen" nor the OOW on the "RMS Mulheim".

The MCA follows the guidance in *The Code for Crown Prosecutors*[338] and specifically the criteria listed in the Marine Enforcement Manual.[339] Thereby the general philosophy not to prosecute suspects automatically is applied.[340]

However, this does not leave the prosecutor with unfettered discretion. The decision "whether proceedings for an offence should be instituted"[341] has to follow the guidance of *The Prosecutors' Code*. A decision of the Director of Public Prosecution is subject to judicial review,[342] and it does not matter that the Director does not take the decision himself.[343] *The Prosecutors' Code* is based on the basic presumption that with sufficient evidence a case will proceed unless public interest factors offset such interest.[344] Although neither *The Prosecutors' Code* nor the "Director's Guidance on Charging"[345] expressly state that a prosecution must go ahead it can be deduced from the Director's Guidance that when the two stage test has been successfully passed a person ought to be charged.[346]

The two stage test is laid down in *The Prosecutors' Code*.[347] The first step is to judge the evidence which does not need to meet the standard of proof required for a conviction but

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[334] See discussion above, Chapter 9.6.3.
[335] *Federal Steam Navigation*, HL, p. 532.
[336] A decision of the prosecution not to prosecute is subject to judicial review, *R v. Director of Public Prosecutions, ex parte C* [1995] 1 Cr. App. R. 136, p. 139/140.
[337] See also above the general discussion on the discretion to prosecute, Chapter 9.2. *et seq*.
[338] See below, Chapter 9.2.
[339] MEM, chapter 2, s. 4.3.1. See above, Chapter 9.4.
[340] See the quote of the Attorney General above in Chapter 9.2.
[341] *R (on the application of da Silva) v. Director of Public Prosecutions* [2006] All ER (D) 215 (Dec), para. 18.
[342] *ex parte C,* p. 139/140.
[343] Lord Bingham in *R v. Director of Public Prosecutions, ex parte Manning* [2001] QB 330, para. 23.
[344] K Macdonald, Director of Public Prosecutions (at the time of writing the article), *The new Code for Public Prosecutors,* 2005, p. 3 of the article in the LexisNexis download.
[345] See http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance.html (26 June 2008).
[346] *Director's Guidance on Charging*, s. 6.1, "Decision not to prosecute", "Where the Crown Prosecutor notifies a Custody Officer that there is not sufficient evidence to charge the person with an offence or that there is sufficient evidence but the public interest does not require the person to be charged or given a caution in respect of an offence, the Custody Officer will notify the person in writing to that effect." Conversely it would seem that if the public interest requires charges to be brought the decision ought to be made accordingly.
[347] Section 5.1.

must only be based on "more likely than not".[348] As the second step the prosecution has to assess whether the public interest[349] actually requires a person to be charged.

The evidential stage of the test does not appear to pose a problem in the "Mulheim/Ratingen" case. It appears, however, that the second step, as to whether it is in the public interest that the master should be prosecuted, had not been seriously contemplated for either vessel because charging him would have run counter to MCA policy.[350] Instead the minute on file suggests that reg. 6(1)[351] was construed in a way which did not pose the question of any other but the company's liability.

> "4. Under regulation 6 of the distress signals and prevention of collisions regulations, the offence is committed by 'any person for the time being responsible for the conduct of the vessel'. I would suggest that the managers do have this responsibility."[352]

The managers and beneficial owners of the "RMS Mulheim" and the "RMS Ratingen" were at all material times Rhein-Maas und See Schifffahrtskontor GmbH ("RMS").[353] The file does not suggest that RMS was also the registered owner. However, according to the Sentencing Schedule, RMS was charged as the owner of the two vessels,[354] which I understand to mean that RMS was treated as the owner for the purposes of the prosecution. As the Court found RMS guilty,[355] and the company did not appeal against the conviction, the approach taken by the prosecution seems to have been accepted both by the company and the Magistrates' Court.

This is of interest because, first, charging RMS as the owner is different from the original MCA decision to commence proceedings against the managers as "any person".[356] The reason for commencing proceedings against RMS was that they were considered to have been the party "responsible for the conduct of the vessel".[357] This would appear to have been based upon the presumption that the overall conduct of operating the vessel, but not the conduct of actually navigating it, is meant by the wording of reg. 6(1). There may also have been doubts as to whether a manager can actually be charged under the Prevention of Collision Regulations.[358] As there would appear to have been a controversial assumption[359] the question therefore appears to be whether any person responsible for the conduct of a vessel is the OOW, the operator, or both of them.

Secondly, the Prevention of Collision Regulations do not define the term "owner" and neither does the original text of the 1972 Convention.[360] The words "manager" and "owner" in the shipping industry are understood to have a variety of different meanings, and their application would appear always to depend on the context in which they are used before a precise meaning can be allocated to the term. A person can, for example, own the vessel legally and thereby be the registered owner. But vessels may also be owned in parts by a number of persons. The vessel may then be chartered to a bareboat charterer who would usually have full disposal, possession and operational control of the vessel.[361] But parts, or all of the operation, may also be contracted out by a registered owner or bareboat charterer to ship managers. These managing companies may, for example, be responsible for crewing, technical and/or commercial operation or the general

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[348] *ex parte Manning,* para. 22.
[349] See also above the discussion of "public interest", Chapter 9.3. *et seq*.
[350] See above, Chapter 9, fn 275.
[351] Of the Prevention of Collision Regulations.
[352] Minute on file 284.
[353] Sentencing Schedule, A.3. and 6.
[354] *Ibid*., A.4.
[355] RMS pleaded guilty, see Annex 5, conviction 57/2005.
[356] As referred to in file 284, minute of 7 May 2004, point 4.
[357] File 284, Schedule Information, para. 1.
[358] See the discussions below, Chapter 9.7., "any other person" and "owner".
[359] Because the MCA initially appears to have considered the manager being "responsible for the conduct of the vessel", see above, Chapter 9, fn 357.
[360] See the text of the Convention in *The Ratification of Maritime Conventions*, chapter II.3.250; for a more detailed discussion of the meaning of the term "owner" see below.
[361] See, for example, "Barecon 2001", clause 10(b), on http://www.bimco.org (14 April 2008).

management of the vessel. Their responsibility and accountability towards the registered owner or bareboat charter will be defined by contract.[362] Managers may in addition have the option to sub-contract any of their obligations provided the contract so stipulates.[363] A ship's manager, however, is not to be confused with a managing owner who is one of the registered owners of the vessel.[364]

This confusing use of terminology has in safety management terms found its solution in the ISM Code.[365] It does not define the word "owner" but uses the term "company" as an umbrella expression. "Company" covers any (legal or natural) person responsible for the operation of the ship and can mean either owner or manager.[366] In acknowledging the variety of expressions common in shipping for persons being responsible, s. 1.1.2 of the ISM Code uses the all encompassing "such as"[367] to ensure all relevant possibilities are covered by the ISM Code.

In the following two subsections I will discuss in more detail which person a prosecutor actually appears to be able to charge beginning with the controversial assumption about the third person mentioned in the Prevention of Collision Regulations,[368] followed by a discussion of the term "owner".

9.7.1. "any person for the time being responsible for the conduct of the vessel"

The wording "any person for the time being responsible for the conduct of the vessel" was first introduced in 1983.[369] Both the 1983 and the 1996 Prevention of Collision Regulations are silent as to the identity of "any person for the time being responsible for the conduct of the vessel". There is also nothing else revealed in the parliamentary papers, which simply state that the draft 1983 Regulations should be forwarded to the Standing Committee and that they were afterwards recommended for approval.[370]

Following the literal meaning of the words "conduct of the vessel" it could possibly be argued that "being responsible for the conduct of the vessel" is referring to both owner and master. At first sight, however, it would appear that the person being responsible for the conduct of the vessel, who would as a consequence also be criminally liable, is the relevant delegate of the owner or master.

It seems justified, therefore, to investigate whether or not there are authorities interpreting the wording or whether a similar expression has been used in other legislation. Admittedly

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[362] See, for example, "Shipman 98", part 1 which gives the parties the opportunity to "tick" the relevant boxes and agree the relevant services to be rendered by the manager, e.g. box 5 for crew management, box 6 for technical management and box 7 for commercial management, on http://www.bimco.org (11 September 2007).
[363] For example, "Shipman 98", cl. 10.
[364] The Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993 No. 3138, hereafter "Registration Regulations") stipulate in reg. 23(1) "Where application is made in respect of a ship which has more than one owner, or whose shares are owned by more than one owner, and no representative person has been appointed under Part V, one of those owners who is resident in the United Kingdom shall be nominated as the managing owner, and the Register shall be marked accordingly and all correspondence shall be sent to that person at the address recorded in the Register in respect of that owner."
[365] See also below, Chapter 10.5.
[366] ISM Code, s. 1.1.2; see also the BIMCO explanation (on www.bimco.org on 11 September 2007) to "Shipman 98", cl. 13, that "following the entry into force of the ISM Code for a number of vessels and the fact that managers who perform technical management will be considered the "Company" for the purpose of the ISM Code".
[367] "Company means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer….".
[368] I.e. "any person for the time being responsible for the conduct of the vessel", reg. 6(1).
[369] The Merchant Shipping (Distress Signals and Prevention of Collision) Regulations 1983, reg. 5(1); hereafter "1983 Prevention of Collision Regulations"; the Regulations repealed s. 419 of MSA 1894, see Chapter 9, fn 297; under s. 419(2) only "master or owner" could be guilty of a misdemeanour, but not any other person.
[370] House of Commons, Official Reports, Vol. 41, 1983, p. 733 and Vol. 42, 1983, p. 702.

interpreting the words "responsible for the conduct of the vessel" in circumstances other than under the Prevention of Collision Regulations is not necessarily relevant for construing the Regulations unless there is clear guidance by the courts as to the general application of such interpretation. However, examples of (civil law) cases in which the wording "conduct of the vessel" or ship was discussed do not form a consistent picture and are of little use for the interpretation of the Prevention of Collision Regulations.[371]

But it seems that the result is different when analysing legislation which uses the words "conduct of a vessel".

I will make reference to three such statutes and statutory instruments, other than the Prevention of Collision Regulations, which have been identified.

> (1) In the Port of London the Port Authority may make byelaws for the purpose of regulating "the conduct of vessels, including the use of their motive power and equipment".[372]
>
> (2) "'Pilot' means a person not belonging to a vessel who has the conduct of the vessel."[373]
>
> (3) An identical wording can be found in the Merchant Shipping (Local Passenger Vessels) (Crew) Regulations 2006, [374] reg. 2.

It appears that all three examples only refer to the conduct of the vessel on board that ship and not to any conduct in the board room of the relevant company. The latter would seem to suggest that the current interpretation in the Prevention of Collision Regulations is referring to the OOW rather than a manager or beneficial owner as being "any person" in reg. 6(1).

This conclusion is also supported by the fact that the problem of whether an OOW is responsible when a breach of the Colregs happens on his watch seemingly had not come before a Divisional Court prior to the decision in *The N.F. Tiger.*[375] The judgment in that case was swiftly followed by a change in the law,[376] indicating Parliament's reaction to two judicial decisions.

> "This decision[377] had the effect that a change in the law would be necessary in order to provide for the situation where the "wilful default", a concept now repealed …,was that of the officer of the watch rather than the master. The result is that in the current provision in regulation 5[378] of the Collision Regulations the offence relates not only to the master but also to "any person for the time being responsible for the conduct of the vessel" and "each", shall be guilty of an offence. The position now is that although there is power to prosecute the officer of the watch, the master and the owner are also liable to prosecution for the error as they shall "each" be guilty of an offence."[379]

In *The N.F. Tiger*, Lord Lane, CJ, already referred to the legislature as the appropriate party to solve the enforcement problem that may arise from refusing to accept a conviction of a master under MSA 1894, s. 419(2) without *mens rea*.[380] In that case the chief officer and not the master was on watch on the bridge when the vessel was in breach of Colreg

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[371] In *BP Exploration Operating Co Ltd v. Chevron Shipping Co* [2003] 1 AC 197, para. 64, it was the charterer under whose operational control the vessel was who was responsible for the conduct of the vessel. In *The General Steam Navigation Company v. The British and Colonial Steam Navigation Company Limited* (1868-69) LR 4 Ex. 238, p. 242, the owner was referred to by counsel as having the conduct of the ship. In *The Navios Enterprise and Puritan* [1998] 2 Lloyd's Rep. 16, p. 23, "conduct" seemed to have been used in connection with the OOW. In *Jensen v. The Corporation of the Trinity House of Deptford, (The Dana Anglia, Dana Regina and Dana Futura)* [1982] 2 Lloyd's Rep. 14, p. 21, and *The Ole Bull* [1905] P. 52, p.56, pilots had the conduct.
[372] Port of London Act 1968, s. 161(a).
[373] The Merchant Shipping (Inland Waterway and Limited Coastal Operations) (Boatmasters' Qualifications and Hours of Work) Regulations 2006, SI 2006 No. 3223, reg. 3(1)(b).
[374] SI 2006 No. 3224.
[375] Lord Lane, p. 569.
[376] Bringing into force the 1983 Collision Regulations which in reg. 5(1) introduced the current wording.
[377] I.e. *The N.F. Tiger.*
[378] It appears that the number of the regulation was not updated for the 13th edition of Marsden and should probably read "6".
[379] Marsden, p. 732.
[380] *The N.F. Tiger,* p. 569.

10(c).[381] As the offence under s. 419(2) did not constitute an offence of strict liability the master was found not to be guilty because he did not possess the necessary *mens rea.*[382] This left the breach of the Colregs by the chief officer completely unpunished because s. 419(2) did not offer the option to prosecute a watchkeeper other than the master for a breach of the Colregs caused by wilful default.

The Nordic Clansman[383] decision following shortly after *The N.F. Tiger* (which was in June 1982) applied the meaning given to "wilful default"[384] with the consequence that a master must have *mens rea* to be convicted (July 1983). At this point in time the new 1983 Regulations were already in force.[385] The Court noted this but did not comment beyond recognising that the law had been "substantially changed".[386]

The law subject to the substantial change concerned the criminal liability of the master or rather the OOW for breaches of the Colregs. Both *The N.F. Tiger* and *The Nordic Clansman* were appeals by the prosecutor from decisions of the Magistrates' Court. Both cases confirmed that the MSA 1894, s. 419(2) did not establish an offence of strict liability but that *mens rea* was required for a master to be convicted and that as a consequence no other watchkeeper could be proceeded against under the law of that time. The 1983 Collision Regulations did away with this requirement. In my view it is now clear that "any person for the time being responsible for the conduct of the vessel" means the person standing in for the master, usually the OOW, and does not refer to a manager or beneficial owner. The words "for the time being" also suggest that rather a shorter than longer period was envisaged which befits the position of an OOW who would normally not be responsible for more than a few hours at the time when he is on watch. A prosecutor would therefore appear to charge the wrong suspect if he considered the manager to be the possible defendant.[387]

A problem may arise on vessels with are permitted to sail with only one certificated watchkeeper such as on small fishing vessels where a deckhand may be left in charge of the wheelhouse.[388] It is my view that a person who does not hold an appropriate certificate as a watchkeeper cannot become the person responsible. A certificated deck officer such as the (certificated) skipper of a fishing boat cannot delegate his "competency".[389] It would seem to follow that in such a case it would always only be the skipper who would become subject to prosecution.[390]

This leaves the question as to who can actually be prosecuted under the term "owner of the vessel".

9.7.2. Owner of the vessel

Legislation and authorities allow for a rather large number of different definitions of the meaning of "owner", and definitions usually apply within the limits of the statute or statutory instrument or even within the particular section only. Judgments by the Courts are yet more specific and restrict the definition normally to the case in question.

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[381] *Ibid.,* p. 566.
[382] *Ibid.,* p. 569.
[383] *The Nordic Clansman,* p. 34.
[384] "Wilful default" being a deliberate breach, see above, Chapter 9.6.3.
[385] The 1983 Collision Regulations entered into force on 1 June 1983.
[386] *The Nordic Clansman,* p. 37.
[387] See above, Chapter 9, fn 357.
[388] As stated, for example, in *Margolle v. Delta Maritime Co. Ltd (The St Jacques II and Gudermes)* [2003] 1 Lloyd's Rep. 203, para. 8, where a 17-year old deckhand was left on his own in the wheelhouse.
[389] This seems to be supported by the Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 1984, SI 1984 No. 1115, reg. 11(1): "No person shall act in a capacity which requires a certificate of competency or certificate of equivalent competency or certificate of service under the Regulations unless he holds an appropriate certificate…".
[390] See the Watchkeeping Regulations, reg. 11(1) which require a master to ensure that the watchkeeping arrangements on board provide for safe navigational watches at all times.

The MSA 1995, for example, does not carry a general definition of "owner"[391] and neither do the Prevention of Collision Regulations or the original text of the Colregs Convention.[392]

Yet, the conclusion that "owner" does not only mean "registered owner" appears to be supported by the Colregs. Rule 2(a) puts the responsibility for complying with the Colregs on "owner, master or crew" and stipulates that nothing shall exonerate them from the consequences of any neglect of the rules. Such provision would not make sense if owner would only mean "registered owner" but not, for example "beneficial owner" or "ship's manager". An owner of a bareboat chartered vessel will usually not have any influence over the day-to-day operation of the vessel.[393]

The closest the MSA 1995 comes to defining "owner" in a situation similar to that under the Prevention of Collision Regulations is in s. 100.

> S. 100(1) It shall be the duty of the owner of a ship to which this section applies to take all reasonable steps to secure that the ship is operated in a safe manner.
> …..
>
> (3) If the owner of a ship to which this section applies fails to discharge the duty imposed on him by subsection (1) above, he shall be liable—
>
> > (a) on summary conviction, to a fine not exceeding £50,000;
> >
> > (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.
>
> (4) Where any such ship—
>
> > (a) is chartered by demise, or
> >
> > (b) is managed, either wholly or in part, by a person other than the owner under the terms of a management agreement within the meaning of section 98,
>
> any reference to the owner of the ship in subsection (1) or (3) above shall be construed as including a reference—
>
> > (i) to the charterer under the charter by demise, or
> > (ii) to any such manager as is referred to in paragraph (b) above, or
> > (iii) (if the ship is both chartered and managed as mentioned above) to both the charterer and any such manager,
>
> and accordingly the reference in subsection (1) above to the taking of all reasonable steps shall, in relation to the owner, the charterer or any such manager, be construed as a reference to the taking of all such steps as it is reasonable for him to take in the circumstances of the case.

The owner liable in respect of the unsafe operation of a ship includes the bareboat charterer and the manager.[394] "Manager", however, does not appear to be a ship manager working under a management agreement such as "Shipman 98". Such a manager seems excluded from the application of s. 100 because he is only acting as agent for owners.[395] A manager would only appear to be covered by the term "owner" if he had taken over the owner's full responsibilities.[396] It seems to follow, though, that both manager and owner

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[391] See s. 313.
[392] Which, apart from the Articles of the Convention are the Colregs; the Articles mainly regulate administrative requirements for State Parties to the Convention such as territorial application (Art. III), entry into force (Art. IV) or denunciation (Art. VII).
[393] See above, reference to "Barecon 2001", cl. 10(b).
[394] Section 100(4).
[395] Shipman 98, clause 4.1.
[396] According to s. 100(4)(b), where a ship is managed "either wholly or in part by a person other than the owner under the terms of a management agreement within the meaning of section 98", reference to the owner shall include reference to the manager (s. 100(4)(b) tailpiece and (ii)). Pursuant to s. 98(5)(a)(i) and tailpiece it is a defence for the owner if his responsibilities "had at the time of the alleged offence been wholly assumed by some other person".

will be criminally liable under s. 100 if the manager has only taken over part of the responsibilities.[397]

However, other than provided for by the Prevention of Collision Regulations[398] an offence under the MSA 1995, s. 100 does, for the following reasons, not appear to impose strict liability on the owner and would therefore not trigger the same problem of having to interpret the use of "or" and "and".

In *Seaboard Offshore Ltd v. Secretary of State for Transport, (The Safe Carrier)*[399] the House of Lords refrained from categorising the offence under what is now s. 100[400] as being or not being one of strict liability and simply held that the duty of the owner, charterer or manager is a personal one which does not make him criminally liable for the act of his subordinate employees as long as he has taken reasonable steps in the interest of the safe operation of the ship.[401] When applying the four elements' test laid down in *B v. DPP*[402] this would seem to support the view that the offence[403] is not one of strict liability as it would not get past the first stage. The language only allows for the owner to be guilty when he fails to discharge his duty. He is thereby not "automatically" guilty when the section has been contravened[404] but needs to be at least at fault,[405] yet does not necessarily appear to require a guilty mind.[406] In addition, the breach needs to be done by him personally or, when the owner is a corporation, by somebody "who by virtue of its [the corporation's] constitution or otherwise are entrusted with the exercise of the powers of the corporation".[407]

In this pre-ISM incident (1990) the vessel "Safe Carrier" had been joined by a chief engineer 2 hours and 50 minutes before she put to sea. Following that, the engine stopped three times and the vessel had eventually to be towed back to port.[408] As the decision to put to sea was not made by senior management but "was the fault of some employee"[409] the conviction of the manager was not upheld.[410] The main reason for the decision appears to have been that no findings were made by the Magistrates' Court whether or not reasonable steps had been taken by the defendant manager.[411] Such analysis was carried out because no procedures existed against which the actions (or inactions) of the company could have been measured.

> "It may very well be that in pursuance of the duty imposed by [s. 100] a system such as desiderated on behalf of the appellant ought to be laid down by an owner, charterer or manager, and that appropriate measures should be taken to see that it is adhered to. The problem for the appellant is that this does not appear to be the way in which the case was presented to the Justices, so that they were not in a position to apply their minds to the question whether these were reasonable steps to be

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[397] See s. 100(4)(b) "wholly or in part".
[398] Regulation 6(1).
[399] [1994] 1 Lloyd's Rep. 589.
[400] The House was interpreting s. 31 of the MSA 1988 which was replaced by, for this discussion, identical version of s. 100.
[401] *Seaboard Offshore Ltd. v. Secretary of State for Transport, (The Safe Carrier)* [1994] 1 Lloyd's Rep. 589, p. 593; the provision in question was s. 31 of the MSA 88; the HL thereby seems to have come to a similar decision as the case comment of J.C.S., *case comment*, p. 612, about the decision of the Divisional Court stating that "this offence, on its face, is neither of these. It is an offence of negligence. It requires a culpable failure to comply with a standard of conduct".
[402] Page 464, see discussion above
[403] Not to operate the ship in a safe manner, MSA 1995, s. 100(1).
[404] As, for example, in the Prevention of Collision Regulations, reg. 6(1).
[405] "Crimes which do not require intention, recklessness or even negligence as to one or more elements in the *actus reus* are known as offences of strict liability…", D Ormerod, *Smith & Hogan Criminal Law*, p. 150.
[406] "some judges still treat negligence as a form of mens rea, using the term 'mens rea' to cover all types of fault, not merely those consisting in a state of mind", J.C.S., *Case Comment*, 1993, p. 612; see also D Ormerod, *Smith & Hogan Criminal Law*, p. 95.
[407] Lord Keith in *The Safe Carrier,* p. 592, referring to Lord Diplock in *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153.
[408] *The Safe Carrier,* p. 590-591.
[409] *Ibid.,* p. 593.
[410] *Ibid*.
[411] *Ibid.,* p. 592; s. 31(1) of the MSA 88 provided that "It shall be the duty of the owner of a ship to which this section applies to take all reasonable steps to secure that the ship is operated in a safe manner."

> taken by the respondents to secure the safe operation of the ship and whether they failed to take them."[412]

Nowadays a court would probably have to analyse the company's and ship's safety management system,[413] part of which is required to ensure proper familiarization of ships' crews.[414] Thus, a parameter for whether or not reasonable steps have been taken would now be available for ships to which the ISM Code applies.

But this does not affect the general difference between an "owner" under s. 100 and under the Prevention of Collision Regulations. Whereas reference to the owner in s. 100 specifically includes the bareboat charterer and seemingly the managing owner, but not the ship's manager, the section's definition appears to be exhaustive. Furthermore, only an owner falling into one of these classes can be found guilty for a breach, and only if he is at fault. In the Prevention of Collision Regulations on the other hand "owner" is not defined, and it can therefore not be concluded that the term is in any way exhaustive. Also, a contravention of those Regulations constitutes strict liability. My conclusion therefore is that s. 100 does not provide guidance as to what is the meaning of "owner" in the context of the Prevention of Collision Regulations.

Other definitions of owner relate, for example, to a person who owns the ship or parts of it whether or not registered as the owner,[415] or, as in Schedule 7 of MSA 1995, to "shipowner" meaning any of the terms "owner", "charterer", "manager" or "operator".[416]

In a different context the term "owner" could also mean "registered owner" or "beneficial owner".[417] It can even mean "registered owner" although the statute in question uses the term "beneficial owner".[418] Lord Donaldson came to this conclusion by constructing "ownership" in accordance with the meaning in the "International Convention relating to the Arrest of Seagoing Ships, 1952". He based this mode of construction[419] on Lord Diplock's statement that

> "statutory language should be construed in the same sense as that of the convention if the words of the statute are reasonably capable of bearing that meaning."[420]

The authorities have dealt with the problem of defining the term "owner" on a large number of occasions in different areas of the law.[421] But it was held by the House of Lords in *BP Exploration Operating Co Ltd v. Chevron Shipping Co* [422] that a definition which is not specific to the statute in question is not necessarily applicable.[423]

In *BP Exploration* the House of Lords was dealing with strict (civil) liability under s. 74 of the Harbours, Docks and Piers Clauses Act 1847 and not with a (criminal) breach of the Colregs. One of the key arguments made in that case not to hold a beneficial owner liable for damages instead of a registered owner was the option of the registered owner to "make a contractual provision for recovery from any person to whom he charters the vessel."[424]

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[412] *The Safe Carrier,* p. 592.
[413] See below, discussion of the ISM Code.
[414] ISM Code, s. 6.3.
[415] The Registration Regulations, reg. 1(2) define "owner" for the purposes of the regulations as meaning "in relation to a ship or share in a ship, the person owning the ship, or as the case may be, a share in the ship, whether or not registered as owner".
[416] Art. 1(2), enabling the parties mentioned to limit their (civil) liability if applicable.
[417] See *The Evpo Agnic* [1988] 2 Lloyd's Rep. 411*,* p. 414.
[418] The Supreme Court Act 1981 uses the term "beneficial owner" in s. 21(4)(b)(i) and (ii) but the Court of Appeal decided that "beneficial owner" in this context means "registered owner", *The Evpo Agnic,* p. 414-415.
[419] *Ibid.,* action *in rem*, p. 413.
[420] Lord Diplock in *The Eschersheim* [1976] 2 Lloyd's Rep. 1*,* p. 6.
[421] See, for example, the list of cases quoted in *BP Exploration,* and in particular paras. 85 to 93.
[422] [2003] 1 AC 197.
[423] Lord Hobhouse in *BP Exploration,* paras. 84 and 91.
[424] Lord Clyde, para. 54; Lord Hobhouse points out in para. 88 that s. 76 of the 1847 act gives the owner a right of recovery where another has been at fault.

It was also acknowledged by the Law Lords when scrutinising the decisions put forward by the defenders that

> "They [the analysed authorities] recognise a potential breadth of meaning for the word "owner" and show that it can in certain contexts be read as including or meaning the charterer of a demise chartered vessel."[425]

The construction of the term should follow "the natural meaning of the words used, guided by a consideration of the purpose of the statute."[426] Guidance to be considered should be contemporaneous.[427]

It appears that there is no contemporaneous case law on the meaning of "owner" in the Prevention of Collision Regulations. However, guidance as to what the "owner" is responsible for can be found in *The Lady Gwendolen* which appears still to be good law.[428]

> "A primary concern of a shipowner must be safety of life at sea. That involves a seaworthy ship, properly manned, but it also requires safe navigation."[429]

Safe navigation will, by default, always cover the compliance with Colregs. But owners or managers cannot leave questions of navigation to the "unassisted discretion of their masters".[430]

None of the above is binding as to the interpretation of "owner" in the Colregs. But considering that the term should be guided by the purpose of the Regulations it would not make sense only to apply the word in a very restricted way. If safe navigation is not only the responsibility of the master but also of the owner or manager it may be wrong to assume that "owner" in the Prevention of Collision Regulations is limited only to the legal (or registered owner).[431]

In my view *The Lady Gwendolen* and *BP Exploration* (although civil law cases) point clearly in the direction of the obligations of the actual operational manager of the vessel, i.e. the (legal or natural) person who is in control.[432] If the Regulations do not contemplate holding liable the person who has operational control[433] a situation could arise similar to the one between master and OOW under the MSA 1894, s. 419(2), where the person responsible for the breach would get away unblemished.[434] For the registered owner does not appear to have the enforceable option to contract out his criminal liability,[435] with the possible exemption for cases of strict criminal liability and if he has no personal fault.[436]

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[425] Lord Hobhouse in *BP Exploration,* para. 93.
[426] *Ibid.,* para. 83.
[427] *Ibid*.
[428] Although *The Lady Gwendolen* is a civil law case it was used by the House of Lords in *Tesco Supermarkets Ltd. v. Nattrass* (a criminal case) when discussing vicarious liability, see Lord Pearson, p. 190, and Lord Diplock, p. 200. Lord Diplock qualified the decision in *The Lady Gwendolen* as being wrong but only insofar as it related to Lord Justice Denning's comparison of a company to a human body without referring to the company's articles. "In so far as there are dicta to the contrary [i.e. contrary to Lord Diplock's speech] in *The Lady Gwendolen* they were not necessary to the decision and, in my view, they were wrong", p. 200. It appears anyway that a breach of the Prevention of Collision Regulations or rather the Colregs, even if established in civil law to claim damages, would also constitute a breach of the Regulations for the purposes of a prosecution. It is submitted, therefore, that the obligations of an owner defined by *The Lady Gwendolen* apply both in civil and in criminal law. See also above, Chapter 9.6.3.
[429] *The Lady Gwendolen,* CA, p. 339.
[430] *Rederij Erven H. Groen and Groen v. The England (Owners)* [1973] 1 Lloyd's Rep. 373*,* p. 383.
[431] Although, as seen above, a legal owner does not even have to be a registered owner.
[432] In *Tesco Supermarkets Ltd. v. Nattrass,* Lord Diplock spoke about a person who "has the power to control the acts or defaults of the other person", p. 196/197. Although the crucial point was that the regulation in question did not create strict liability offence, the principle ought to be the same.
[433] I.e. if the charterer by demise or ship's manager (i.e. the operator) could not be charged under the term "owner".
[434] See discussion above, Chapter 9.7.1.
[435] "The absolute rule is that the Courts will not recognize a benefit accruing to a criminal from his crime", *Beresford v. Royal Insurance Company Limited* [1938] AC 586, p. 599.
[436] An example from P&I insurance may help illustrate this: "In the vast majority of cases where a member seeks an indemnity in respect of a civil claim, his indemnity claim against the club will not be prejudiced by

This seems different from a civil law obligation in so far as an owner who does not have the operational control of the vessel can agree with, for example, a bareboat charterer to be reimbursed for any damage the vessel caused.[437] A bareboat charterparty would usually not give the registered owner any operational control.[438] The registered owner is under those circumstances not given the opportunity to ensure compliance with navigation regulations. Although the Prevention of Collision Regulations and thereby the Colregs establish strict criminal liability a contract giving the registered owner the right to be reimbursed for fines imposed after the bareboat charterer has contravened the Colregs may be illegal.[439] In consequence the bareboat charterer may not feel bound by the contract and therefore not pay up. That would, therefore, leave the owner having to pay the fine even though he was not at all involved in the contravention of the Colregs.

Thus, my conclusion is that "owner" in the Prevention of Collision Regulations[440] means operator[441] or any person in charge of the management control of the vessel.

9.8. Conclusions

These conclusions will address the two main aspects of this Chapter which were the MCA policy and the general problem of selecting the right defendant.

9.8.1. MCA policy

Enforcement through prosecution by the MCA appears not to target masters and crew members. The MCA policy is not in favour of charging seafarers when they have not attracted any personal culpability.[442] Whereas I fully agree with that approach it suggests a systemic failure in the enforcement of merchant shipping health, safety and environmental legislation. The majority of contraventions are offences of strict liability[443] which Parliament created to have persons punished regardless of their "knowledge, state of mind, belief or intention".[444] By re-introducing an analysis of a suspect's culpability the

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virtue of the fact that the claim is tainted by criminality where the *mens rea* is mere negligence or carelessness or where it is an offence of strict liability which has been committed innocently", SJ Hazelwood, *P. & I. Clubs, Law and Practice,* 2000, p. 148, referring to the Court of Appeal in *Beresford v. Royal Insurance Company Limited* [1937] 2 KB 197 (which was confirmed by the House of Lords), p. 219. Lord Wright in that case says on p. 219/220: "…the Court must, we think, apply the general principle that it will not allow a criminal or his representative to reap by the judgment of the Court the fruits of his crime… The principle has been applied not only in the authorities quoted above but also in many decisions dealing with varied states of fact and applications of the same or similar principle. These are all illustrations of the maxim ex turpi causa non oritur action [no action can be based on a disreputable cause]. The maxim itself, notwithstanding the dignity of a learned language, is, like most maxims, lacking in precise definition. In these days there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would, it seems, afford no moral justification for a Court to apply the maxim."
Whether or not the owner has personal fault, though, is not the subject of a trial in cases of strict liability as that would defeat the whole purpose of the strict liability system. In fact any evidence proving the guilt is probably not even admissible, see *R v. Sandhu,* Court of Appeal, 10 December 1996, transcript p. 4-5.

[437] See *BP Exploration,* para. 54, where Lord Clyde points out that the owner "can make a contractual provision for recovery from any person to whom he charters the vessel".

[438] See above, "Barecon 2001", clause 10(b).

[439] *Beresford v. Royal Insurance Company Limited* [1938] AC 586, p. 598. It is rather doubtful in this context that "Shipman 98", cl. 11.3 would apply to fines. It appears from the BIMCO comments on cl. 11.2 and 11.3 that criminal liability was not really contemplated as a basis for possible indemnity. One reason to assume this is that criminal liability cannot really arise "in connection with the performance of the Agreement", cl. 11.3, lines 362/363, as the agreement would be illegal if it would have agreed criminal activities. However, strict criminal liability, as shown above, will attach without any guilty mind.

[440] Regulation 6(1).

[441] In the sense of the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997, SI 1997 No. 2367, reg. 2(1): "'operator' in relation to a ship includes any owner, charterer, manager and agent of the ship" who, it would probably have to be added for the purposes of the Prevention of Collision Regulations, is in control of the vessel.

[442] Or, as the MEM, chapter 2, s. 2, Annex C, states unless "they are personally culpable".

[443] See above, Chapter 9.5.

[444] *R v. Milford Haven Port Authority* [2000] 2 Cr. App. R.(S.) 423*,* p. 432-433

MCA ironically uses the prosecutor's discretion to bypass the will of Parliament. This would appear to suggest that either the MCA is wrong in applying such a policy or the concept of strict liability in merchant shipping health and safety legislation is outdated and needs overhauling.[445]

Even if the MCA policy was wrong the EnU does not seem to be staffed or equipped in a manner that would allow extensive investigations of all breaches of merchant shipping legislation.[446] With a staff of four trained enforcement officers, who do not all have a maritime background and have no formal legal training, the number of cases which can be handled per year would appear to be rather limited.[447] Also, the final decision as to whether or not a prosecution should go ahead is not currently taken by somebody with experience in the maritime industry.[448]

The annual budget[449] of the EnU is currently £182,000.[450] This amount has to be balanced against the average cost of trials[451] and the additional operational cost of investigations.[452] Although overseas investigations seem hardly ever to take place because of the legal hurdles to overcome,[453] the budget does not seem to allow for extensive investigatory activity.[454]

In addition to these potential financial restrictions Surveyors appear to be rather reluctant to recommend prosecutions.[455]

It would seem to follow that despite the uncertainties for a master and seafarer as to the collection and use of evidence for a prosecution[456] the practical risk of being prosecuted would seem to be rather small. This conclusion, however, does not cover cases of alcohol abuse which, when found out, would appear always to lead to a prosecution.[457]

9.8.2. Charging

It emerges that charging and convicting RMS in the "Mulheim/Ratingen" case can only have been made on the basis of RMS, the manager, being treated as owner which in my view was correct. But by not charging either of the two masters nor the OOW of "RMS Mulheim" the prosecution seems to have applied its discretion outside of the principles upon which strict criminal liability is based.

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[445] See below, Chapter 15.
[446] If only looking at the numbers of port state control inspections and the breaches that are established on foreign flagged ships it would appear to be impossible to contemplate investigating and also prosecuting them, let alone all the breaches established on UK flagged ships, see above, Chapter 6.
[447] It would appear that around 120 new cases are opened with a roll over of about 90 cases every year, see Annex 16, question 7.
[448] The Director responsible for the decision whether or not to prosecute is the ex-Director of Finance for the Valuation Office Agency, see MCA press notice of 16 April 2008. See Annex 16, question 15.
[449] It would appear to be the operational budget not including staff salaries.
[450] Head of the EnU, Annex 16, question 12 (May 2008).
[451] Magistrates' Court £5,000 and Crown Court £50,000, see Head of the EnU, Annex 16, question 13.
[452] Such as, for example, travel and subsistence, specialist advice, or legal opinions prior to prosecutions brought.
[453] Head of the EnU, Annex 16, question 21.
[454] But according to the Head of the EnU, Annex 16, question 12, "over the past years the number of staff has increased and the budget in real terms has decreased. However, what has decreased is the contingent allowance for Crown Court trials. Clearly I seek to get good value for money from any aspects of expenditure. The budget does not dramatically effect what is undertaken, it does however effect timing in as much as with routine cases we will group evidence collection in any location together, and it does make me consider all options regarding the collection of sufficient evidence. It does not effect the decision to prosecute and should the defence escalate matters by going to a higher court we will go with them and in these cases it is accepted by the MCA that my budget may be overspent."
[455] Because they prefer detention as a means of enforcement, see above, Chapter 2.3.
[456] See above, Chapter 3.2.3.
[457] Because an alternative measure such as a "conditional caution" cannot yet be applied by the MCA, see above Chapter 9.3.

The MCA policy particularly requires the relevant prosecutor to weigh up several factors which will "figure strongly" in the final decision whether or not to prosecute.[458] It would seem that in this context it has to be kept in mind that strict liability has been created by Parliament because the particular activity in question is so unwanted that it imposed "criminal punishment on anyone who does or does not do that thing".[459] The latter seems to suggest that independently of the general principle not to automatically prosecute a suspect[460] if "that thing" has happened the persons falling under strict liability would all be guilty. The text of the Prevention of Collision Regulations

> "where any of these Regulations is contravened, the owner of the vessel, the master and any person for the time being responsible for the conduct of the vessel shall each be guilty of an offence,…"[461]

suggests by using the conjunctive "and" that those persons are the owner and the master and/or the OOW. If it is in the public interest they, therefore, ought to be charged. The default position in cases of strict liability would appear to be a prosecution because of the undesirability of the relevant activities[462] and the assumption that strict liability will encourage stricter vigilance.[463] It would seem that strict liability by itself already indicates a public interest based on the above mentioned undesirability of the offence.

Applying the MCA policy only to bring a prosecution when the individual has attracted personal culpability appears to be incompatible with the principle of strict liability because it would re-introduce dependency on responsibility of the individual which strict liability cannot depend on.[464] It would, therefore, appear that only factors which are void of any reference to the guilt of a person ought to be used by the prosecution to establish grounds for not bringing charges.

It seems to follow that out of the six criteria which are said to figure strongly in the decision to prosecute[465] it is only those which do not refer to the *mens rea* of the defendant that ought to be used to establish the public interest. The only criteria that may fall into the latter bracket appear to be "the seriousness of the offence"[466] and that "the defendant's previous convictions or cautions are relevant to the present offence".[467] The other four criteria, i.e. the likelihood for a significant sentence, the defendant being in a position of trust, proof that the contravention was premeditated and the fact that the defendant may continue to pose a danger if not prosecuted, seem to include an assessment of guilt.

It would appear that the MCA policy to prosecute "owners rather than individuals"[468] ought not to be applied for an offence of strict liability. Instead, the prosecution has to make its decision by establishing whether or not charges are required in the public interest.[469]

With all of this in mind it is hard to understand why neither of the masters of any of the two vessels nor the OOW of "RMS Mulheim" was charged.[470] The offences would appear to have been rather serious as they were potentially life threatening. The master of "RMS Ratingen" himself provided proof three days after the incident in Shoreham that he

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[458] MEM, Chapter 2, s. 4.3.1, quoted above, Chapter 9.4.
[459] Lord Bingham in *R v. Milford Haven Port Authority* [2000] 2 Cr. App. R.(S.) 423, p. 433.
[460] See above, Chapter 9.2.
[461] Regulation 6(1).
[462] *R v. Milford Haven Port Authority,* p. 433.
[463] As was for example found to be the case in *R v. Muhamad* [2003] QB 1031, para. 22.
[464] *Federal Steam Navigation,* p. 530.
[465] See MEM, chapter 2, s. 4.3.1.
[466] Although even here a prosecutor would have to be careful not to assess the individual but only the offence as such. A breach of the look-out requirements would, for example, appear to be more serious when there was no person on the bridge than when only the OOW was present but no dedicated look-out.
[467] For both see MEM, chapter 2, s. 4.3.1.
[468] See above, Chapter 9.7.
[469] See also below, Chapter 12.2.4. (*(a) The prosecution and the owner and the master of the "Borden"*).
[470] For the facts of the case see Chapter 10.

continued to pose a danger to the seafaring community[471] which the MCA, if following its own catalogue of criteria, should have taken into account.[472]

In the following three Chapters I will discuss prosecution action in relation to the main trigger points[473] beginning with groundings and followed by breaches of the Collision Regulations before addressing pollution.

[471] File MS 10/74/284, Sentencing Schedule, para. 43.
[472] Although, considering that it was an offence of strict liability the MCA ought not to have done so because guilt is a significant aspect of the criterion of evaluating potential future danger to the seafaring community.
[473] See above, Chapter 1.6.

Chapter [10] – Prosecutions and groundings

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10.1. Introduction

This Chapter deals with the prosecutions under the first "enforcement trigger" listed in the Marine Enforcement Manual.[1] Groundings were selected for analysis because of their inherent threat to people and the environment, and because they usually indicate negligence, ignorance, incompetence or a safety management failure and as such combine a number of subjects which are highly relevant in the discussion of merchant shipping legislation.

Files on grounding represent, in my categorisation of 207 files, a total number of 10 or 4.8%.[2] Of the recorded 65 successful prosecutions on the MCA website I only allocated two cases to the trigger "grounding", which represent a total of 3.1%.[3] A discrepancy arises for three reasons. First, successful prosecutions cover the period between 1 January 2001 to 31 December 2005, whereas the files seen only cover the time between May 2002 and September 2005. Secondly, the number of files seen are 207 out of the 374 which it would have been theoretically possible to view had they all been available. Thirdly, for example, I recorded conviction no. 57[4] under "Colregs" because convictions were made under the Prevention of Collision Regulations[5] and ISM Regulations, even though the file was listed under "grounding", because I put the file list together by identifying "grounding" as the key word under "facts and charges".[6]

Grounding is, for the purposes of enforcement as defined by the MCA,

> "where a vessel touches the ground or, where there is little water, touches the bottom of the sea, harbour, river, lake, etc. and is therefore unable to move."[7]

This definition does not cover temporary groundings, such as bottom contact, which do not leave the vessel unable to move. Such groundings may nevertheless have a severe impact in that the hull may be holed or the vessel may suffer other structural damage.

The restricted definition, however, does not appear to stop an investigation being commenced, as file no. 485 demonstrates; here the vessel refloated with the incoming tide and thereby was able to move.[8] The definition therefore appears in practice to cover both a vessel being only temporarily stuck, e.g. in tidal waters on an outgoing tide, and when it is permanently grounded unless refloated with external help.

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[1] MEM, chapter 1, s. 2.1. - 2.14. See above, Chapter 1.6.
[2] See Annex 1, s. 1.
[3] See Annex 7.
[4] "RMS Ratingen", "RMS Mulheim".
[5] The Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996, SI 1996 No. 75, hereafter "Prevention of Collision Regulations", including the Colregs.
[6] See Annex 1.
[7] MEM, chapter 1, s. 2.1.1.
[8] See Annex 1, s. 1, "Groundings".

As a "grounding" itself is at first sight not a breach of merchant shipping legislation, this trigger requires further clarification as to what may actually constitute a breach of the law. Consequently, the MCA advises[9] any attending Surveyor to establish the underlying reasons for the grounding which are said to fall generally into the three categories of "human failings", "effects of a natural phenomenon" or "mechanical failings". Possible causes given are broken down into "proper look-out" (which should probably rather read "improper look-out"), "weather" and "construction/equipment", and relevant applicable merchant shipping legislation is listed which might be affected as a consequence of a grounding.

Under "Proper look-out" the enforcement manual refers to Rule 5 of the Colregs, fatigue, unsafe operations[10] and individual actions that would be covered by MSA 95 s. 58.[11] "Weather" refers to possible breaches of MSA 95, ss. 58 and 100 and to the ISM Regulations.[12] "Construction/equipment" finally suggests the possibility of a breach of various merchant shipping regulations.[13]

An attending Surveyor is encouraged to advise the EnU as soon as possible if he has reason to believe that the grounding has been caused by a significant breach of safety regulations rather than unavoidable circumstances.[14]

The 10 groundings recorded[15] led only to two convictions.[16] The other eight incidents, which concerned fishing vessels (five), small passenger boats (two), and one cargo ship, did not go to trial for various reasons.

In one incident[17] where the grounding appears to have happened just inside the baseline[18] no pollution charges were brought despite pollution having occurred. The officer of the watch (OOW) was not prosecuted because he could not be tracked down and the skipper was not co-operative. The file was eventually closed because the investigation ran out of time.[19]

In five incidents a "notice of concern"[20] was sent. Reasons given were, amongst others, that the skipper "was full of self criticism"[21] and "there is little to be served by prosecuting someone who has learned from his mistake",[22] or the skipper cannot be seen as a

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[9] MEM, chapter 1, s. 2.1.1.
[10] In the sense of MSA 95, s. 100.
[11] MEM, chapter 1, s. 2.1.2.a.
[12] The Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, SI 1998 No. 1561, hereafter "ISM Regulations".
[13] For example, to name but two, the Merchant Shipping (Safety of Navigation) Regulations 2002, SI 2002 No. 1473 (hereafter "Safety of Navigation Regulations"), or the Merchant Shipping (Cargo Ship Construction) Regulations 1997, SI 1997 No. 1509.
[14] MEM, chapter 1, s. 2.1.3.
[15] Annex 1, s. 1.
[16] See below, next page.
[17] File MS 10/74/254.
[18] For the term "baseline" see UNCLOS, Art. 5 (quoted after A Bernaerts, *Bernaerts' Guide to the 1982 United Nations Convention on the Law of the Sea,* 1988); see also discussion on "Jurisdiction" below, Chapter 11.5. In the UK the baseline is established by an Order in Council, see Territorial Sea Act 1987, s. 1(1)(b). According to s. 1(4) of the Act the Territorial Waters Order in Council 1964 and the Territorial Waters (Amendment) Order in Council 1979 shall continue to have effect.
[19] Summary proceedings under the MSA 1995 have to be commenced in the UK within six months of the date the offence was committed, or within two months after the defendant has returned to the UK if he was out of the country. The ultimate deadline of a prosecution is three years from the day the offence was committed. See for all the MSA 1995, s. 274(1).
[20] "A notice of concern (NoC) is issued when we have investigated a case but there is insufficient evidence to meet the criteria contained in the code for crown prosecutors, however, we may well have discovered some bad practices that may or may not be legal. A NoC is a non accusatory letter pointing out areas where the MCA has concerns about their operational practices", Head of the EnU, Annex 16, question 10. See also above, Chapter 9.4.
[21] File MS 10/74/294.
[22] File MS 10/74/294.

criminal but "a bit stupid",[23] or a look out was kept but navigational aids were not made use of,[24] or not enough evidence was found or existed,[25] or it could not be found out what really happened.[26] Another OOW was not prosecuted although he "verged on the incompetent".[27] He was no longer in the UK, and the only option left seemed to have been to report him to his national authorities.

These eight incidents which did not go to trial suggest that a defendant is best off when delaying the case as much as possible,[28] when not at all co-operating with the MCA/EnU, when ensuring that no evidence is available, when showing serious concern and remorse, and, particularly, when a foreign nationality helps a successful departure to a foreign jurisdiction before the case can be investigated properly.[29]

The remaining two incidents led to convictions based upon three different successful charges.

One OOW was fined £400 after pleading guilty, probably to charges of intoxication with alcohol.[30] The relevant news release (there was no other information on file) does not give much detail other than mentioning a breathalyser and blood test and referring to the Railways and Transport Act 2003.[31] According to s. 78(1)(c) and (2) of the Act an OOW is guilty of an offence when the proportion of alcohol in his breath, blood or urine[32] exceeds the prescribed limit of s. 81(1). Prosecutions based on alcohol abuse appear to be safe to get a conviction as the evidence is usually speaking for itself.[33]

The second conviction[34] highlights two other legal implications of a grounding[35] and caused considerable coverage in Lloyd's List.

> "There was something of the comical about the stranding on the Cornish coast of the little RMS MUHLHEIM in 2003, after the sole occupant of the bridge got his trousers turn-ups caught in the pilot chair and knocked himself cold before a crucial navigational waypoint."[36]

However, neither the MCA nor West Cornwall Magistrates' Court seem to have considered the grounding to be funny and the company, after pleading guilty, was fined £20,000 for four different charges plus £22,227 costs. In the related incident of "RMS Ratingen" which was tried together with "RMS Mulheim"[37]

> "The pilot saw that the pilot ladder on the RMS Ratingen was not rigged. However owing to a low freeboard on the RMS Ratingen, the pilot was able to simply step onboard and climb over the rails. After which the pilot made his way to the bridge where he found the Master alone on the bridge asleep in a chair."[38]

It appears that it was advantageous for the prosecution that both incidents happened shortly after another on 22 March 2003 ("RMS Mulheim") and 24 March 2003 ("RMS Ratingen") respectively. This coincidence may well have strengthened the prosecution's

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[23] File MS 10/74/309.
[24] File MS 10/74/293.
[25] File MS 10/74/313 and 317.
[26] File MS 10/74/355.
[27] File MS 10/74/485.
[28] According to MSA 95, s. 274(1)(a), proceedings have to be brought within six months from the date of the offence.
[29] See also below Chapter 11.2. where lack of evidence, passing the file on to a foreign maritime administration, or a lapse of too much time also caused various investigations to close.
[30] File MS 10/74/464.
[31] Annex 5, Convictions 50/2004.
[32] S. 78(3).
[33] See also above, Chapter 9.4.3. "Drunken Sailor".
[34] Annex 6, Conviction 57/2005.
[35] File MS 10/74/284, breach of Colregs and thereby the Prevention of Collision Regulations and the ISM Regulations; two different incidents involving the same company but different ships resulting in four different charges were both heard together by Camborne Magistrates' Court.
[36] Lloyd's List, 11 January 2005, p. 5.
[37] Both vessels were operated by the same manager, Sentencing Schedule, on file, para. 6.
[38] Sentencing Schedule on file 284, para. 40.

case.[39] For two similar incidents to happen on two different ships of the same company in different parts of the sea at about the same point in time, is a good indication that the safety management procedures may not have been followed by either the ships, the company, or both.[40]

File 284 gives access to the "Schedule Information" and the "Sentencing Schedule" provided to the Court, but the information about the conviction could only be taken from the MCA's news releases on the website.[41]

Charges for each incident were brought under the Prevention of Collision[42] and under the ISM Regulations.[43]

The defendant for all charges was RMS, the beneficial owner and manager[44] for "being the manager of and as such the person responsible for the conduct of the vessel".[45] No prosecution was brought against either of the two masters or any watchkeeping officer.

Charges were also not brought under the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997,[46] but a breach of the Regulations was used to establish one of the ISM contraventions.[47]

The convictions both under the Prevention of Collision, and the ISM, Regulations deserve a more detailed analysis as seemingly obvious charges for failing to keep a proper look-out were not brought against the ship's personnel. By excluding the master and the OOW from the prosecution the EnU followed its policy "to prosecute owners rather than individuals except when they are personally culpable".[48]

In the light of the convictions in the RMS case I will in the following main sections analyse look-out requirements[49] and also breaches of ISM Regulations.[50] In this context it is, in my view, unavoidable also to address problems associated with strict criminal liability and the question of whether or not the prosecution always chooses the correct defendant.

10.2. Look-out

The maintenance of a proper look-out is required by the "International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978", as amended, and its Annex 1, the STCW Code (STCW Code). The requirement for a look-out, as such, is regulated by the "The International Regulations for Preventing Collisions At Sea, 1972" (Colregs).

Chapter VIII of Part A of the STCW Code, dealing with look-out in section A-VIII/2, part 3-1, paras. 13 to 16, is incorporated into English law by the Watchkeeping Regulations, reg. 11(1). These Regulations also apply to UK registered ships anywhere in the world and to foreign flagged vessels in UK waters.[51] Regulation 17(2)[52] imposes a penalty on "any

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[39] Combining the two incidents also involved having only one defendant for both incidents, see below.
[40] See below, chapter 10.5.
[41] Corresponding prosecution no. 57 in "Convictions 2005" .
[42] Reg. 6(1), for breaching reg. 4 in not complying with the Colregs.
[43] Reg. 19, for breaching reg. 4 by not complying with requirements of the ISM Code - see Schedule Information, pp. 3 and 6; see also below Chapter 10.5.
[44] Sentencing Schedule s. A.6.; "RMS is charged as the owner of two vessels: RMS Mulheim and RMS Ratingen", Sentencing Schedule A.4. See also above, Chapter 9.6.
[45] Schedule Information, p. 1.
[46] SI 1997 No. 1320, hereafter the "Watchkeeping Regulations".
[47] See below Chapter 10.5.
[48] MEM, chapter 1, s.1.2.4.
[49] Chapter 10.2., 10.3., 10.4.
[50] Chapter 10.5.
[51] Reg. 3(b).
[52] Of the Watchkeeping Regulations.

master who contravenes regulation … 11(1)". The owner, manager or bareboat charterer of a ship is not subject to a penalty for any contravention of reg. 11. A company[53] can only become subject to a penalty if it contravenes regs. 4(2) or (4), 5(1) or (3), or 14.[54]

The Colregs are incorporated into English law by the Prevention of Collision Regulations, reg. 4(1)[55] and are set out in MSN 1781[56] in their current version. The Prevention of Collision Regulations apply also to foreign flagged vessels in UK waters.[57] Regulation 6(1) of the statutory instrument imposes a penalty on "the owner of the vessel, the master and any person for the time being responsible for the conduct of the vessel" contravening any of the Prevention of Collision Regulations.

Section A-VIII/2, Part 3-1, para. 13 of the STCW Code, Part A, requires that

> "A proper look-out shall be maintained at all times in compliance with rule 5 of the International Regulations for Preventing Collisions at Sea, 1972 and shall serve the purpose of:
> .1 maintaining a continuous state of vigilance by sight and hearing as well as by all other available means, with regard to any significant change in the operating environment;
> .2 fully appraising the situation and the risk of collision, stranding and other dangers to navigation; and
> .3 detecting ships or aircraft in distress, shipwrecked persons, wrecks, debris and other hazards to safe navigation."

A vessel to which the Colregs apply, "shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances".[58]

Thus, keeping or maintaining a proper look-out is not just the activity of identifying another vessel or other obstructions by sight and hearing but is rather a concept of making an accurate assessment of vessels in the vicinity[59] including the surrounding environment.[60] A proper look-out includes, for example, monitoring the progress of the vessel by systematic radar observation.[61] It appears that in the case of "RMS Mulheim" and "RMS Ratingen" there was neither a visual nor an audible look-out, let alone an assessment of the situation the vessel found herself in.

In my view, it is apparent that watchkeepers on both vessels did not comply with para. 13 of section A-VIII/2, Part 3-1 of Part A of the STCW Code nor with Rule 5 of the Colregs.

Any such violation appears to constitute an offence under both statutory instruments.[62] It seems to be necessary to analyse whether or not criminal liability under those Regulations is strict. If that is the case an owner, master or watchkeeper would have no defence except the statutory defence of the relevant Regulations.[63]

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[53] "'company' includes an individual, and in relation to a ship means the owner of the ship or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over all the duties and responsibilities imposed on the company by the Regulations annexed to the STCW Convention", reg. 2(1).
[54] Reg. 17(1); see also table no. 2 below.
[55] The Prevention of Collisions Regulations.
[56] Merchant Shipping Notice no. 1781, published by the MCA, see www.mcga.gov.uk. For the legal status of an MSN see below, Chapter 6, fn 255.
[57] Reg. 2(1)(a).
[58] Colregs, Rule 5.
[59] See, for example, *The Global Mariner* [2005] EWHC 380 (Admlty), para. 83.
[60] STCW Code, Part A, section A-VIII/2, part 3-1, subsection 13.2.
[61] *The Eleftheria* [2006] EWHC 2809 (Comm), para. 52 (i).
[62] The Prevention of Collision Regulations, reg. 6, and the Watchkeeping Regulations, reg. 17.
[63] That means the defence that the person charged "all reasonable precautions to avoid the commission of the offence", the Prevention of Collision Regulations, reg. 6(2); or, as in the Watchkeeping Regulations, reg. 17(9) "he took all reasonable steps to avoid commission of the offence".

10.3. Look-out violation as an offence of strict criminal liability

In light of the four aspects[64] (1) language of the statutory instrument, (2) nature of the offence (prevention of mischief), (3) objective of the provision and (4) other circumstances I will first look at the Watchkeeping Regulations and follow with a short analysis of the offence in the Prevention of Collision Regulations.

10.3.1. The Watchkeeping Regulations

Regulation 17 reads as follows:

> "**17.** - (1) Any company which contravenes regulation 4(2) or (4), 5(1) or (3), or 14 shall be guilty of an offence punishable on summary conviction by a fine not exceeding the statutory maximum, or on indictment by a fine, or (in the case of an individual) by imprisonment not exceeding 6 months, or both.
>
> (2) Any master who contravenes regulation 4(6), 5(2), 11(1) or (2), 12, 13 or 14 shall be guilty of an offence punishable on summary conviction by a fine not exceeding the statutory maximum, or on indictment by a fine, or by imprisonment not exceeding 6 months, or both.
> (2A) revoked
>
> (3) Any member of the crew who contravenes regulation 4(6) shall be guilty of an offence, punishable on summary conviction by a fine not exceeding level 3 on the standard scale.
>
> (4) Any chief engineer who contravenes regulation 11(3) shall be guilty of an offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale.
>
> (5) Revoked.
>
> (6) Revoked.
>
> (7) Revoked.
>
> (8) Revoked.
>
> (9) It shall be a defence for a person charged with an offence under these Regulations to prove that he took all reasonable steps to avoid commission of the offence.
>
> (10) In any proceedings for an offence under these Regulations consisting of a failure to comply with a duty or requirement to do something so far as is reasonably practicable, it shall be for the accused to prove that it was not reasonably practicable to do more than was in fact done to satisfy the duty or requirement."

Aspect (1) Language

The language of reg. 17(1) and (2) does not appear to require *mens rea* to find the accused guilty. A contravention of the Regulations establishes guilt of the company[65] or the master.[66] However, two qualifications are made in regulation 17(10). One refers to the burden of proof and the second allows for a statutory defence of the accused.

The burden of proof to show that it was not reasonably practicable to do more to satisfy the duty or requirement is reversed and is on the accused and not on the prosecution.[67] Even though these two qualifications could create doubt as to the establishment of strict liability[68] this point does still not appear to establish that *mens rea* is required to find the

[64] See above, Chapter 9.5.
[65] Reg. 17(1).
[66] Reg. 17(2).
[67] Reg. 17(10).
[68] Although Lord Reid appears to suggest in *Sweet v. Parsley* that, by putting the burden of proof on the accused or by substituting *mens rea* with gross negligence, Parliament chose a third and fourth way in addition to proving *mens rea* or establishing strict liability, before an accused could be found guilty, p. 150. It

accused guilty. Regulation 17 nowhere specifies a mental element other than the inherent mental awareness of company or master of having to do something which is "reasonably practicable". But the latter does not negate the strict character of reg. 17 as the subjective element of *mens rea* is replaced by the objective parameter of having to be reasonably practicable.[69] Unless, therefore, the defendant can prove that it was not reasonably practicable to satisfy the duty under the Regulations a contravention appears to have been established because "a more skilful or diligent man in his position might have done better".[70]

> "But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care."[71]

It follows, in my view, that the intention expressed by Parliament is that non-compliance with the Regulations initially constitutes an offence irrespective of the state of mind of the defendant as to the *actus reus*. As a second step the accused can then prove for his defence that it was not reasonably practicable to do more than was in fact done. The latter, however, does not require a particular state of mind and does not address a particular intent on part of the accused. The only thing it appears to say is that reasonable steps which would normally be taken[72] by a person in that situation are the yardstick for whether or not enough had been done in the first place. Even awareness of what is reasonably practicable does not appear to be required because "a person who lacks the necessary intent or belief may nevertheless commit the offence" because that person's "crime lies in his negligence".[73]

A measure would not have been reasonably practicable if its very low degree of risk involved would have been met with a very high cost of taking the measure.[74] It is not at issue what the subjective state of mind of the accused was, but only what the objective test of "reasonably practicable" suggests should have been done.

The language, therefore, appears not to stand in the way of categorising the offence as being one of strict liability.

Aspect (2) Nature of the Offence

The Watchkeeping Regulations impose a maximum penalty of six months imprisonment on company[75] or master.[76] Depending on the point of view a six months prison sentence would appear to be significant, but is not one of utmost seriousness.[77]

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seems to follow that a reverse burden of proof is not an indication establishing the requirement for *mens rea* if no other words or implications exist.

[69] See Lord Nicholls in *B v. DPP*, p. 462 and also *Muhamad,* par. 18.

[70] Lord Reid in his dissenting opinion in *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256*,* p. 272.

[71] Lord Diplock in *Sweet v. Parsley,* p. 163.

[72] See, for example, *R v. Mei Hua Yu, Chang Shu Yu* [2006] EWCA Crim 349*,* where the Court of Appeal in 2006 discussed the meaning of "reasonably practicable" in the context of the s. 23 of the Criminal Justice Act 1988.

[73] *B v. DPP*, p. 462.

[74] *HTM Ltd*, para. 20; Lord Goff in his speech in *Austin Rover Group Ltd. v. Her Majesty's Inspector of Factories* [1990] I.C.R. 133*,* which the Court of Appeal in *R v. HTM Ltd* [2006] I.C.R. 1383, para. 22 thinks "correctly identifies the proper approach", said on p. 139 "If, for example, the defendant establishes that the risk is small, but that the measures necessary to eliminate it are great, he may be held to be exonerated from taking steps to eliminate the risk on the ground that it was not reasonably practicable for him to do so."

[75] Reg. 17(1).

[76] Reg. 17(2).

[77] Which the Court of Appeal in 2002 also said about an offence subject to a maximum prison sentence of two years, *Muhamad,* para. 16.

More recently in *Muhamad*[78] the Court of Appeal suggested that it is open to doubt that an offence subject to a maximum penalty of two years' imprisonment would today be regarded as a "truly criminal" offence. The judgment thereby gives the points made by Lord Reid in 1969[79] a more current relevance. In a less serious offence less weight would have to be attached to the presumption that *mens rea* is required.[80]

This approach appears also to support strict liability of an accused under the Watchkeeping Regulations for it seems to be accepted that

> "some conduct - often not truly criminal in the way most people would understand that expression - carries with it such grave risk of endangering public safety or is so heavily the cause of public concern, that it can properly be punished without the need for the establishment of any degree of mens rea."[81]

Thus the nature of an offence under the Watchkeeping Regulations would not stand in the way of understanding it to be one of strict liability.

Aspect (3) Mischief

The Watchkeeping Regulations deal with safety matters related to the operation of ships and the mischief they intend to prevent appears to be the operation of ships by unqualified crews.[82] Such an activity would, like operating any other means of transport, involve a potential danger to public safety. And

> "the rationales behind the creation of such offences is generally that they cover conduct which of itself is potentially dangerous to other members of the public and accordingly the public interest overrides the need to prove knowledge on the part of the alleged offender that he was in fact committing an offence or did the act complained of with any particular mens rea."[83]

It appears that the mischief sought to be prevented also justifies categorising an offence under reg. 17 as an offence of strict liability.

Aspect (4) Other Circumstances

Obtaining evidence when a breach of the Watchkeeping Regulations has occurred would usually prove to be rather difficult,[84] time consuming and thereby potentially costly. It may therefore be assumed that it is not in the public interest to sacrifice safety at sea to procedural obstacles in a criminal prosecution for the violation of safety regulations. "Guilt is to be found in the commission of the act - no particular frame of mind has to be established before guilt is established."[85]

It is submitted that the aforesaid also supports the assumption that an offence under reg. 17 constitutes an offence of strict liability.

The statutory defence in reg. 17(10) does not do away with strict liability but simply allows an accused to exculpate himself. Any mental element or the state of mind of the defendant does not affect whether or not it was reasonably practicable to do more than was in fact done. The parameter for what is reasonably practicable is what a skilful and

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[78] para. 14.
[79] "There is a long line of cases in which it has been held with regard to less serious offences that absence of mens rea was no defence", Lord Reid in his dissenting opinion in *Warner,* p. 271.
[80] *Muhamad,* par. 15.
[81] Hooper LJ in *R v. Jackson* [2007] 1 WLR 1035, p. 1040, in a recent (2006) Court-Martial Appeal Court decision.
[82] See, for example, reg. 11 which requires the master to ensure compliance with STCW provisions.
[83] *R v. Jackson,* p. 1040.
[84] As the information available is usually held by the vessel and no witnesses other than the ship's personnel may be available.
[85] *R v. Jackson,* p. 1040.

diligent person would have done in the same situation,[86] and whether the risk involved is commensurate with the cost involved for the necessary measure.[87]

It would appear that a breach of the Watchkeeping Regulations constitutes an offence of strict criminal liability.

10.3.2. The Prevention of Collision Regulations

Aspect (1) Language

The Prevention of Collision Regulations provide in reg. 6(1) that the person responsible for the conduct of the vessel "shall be guilty of an offence". The language clearly suggests that to be guilty an owner, master or any other person is not required to have any *mens rea.* A breach of the Regulations is sufficient to establish an offence.[88]

It is a defence for the accused if he can show that all reasonable precautions were taken.[89] "Reasonable precautions" seem to have a meaning equivalent to "reasonably practicable".

> "The duty under each section is broken if the specified consequences occur, but only if "so far as is reasonably practicable" they have not been guarded against. So the company is in breach of duty unless all reasonable precautions have been taken, and we would interpret this as meaning "taken by the company or on its behalf."[90]

It appears that in a similar way to the Health and Safety at Work Act 1974[91] neither the available defence in reg. 6(2) nor "the relevant offences are … concerned with the defendant's state of mind. His intent is irrelevant."[92]

The language of the Regulations does therefore not appear to stand in the way of classifying an offence to be one of strict liability.

Aspect (2) Nature of the offence

The Prevention of Collision Regulations impose in reg. 6(1) a maximum sentence of two years' imprisonment and a fine on indictment only, and on summary conviction, for any infringement other than one of Rule 10(b)(i), a fine not exceeding the statutory maximum.[93] In line with the aforesaid it can be concluded that an offence attracting a fine not exceeding two years' imprisonment or even only the statutory maximum ought to be classified as a violation of the law of not the utmost seriousness.[94] In addition, a violation does not appear to contain an element of "true criminality".[95]

> "A strict responsibility may be acceptable in the case of statutory offences which are concerned to regulate the conduct of some particular activity in the public interest… The promotion of health and safety and the avoidance of pollution are among the purposes to be served by such controls. These kinds of cases may properly be seen as not truly criminal."[96]

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[86] See above, Lord Diplock in *Sweet v. Parsley,* p.163.
[87] See above, Lord Goff in *Austin Rover Group Ltd v. Her Majesty's Inspector of Factories,* p. 139.
[88] See also, for example, *R v. Gateway Foodmarkets Ltd* [1997] I.C.R. 382, p. 386; in that case the Court of Appeal held that s. 2(1) of the Health and Safety at Work Act 1974 establishes strict liability; "It is a duty to 'ensure ... the health, safety and welfare at work of all his employees.' If the duty is broken, the employer is guilty of an offence (s. 33(1)(a))".
[89] Regulation 6(2).
[90] *Gateway Foodmarkets Ltd*, p. 386; quoted with approval in *HTM Ltd*, para. 26.
[91] In *Gateway Foodmarkets Ltd* the Court of Appeal was dealing with a breach of the Health and Safety at Work Act 1974.
[92] *R v. Davies* [2002] EWCA Crim 2949, para. 20.
[93] Reg. 6(1)(b).
[94] See above, *R v. Muhamad*, para. 16.
[95] At least other than when it would be done with intent or gross negligence.
[96] Lord Clyde in *R v. Lambert* [2002] 2 AC 545*,* para. 154.

The offence under the Prevention of Collision Regulations "is regulatory rather than prescriptive".[97] The Prevention of Collision Regulations are concerned with public safety and have been enacted by the Secretary of State for Transport in exercise of the powers conferred to him by MSA 95, s. 85,[98] which empowers the Secretary of State to make safety Regulations.[99]

This appears to suggest that the nature of the offence rather invites the conclusion that it should be classified as one of strict liability.

Aspect (3) Mischief

It is rather obvious that breaching the Colregs could, but does not have to, lead as a serious consequence to a collision between ships. A collision in turn may cost lives, cause pollution and destroy property.

The Prevention of Collision Regulations give effect to the Colregs.[100] It is the purpose of the Colregs to avoid the dangers of collisions.[101] The mischief to be prevented is not the commission of a "true crime",[102] but the non-compliance with the Colregs. A more serious breach may trigger a prosecution under a different statute or part of the common law.[103]

This, again, does not suggest there to be an obstacle to classifying an offence as one of strict liability.

Aspect (4) Other circumstances

Even though it is not clear what would be required to demonstrate that strict liability would further the objectives of the Regulations, by analogy with the Court of Appeal's decision in *Muhamad* it is suggested that "the only way to avoid running the risk of committing the offence"[104] would have been to be more vigilant and ensure compliance with the look-out requirements of the Colregs.[105] If penal measures are considered to work at all,[106] the threat of strict liability will most likely "encourage greater vigilance"[107] of any owner, master and OOW.

Conclusion

In conclusion, it is submitted that both sets of Regulations[108] impose strict liability on an accused. The only defence for the two watchkeepers, the master and the OOW, would have been to prove that all reasonable steps,[109] or to show that all reasonable precautions,[110] were taken to avoid commission of the offence. It is not clear whether or not such a defence for the watchkeeper was considered in the "Mulheim" case as it appears that neither master nor the watchkeeper on "RMS Mulheim" was charged

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[97] Analogous to the approach in *Davies,* para. 15.
[98] See headnote in both statutory instruments.
[99] MSA 95, s. 85.
[100] The Prevention of Collision Regulations, reg. 4(1), also Explanatory Note, first sentence.
[101] Which may be deduced from Rule 2(b): "In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision…".
[102] See above, for example, *R v. Lambert*, para. 154.
[103] See for example Conviction 29/2003, Annex 4, where the second officer was found guilty of manslaughter after a collision with another vessel.
[104] *R v. Muhamad,* para. 22.
[105] reference is here made to the incidents involving the "RMS Mulheim" and the "RMS Ratingen".
[106] See below, Chapter 10.8.
[107] *R v. Muhamad,* para. 22.
[108] The Watchkeeping Regulations and the Prevention of Collision Regulations.
[109] The Watchkeeping Regulations, reg. 17(9).
[110] The Prevention of Collision Regulations, reg. 6(2).

because the MCA stuck to its policy to prosecute owners rather than masters or watchkeepers.[111]

By applying its own policy to prosecute the company instead of the master or crew the MCA may correctly follow its own procedures. But the prosecution does not appear to address all guilty persons in these two incidents.[112] Furthermore, a prosecution of the company only under the Prevention of Collision Regulations appears to be diverting the attention from the underlying cause, although perhaps not from the correct defendant. Still, doubts may be raised as to the very lawfulness of the choice of defendant made by the prosecution.[113]

But before I will deal with the details of the prosecution and trial in the "Mulheim" case I will first discuss what I would call "the underlying cause".

10.4. The Hours of Work Regulations

A minute on the "Mulheim/Ratingen" file addresses the fact that it was

> "most unlikely, we can prove that an individual has exerted undue pressure on the Master and despite the Masters [sic] assertion that the company did put pressure on him".[114]

The minute on file mentions under point two that a prosecution of individuals under the MSA 1995, s. 277[115] was contemplated at some stage but as "some breaches apply directly to managers without the use of s. 277" it was not pursued.

It is not evident what pressure the master of which ship was talking about, but what appears to be clear is that both master and chief officer on "RMS Ratingen" were under work pressure as both were contravening the hours of work requirements[116] on a vessel crewed by a total number of six, consisting (for each of both vessels) [117] of master, chief officer, chief engineer, two ordinary seamen and a cook. Even though on "RMS Mulheim" a breach of the Merchant Shipping (Hours of Work) Regulations 2002[118] was not detected the prosecution considered "that the cumulative effect of working such consecutive hours is not conducive to the safe operation of a ship".[119]

Regulations 15 and 16 of the Hours of Work Regulations also apply to foreign flagged vessels in UK waters,[120] and thereby to "RMS Ratingen"[121] which was voluntarily[122] visiting UK waters.[123] The vessel "was approaching the Shoreham anchorage to pick up a pilot prior to berthing".[124]

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[111] File 284, minute of 11 January 2005, para. 2(b); see also above, Chapter 9.6.
[112] See also the discussion above in Chapter 9.6.
[113] According to the Head of the EnU, Annex 16, question 19, why masters and watchkeepers were not charged, "We concluded that the Master and Chief Officer were not working in a safe environment and that environment was put in place by the company."
[114] Memo of 7 May 2004 on file MS10/74/284 under point 3.
[115] Which addresses the criminal liability of "director, manager, secretary or other similar officer of the body corporate", see s. 277(1).
[116] Sentencing Schedule, para. 39.
[117] *Ibid*., paras. 27 and 38.
[118] SI 2002 No. 2125, hereafter the "Hours of Work Regulations".
[119] Sentencing Schedule, para. 29.
[120] Reg. 3(1)(b).
[121] Both "RMS Ratingen" and "RMS Mulheim" were flying the flag of Antigua & Barbuda, Sentencing Schedule, para. 17
[122] The power to inspect a ship is restricted to ships which voluntarily call at a port of the UK, reg. 15(1).
[123] As reg. 15(1) requires for a foreign flagged ship before it can become subject to an inspection under the Hours of Work Regulations.
[124] Sentencing Schedule, para. 40.

Regulation 15(1) entitles a UK Inspector[125] to verify that the requirements of regs. 4, 7 and 9 are complied with, thereby setting the standards for the master's and company's[126] obligations.

Regulation 15(2) specifies that an Inspector shall determine the table of scheduled hours of rest[127] is posted-up (a), that records of daily hours of rest are being maintained (b), and that there is evidence that such records have been endorsed by the relevant flag State authority (c). The latter requirement does not refer to any regulation in particular and not meeting it does not attract any penalty,[128] which makes the provision rather pointless for enforcement purposes.[129]

It is initially the choice of an Inspector whether or not a ship will be inspected.[130] However, it appears that an Inspector must check the daily hours of rest records if any of the requirements of reg. 15(3)(a) or (b) are satisfied. That provision requires either a complaint to be received by the MCA,[131] or the Inspector "from his own observations on board" to believe that the seafarers may be unduly fatigued.[132] If either of the latter two points is established the Inspector shall in a more detailed inspection determine whether the hours of rest requirements[133] have been duly observed.[134]

A complaint made to the MCA can come from any person with an interest in the safety of the ship,[135] and a pilot having found the master asleep on the bridge (as was the case on the "RMS Ratingen") would therefore satisfy such a requirement.

The basis on which an Inspector may believe that a seafarer is unduly fatigued is not explicitly defined in the provisions. But as the Hours of Work Regulations stipulate what the minimum hours of rest must be[136] it seems to be appropriate to assume that initially any breach of the minimum hours of rest would suggest that a seafarer is unduly fatigued.[137] Yet, it appears that fatigue[138] will not only be caused by a breach of the Regulation requirements but can be triggered by a variety of factors having to do with crew-specific factors (e.g. sleep and rest), management factors (ashore and aboard ship, e.g. staffing policies and schedules), ship-specific factors (e.g. ship design and equipment reliability) and environmental factors (e.g. temperature, humidity, noise).[139]

If an Inspector initially does not intend to inspect the hours of rest records when coming on board he does not appear to have much of an opportunity to detect fatigue. Unless the

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[125] As defined by MSA 95, s. 258(1)(a), (b) or (c), according to reg. 2(1). See above, Chapter 2 and Tables 1 and 2 in that Chapter.
[126] According to reg. 2(1) "'company', in relation to a ship, means the owner or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner".
[127] Required by reg. 7(1).
[128] Reg. 20 ("Penalties") does not refer to reg. 15 and no other specific provision for an endorsement by the flag State exists, the breach of which would be subject to a penalty.
[129] Other than that non-compliance may constitute a violation of the Merchant Shipping (International Safety Management (ISM Code) Regulations 1998 (hereafter "ISM Regulations"), SI 1998 No. 1561, reg. 4, in that the company may not have complied with the requirements of the ISM Code, s. 1.2.3.1; non-compliance may also constitute negligence in a civil case.
[130] "A relevant Inspector may inspect a ship…", reg. 15(1).
[131] Reg. 15(3)(a).
[132] Reg. 15(3)(b).
[133] Laid down in reg. 5.
[134] Reg. 15(3) tailpiece.
[135] Reg. 2(1).
[136] "…the minimum hours of rest shall not be less than…", reg. 5(1).
[137] Reg. 15 tailpiece requires the Inspector to determine in a more detailed inspection whether the standards of reg. 5 have been complied with.
[138] The IMO uses the following definition of fatigue in MSC/Circ.1014 (12 June 2001), p. 4, s. 2: "A reduction in physical and/or mental capability as the result of physical, mental or emotional exertion which may impair nearly all physical abilities including: strength; speed; reaction time; coordination; decision making; or balance."
[139] See, for example, IMO MSC/Circ.1014, *Guidance on Fatigue Mitigation and Management* , 2001, p. 5 *et seq*.

Inspector has reason to believe that the master or crew members are unduly fatigued,[140] the Inspector would only be able to identify a breach of the hours of rest requirements when consulting the ship's records. But he would only be forced to inspect those records when he has reason to believe that a seafarer may be fatigued. This seems to be a *circulus vitiosus* in that to be forced to investigate the Inspector must believe that the seafarer is fatigued which the Inspector could, in most cases, only have reason to believe when he has inspected the records.[141]

It is interesting to notice in this context that the so-called "mini codes" used in the Report of Inspection by both the flag State and the PSC Inspector to record defects do not list a breach of the rest requirements as a possible defect.[142]

Regulation 4 makes it a duty of the company, the employer and the master to ensure that a seafarer gets at least the minimum hours of rest, which are laid down in reg. 5. The term "seafarer" includes the master of the ship.[143]

According to reg. 7(1) the master is required to ensure that a table of scheduled hours of rest is posted-up in a prominent place on the ship.

Regulation 9 provides for the master to maintain a record of the seafarer's daily hours of rest.

According to the prosecution, the time sheet for the chief officer of the "RMS Ratingen" showed that the hours of work requirements were violated in February on 10 occasions and timesheets for the master were not available.[144] No attempt appears to have been made to prosecute either master or company under the Hours of Work Regulations. The accessible MCA files do actually not suggest that there has ever been a case in which a master or a company has been prosecuted for breaching the Hours of Work Regulations.[145]

This is surprising given that the IMO Marine Safety Committee considers that

> "The effects of fatigue are particularly dangerous in the shipping industry. The technical and specialized nature of this industry requires constant alertness and intense concentration from its workers. Fatigue is also dangerous because it affects everyone regardless of skill, knowledge and training."[146]

Also Nautilus UK, a British union representing about 18,000 maritime professionals,[147] sees fatigue to be "the primary factor affecting ship's safety".[148] IMO and Nautilus are not alone by addressing fatigue as a major factor to interfere with vessel safety. Particularly as regards vessels with only two watchkeeping officers,[149] as the "RMS Ratingen" was, it

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[140] Reg. 15(3)(b); if he will notice, for example, that master or crew are impaired in their aspects of human performance, see more details in MSC/Circ.1014, p. 9, s. 6.
[141] "Fatigue is dangerous in that people are poor judges of their level of fatigue", MSC/Circ.1014, p. 9, s. 6. I find it doubtful that an Inspector will be able to identify fatigue unless certain parameters are available against which to measure it. There is no indication in any of the enforcement or detention files which I inspected that fatigue has ever been detected other than by noticing a breach of the hours of rest records.
[142] See Annex 20 and Annex 21, "Mini Codes", codes 0253 to 0272 under "Training-Cert.-Watchkeeping for Seafarers (0200 Series)".
[143] Reg. 2(1).
[144] Sentencing Schedule, para. 39.
[145] None of the files I inspected (Annex 1) nor any of the information in the list of convictions (Annex 7) suggests a prosecution of such a breach. On the question of whether it is still the case that there are no prosecutions for hours of work violations Captain Smart, said that "My memory does not allow me to be positive on this point, but for a long time now we have been requesting hours of work records either at the initial fact finding stage or at full investigation stage", Annex 16, question 18.
[146] MSC/Circ.1014 (12 June 2001), p. 1.
[147] According to an information provided by Mark Dickinson, Assistant General Secretary of Nautilus UK on 25 September 2008.
[148] According to R Hoole, *Stress and Fatigue,* reporting in the journal "Seaways" statements by the Nautilus UK Senior National Secretary, December 2006, p. 30.
[149] I.e. master and mate.

has been identified for some time that doing the job within the parameters of the hours of rest requirements appears to be impossible.

> "For the chief officer, these additional responsibilities are likely to include the supervision of cargo operations, the correction of the nautical charts and publications, the supervision and co-ordination of the maintenance of deck fittings and equipment, the maintenance of fire-fighting equipment, and the role of the safety officer. For the master, these will include all of the requirements placed upon him by international conventions such as STCW and SOLAS, the recently introduced ISPS Code, and company commercial and safety management systems. It follows that either some, or all, of these tasks are not completed, or the minimum hours of rest regulations are contravened."[150]

The data evaluated by the MAIB study

> "highlight(s) the link between small dry cargo ships operating in the short sea trade, manned with just two deck officers, and groundings caused by fatigue."[151]

The MCA itself seems to be concerned about fatigue, going by the fact that a study into seafarer fatigue by the Seafarers International Research Centre (SIRC)[152] was supported by the UK flag State administration.[153] In a leaflet the MCA quotes the SIRC study saying that

> "Reduced safety due to fatigue will increase the risk of accidents that may lead to loss of live, environmental damage and huge economic cost".[154]

The UK went even further when together with Spain and Sweden it submitted a document to the IMO "Sub-Committee on Standards of Training and Watchkeeping"[155] and proposed that

> "a Master and two other deck officers on vessels of more than 500gt should be considered normal in all circumstances".[156]

By not prosecuting the expressly noticed violation of the Hours of Work Regulations[157] the prosecution in the case of "RMS Ratingen" forewent the opportunity to stress the importance of having to follow these provisions and bring home to both master and employer the importance of complying with this specific piece of legislation as

> "the number of recent groundings in which fatigue has been a contributory factor, indicates that the hours of rest regulations are not having significant effect with regard to the bridge watchkeeping arrangements on many vessels."[158]

Even though the prosecution addressed the fact of a missing look-out or second person on the bridge under the Prevention of Collision Regulations, the underlying cause of what appears to have been too small a crew for the vessel, is not highlighted. It is safe to assume that the vessel will have held a valid Safe Manning Document,[159] as such lack would have been addressed during the investigation. Any inspection or survey of any vessel always requires a check of the validity of all ship certificates before progressing with the inspection.[160]

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[150] MAIB, *Bridge Watchkeeping Safety Study*, 2004, p. 13.
[151] *Ibid*., p. 10.
[152] "A person may feel fatigued, performance may deteriorate and the body's physiological functioning may be affected. These three outcomes, subjective perceptions, performance and physiological change are usually recognised as the core symptoms of acute fatigue", A Smith, P Allen, E Wadsworth, *Seafarer Fatigue: The Cardiff Research Programme*, 2006, p. 16, hereafter "*Seafarer Fatigue".*
[153] *Seafarer Fatigue,* p. 2, also on MCA webpage (26 June 2008).
[154] *Fatigue in Seafarers*, leaflet, MCA, May 2007.
[155] STW 38/13/7/Rev.1, 24 November 2006.
[156] *Ibid*., para. 15.1.
[157] For "RMS Ratingen", see Sentencing Schedule, para. 39, where it is stated that "the Chief Mate did not regularly benefit from the compulsory rest period of ten hours per day", followed by listing the contraventions.
[158] MAIB, *Bridge Watchkeeping Safety Study*, 2004, p. 13.
[159] See the Watchkeeping Regulations, reg. 5(1).
[160] Paris MoU, s. 3.1.

Making the point of too small a crew would, however, also backfire on UK flagged ships as the bad practice of only carrying two watchkeeping officers (one of whom is the master) is similarly well known in the UK.[161] A prosecution for a violation of hours of rest in such cases will inevitably lead towards the identification of unsafe but legal manning practices which are also condoned by the UK flag State administration on the basis of international guidance from various international bodies.[162]

In my view, the incident of "RMS Ratingen" highlighted the need for the UK to take relevant measures against the individual master/OOW for this particularly important contravention. For road traffic, driver fatigue has been recognised by the House of Lords in *Cantabrica Coach Holdings Ltd v. Vehicle Inspectorate*[163] to be "apparently a significant factor in road accidents in the United Kingdom".[164] In air traffic a fatigued pilot is seemingly subject to "lose his licence to fly and then have difficulty in regaining it".[165] In merchant shipping, it appears, rhetorical measures are so far the only method applied to combat fatigue.[166]

It seems that a good opportunity was missed when not bringing charges against any person under the Hours of Work Regulations. The significant breach of the Regulations on "RMS Ratingen" in which both owner[167] and master were involved could have caused loss of life, serious injury or significant pollution and damage to property.[168]

The master was not prosecuted under this statutory instrument nor under the Watchkeeping, or the Prevention of Collision, Regulations either. The following section will discuss the ISM Regulations and look at the outstanding prosecution under those Regulations.

10.5. International Safety Management Code

SOLAS makes compliance with the International Safety Management Code (ISM Code) mandatory for the company[169] and ship.[170] The ISM Code is incorporated into English law, and its application has been compulsory since 1 July 2002 for every company and any ship operated by it to which the statutory instrument applies.[171] Non-compliance may result in suspension of the operation of ships by that company,[172] in detention of a ship[173] or in prosecution of company, master, designated person (DP), or any other person having committed the offence.[174]

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[161] See, for example, MAIB report 10/2004 (August 2004) about the collision between the "Hoo Finch" and the "Front Viewer", p. 1.
[162] MSN 1767, para. 13.3 refers to IMO, ILO, International Trade Unions, World Health Organisation and the EU.
[163] [2001] UKHL 60.
[164] Lord Steyn in *Cantabrica Coach Holdings Ltd v. Vehicle Inspectorate,* para. 24.
[165] *Mathews v. DHL Air Limited,* unreported, 28 September 2005, Employment Appeal Tribunal, Westlaw Transcript, para. 6.
[166] The above mentioned (Chapter 10.4.) proposal by Spain, Sweden and the UK to consider a master and two deck officers to be the normal crew composition in all circumstances on ships of more than 500 gt was not accepted by the international shipping community: "This being too prescriptive, the Working Group did not agree to take that on board", STW 38/WP.5/Rev.1 (29 January 2007), para. 24.
[167] In the sense in which the prosecution made use of the term owner addressing RMS as the beneficial owner and manager, see above, Sentencing Schedule, s. A.6.
[168] See definition of "significant breach" in MEM, chapter 1, s. 1.1.
[169] The ISM Code uses the expression "company" in a wide sense to include owners, managers and bareboat charterers who have assumed responsibility for the operation of the ship: see reg 2(1) and the ISM Code, s. 1.1.2 qoted below.
[170] SOLAS, Chapter IX, Reg. 3.1.
[171] The ISM Regulations (SI 1998 No. 1561), regs. 3(2)(b), 3(3), 4. Between 1 July 1998 and 30 June 2002 the ISM Regulations already applied to passenger ships, tankers and bulk carriers, reg. 3(2)(a). According to reg. 3 (1)(b) the Regulations apply to both UK and foreign flagged ships.
[172] Regulation 16(1).
[173] Regulation 16(2)(b).
[174] Regulation 19.

Even though supervision of operations, or detention, under reg. 16 of the ISM Regulations, does not restrict the powers of the Secretary of State to UK companies only,[175] the concept of sovereignty suggests that suspension of a company's operation of its ships can only be enforced by the flag State[176] and not by the Secretary of State in respect of foreign ships.[177] The Secretary of State only verifies that a UK company complies with the provisions of the ISM Code.[178] Other flag States have their own certification organisations which authorise the operation of companies within their jurisdiction.[179]

For the case of "RMS Mulheim" and "RMS Ratingen" a suspension of the company's operation was therefore not an option open to the UK.

If a company is considered unable to operate its ships without creating a risk of "serious danger to safety of life", "serious damage to property", or "serious harm to the environment", the operation of its ships may be suspended.[180] For two reasons this appears to set a higher threshold than is required for criminal action to be taken against the company.

First, a suspension is at the discretion of the authorised person[181] auditing the system. In practice the authorised person has hardly any guidance as to how to interpret the legal requirements ("serious danger to safety of life", "serious damage to property" and "serious harm to the environment").[182] Secondly, a suspension may only be considered when any of the three risks listed is a "serious" one.

On the other hand, a prosecution requires the existence of a public interest.[183] Guidance for its determination is contained within the *Prosecutor's Code*. More importantly, though, charges can be brought, for what appears to be an offence of strict liability,[184] for "any contravention" without any qualification as to the seriousness of the breach.[185]

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[175] "'Company' means the owner of a ship to which these Regulations apply", ISM Regulations, reg. 2(1). The Regulations apply to other ships while they are in UK waters, reg. 3(1)(b).
[176] SOLAS, Chapter IX, reg. 4.1 (Document of Compliance) or 4.3. (Safety Management Certificate), in connection with Chapter I, Part A, reg. 2.b.
[177] See, for example, UNCLOS, Art. 94(2)(b), according to which the flag State shall assume jurisdiction under its internal laws. The ISM Regulations, therefore, allow a foreign ship to be detained for missing ISM certification, see reg. 5 in connection with reg. 16(2)(b), but do not permit the withdrawal of an ISM certificate, reg. 18(1)(a), other than when it had been issued by the Secretary of State, reg. 18(1)(a). If a company is not able to operate ships without creating a risk of a serious danger to life etc. the Secretary of State may suspend the operation of ships, reg. 16(1)(b)(i) and tailpiece. However, it would appear that only foreign flagged ships within UK waters can be suspended as the Regulations only apply to foreign ships while they are in UK waters, reg. 3(1)(b). It also seems to follow from reg. 18(1)(a) that only certificates which have been issued by the Secretary of State can be suspended or cancelled (*inclusio unius est exclusio alterius* – the mention by name of the one is the exclusion of the other).
[178] Regulation 9(1).
[179] SOLAS, Chapter IX, reg. 4.1. and 4.3. See also Lord Donaldson, *The ISM Code: The Road to Discovery,* 1998, p. 532.
[180] Regulation 16(1)(b)(i)-(iii).
[181] In the UK this will usually be a MCA Surveyor, as the MCA, as a rule, does not delegate ISM audits to recognised organisations (such as Classification Societies).
[182] Regulation 16(1)(b) tailpiece. The MSA 95, s. 94(1A) does not provide any help as it only defines a "dangerously unsafe ship" and uses a similar terminology for that definition by referring to "serious danger to human life".
[183] See above, Chapter 9.3.
[184] See above, discussion on strict liability. The master, for example, shall operate his ship in accordance with the SMS (reg. 7). If he does not do that, independent of any *mens rea*, he contravenes reg. 19(3) and thereby commits an offence.
[185] Regulation 19(1), (2), (3), (4), and (6).

10.5.1. ISM Code and detention[186]

During the detention discussion I will only focus on foreign flagged ships. UK flagged vessels would not appear to pose the same problems as the Secretary of State can withdraw the safety management certificate (SMC).[187]

A (foreign) ship may become subject to detention when regs. 4[188] or 5 of the ISM Regulations are not complied with. If

> "an authorised person is satisfied on inspecting a ship that there is a failure to comply in relation to that ship with the requirements of regulation 4 or 5 he may detain the ship."[189]

Regulation 5 will not be discussed as it is only about the duty to hold valid certificates.

Regulation 4 provides that

> "every company shall comply with the requirements of the ISM Code as it applies to that company and to any ship owned by it or for which it has responsibility".

Company, according to reg. 2(1)

> "means the owner of a ship to which these Regulations apply or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner".

This definition is closely modelled on the relevant section in the ISM Code according to which

> "Company" means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code."[190]

The definition in reg. 2(1) would not appear to include the master. The reference to both manager and bareboat charterer seems clearly to focus on the senior management of the company and not on the on-board management of the particular vessel. Although the master has the responsibility for the safety of the ship[191] he would, therefore, not be covered by the term "company" in reg. 4. This, in conclusion, would only seem to allow a detention of a ship under reg. 4 for a non-compliance with the ISM Code by the master or his crew if he were to be covered by the requirement that the *company* must comply with the ISM Code in relation to the ship. It would appear arguable that that is not the case because the company does not seem to be responsible for the day-to-day implementation of the SMS on board other than having to "carry out internal safety audits to verify whether safety and pollution-prevention activities comply with the safety management system".[192]

It would seem that the key requirement[193] a company has to comply with in relation to any of its ships is to "develop, implement and maintain"[194] a safety management system

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[186] This discussion was not had in detail under Chapter 7.3.2. because I believe it is better placed in this Chapter to clarify the role of, and relationship between, both detentions and prosecutions under the ISM Regulations.
[187] Regulation 18(1)(a). Technically this does not represent a detention, but as vessels are not permitted to go to sea without a valid SMC (reg. 5(3)(b)), it practically is a detention of the vessel. If the certificate is removed and the ship is in UK waters a detention would usually follow such measure. If the ship is not detained but goes to sea without a valid SMC the company, but not the master, commits an offence: reg. 19(1).
[188] The ISM Regulations apply to both UK and foreign flagged vessels, reg. 3(1). Other than reg. 5(3) reg. 4 by default, therefore, applies to UK and foreign flagged ships.
[189] Regulation 16(2)(b).
[190] ISM Code, s. 1.1.2.
[191] *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, p. 160.
[192] ISM Code, s. 12.1.
[193] ISM Regulations, reg. 4.
[194] ISM Code, s. 1.4.

(SMS) for each vessel. The main obligations of the company appear to concern procedural matters.[195] Operational obligations of the company, for example, seem to be restricted to management activities which enable the on-board personnel, including the master, to comply with the safety management system.[196]

For instance, "the Company should ensure that the master is fully conversant with the Company's safety management system".[197] This suggests that the company has to satisfactorily train and familiarise the master in and with the SMS so that he is in a position to understand and implement the system appropriately. To ensure

> "that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established by the Company",[198]

it is required to "ensure that inspections are held at appropriate intervals"[199] and appropriate corrective action is taken.[200] The corrective action on defects found, however, is the responsibility of management personnel for the area in question.[201] The management personnel for the area would appear to be shipboard personnel as it is the crew who carries out such inspections.[202] It would seem that only when the ship cannot correct the defect with its own means would the responsibility for corrective action move up a level into the shore-based operation of the company.[203]

In consequence it would appear that a detention of a ship is only possible when a company, rather than a master, does not comply with its tasks set by the ISM Code. It would not seem part of those requirements to ensure the daily compliance with the ISM Code by the master and crew beyond the company's obligations to provide an appropriate SMS, to verify through audits the compliance of safety and pollution prevention activities with the SMS, and to carry out corrective actions triggered by these audits.

Even though it would not seem to be possible to detain a foreign flagged ship for non-compliance with the SMS by master and crew, a detention would still be permitted under the MSA 1995 or other merchant shipping regulations provided the relevant requirements are met.[204] In addition, a ship would violate the ISM Regulations if it were to depart without carrying a safety management certificate (SMC)[205] or where the SMC had been withdrawn.[206]

Sailing without a valid SMC constitutes an offence only by a company, but not the master of the ship.[207]

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[195] These are, to name but a few, to establish a safety and environmental policy (s. 2.1); to document the responsibility and authority of personnel who manage work relating to safety and pollution (s. 3.2); to define and document the master's responsibility (s. 5.1); to establish procedures for the preparation of plans for key shipboard operations concerning the safety of the ship and the prevention of pollution (s. 7); to establish programmes for drills and exercises to prepare for emergency actions (s. 8.2) etc.
[196] See also the discussion above in Chapter 7.3.2.
[197] ISM Code, s. 6.1.2.
[198] *Ibid*., s. 10.1.
[199] *Ibid*., s. 10.2.1.
[200] *Ibid*., s. 10.2.3.
[201] "The management personnel responsible for the area involved should take timely corrective action on deficiencies found", ISM Code, s. 12.6.
[202] The ISM Code makes it clear in s. 10.4 that "the inspections mentioned in 10.2 as well as the measures referred to in 10.3 should be integrated into the ship's operational maintenance routine".
[203] As the company has to ensure that corrective action is taken (ISM Code, s. 10.2.3) the company ought to have procedures in place defining the steps necessary to carry out corrective action including its own responsibility for ensuring that spare parts or specialist service personnel is provided when required by the vessel.
[204] See above, Chapter 5.
[205] ISM Regulations, reg. 5(2).
[206] Which the Secretary of State can do for UK flagged ships, ISM Regulations, reg. 18(1)(a) in connection with reg. 5(3)(b).
[207] See above, Chapter 10, fn 187.

A detention of "RMS Mulheim" was obviously no longer necessary[208] and as regards "RMS Ratingen" the option of a detention does not appear to have been used. Instead the MCA went for prosecution under the ISM Regulations.[209]

10.5.2. ISM Code and prosecution

The basis of a breach sufficient for a detention is similar to one for a prosecution.[210] It is sufficient for the authorised person to be satisfied "that there is a failure to comply",[211] for example, with reg. 4. This is similar to the wording of reg. 19(1) which provides that any contravention of reg. 4 shall be an offence whereby the provision stipulates "that every company shall comply with the requirements of the ISM Code".[212] The degree of failure to comply is not qualified in either regulation.

The following table sets out who may be prosecuted under the ISM Regulations and for what contravention.

Table 13: Breaches subject to a penalty in the ISM Regulations,[213] regs. 19(1) - (6)

Breach of Regulation	**4**	**5**	**6**	**7**	**8**	**8(2)**	**16(1(b)**	**18(3)**
Subject	comply	DOC+SMC	SMC	operation	DP	DP duty	Suspension Breach	Any Person
Company	**yes**	**yes**	**yes**	no	**yes**	no	**yes**	**yes**
Master	no	no	no	**yes**	no	no	no	**yes**
Designated Person	no	no	no	no	no	**yes**	no	**yes**
Any Person	no	no	no	no	no	no	no	**yes**

Breach of Regulation = breach of the relevant regulation which is subject to a penalty under reg. 20;
Subject = subject dealt with in the relevant regulation;
Master = yes denotes criminal liability of the master;
Company = yes denotes criminal liability of the company as defined by reg. 2(1);
Designated Person = yes denotes criminal liability of the person designated by the company under reg. 8(1);
Any Person = yes denotes criminal liability of any person.

Identical charges for both incidents were brought in the "Mulheim/Ratingen" cases under reg. 19(1) for contraventions of reg. 4 against the company for failing to comply with the ISM Code s. 1.2. (Objectives) and also s. 2.1. (Safety and Environmental-Protection Policy)

> "in that the safety management system ("the System")…failed to comply with the material part of the Seafarers' Training, Certification and Watchkeeping (STCW) Code Chapter 8…in that the system failed to document procedures relating to the need to ensure that the duties of the officer in charge of the navigational watch, look-out and helmsperson are separated in the hours of darkness."[214]

The Designated Person[215] whose responsibility it is "to ensure compliance with the company safety management system"[216] and in particular

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[208] As the vessel came to rest on the rocks and could not sail anyway.
[209] Regulation 19.
[210] Leaving aside the evidential requirement which for a prosecution ("beyond reasonable doubt" – see *Mancini v. Director of Public Prosecutions* [1942] AC 1, p. 11) poses a higher persuasive burden than for a detention ("satisfied", reg. 16(2)(b) – see *R v. Liverpool City Justices, ex parte Grogan* (1990) 155 JP 450, DC, 1 October 1990, p. 5 in download. See also above, Chapter 7.3.2.
[211] Regulation 16(2)(b).
[212] Regulation 4.
[213] The ISM Regulations.
[214] Schedule Information, p. 2+3.
[215] "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

> "that proper provision is made for each ship to be so manned,…that it is fit to operate in accordance with the safety management system and with statutory requirements"[217]

was not charged and neither was the master whose duty it is "to operate his ship in accordance with the safety management system".[218]

The company was fined the statutory maximum of £5,000 for each offence.[219] In the absence of a published judgment it has to be assumed that the prosecution was successful with its presentation of what constitutes a contravention and also with the charges brought.

This case and another two Magistrates' Court decisions[220] appear to be the only decisions on what may constitute a breach of ISM provisions.[221] Even though these decisions cannot be used as precedents they constitute indicators as to what appears to be accepted as an ISM violation by the lower courts.

In the case of "Gerhein G" which grounded in the Thames, the Dartford Magistrates' Court fined the managers of the vessel who pleaded guilty for a breach of the ISM Regulations.[222]

In the second case in Folkstone the owners of two fast ferries pleaded guilty for 16 breaches of Merchant Shipping Regulations, amongst them ISM Regulations, for operating "Rapide" and "Diamant" without any certification.[223]

The only guidance publicly available at High Court level on what may constitute a breach of the ISM Code appears to have been given in two cases concerning *The Torepo* (oil tanker) and *The Eurasian Dream* (car carrier). The subject matter of these cases was the question of unseaworthiness and the aim was to determine fault in civil, but not in criminal, law. Both the fire on the "Eurasian Dream" (23 July 1998) and the grounding of the "Torepo" (12 February 1997) were pre-ISM incidents. However, the "Torepo" was in the process of gaining ISM certification,[224] and the "Eurasian Dream" "was subject to the same company [ISM] procedures as all other vessels in the fleet".[225]

I recognise that the civil cases are about establishing fault to determine liability for loss or damage. Hence, a breach of the ISM Regulations is only relevant for a civil claim if the contravention has caused or contributed to the damage. For a prosecution a breach of the Regulations and thereby the ISM Code does not require fault, or *mens rea*, or damage, because any breach constitutes an offence of strict liability.

It would seem to follow that a breach of ISM Regulations which caused damage will by default almost always constitute a criminal violation of the law. On the other hand, a breach of the Regulations which does not cause, or contribute to, damage will not trigger any civil liability, and will therefore probably be irrelevant for the outcome of a claim. Thus an analysis of breaches of ISM Regulations in civil cases will usually be narrower than it

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include monitoring the safety and pollution-prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required", ISM Code, s. 4.

[216] Regulation 8(2)(a).

[217] Regulation 8(2)(b).

[218] Regulation 7.

[219] Which can be deduced from the MCA press release (see Convictions 57/2005, Annex 6) as the total fine for four convictions was £20,000.

[220] Convictions 37/2004 (Annex 5 - "Gerhein G") and 56/2005 (Annex 6 - "Rapide" and "Diamant").

[221] But see below the discussion of judgments of the Admiralty Court (*The Torepo* [2002] 2 Lloyd's Rep. 535) and the Commercial Court (*The Eurasian Dream* [2002] 1 Lloyd's Rep. 719).

[222] Conviction 37/2004 (Annex 5). The MCA information does not break down the fine of £3,000 for a breach of Rule 5 (owner) and the ISM Regulations (manager).

[223] Conviction 56/2005 (Annex 6). The fine of £7,000 for the owner for various breaches was not broken down.

[224] *The Torepo,* para. 6.

[225] *The Eurasian Dream*, para. 142.

would be in a criminal case. A civil case may not even address the violation of the Regulations at all.[226]

It appears therefore to be acceptable to take civil cases dealing with identified ISM breaches as some guidance for the criminal law.

10.6. ISM case law guidance

In *The Torepo,* which grounded in the Patagonian Channels near Isla Wellington, Chile,[227] there are limited findings as to the relevance of the ISM Code, other than the satisfactory report of the BP vetting Surveyor that "all in all operational practices on board were good".[228] But guidance from the judgment can be taken from comment on documentary requirements as regards navigation. Without making any statement about the need of having to have documentary guidance in place Steel J dealt with the master's standing orders,[229] night orders,[230] the navigation procedures manual[231] and passage planning.[232] None of the discussions on these points persuaded the judge to find in favour of the claimants for a breach of those procedures other than a slight criticism of the master's decision not to have put down in his night orders to be called to the bridge for the turn off Foot Island.[233]

It is suggested, though, that a lack of any of these procedures would have had an impact to the detriment of the defendant's interest. It appears that the fact that plans and procedures for navigation of the vessel were in place and more or less followed on board, played a significant role in saving the defendant from the finding that his master had set sail from La Plata with an unseaworthy ship. This is supported by the judge's statement that "against this background [passage planning dealt with in the Navigational Procedures Manual], the focus of the claimants attack became the newly pleaded allegation relating to the competence of the master."[234]

As the ISM Code was not applicable to the "Torepo" at the time of the incident no references to any particular section are found in the judgment.

The "Eurasian Dream", which had her cargo damaged and destroyed by fire and herself became a total constructive loss,[235] was not ISM certified at the time of the incident in 1998[236] and would only have been required to be so by 1 July 2002. But the company operated an ISM system and the vessel was subject to and carried copies of the company fleet procedures.[237] Valuable guidance as to the necessary ISM documentation on board can therefore be extracted from this case even though in lack of the ISM Code's direct application the judgment does not refer to any particular sections thereof.

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[226] See, for example, *Davis v. Stena Line Ltd* [2005] 2 Lloyd's Rep. 13, a claim under the Athens Convention, Art. 3 – see para. 4, for the loss of life of a passenger in 2000. The ISM Code will already have applied to the vessel but only indirect reference was made to the ISM Code when the MAIB recommendations to improve the company's procedures were referred to, para. 107. It can be deduced from the case that most likely a breach of the ISM Regulations, reg. 4, had occurred in that the company had not complied with s. 8.1 of the ISM Code which requires a company to "establish procedures to…respond to potential emergency shipboard situations".
[227] *The Torepo,* para. 1.
[228] *Ibid.,* para. 53.
[229] *Ibid.,* para. 63.
[230] *Ibid.,* in particular paras. 112 *et seq*.
[231] *Ibid.,* in particular paras. 89 *et seq*.
[232] *Ibid.,* in particular paras. 96 *et seq*.
[233] *Ibid.,* para. 115.
[234] *Ibid.,* para. 101.
[235] *The Eurasian Dream,* para. 1.
[236] *Ibid.,* para. 57.
[237] *Ibid.,* para. 142.

Unlike the decision in *The Torepo,* Creswell J decided that the *Eurasian Dream* was an unseaworthy ship. He based his decision on his findings under headings of "the vessel's equipment", "competence/efficiency of the master and crew" and "adequacy of the Documentation supplied to the vessel" – all points which are highly relevant in the ISM Code.[238]

Maintenance of ship and equipment is specifically covered under s. 10; qualification, familiarization and training of master and crew are dealt with in s. 6; and documentary requirements for a safety management system are laid down in s. 11 of the ISM Code. In addition, the judge made some comments on the role of the Designated Person although it appears that they were made *obiter.*[239]

As the cargo damage occurred through fire the judge focused on specifics of fire fighting. Nevertheless, it is suggested that general requirements for on board documentation and observations about the role of the Designated Person would apply to any ISM certificated company and vessel in any circumstances.

Criticism as to the ship's equipment concerned an insufficient number of walkie-talkies for which there appears to be no legal carrying requirement[240] and also insufficient breathing apparatuses[241] despite recognising that the number of the latter conformed to SOLAS requirements.[242] Maintenance deficiencies were identified in some defective portable fire extinguishers, a corroded main valve for the CO2 system, and two fire hydrants which had been tied with rope.[243]

The master and crew were found ignorant of dangers posed by carrying cars as cargo [244] and were insufficiently trained in fire fighting.[245]

The vessel's documentation was considered inadequate because no specific fire fighting manual was provided.[246] The manuals were in large parts irrelevant for not being ship specific and were also too voluminous.[247] The master's introductory briefing, despite it being his first time on a car carrier, was a standard letter requesting him to read all company documentation on board which alone would have occupied him for two to three weeks.[248] The Emergency Procedures Manual did not contain relevant guidance and a SOLAS manual was also not on board despite the master having complained about the lack of it.[249]

It appears that if the ISM Code had been applicable, and the vessel had been in UK waters, the company but not the master would have been guilty of several contraventions

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[238] *Ibid.,* para. 155.
[239] The DP is discussed in paras. 55 *et seq.* and reasons for the decision are summarized in para. 155. Para. 156, mentioning witnesses, only refers to the evidence and the shortcomings proved by the witnesses one of which was the DP, but does not evaluate his role again.
[240] Other than that "three two-way VHF radiotelephone apparatus shall be provided on every…cargo ship of 500 tons gross tonnage and upwards", SOLAS, Chapter III, Part B, reg. 6.2.1.1., have to be supplied as part of the life saving appliances of ships.
[241] Para. 151(1) and (3).
[242] Para. 73.5.
[243] Para. 151(2), (3) and (4).
[244] Para. 151(7).
[245] Para. 151(8).
[246] Para. 151(12).
[247] Para. 151(13), (14) and (18); the judgment speaks of "hundreds of pages and about 100 technical equipment manuals" (para. 151(15)(c)). The judge may not have appreciated that by 2008 this has become the norm for safety management systems. The SMS for a small (i.e. approx. 7,000 gt) passenger cum cargo vessel, for example, consists of nine full A4 ring binders: (1) general information, (2) operational instructions, (3) policy manual, (4) emergency procedures manual, (5) technical instructions, (6) cargo instructions, (7) shipboard operations manual, (8) safety instructions, (9) shipboard personnel manual. Richard Pellew, then (3 July 2007) a Principal Surveyor and Lead ISM auditor in the MCA Southampton Marine Office, confirmed that SMS systems on average consist of around 10 full A4 ring binders.
[248] Para. 151(15).
[249] Para. 151(16) and (17).

of reg. 4 of the ISM Regulations. Whereas it seems that as the company's breaches would mainly have occurred under sections 1, 5, 6, 10 and 11 of the ISM Code, the master would have had to answer whether he operated his ship in accordance with the safety management system (SMS).[250] This, however, remains speculation and would probably have required more details on the compliance with company fleet procedures.[251] Details which were provided in the Emergency Procedures Manual suggested that it would have been "misleading and dangerous" for the master to follow the company advice.[252] If the decision of the master to deviate from the manuals would have been deliberate he would have found himself in a predicament: does he have to follow guidance which would be dangerous or rather not follow guidance which makes his action a criminal offence? It appears that whatever decision a master would have made he could have found himself between "ship and pier" if he were to make use of his right of the overriding authority under s. 5.2 of the ISM Code.

On the other hand the ISM Code seemingly provides a solution for a master dealing with a deficient system in that he has the obligation to review the system and report its deficiencies to the shore-based management.[253] But failure to do so would not be an offence by the master if such a requirement would not have been laid down in the SMS because the master would only be guilty of an offence when not complying with the SMS.[254] Even if the SMS provided for a master's review, a master who did not have relevant training, and was therefore ignorant of a particular problem, would not have been able to identify the deficiencies.

What can be concluded is that a master cannot be penalised for not complying with the ISM Code but only for not complying with the safety management system. This is somewhat surprising as the incentive of having to follow a legal requirement (or rather the policing of whether it has been complied with or not) is thereby moved out of the public into the private sphere. The pressure to comply with the ISM Code is on the company and the company will therefore want to ensure that its employees, including the master, satisfy the ISM requirements. Thus the enforcement of compliance with the ISM Code[255] is only subject to disciplinary measures based in employment law.

The provision of a valid SMS to the ship is the duty of the company[256] and the validity of an SMS is certified by the Secretary of State.[257] The Secretary of State is not under any criminal liability if issuing a certificate validating an SMS which is not ISM Code compliant. A possible result is therefore that a ship could be operated under a deficient SMS, which could lead to civil liability such as unseaworthiness in case of the "Eurasian Dream", without the master being criminally liable. The company, however, appears to still be criminally liable as its duty is not restricted to providing a valid SMS to the ship but also to comply with the requirements of the ISM Code.[258]

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[250] The ISM Regulations, reg. 7.
[251] For example, was there documentary evidence on board that (1) all required safety inspections had been carried out regularly?, (2) a schedule of drills existed?, (3) drills were carried out accordingly?, (4) the crew was properly familiarised with their duties, (5) master's standing orders emphasize relevant safety matters?, (6) the SMS review and deficiency reporting was done as required?, (7) procedures for emergencies were in place, known by relevant crew and also followed?; to name but a few relevant items for possible violations of the ISM Regulations, reg. 4, by the master.
[252] Para. 151(16).
[253] ISM Code, s. 5.1.5.
[254] The ISM Regulations, reg. 19(3).
[255] With the exemption of the requirement for the master to follow the SMS on board.
[256] The ISM Regulations, reg. 6.
[257] *Ibid*., reg. 9(2).
[258] *Ibid*., reg. 4; this could also be seen in the convictions referred to above (37/2004, Annex 5, and 56/2005, Annex 6).

In addition to the company the Designated Person also came in for some heavy criticism in *The Eurasian Dream*. The judge described him as an ISM "compliance officer"[259] and did not think that he did his job well.[260]

The Designated Person accepted that the company did not give specific information and advice to the master about gas-tight doors and the quick deployment of CO2. Furthermore, he accepted that it was the company's duty to provide specific instructions about the risks the cargo poses. He agreed that hindsight was not necessary to see the need for certain instructions. The Designated Person did not know whether the master had undergone any fire-fighting training for car carriers, said that there was no overlap with the master's predecessor and accepted that the master was "submerged in paper". When asked about the frequency of fire drills he agreed that, within the company, safety matters were delegated to the master.[261]

It appears that under the ISM Regulations the Designated Person would be in a similar situation to that of the master. Without any more detail of what the particular SMS required it is impossible to measure the Designated Person's performance against it. First, he has to ensure compliance with the SMS,[262] and the criticism of him was rather directed at the role of the company not having provided an efficient system. Secondly, he appears not to have contravened the requirement to ensure that the ship is fit to operate[263] as the parameter is again the SMS, but in addition there are also statutory requirements. There was no finding that the ship had not been operated within statutory requirements other than that the SOLAS training manual was missing,[264] and neither was it said that the vessel was not fit to operate within the SMS. The SMS was deficient but that would have fallen on the company and not on the Designated Person.

The emerging picture indicates that the ISM Regulations really put the emphasis of the delivery of the ISM Code objectives on the company.[265] It is not only that the bulk of the responsibilities, the breach of which can trigger criminal liability, rests with the company,[266] but also that neither master nor Designated Person can be held criminally liable for contraventions of the ISM Code itself as long as their actions are covered by the SMS, however deficient it may have been. In addition to the master, though, the Designated Person has to ensure proper operation of the ship within statutory requirements.

10.7. The Magistrates' Court decision on "RMS Mulheim/RMS Ratingen"

The breaches of the ISM Regulations in respect of which the defendant manager[267] was charged and convicted in each of the "Mulheim/Ratingen" cases[268] were solely documentary breaches in that it was said that the SMS failed to ensure proper watchkeeping.[269] "Primary failings" of the company were that "it failed to give any particular instructions on the company's policy on navigating during hours of darkness."[270] There was also "a lack of direct personnel management", and it was alleged that

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[259] Para. 55; whether the witness was really a "designated person" in the sense of s. 4 of the ISM Code does not matter for this discussion as the only point of interest is the role a proper DP would have to fulfil.
[260] Para. 55, Creswell J's only comment after having addressed a list of shortcomings in the documentary system for what the DP was responsible, was that he was "a most unsatisfactory witness"; para. 58.
[261] For all facts and the quotation see *The Eurasian Dream*, para. 56.
[262] Regulation 8(2)(a).
[263] Regulation 8(2)(b).
[264] See above, *The Eurasian Dream,* para. 151(17).
[265] Which appears to make sense as it is the company who is in direct control of the SMS and whose responsibility it is to develop such a system, ISM Code, s. 1.4. See also above, Chapter 7.3.2.
[266] See table no. 3 above.
[267] File 284, Schedule Information, para. 1; in its web information the MCA speaks about the "owner", see Conviction 57/2005.
[268] I.e. in case of "RMS Mulheim" and "RMS Ratingen".
[269] Schedule Information, pp. 2 and 3.
[270] Sentencing Schedule, para. 44.

> "the monitoring of the timesheets by RMS would have shown that the watch keeping arrangements were insufficient and that the crew were working long hours."[271]

The breach of which the company was accused becomes clearer when in the opening summary after having quoted STCW Code, Part A, Chapter VIII, section A-VIII/2, Part 3-1, paras. 13 – 15 the prosecution stated that

> "Accordingly, RMS were required to put in place and implement a safety management system, which ensured that the officer of the watch did not act as the sole look-out during periods of darkness."[272]

The legal basis of the charges was constructed by alleging a contravention of the STCW Code requirement for maintaining a proper look-out.[273] The breach of ISM legislation according to the prosecution was that

> "…you…the manager…failed to comply with the ISM Code the material parts of which provide as follows:…in that the safety management system ("the System") which operated on board…failed to comply with the material part of the …(STCW) Code Chapter 8 of which provides as follows: *[quoting the text of the STCW Code, Part A, s. A-VIII/2, Part 3-1, paras. 13, 14 and 15]* in that the System failed to document procedures relating to the need to ensure that the duties of the officer in charge of the navigational watch, look-out and helmsperson are separated in the hours of darkness."[274]

The prosecution's case was that in not doing so the company did not comply with ss. 1.2 and 2.1 of the ISM Code. By not complying with the ISM Code the company was said to have contravened the ISM Regulations, reg. 4.

It appears that the prosecution based its ISM related charges on legislation which is not directly applicable to the material facts. The Watchkeeping Regulations,[275] which incorporate the relevant STCW Code provisions, do not require the company to document procedures relating to watchkeeping. The Regulations appear to leave watchkeeping as the sole responsibility of the master and do not impose such a duty on the company.[276] There is, however, guidance in the STCW Code which recommends that

> "4. Companies should issue guidance on proper bridge procedures…"[277]

and in particular

> "5. Companies should also issue guidance to masters and officers in charge of the navigational watch on each ship concerning the need for continuously reassessing how bridge-watch resources are being allocated and used, based on bridge resource management principles such as the following:
> .1 a sufficient number of qualified individuals should be on watch to ensure all duties can be performed effectively;…"[278]

But this guidance would not seem to have been specifically incorporated into English law.[279] Even if it would apply as "hard" law[280] it merely recommends to the company to issue guidance, but not instructions.

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[271] *Ibid*., para. 45.
[272] *Ibid*., para. 24, as regards "RMS Mulheim".
[273] *Ibid*., para. 1, covering both vessels.
[274] Schedule Information, pp. 1-3 ("RMS Mulheim"), and similarly on pp. 4-6 ("RMS Ratingen").
[275] The Watchkeeping Regulations.
[276] See also above, Chapter 10.2.
[277] STCW Code, Part B, Chapter VIII, s. B-VIII/2, Part 3-1, para. 4.
[278] *Ibid*., para. 5.
[279] See the Watchkeeping Regulations, reg. 11 which only incorporates Chapter VIII of Part A of the STCW Code. The requirement for the company to issue guidance on proper bridge procedures (STCW Code, s. B-VIII/2) is not incorporated into UK law despite the obligation in STCW Annex, Chapter VIII, reg. VIII/2 which requires that watchkeeping arrangements and principles are to be observed: "Administrations shall direct the attention of companies, masters, chief engineer officers and all watchkeeping personnel to the requirements, principles and guidance set out in the STCW Code which shall be observed to ensure that a safe continuous watch or watches appropriate to the prevailing circumstances and conditions are maintained in all seagoing ships at all times." The latter text suggests to me that guidance (STCW Code, Part B) shall be observed in the same way as requirements set out in the STCW Code, Part A (which is incorporated into UK law).
But even if "faced with a material disagreement on an issue of interpretation" (*R v. Secretary of State for the Home Department* [2001] 2 AC 477, p. 517) and it would be assumed that one "must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty", as Lord

Consequently a lack of detailed watchkeeping instructions to master and officers in the SMS appears so far not to be a breach of the ISM Code. What could possibly be considered to have been a breach was the company not requesting the master to establish a satisfactory watchkeeping system on board. This could be in breach of s. 1.2.3.[281]

> "1.2.3 The safety management system should ensure:
> .1 compliance with mandatory rules 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."[282]

The obligation under s. 1.2.3.1 refers to "mandatory" rules, but issuing guidance on watchkeeping to the ship is not mandatory for a company.[283] It appears that a breach under this sub-section could therefore not have been established in the RMS case.

Under s. 1.2.3.2, however, it is stipulated that an SMS should take guidelines into account. According to the Sentencing Schedule the company's safety management system stated that

> "Bridge watches shall be set and manned according to regulations and Master's requirements and according STCW-Regulations."[284]

Even though this requires the master to take due account of the STCW Code which, it appears, would include s. B-VIII/2, none of the guidance required under that section seems to have been expressly stated in the SMS in the RMS case.[285] An SMS lacking such guidance appears not to comply with the ISM Code,[286] and this despite the Watchkeeping Regulations not having specifically incorporated s. B-VIII/2 into English law.[287] Section 1.2.3.2 specifically refers to guidance and standards recommended by the IMO[288] and STCW is one of the IMO instruments.

But it does not seem that the company, RMS, was prosecuted for a lack of guidance or instructions.

The wording of the Schedule Information[289] appears to say that the SMS did not comply with relevant provisions of the STCW Code. As evidence of the legal requirement the Schedule Information quotes the relevant paragraphs of s. A-VIII/2 but not s. B-VIII/2.[290] Section A-VIII/2, however, does not require the company to issue any documentation. This is left to s. B-VIII/2 under which a company is, however, not obliged to "give particular

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Steyn put it in that case on p. 517, the Watchkeeping Regulations do not make the lack of guidance on bridge procedures an offence. It would, therefore, appear that even though the STCW Convention may have to be interpreted in line with the guidance in that Convention an offence can only be committed of it is enacted in domestic legislation. Not only does STCW not provide for any offences but the principle of "nullum crimen, nulla poena sine lege: only the law can define a crime and prescribe a penalty", *R v. Rimmington* [2006] 1 AC 459, para. 35, would seem to apply. As the Watchkeeping Regulations, being the specific legal instrument, do not provide for an offence it would appear to be rather far fetched to apply the ISM Regulations instead and thereby "assume" that Parliament intended to make the lack of guidance required under the STCW Code, Part B, a contravention attracting a penalty.

[280] As compared to "soft" law, i.e., for example, IMO recommendations, MSC Circulars or similar.

[281] Of the ISM Code.

[282] *Ibid*.

[283] See above.

[284] File 284, Sentencing Schedule, para. 25.

[285] STCW Code, Part B, Chapter VIII, s. B-VIII/2, Part 3-1, para. 5 contains 14 different subjects on which a company should issue guidance to its masters and officers.

[286] Section 1.2.3.2.

[287] See above.

[288] "Guidelines…recommended by the organization" which is the IMO, SOLAS 74, Art. III.

[289] See above.

[290] See above.

instructions on the company's policy on navigating during hours of darkness",[291] but to only issue guidance on the 14 subjects mentioned in that section.[292]

It appears, therefore, that the company was prosecuted on the wrong legal basis. But a conviction seems still to be appropriate as a breach of the ISM Code was committed.[293] In my view, though, the lack of guidance in an SMS is not as serious a breach as would have been an SMS which did not ensure compliance with mandatory rules and regulations. The former would probably justify a lesser sentence than the latter.

In addition, the company seems also to have breached duties under the Hours of Work Regulations[294] and was convicted for a violation of the Prevention of Collision Regulations.[295] The former suggests a breach of s. 1.2.3.1[296] in that the SMS did seemingly not ensure compliance with mandatory rules and regulations. The latter implies that the management appears not to have exercised supervision over the navigation of its vessels.[297] An SMS would have had to be in place which allowed for such supervision. If that was not the case the company seems also to have been criminally liable for not ensuring that applicable standards were taken into account.[298]

The organisation of watchkeeping is the master's responsibility it is also his obligation under the ISM Code to review the SMS. He has to report deficiencies which would affect his duty "to ensure that watchkeeping arrangements are adequate for maintaining a safe navigational watch"[299] to the shore-based management.[300] The company in turn has to take steps to rectify the defects.[301] It would have been appropriate for the master to highlight the lack of guidance in the company's safety management system. But the master may have relied on the system being subject to frequent verification which was external to the ship[302] and also the company.[303]

The master would have committed an offence if he had been allocated a reporting duty under the SMS as he can only be charged for not operating his ship within the limits of the SMS.[304]

It appears that in the case of "RMS Mulheim"/"RMS Ratingen" the master has failed in his reporting duty.[305] He would not have had the excuse that he did not know that the system had defects, and what they were, because he is supposed to know what his duty is under the Colregs,[306] and, I would add, under STCW.[307] He must also be assumed to have

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[291] As stated in the Sentencing Schedule, para. 44.
[292] Section B-VIII/2, Part 3-1, para. 5.
[293] This view is strengthened by IMO Resolution A.913(22) - ISM Code implementation guidelines - which suggest for the SMS to meet specific safety standards; part of those standards are the guidelines and standards recommended by the organisation, para. 2.3.1.2.
[294] See above, Chapter 10.4.
[295] As discussed above in Chapter 10.1. *et seq*.
[296] Of the ISM Code.
[297] Even though Lord Brandon restricted this requirement to limitation cases, *Grand Champion Tankers Ltd v. Norpipe A/S (The Marion)* [1984] AC 563*,* p. 4/5, it appears that it is now the accepted standard in shipping, *The Eurasian Dream,* para. 133.
[298] ISM Code, s. 1.2.3.2, as such a requirement could probably be considered a standard which would have to be followed.
[299] SCTW Code, Part A, Chapter VIII, s. A-VIII/2, Part 3, para. 9.
[300] Section 5.1.5.
[301] Section 6.1.3.
[302] ISM Code, s. 12.1.
[303] The Document of Compliance (DOC) is subject to an annual verification by the Administration, ISM Code, s. 13.4, and the Safety Management Certificate is subject to at least one verification by the Administration during five years, ISM Code, s. 13.8.
[304] ISM Regulations, reg. 7.
[305] Provided a reporting duty was laid down in the SMS.
[306] See above, *The Nordic Clansman*, p. 36.
[307] The syllabus for a master's oral exam in MGN 69, p. 15, requires that "Candidates should demonstrate the ability to apply the knowledge outlined in this oral syllabus"; one of the requirements is to have "knowledge of international conventions relevant to the operation of ships", p. 17. Although it is unknown where the master obtained his certificate of competency his training would have made him undergo similar requirements in his

known the hours of work rules for it is his duty to ensure compliance with such professional standards.[308]

In my view, the Designated Person (DP) should also have been charged for an offence under the ISM Regulations. His duty, amongst others, was to provide for all company ships to be suitably manned so that vessels are fit to operate according to statutory requirements.[309]

The DP did not fulfil this duty in that he appears to have relied on the valid Safe Manning Document which can safely be assumed to have been on board as no charges were brought on this issue, and also because "RMS Ratingen" was not detained in Shoreham suggesting that all required certificates were on board and were valid. The DP does not appear to have taken a supervisory role or if he has, has done it badly. It should have come to his attention by checking hours of rest records, and the ship's logbooks, that navigation practices of the two ships were not complying with the law. Even if the number of seafarers (with master and crew) on board would have matched the requirements of the Safe Manning Document he should have realised that the manning of the vessel did not make it fit to operate in line with the statutory requirements.

The file is silent over why neither the Designated Person nor the master[310] were charged. As it would appear that both were guilty of committing an offence of strict liability with no question over the evidence, public interest remained as the reason for not commencing proceedings against them. But the company was based in Duisburg/Germany[311] and the prosecution would have needed the co-operation of the company to make the Designated Person appear in court in the UK. The file suggests that this co-operation was lacking by the company from the outset.[312] It might therefore have been difficult to get hold of the Designated Person.[313]

Both masters,[314] however, were present in the UK. But there remains the issue of one of the masters having asserted that he was put under pressure (the nature of which could not be verified).[315] If the pressure was on the master to operate the ship without any additional crew he would have found it difficult to state in his master's review that he could not meet statutory requirements as his job might have been in jeopardy. In my view, such reasoning would rather support the public interest for a charge as, first, there are grounds to believe that the same breach might happen again[316] and, secondly, having had the master in court might have revealed more about the alleged pressure. The former was actually confirmed by the "RMS Ratingen" running aground in France on 25 March 2003

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country of certification if the certificate complied with STCW requirements. The latter is the international standard. In lack of any information about the individual in question it cannot be commented on any further. An MGN is an instrument which the UK flag State administration (the MCA) uses to advise the shipping industry. The contents of an MGN does not have a directly binding character on anybody. However, Courts have been known to take notice of the advice, e.g. in *The Mineral Dampier and Hanjin Madras* [2001] 2 Lloyd's Rep. 419, para. 40, or in *The Sanwa and Choyang Star* [1998] 1 Lloyd's Rep. 283, p. 295. In both cases the Court of Appeal and the Admiralty Court respectively used the guidance of the relevant MGN as support for the position taken by the Court. Following the advice of an MGN would probably constitute good practice whereas not following it could possibly establish a breach of a duty of care. It would appear to be unreasonable to act against advice given by the State's appointed shipping safety institution unless there is a particular reason not to follow that guidance.

[308] *Greaves & Co. Ltd v. Baynham Meikle* [1975] 2 Lloyd's Rep. 325, p. 328/329.

[309] ISM Regulations, reg. 8(2)(b).

[310] But as regards the master see Annex 16, question 19 and Chapter 11, fn 28.

[311] See: http://www.rheinmaas.de/maildire.htm

[312] File MS 10/74/284, minute of 7 May 2004, point 1.

[313] When asked why the DP was not charged Captain Smart, said "Under the ISM Regulations, the offences that the DP can commit are limited and taking all facts into consideration, he himself was put in a position by the company that he could not fully control. In general whether they are abroad or not does not have any effect on whether the matter is pursued. It does, however, impact on the effort required and it can affect the proposed outcome, but the effect on the individual / company will be appropriate", Annex 16, question 20.

[314] Of "RMS Mulheim" and "RMS Ratingen".

[315] File MS 10/74/284, minute of 7 May 2004, point 3, see also above.

[316] *The Prosecutors' Code for Crown Prosecutors,* s. 5.9.o.

only three days after the incident in Shoreham with, again, the same master being alone on the bridge.[317]

It remains debatable whether a policy of only charging the company, and failing to insist that the master stands up for his responsibilities, serves the purpose of achieving a safe environment which, according to the Court of Appeal, is "the objective of prosecutions for health and safety offences in the work place".[318]

10.8. Conclusions

The files covered in this Chapter all suggest that the MCA sticks solidly to its policy not to prosecute seafarers unless they are personally culpable. The risk of prosecution for a master would appear to be negligible. This does not seem to be affected by other public policy considerations as, for example, they appear to exist for combating fatigue.[319]

If the concept of deterrence is the driving force for prosecutions on health and safety matters[320] the MCA practice would suggest that it has limited application in respect of individual seafarers. This probably raises the question as to whether prosecutions have any role to play at all within the enforcement of merchant shipping legislation. I will discuss this issue after I have looked into the subjects of prosecutions for breaches in respect of the Colregs[321] and pollution.[322]

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[317] Sentencing Schedule, para. 43.
[318] *R v. Howe,* p. 44.
[319] See also below in Chapter 15 the discussion about culpability and administrative v. criminal enforcement in general.
[320] See above, Chapter 9.4.
[321] Chapter 11.
[322] Chapter 12.

Chapter [11] – Prosecution and Collision Regulations

11.1. Introduction
11.2. No prosecution
11.3. Colregs prosecutions
11.3.1. Rule 10 – Traffic Separation Schemes
11.3.2. Rule 5 – look-out
11.3.3. Other Rules
11.4. Collisions that did not trigger an MCA investigation
11.5. International criminal jurisdiction of the MCA
11.6. Conclusions

11.1. Introduction

Out of the 83 MCA files I investigated and which I have categorised under "Collisions", 64 investigations ended without a trial; this is equivalent to approximately 77.1%. Another three files are inconclusive as to the result, but a trial was not mentioned.[1] These would bring the total of non-trial files to 67, which is equivalent to 80.7%.

Outside of Colreg incidents investigated by the MCA there are those (i) which do not come to the knowledge of the MCA, (ii) which are not considered to constitute a "significant breach" and therefore do not get past the threshold of the local MCA Marine Office,[2] (iii) which are passed on to local harbour authorities, and, (iv) those which are not investigated any further by the EnU. The EnU files will usually not exist for incidents falling under numbers (i) and (ii) for obvious reasons, may exist for number (iii),[3] and will usually exist for incidents falling under number (iv).

It is impossible to estimate the quantity of incidents falling into any of those four groups, particularly, as those which do not come to the knowledge of MCA cannot be quantified. There is also no system in place to record how many incidents do not get past the local MCA Marine Office stage.

11.2. No prosecution

The reasons for not taking any prosecuting action are various,[4] but the main grounds which can be crystallised are a lack of evidence,[5] the appearance of additional information which exculpated the company or master,[6] passing of the case to another flag State,[7] or the lapse of too much time.[8] In some cases a formal caution was administered,[9] but the largest group of files cover those cases where a letter of warning or a letter of concern was sent to the accused or his company.[10]

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[1] File 223 – file was passed to harbour authority; file 259 – recommendation to procurator fiscal to prosecute, but no other information on file; file 451 – file inconclusive.
[2] This was, according to a Principal Surveyor, for example, the case for the collision of a local tanker and a domestic ro-ro ferry which occurred on 22 December 2006 and only caused minor damage and no injury. In this case agreement was reached between the companies involved, the harbour authority and the MCA Marine Office that special training for the companies' masters and officers operating in the relevant area was an appropriate measure to justify non-prosecution.
[3] See file 223.
[4] The lack of evidence and the lapse of too much time was also identified under groundings, see Chapter 10.
[5] Files 23, 237, 435, 476 and 494.
[6] Files 261, 276, 354, 406 and 421.
[7] Files 61, 95, 116, 226, 358 and 530.
[8] Files 33, 36, 162, 367, 400 and 498.
[9] Files 296, 299 and 487.
[10] Files 155, 243, 244, 246, 260, 297, 312, 323, 328, 333, 336, 337, 342, 349, 352, 356, 366, 370, 403, 404, 412, 433, 439, 441, 444 and 484.

The reasons for a "letter" or "notice of concern"[11] (NOC) can be various. A few examples will help to illustrate this.

There is the letter which was sent because it appeared that the accused did not want to accept the caution and the prosecution did not want to go to Court.[12]

Another example is that of a speed boat skipper operating too close to swimmers off Scarborough who was sent a letter of concern rather than taking a more stringent measure because it was felt that he was aware of the problem.[13]

In a further case the skipper of a fishing vessel had by-pass surgery after a collision and would not return to sea. Otherwise a formal caution would have been considered.[14]

A notice of concern was also sent instead of commencing a prosecution after a collision between an angling boat and a fishing vessel when it was found out that the wife of the fishing boat skipper was seriously ill which might have burdened him and also caused lack of sleep.[15]

Where a skipper had gone into a new business of towing and caused a collision with an angling boat in fog after being in the industry for 50 years without any serious problem, a notice of concern was also considered the appropriate action.[16]

Last, but not least, a notice of concern was sent to two cruise ship companies when it became known that their respective vessels came close in poor visibility on approach to the Solent.[17]

A notice of concern is usually sent when there is not enough evidence.[18] The last example probably demonstrates the inability of the MCA to prosecute a violation of the Colregs successfully if no recorded accessible evidence is available.[19]

11.3. Colregs prosecutions

Colregs prosecutions can be broken down into four main categories. First there are convictions for breaches of Rule[20] 10, followed by, secondly, Rule 5, thirdly "unsafe operations", and, fourthly any other Rule. In the following three sub-sections I will discuss all but "unsafe operations". Apart from a lack of information about serious breaches of the MSA 1995, s. 58,[21] it would appear doubtful that "unsafe operations" will play the same role in prosecutions as they have done in the past. With the Railways and Transport Safety Act 2003 being in force, and after the decision of the Court of Appeal *in R v. Goodwin*[22] the relevance of s. 58 may be restricted to a very few cases only.[23]

I will begin by discussing Rule 10 and relevant prosecutions, followed by a similar discussion about Rule 5 in which I will also address look-out requirements, and will

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[11] For more detail on a "Notification of Concern" (also "Notice of Concern") see above, Chapter 9.3. and Annexes 16 (question 10) and 27.
[12] File 155.
[13] File 336.
[14] File 349.
[15] File 356.
[16] File 370.
[17] File 412.
[18] Captain Smart, Annex 16, question 10.
[19] According to Captain Smart, Annex 16, question 23, "if you interpret collision so as to include a collision with the ground then I don't think so, but some are coming through now that are recorded on AIS".
[20] Any reference to a "Rule" is a reference to a Rule of the Colregs.
[21] For the contents of s. 58 see Chapter 1, fn 45, and for the changes introduced by the Railways and Transport Safety Act 2003 see above Chapter 9, fn 145.
[22] [2006] 1 WLR 546, para. 45.
[23] See also above, Chapter 9.4.3.

conclude the sub-sections by referring to violations of other Rules for which prosecutions were brought.

11.3.1. Rule 10 – Traffic Separation Schemes

Cases which do not appear to present a great deal of difficulty for the prosecution are breaches of Colregs Rule 10 in areas with radar surveillance such as the Dover Strait. This is also supported by the fact that no prosecution for breaches of Rule 10 in an area other than the Dover Strait was found in the files. In addition to radar surveillance a mandatory reporting scheme is in place in the area,[24] and vessels which can safely use the appropriate traffic separation lane but do not do so are warned in an MCA publication that they may be prosecuted.[25]

The prosecuted breaches of Rule 10 fall into two categories only. First there are violations of Rule 10(b)(i) which requires vessels to proceed in the appropriate traffic lane. Secondly successful prosecutions were recorded for breaching the requirement of Rule 10(c) to cross traffic lanes at a right angle.

Whereas fines on summary conviction for breaches of Colregs in general are restricted to the statutory maximum of £ 5,000,[26] a violation of Rule 10(b)(i) can cost a defendant up to £50,000.[27]

Six convictions for breaches of Rule 10(b)(i) were recorded between 2001 and 2005. The smallest fine was £400 for a master who proceeded about six miles in the wrong direction in a traffic lane against the advice of the coastguard.[28] A significantly bigger amount, and the highest recorded penalty for a breach of Rule 10(b)(i), namely £14,000, had to be paid by a master who sailed his vessel for 14.5 miles against the traffic flow and is said to have created several close-quarters situations.[29]

The appropriate traffic lane is the lane the direction of which is given by the outlined arrows printed on the chart in the relevant lane.[30] These outlined arrows together with the separation lines or zones establish the direction of traffic flow. Unless a vessel has to give way to another vessel there appears to be no reason not to follow a course established by the outlined arrows or the separation line or zone even though following the precise direction is not required.

> "The obligation is clearly not one to follow a course parallel to the sides of the traffic lane, nor the exact course suggested by any traffic lane direction arrow marked on charts some lateral movement across the lane is permitted." [31]

A deviation of up to 10º either side from the course established by the outline arrows will probably not be considered constituting a violation of Rule 10(b)(i) but nonetheless vessels should be recommended to follow the direction of the outline arrows as closely as

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[24] Since 1 July 1999, which Marine Guidance Note (MGN) 128, para. 3, informs about. An MGN is an instrument which the UK flag state administration (the MCA) uses to advise the shipping industry. The contents of an MGN does not have a directly binding character on anybody. However, Courts have been known to take notice of the advice, e.g. in *The Mineral Dampier and Hanjin Madras* [2001] 2 Lloyd's Rep. 419, para. 40, or in *The Sanwa and Choyang Star* [1998] 1 Lloyd's Rep. 283, p. 295. In both cases the Court of Appeal and the Admiralty Court respectively used the guidance of the relevant MGN as support for the position taken by the Court. Following the advice of an MGN would probably constitute good practice whereas not following it could possibly establish a breach of a duty of care. It would appear to be unreasonable to act against advice given by the State's appointed shipping safety institution unless there is a particular reason not to follow that guidance.
[25] MGN 128, para. 6, recently (May 2008) replaced by MGN 364 which repeats the warning in para. 3.4.
[26] Prevention of Collision Regulations (SI 75), reg. 6(1)(b).
[27] *Ibid*., reg. 6(1)(a).
[28] Conviction no. 48.
[29] Conviction no. 41.
[30] International Maritime Organisation (IMO), *Ships' Routeing*, 9th ed., 2007, p. 12.
[31] *Marsden*, p. 247.

safely possible. This should, particularly in congested waters, not prevent vessels from making use of the whole width of the lane subject to the requirements of Rule 10(b)(ii).

When transferring from one side of a lane to the other, prudent seamanship would dictate that such a transfer should only be done at as small an angle to the general direction of traffic flow as practicable.[32]

A violation of the requirement to proceed "in the general direction of traffic flow"[33] may not only result in a fine but in addition a master/owner runs the risk of facing a huge commercial loss when a collision ensued which caused damage for another party and the navigation is considered to have been reckless.[34]

Compared to Rule 10(b)(i), violations of Rule 10(c) "cost" on average significantly less. In the three recorded cases the fines varied between £1,000 and £2,500.[35]

What constitutes a right angle during the crossing of a traffic separation lane could cause an interpretation problem in Rule 10(c) cases. Does the crossing angle have to be exactly 90º or could it approximately equate such an angle?

In two of the cases the vessel's course was 41º and more than 50º off a right angle respectively.[36] The third case does not provide any figures.[37] Even if it were considered that a vessel would never be able to exactly stay on a right angle crossing heading the deviations of 41º and 50º do not appear to leave any doubt that the crossings were not carried out at a right angle.

In *The Century Dawn v. The Asian Energy* the judge calculated the 90º angle down to the exact course of 157º.[38] However, he did not clearly state that a crossing has to be exactly at a right angle, but only said that the vessel would also have been at fault had it crossed at 120º.[39] Such crossing angle would still have been 37º out.

Despite the fact that "the obligation to cross at a right angle is qualified by the expression 'as nearly as practicable'"[40] Clarke J in that case did see "no reason why *The Century Dawn* could not have crossed at a right angle".[41] *The Century Dawn* was held to be at fault in that collision "not for crossing the westbound lane at all, but for doing so at significantly less than a right angle".[42]

The conclusion appears to be that although the angle does not have to be exactly 90º a crossing heading has to be as close as is possible to a right angle as long as it is safe to do so. It is certainly not enough to only be as close as 37º to a right angle and, moreover, if for collision avoidance reasons it would be unsafe to cross at a right angle then the vessel intending to cross would have to wait.[43]

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[32] IMO, Maritime Safety Committee, "Guidance for the Uniform Application of Certain Rules of the International Regulations for Preventing Collisions at Sea, l972, MSC/Circ. 320, 5 April 1982, paragraph 5.
[33] Rule 10(b)(i).
[34] *St. Jacques II,* para. 21, where Gross J was satisfied that "what was involved here was the taking of a "stupid risk" or a "reckless manoeuvre. . . by a non-suicidal" mariner sufficient to bring the matter within art. 4" and would thereby open the possibility to loose the right to limit the liability for the owner/master.
[35] Convictions nos. 36 (Annex 5), 52 (Annex 6) and 65 (Annex 6).
[36] Conviction no. 65 and 36 respectively.
[37] Conviction no. 52.
[38] *The Century Dawn and Asian Energy* [1994] 1 Lloyd's Rep. 138*,* p. 150; the decision was later upheld by the Court of Appeal in [1996] 1 Lloyd's Rep. 125. The Court uses the word "course" but probably means "heading" as required in Rule 10(e). Course and heading can differ significantly, particularly if a crossing is affected by a strong current.
[39] *The Century Dawn* (Adm. Court), p. 150.
[40] *Ibid.,* p. 151; the qualification can be found in Rule 10(c) of the Colregs.
[41] *Ibid*.
[42] *Ibid*.
[43] *Ibid*.

11.3.2. Rule 5 – look-out

Rule 5 contraventions are mostly combined with violations of other Rules or provisions.[44] The total number of convictions for Rule 5 contraventions during the period concerned (including, where it is the case, breaches of other Rules or provisions) appears to be nine.[45] The range of fines was between £1,000[46] and £5,000.[47]

The violations of Rule 5 are constituted by a number of different failures on part of master/watchkeeper or owner.

Keeping a proper look-out means both having a designated person in place[48] and actually seeing objects which are there.[49] The failure, for example, to keep a good look-out and notice the radar echo of another vessel which must have been apparent prior to the collision can lead to a higher apportionment of liability.[50] However, when the crewing requirements as, for example, on a small fishing boat do not stipulate the need for a trained look-out it is accepted that the skipper may fulfil that role in addition to his other duties.[51] The STCW Code also allows the officer of the watch to be the sole look-out but only in narrowly defined circumstances during daylight.[52]

Keeping a proper look-out does not only mean having to have a designated and trained person available, but also necessitates a concept of understanding of the whole environment in which the vessel is operating. "A proper look-out comprises the proper use of sight and hearing and proper appreciation of the situation and of the risk of collision."[53] The appreciation of the situation requires a watchkeeper to have "a proper understanding of the position and behaviour of the vessels they were to pass".[54] The concept of keeping a look-out also includes the planning of manoeuvres which have to be based on such proper understanding.[55]

The different reasons for a successful prosecution thereby appear to fall into two main categories. First, there are the cases where a designated look-out does not notice the object in question; secondly there are cases where no look-out was on the bridge or the relevant person fell asleep. This would seem also to have been the case in the lower courts. I will demonstrate this with several examples taken from the files.

In the case of the "Unden" the second officer allowed the look-out to go below to the engine room while the officer himself went to the toilet. On his return he could not prevent his vessel from running into the stern of the "Star Maria". The absenteeism of a look-out from the bridge had been condoned by the master. The second officer got fined £1,000 and the master £3,000.[56]

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[44] It appears that only conviction no. 27 (Annex 3) is for a breach of Rule 5 only.
[45] Convictions no. 1 (Annex 2), 16 (Annex 3), 27 (Annex 3), 30 (Annex 4), 34 (Annex 4), 36 (Annex 5), 37 (Annex 5), 57 (Annex 6), and 60 (Annex 6). An additional conviction of the master of the "Highland Pioneer" of 5 April 2000 which is not recorded in convictions 2001 – 2005 also falls into the category of Rule 5 convictions, see below, chapter 11.3.2.
[46] Convictions 27 (Annex 3) and 34 (Annex 4); although the fine in no. 34 appears to be lower because it includes a penalty for breaching the safety zone around a gas platform.
[47] Conviction no. 57 (Annex 6).
[48] *The E.R.Wallonia* [1987] 2 Lloyd's Rep. 485*,* p. 487, where, according to the judge "there ought to have been a look-out on the bridge as well as a helmsman and the officer on watch".
[49] *Ellerman Lines Limited (The City of Naples) v. The Trustees of the Harbour of Dundee* 1921 1 S.L.T. 2*,* p. 14.
[50] In *The Owners of the Ship Bulk Atalanta v. The Owners of the Ship Forest Pioneer (The Bulk Atalanta)* [2007] EWHC 84 (Comm)*,* para. 42, the "Forest Pioneer" which did not detect the "Bulk Atalanta" was held 85% to blame because "she created the situation of danger by a blind alteration of course and speed", para. 56.
[51] *The Antares II and Victory* [1996] 2 Lloyd's Rep. 482*,* pp. 496/497.
[52] STCW Code, Part A, Chapter VIII, section A-VIII/2, part 3-1, para. 15; see also above Chapter 10.2.
[53] *Marsden*, para. 6-137.
[54] *The Global Mariner,* para. 81.
[55] *Ibid.,* para. 81.
[56] Conviction no. 1 (Annex 2).

The owner and, has to be assumed, skipper of the leisure yacht "Mandator" was fined £1,500 for it failing to keep a proper look-out after striking the breakwater at Portland at high speed.[57]

The fishing vessel "Our Nicholas" ran aground because the watchkeeper fell asleep. He was fined £1,000.[58]

The master of the Luxemburg flagged high speed craft "Diamant" was fined £1,500 for a failure to keep a proper look-out after the "Diamant" collided in dense fog with the UK flagged "Northern Merchant". The bridge team of the "Diamant" believed to have heard a fog signal on starboard and had altered course to port. The "Diamant" collided with the "Northern Merchant" beam on. An additional fine of £1,500 for a violation of Rule 19 was also administered.[59] The "Diamant's" owner was not prosecuted.

Neither the master/watchkeeper nor the owner of the "Northern Merchant" were prosecuted for the collision with the "Diamant". The MAIB's finding that the "Northern Merchant's" speed was potentially unsafe[60] and that there was "a lack of company procedures and guidance on board the "Northern Merchant" as to what constituted a close quarters situation and safe speed in coastal waters"[61] suggests also fault on part of the "Northern Merchant". But, as suggested by a letter from the relevant enforcement officer in the MCA, the evidential and public interest test was "most certainly" not passed in case of the "Northern Merchant's" master.[62]

The second officer of the "Marbella" was prosecuted by the MCA after his vessel hit a gas platform in fog. He had to pay a fine of £1,000.[63] The MCA did not prosecute the master who was not on the bridge at the time of the collision, but instead appears to have considered that a caution was the appropriate instrument.[64] For the company[65] the MCA only wanted to issue a notification of concern.[66] Other, however, the HSE[67] who prosecuted both master and company under the Petroleum Act 1987 which makes the vessel's owner and master each guilty of an offence when the vessel enters a safety zone around an installation.[68] The master was fined £3,000[69] and the company initially £40,000.[70] The fine was quashed by the Court of Appeal who saw £15,000 to be an appropriate sentence.[71] Main reasons given for reducing the fine for this offence of strict liability[72] were the co-operation of the company, the existence of a voluntarily applied safety management system covering the relevant instructions for operation in fog and the dismal financial state of the company after the collision.[73] Loss through lack of revenue from the catch, repair costs before insurance, and additional insurance premium amounted to a total of more than £1,000,000.[74]

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[57] Conviction no. 16 (Annex 3).
[58] Conviction no. 27 (Annex 3).
[59] Conviction no. 30 (Annex 4). See also Chapter 11.3.3.
[60] MAIB report 10/2003, p. 45.
[61] *Ibid*., p. 46.
[62] Letter of 12 March 2002 on file MS10/74/205.
[63] Conviction no. 34 (Annex 4).
[64] *R v. Armana Ltd* [2004] EWCA Crim 1069, para. 12.
[65] The "company" was the owner of the "Marbella", *R v. Armana Ltd,* para. 3.
[66] *R v. Armana Ltd,* para. 12.
[67] The HSE has jurisdiction for offshore installations, see the Health and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 2001, SI 2001 No. 2127, reg. 4(1)(a). According to the MOU between the MCA, MAIB and the HSE (which entered into force after the event), para. 7.2.1, the MCA/MAIB "is primarily responsible for the safety of navigation" and the HSE "for the safety of offshore installations".
[68] Petroleum Act 1987, s. 23(2). An "installation" is a structure "for the storage of gas in or under the shore or bed of any water", see the Health and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 2001, reg. 4(2)(b)(ii).
[69] *R v. Armana Ltd,* para. 13.
[70] *Ibid.,* para. 1.
[71] *Ibid.,* para. 20.
[72] *Ibid.,* para. 15.
[73] *Ibid.,* para. 17.
[74] *Ibid.,* para. 18.

The master of the "Kronborg" was fined a total of £1,000 for breaches of Rule 10(c) and Rule 5. He was alone on the bridge and did not cross the Dover Strait traffic separation scheme at a right angle.[75]

The owner and manager of the "Gerhein G" were fined a total of £3,000 for a breach of Rule 5 and a breach of the ISM Code.[76] Their Antigua and Barbuda[77] registered vessel was inbound to Sheerness when the master, who was alone on the bridge during the hours of darkness, was stung on the ear by an insect[78] and subsequently became unconscious.[79] The vessel grounded in the river Thames.[80]

The owners of "RMS Mulheim" and "RMS Ratingen" were fined a total of £20,000 for four offences two of which were violations of Rule 5. In the first case the chief officer was alone on the bridge and knocked himself out when his trousers got caught on the foot rest of his chair. The second incident saw the master of "RMS Ratingen" alone and asleep on the bridge when picking up a pilot in Shoreham.[81]

Last, but not least, a rigid hull inflatable driver was jailed for four months after striking an unlit buoy. His boat was travelling at 33 knots. It had six people on board five of whom were seriously injured by the collision and one passenger subsequently lost the sight in one eye.[82]

In conclusion it appears that a master would be well advised to lay down in his standing orders how he wants the look-out function to be exercised on board. He also must ensure the implementation of his requirements. He otherwise risks prosecution as was shown in case of the "Unden" and the "Marbella".[83]

11.3.3. Other Rules

Prosecutions for violations of rules other than Rule 5 and 10 appear to be rare. The only other Rules for the breach of which masters/skippers were prosecuted are Rule 7 and 13, and only one violation of Rule 19 in connection with a breach of Rule 5.[84] Some other Colreg violations were taken to court under the MSA 1995, s. 58, but will not be discussed any further.[85]

One prosecution for a breach of Rule 7 was noted. The skipper of the fishing vessel "Aspire" was fined £500 for not complying with Rule 7(a) and (d)(i) by not ascertaining that a risk of collision existed. The vessel had collided with a clam dredger which capsized and trapped two crewmen who, however, managed to swim free.[86]

In two other cases a breach of Rule 13 gave rise to a fine or was at least involved.

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[75] Conviction 36 (Annex 5); the vessel was 50º off a right angle.
[76] Conviction 37.
[77] File MS10/74/286, letter of 16 August 2004 by the enforcement officer.
[78] Conviction 37 (Annex 5).
[79] Background information in the Preliminary Case Analysis (file MS 10/74/286), para. 2.1, according to the master's witness statement.
[80] According to Conviction 37 (Annex 5). The Prelimary Case Analysis states (para. 2.2) that the master disputed that the vessel actually ran aground although he had initially reported the grounding to Medway Port Control.
[81] Conviction 57 (Annex 6); see also above, Chapter 10.
[82] Conviction 60 (Annex 6).
[83] See above in this chapter.
[84] File MS 10/74/205, see above, Chapter 11.3.2.
[85] See Convictions 9 (Annex 2), 20 (Annex 3), 29 (Annex 4), 34 (Annex 4), 53 (Annex 6), 60 (Annex 6), and 61 (Annex 6). See also above the reference to s. 58 in Chapter 1, fn 45.
[86] Conviction 46 (Annex 4).

One incident involved the "Unden"[87] where the MCA report does not clarify whether the convictions of master and watchkeeper were only based upon the breach of Rule 5 or also upon Rule 13.[88]

The other conviction for a breach of Rule 13 followed the collision of the "Atlantic Mermaid" (AM) and the "Hampoel" in the Dover Straits at 02.53 hours in the morning which injured one crew member and caused considerable damage. None of the three persons on the bridge of AM saw the "Hampoel" either by radar or visually, and "Atlantic Mermaid" being the faster vessel ran into the stern of the "Hampoel". The master admitted full responsibility and was fined £2,000.[89]

The sole watchkeeper on the "Hampoel", who appears to be the only person who saw the other vessel before the collision,[90] was not prosecuted. The MAIB found that although the cause of the collision was the failing of the "Atlantic Mermaid" to establish the presence of the "Hampoel",[91] the Chief Officer of the latter vessel "failed to take any avoiding action".[92] If that be so it appears that the operation of the "Hampoel" was in breach of Rule 5 and Rule 17(a)(ii) and (b).

Being on watch without a dedicated look-out at night constitutes a breach of STCW requirements[93] and makes a master guilty of an offence.[94]

Failing to take avoiding action would appear to constitute a breach of Rule 17(a)(ii) and (b) for the stand-on ship. Even though Rule

> "17(a)(ii) is expressed in permissive terms, situations may arise in which the requirements of good seamanship require a vessel being overtaken to take avoiding action before the stage at which r. 17(b) applies".[95]

A "prudent seaman" would always consider, when it is doubtful that an overtaking vessel is going to take any avoiding action, that an alteration of course should be made rather earlier than later.[96] It appears therefore that the watchkeeper of the "Hampoel" was in breach of the Rule 17(a)(ii) requirement. As he failed to take any avoiding action at all[97] it would appear to follow that he was also in breach of Rule 17(b).

Such a violation by the overtaken vessel constituted 15% of the fault for the collision in *The Koscierzyna.*[98] The minute on file acknowledges that "both vessels could have taken more action to avoid the collision" but also made it clear that "the majority of the responsibility should lie" with the "Atlantic Mermaid".[99] Hence, a prosecution of or any

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[87] See also above, Chapter 11.3.2.
[88] Conviction 1 (Annex 2). See also discussion above, Chapter 11.3.2.
[89] Conviction 5 (Annex 2).
[90] MAIB investigation report 12/2002, paragraph 3.3.2.5., p. 27.
[91] *Ibid*., paragraph 3.1., p. 25.
[92] *Ibid*., paragraph 3.3.2.8., p. 27.
[93] See above Chapter 11.3.2. and also Chapter 10.
[94] The Watchkeeping Regulations, reg. 17(2).
[95] *The Koscierzyna and Hanjin Singapore* [1996] 2 Lloyd's Rep. 124*,* p. 129.
[96] *Ibid.,* p. 130; see also *The Mineral Dampier,* para. 48.
[97] The MAIB even appears to consider a "mental risk assessment" to be appropriate under such circumstances showing that a grounding on a sandbank should be preferred to being run into by a larger and faster vessel, MAIB investigation report 12/2002, p. 22.
[98] *The Koscierzyna,* p. 131; a decision which did not find universal praise and "makes the Rules become much more complicated bringing further confusion to a currently unsatisfactory situation", according to J Zhao, *Shall the vessel being overtaken give way to the overtaking?*, LMCLQ [1998] 3, 361, p. 380, a position which I do not share. Good seamanship would, in my opinion, always require the relevant OOW to take "effective action to avoid a close-quarters situation" (Rule 8(c)) when he believes (or when "it becomes apparent" to him – Rule 17(a)(ii)) that the give way vessel may not take appropriate action. Waiting to be in a close quarters situation before action were permitted, which I interpret Rule 17(b) to describe, may cause more of a black and white solution for a lawyer who has to decide about the liability of each of the parties if a collision should occur. But it would not seem to facilitate the safe operation of vessels in sight of each other and would, in my view, "neglect…any precaution which may be required by the ordinary practice of seamen" (Rule 2(a)).
[99] File MS 10/74/152, minute of 18/06/2001, paragraph 3.

other measure against the watchkeeper on the "Hampoel" does not appear to have been considered any further.[100]

A prosecution for a violation of Rule 19 was undertaken after the collision of the Luxemburg flagged high-speed craft "Diamant" with the UK flagged ferry "Northern Merchant" in restricted visibility.[101] The "Diamant" was on her way to, while "Northern Merchant" had just departed, Dover. The MCA prosecution report had the "Diamant" reduce speed to 33 knots at the time of acquiring "Northern Merchant" on ARPA[102] whereas the MAIB stated the speed to have been 29 knots.[103] The "Northern Merchant's" speed is not mentioned in the MCA report but stated by the MAIB to have been 21 knots.

> "The closest point of approach closed to 3 cables on the starboard quarter and a slight alteration to port was made to open the point of approach. At this time the Master believed that the "Northern Merchant" was on a reciprocal course, and allowed the range to close. The "Diamant" bridge team were well aware of the developing situation and were looking and listening for the "Northern Merchant". At about this point the fog signal from the "Northern Merchant" was heard, apparently to starboard, and both the Master and Chief Officer noted the radar echo slightly distort radially, so that the bearing discrimination became impossible. The master altered course to port to open the range. Some thirty seconds later the "Northern Merchant" appeared right ahead and beam on. An emergency turn to port was initiated, which served to reduce the force of the impact."[104]

The master of "Diamant" admitted the violation of Rule 19 and was fined £1,500 for the breach. Nobody was prosecuted for failures on board the "Northern Merchant". Unfortunately the MCA report does not specify why exactly it was held that the master did not follow Rule 19.

It appears that one of the main MAIB findings of causes and contributing factors was that both vessels were at a potentially unsafe speed.[105] This conclusion is supported by the fact that the MCA was recommended to "issue guidance on how operators should determine a safe speed".[106]

When looking at the overall picture in the case, the number of 11 findings by the MAIB suggests fault on part of the "Diamant" and seven findings of fault on the part of the "Northern Merchant".[107] But the only conclusion addressing a breach of the Colregs was made by highlighting that the "Diamant's" bridge team failed to act in accordance with Rules 2(a) and 19(e).[108]

Not knowing what exactly the distance was between the "Diamant" and the "Northern Merchant" the MAIB's opinion was that

> "A prudent course of action then would have been to apply Rule 2(a): assume a close quarters situation and/or risk of collision and take all way off the vessel in accordance with Rule 19(e)."[109]

Despite the explicit finding of a violation of Rule 19(e) it appears that the "Diamant" was at least also in breach of Rule 19(b) in that she did not operate on a safe speed, Rule 19(c) in anticipating "that 'Northern Merchant' would stand on",[110] and Rule 19(d) in not considering that a CPA[111] of three cables was getting her into a close-quarters situation

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[100] A letter on file MS 10/74/205 suggests that the public interest test was not passed for a prosecution of the "Hampoel's" chief officer.
[101] See also Chapter 11.3.2.
[102] Conviction 30 (Annex 4).
[103] MAIB investigation report 10/2003, p. 13.
[104] Conviction no. 30 (Annex 4).
[105] MAIB investigation report 10/2003, sections 3.1.1. ("Diamant") and 3.1.13 ("Northern Merchant").
[106] *Ibid*., section 5.2.
[107] *Ibid*., pp. 45-46.
[108] *Ibid*., section 3.1.11.
[109] *Ibid*., section 2.2.3.
[110] *Ibid*., section 2.2.2. Although there is no such thing as a stand-on vessel in restricted visibility which, if given as an answer in an MCA oral exam for a master's certificate, would have caused the candidate to fail the exam.
[111] Closest Point of Approach.

which she would have had to avoid by taking action in ample time.[112] Such action would have required avoiding an alteration of course to port "so far as possible".[113] It is suggested that as long as it is physically possible without increasing any existing danger a vessel must avoid turning to port.[114]

The "Northern Merchant" also seems to carry a significant amount of blame for the collision. In terms of Rule 19 it appears that several violations have occurred. The "Northern Merchant" was not sailing at a safe speed as the speed was not, as required by Rule 19(b), adapted to the prevailing circumstances. The speed was based on normal operating practice and "the visibility was never a factor" for the master.[115]

When the "Northern Merchant" eventually altered course to starboard by 7º to 10º after the bridge team became aware that the "Northern Merchant" was heading for a close-quarters situation with the "Diamant" the master was in the eyes of the MAIB acting in contravention of Rule 8 (and thereby Rule 19(c)).[116] An alteration of only 7º to 10º was considered inadequate.[117]

A further violation occurred when the "Northern Merchant" seemingly did not follow the requirements of Rule 19(e). The master did not act on any founded knowledge when manoeuvring into a close-quarters situation but based his decision on the perceived unwritten and non-existent rule that a high-speed craft would always keep clear of other traffic. He did not establish that a risk of collision did not exist or that he was able to avoid a close-quarters situation. He did not take all her way off or even reduce the speed to a minimum.[118]

It appears that he did not navigate with extreme caution. The "Northern Merchant" should probably "have reduced speed to little more than steerage way and felt her way past the other vessel".[119]

By not prosecuting any owner, master or watchkeeper of the "Northern Merchant" a message seems to have been sent that the "Northern Merchant's" navigation and manoeuvring was free of blame. This, however, does not appear to be the case.

It would also have been appropriate for the MAIB when stating a contravention of Colregs by the "Diamant" under "causes and contributing factors" to similarly address the "Northern Merchant's" shortcomings. The latter, however, has been slightly buried in the main text where it is said that the "Northern Merchant" "should have acted in accordance with Rule 19(d)" and that the alteration of course was in contravention of Rule 8.[120]

11.4. Collisions that did not trigger an MCA investigation

Apparently, in a number of cases the MCA did not investigate the same incidents as the MAIB. Corresponding MCA files were not found for 22 out of 41 investigations reported by

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[112] MAIB investigation report 10/2003, section 2.2.2.
[113] Rule 19(d)(i).
[114] See also *The Roseline,* p. 417, where Sheen J strongly condemned any alteration to port for vessels on a head-on course not in sight of each other.
[115] MAIB investigation report 10/2003, s. 2.3.1.
[116] *Ibid*.
[117] *Ibid*.; see also *The Maloja II* [1994] 1 Lloyd's Rep. 374*,* p. 379, where Staughton LJ held an alteration of 10º to starboard at a distance of 6 miles not be a serious fault but a failing which did not make it easy for the other vessel to appreciate what the first vessel was doing. also in *The Topaz,* para. 44, where, with a collision angle of 51º, it was considered that an alteration of course of 10º in good visibility at a distance of three miles was a "nibble" and should at least have been 30º.
[118] For the facts see MAIB investigation report 10/2003, s. 2.3.1.
[119] *The Maloja II,* p. 379.
[120] MAIB investigation report 10/2003, s. 2.3.1.

the MAIB between 2000 and 2005.[121] But the reason for the absence of any documentary trail may not only be that incidents were not investigated.

Even though the MCA file list dated back to 1998, incidents which the MAIB investigated may not all overlap with MCA investigations.[122] It might also be that spelling of names is different on the MCA list. However, it can be safely assumed that if I overlooked files on the MCA file list they do not represent a large number for this comparison. The conclusion that approximately 50% of MAIB investigations are covered by MCA investigations appears therefore to be appropriate.[123]

Of the 41 collisions and near misses, about which the MAIB published investigation reports between 2000 and 2005, thirty involved UK flagged vessels and five out of those cases led to a conviction after prosecution by the MCA.[124]

Eight other collisions[125] with UK flagged ship involvement were investigated by the MCA and, together with 17 further cases which were not investigated,[126] did not trigger any MCA prosecution.

Seafarers convicted in the remaining five cases were the master of UK flagged off-shore supply vessel the "Highland Pioneer",[127] the skipper of the UK Class V passenger boat the "Poole Scene",[128] the master of the Luxembourg flagged high-speed craft the "Diamant",[129] the second mate of the UK flagged fishing vessel "Marbella",[130] and the master of the UK flagged dredger "Donald Redford".[131]

No master or officer of any other seagoing[132] UK flagged cargo or passenger vessel was prosecuted throughout the sample period.

Three examples of collisions which involved UK flagged cargo vessels and did not trigger an investigation will be discussed to highlight the different approaches of MCA, MAIB and also the Admiralty Court. The collision cases selected are those of the "Global Mariner",[133] the "Scot Explorer",[134] and the "Hyundai Dominion".[135] All three vessels were flying the UK flag.

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[121] See MAIB collision reports, Annex 14.
[122] An MAIB investigation report will sometimes only be published several years after the collision (e.g. report 7/2003 deals with the collision of the "Dutch Aquamarine" and the "Ash" which happened on 9 October 2001 (see Convictions 29/2003)). The report date thereby does not give any indication of the incident date (although the date of the incident is published as part of the report). MCA files on the other hand refer to the date of the incident and investigations (unless they end up as prosecutions which usually significantly extends the life of a file, see above, conviction 29/2003) are usually dealt with in a shorter period of time than MAIB investigations. As a consequence the MAIB reports referred to may be dealing with incidents prior to the first date of the complete MCA file list (which was 14 June 1998) and MCA files may have been searched for in the relevant period 2000 – 2005 for which the MAIB had not published their report by the end of 2005. Although the latter does not appear to be the case as MAIB investigation results of collisions are now reported sooner than in previous years, e.g. the collision of the "Lykes Voyager" on 8 April 2005 was already reported in February 2006 and the collision of the "Harvester" on 5 November 2005 was reported in June 2006.
[123] The estimate of 50% was not questioned by the Head of the EnU, Annex 16, question 24.
[124] Annex 14, MAIB consecutive nos. 10, 16, 27, 28 and 32.
[125] *Ibid*., MAIB consecutive nos. 1, 3, 4, 5, 9, 12, 19 and 31.
[126] *Ibid*., MAIB consecutive nos. 2, 8, 13, 15, 17, 21, 22, 24, 29, 33, 34, 35, 36, 37, 38, 39 and 40.
[127] Fined £1,250 for "conduct endangering ships, structures or individuals", news release of 5 April 2000 on file MS 10/74/66; Annex 14, MAIB consecutive no. 10.
[128] Fined £300 for endangering ship, passengers and crew, Conviction 9/2001 (Annex 2); Annex 14, MAIB consecutive no.16.
[129] The master of the "Diamant" was fined a total of £3,000, see discussion above; also Annex 14, MAIB consecutive no. 27.
[130] Second mate of "Marbella" fined £1,000, see discussion above; Annex 14, MAIB consecutive no. 28.
[131] Master was given an 8 months custodial sentence for being intoxicated by alcohol and colliding with a jetty, conviction 40/2004 (Annex 4); Annex 14, MAIB consecutive no. 32.
[132] "Sea" in seagoing is to be understood here as not being any categorised waters, see MSN 1776, para. 4.
[133] Annex 14, MAIB consecutive no. 24 (investigation report 35/2002).
[134] *Ibid*., MAIB consecutive no. 35 (investigation report 10/2005).
[135] *Ibid*., MAIB consecutive no.38 (investigation report 17/2005).

(a) The "Global Mariner"

The "Global Mariner" (GM) collision not only triggered an MAIB investigation but is also one of the few cases which were tried in the Admiralty Court.[136]

GM collided with the anchored Cyprus flagged "Atlantic Crusader" (AC) in broad daylight on the river Orinoco in Venezuela after leaving her berth sailing down river. As a result of the collision GM grounded and sank on the south side of the river with all crew being able to safely evacuate the vessel.[137]

The MAIB considered it a "key factor" in the collision that GM's crew was unprepared for AC's "relative position and aspect" directly after GM finished her turn downstream[138] even though a "most probable scenario" for the collision was not suggested.[139]

No other key factors as such were addressed but a number of points were made about GM's bridge team management and her manoeuvring and navigation. The main carefully worded criticism always comes back to the key factor, for example, in that AC's position was not fixed on the chart,[140] the bridge team did not establish the pilot's intention,[141] AC's position was not known,[142] and GM's bridge team "believed" that AC was underway.[143] Other than this the report is lacking a clear conclusion and states that "in view of the uncertainty, a number of scenarios are possible".[144]

When discussing collision avoidance the MAIB report does not address a breach of any rule by GM other than Rule 34 (d).[145] The report actually approves of the master's action on the assumption that both vessels were underway. It is said that in this scenario the GM would have taken action in line with Rule 17(a)(ii) requirements.[146]

No mention is made of Rules 5, 6, and 7 or any other merchant shipping legislation such as the Safety of Navigation Regulations. Under these Regulations it is an offence by the master when the voyage is not planned in accordance with the requirements of SOLAS Chapter V, reg. 34 (1) and (2).[147] Part of this plan is the obligation to ensure sufficient sea room for the safe passage of the vessel throughout the voyage.[148] The facts in the MAIB report seem to make it clear that this requirement was not satisfied.

The Admiralty Court judge did not have doubts as to which vessel was to blame for the collision and held GM to be 100% at fault.[149] Gross J established clear breaches by GM of Rules 5, 6 and 7(a). He saw the breach of Rule 5 and 7(a) in that "those on board GM proceeded on the basis that both the "Illapel"[150] and AC posed no risk to their proposed manoeuvre".[151]

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[136] *The Global Mariner* [2005] 1 Lloyd's Rep. 699.
[137] For details see MAIB investigation report 35/2002, p. 9 *et seq.*
[138] MAIB investigation report 35/2002, p. 17.
[139] *Ibid*.
[140] *Ibid*., p. 24.
[141] *Ibid*.
[142] *Ibid*.
[143] *Ibid*., p. 25; the bridge team "believed" as opposed to knew – the latter being a requirement which follows from the application of Rule 7(c) that "assumptions shall not be made on the basis of scanty information"; see, for example, *The Pulkovo and Oden* [1989] 1 Lloyd's Rep. 280, p. 287.
[144] MAIB investigation report 35/2002, p. 17.
[145] *Ibid*., p. 21; according to Rule 34 (d) vessels which fail to understand the action of the other vessel shall indicate their doubt by sounding at least five short blasts on the whistle.
[146] *Ibid*.
[147] Safety of Navigation Regulations, Schedule 4, para. 19.
[148] SOLAS Chapter V, reg. 34.2.2.
[149] *The Global Mariner,* para. 106.
[150] Another vessel which GM had to pass before encountering AC, MAIB investigation report, p. 11 (figure 1).
[151] *The Global Mariner,* para. 81.

> "They [Rule 5 and 7(a)] emphasise the need for those on a vessel to make a proper appreciation of her situation; assumptions are to be avoided; where there is doubt, a risk of collision is deemed to exist."[152]

Rule 6 was considered to be breached because neither traffic density[153] nor current[154] was adequately taken into account when GM left her berth and conducted her turn.[155] The breaches of the three Rules taken together were held to have caused the collision.[156]

When considering the MAIB investigation report and the Admiralty Court ruling it appears in retrospect that enough reasons would have existed for an investigation by MCA in that there was enough evidence that a "significant breach"[157] might have occurred.

(b) The "Scot Explorer"

The "Scot Explorer" (SE) collided with the Danish fishing vessel "Dorthe Dalsoe" (DD) inside the Danish EEZ west of Gothenburg but seemingly outside of Danish territorial waters.[158] It was dark, the visibility was good and crews on both vessels were awake at the time of the collision.[159]

The master of SE was alone on the bridge, did not determine whether a risk of collision existed[160] despite having been fully aware of the presence of DD,[161] but monitored the ship's position at the chart table and updated the ship's log book immediately prior to the collision.[162] No attempt was made to alter course or speed other than seconds before the collision when the master applied starboard helm.[163]

The MAIB investigation report, without addressing a breach of the Colregs as such, makes it clear that the master on SE did neither follow Rule 7(c) nor Rule 5. The master's inaction was based on scanty information as no bearing or radar plot of the approaching DD was taken and the risk of collision was only assessed from the visual aspect of DD and from the "synthetic trail behind her echo on the radar display".[164]

Rule 5 was breached as the relevant AB who would have been the look-out was also the cook and was working in the galley at the time in question.[165] "Had a proper look-out been maintained, the likelihood of collision would probably have been detected in time for successful avoiding action to be taken."[166]

It appears that in addition SE was probably in breach of Rule 17(a)(ii) and (b) as DD was approaching from port side and SE was independent of DD's activity initially the stand-on vessel which under good seamanship would appear to have been required to act before Rule 17(b) applied.[167]

The MCA files also suggest for this collision that no investigation was undertaken.

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[152] *Ibid*.
[153] Rule 6(a)(ii).
[154] Rule 6(a)(v).
[155] *The Global Mariner,* para. 94.
[156] *Ibid*., para. 99.
[157] See above, Chapter 2, fn 107.
[158] See chart in MAIB investigation report 10/2005, p. 7 (figure 3).
[159] MAIB investigation report 10/2005, p. 1.
[160] *Ibid*., p. 20.
[161] The master had taken over the watch from the chief officer when DD was at a distance of approx. 2.5 - 3 miles, MAIB investigation report 10/2005, p. 6.
[162] *Ibid*.
[163] *Ibid*.
[164] *Ibid*., p. 20-21.
[165] *Ibid*.
[166] *Ibid*., p. 21.
[167] *The Koscierzyna*, p. 129. Although Sir Thomas Bingham M.R. (as he then was) explicitly only referred to a vessel being overtaken it would seem to be appropriate to also apply such relationship between Rule 17(a)(ii) and (b) for crossing situations.

(c) The "Hyundai Dominion"

The last example for a collision scenario which did not lead to an MCA investigation is the collision of the UK flagged container vessel "Hyundai Dominion" (HD) with the Hong Kong registered "Sky Hope" (SH) during day light in good visibility[168] in June 2004 in the East China Sea.[169]

It appears that the MAIB identified three potential violations of merchant shipping legislation on HD which cannot be dismissed as having played a role in causing the collision. First, fatigue may have played a role in that the watchkeeper "had worked in excess of the hours permitted by STCW over the previous 2 days"[170] and that "the decision by both OOWs not to take action until too late might have been influenced by their fatigue".[171] Working in excess of permitted hours constitutes a violation of the Hours of Work Regulations, reg. 4, and is subject to a penalty for both master and company.[172]

Secondly, watchkeeper and look-out could not communicate in a common language. While the chief officer was Yugoslavian and had good English his Turkish look-out's command of the language was poor and they could not have communicated effectively with each other.[173] This may have contributed to the collision as not to have "this ability invites confusion and misunderstanding, particularly during times of intense workload or stress".[174]

The master and company of a UK flagged ship have the duty to ensure that "there are at all times means in place for effective oral communication related to safety between all members of the ship's…crew".[175] A watchkeeper and look-out who may have to resort to sign language[176] does not appear to satisfy this requirement as "there is concern at the potential safety problems of using him [the look-out] in such an important safety related role".[177] A contravention of a requirement stipulated in reg. 5 is subject to a penalty.[178]

Thirdly, despite the fact that HD appears to have been the stand-on vessel the watchkeeper only applied starboard helm very shortly before the collision which could not be avoided by this action.[179]

HD appears to have been violating Rule 17(a)(ii) and (b).[180] No action to avoid a collision was taken by the watchkeeper when it became apparent to him that SH was not taking appropriate action to keep out of the way. An indication that it became apparent to the chief officer in time to avoid collision was his inadequate measure of sending a message by AIS worded "PLS KEEP CLEAR".[181]

The breach of Rule 17(b) would seem evident in that HD did not take the action which best aided to avoid the collision when the point in time was reached that the give-way vessel could no longer avoid the collision by her action alone. HD did not make use of her engines[182] and her attempt to alter course came much too late and was ineffective.[183]

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[168] MAIB investigation report 17/2005, p. 9.
[169] *Ibid*., p. 1.
[170] *Ibid*., p. 21.
[171] *Ibid*., p. 27.
[172] Hours of Work Regulations, reg. 20(1)(a) and (d) respectively.
[173] MAIB investigation report 17/2005, p. 33.
[174] *Ibid*.
[175] The Merchant Shipping (Minimum Standards of Safety Communications) Regulations 1997; SI 1997 No. 529 (hereafter "Standards of Safety Communications Regulations"), reg. 5(1)(a).
[176] See MAIB finding in MAIB investigation report 17/2005, p. 33, when discussing the ability of the look-out who was also doing fire rounds to communicate safety problems effectively.
[177] *Ibid*.
[178] Standards of Safety Communications Regulations, reg. 6.
[179] MAIB investigation report 17/2005, p. 22 *et seq.*
[180] See also above, discussion of collision between the "Atlantic Mermaid" and the "Hampoel".
[181] Facts according to MAIB investigation report 17/2005, p. 7.
[182] Although it was acknowledged by the MAIB that reducing speed "might not have been the most appropriate action", *Ibid*., p. 27.

The three possible breaches of merchant shipping legislation by HD suggest that an investigation by the MCA would have been appropriate.

It is not clear why in the above three cases investigations were not carried out.[184]

As all three collisions occurred outside UK waters it could be questioned whether the UK flag State administration has jurisdiction in international law on the high seas (HD v. SH), in the EEZ of Denmark (SE v. DD) or in internal Venezuelan waters (GM v. AC) to investigate and/or prosecute the master, watchkeeper or owner involved.

Next I will therefore analyse the criminal jurisdiction of the MCA to verify whether or not the MCA had jurisdiction outside of the UK in the three above cases.

11.5. International criminal jurisdiction of the MCA

Criminal jurisdiction for cases of collision on the high seas is regulated in international law, UNCLOS 1982. Criminal proceedings against the master or any crew member may only be instituted before authorities of either the flag State or the State of which such person is a citizen.[185]

In addition the responsibility for penal jurisdiction in case of collision is addressed in an international convention to which the UK and Denmark are parties but not Venezuela.[186] The Penal Jurisdiction Collision Convention provides for the same rules as UNCLOS save that it does not restrict the application of the penal jurisdiction to the high seas only and does not give penal jurisdiction to the State of which the person in question is a national.[187]

However, collisions in internal waters are not covered by the convention,[188] and a contracting party may also reserve to itself the right to commence proceedings for offences committed in its own territorial waters.[189] The UK has made use of the latter option and reserves the right to commence proceedings for such offences.[190]

It would seem to follow that in international law the MCA has sole jurisdiction for UK flagged vessels "in the event of a collision or any other incident of navigation"[191] in all waters other than internal, and if so provided for by the relevant legislation of the other State, in territorial, waters of that State. The MCA would therefore have been the only authority to investigate the collisions of HD v. SH on the high seas and of SE v. DD in the Danish EEZ as regards any criminal liability of owner, master and crew of the UK flagged vessels involved (i.e. HD and SE).

Not having the sole jurisdiction, however, does not stop the MCA from proceeding against owner, master and crew of UK flagged vessels, and the Prevention of Collision

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[183] *Ibid*.
[184] The answers of Captain Smart do not suggest that financial constraints stopped the MCA from investigating, but that the relevant information was probably not reported to EnU, Annex 16, questions 12 and 24. The master of a UK flagged vessel involved in an accident "which affects the safety of the ship or the efficiency or completeness of its life-saving appliances or other equipment" is, however, under an obligation to report the accident to the MCA, the Merchant Shipping (Survey and Certification) Regulations 1995, SI 1995 No. 1210, hereafter "Survey Regulations", reg. 8(1)(c)(i).
[185] UNCLOS, Art. 97(1). This Article therefore gives overlapping jurisdiction to two different States.
[186] International Convention for the Unification of certain Rules Relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation, 1952 (hereafter "Penal Jurisdiction Collision Convention"); the convention entered into force in the UK on 18.09.59 – see *The Ratification of Maritime Conventions*, chapter I.2.30.
[187] Penal Jurisdiction Collision Convention, Art. 1.
[188] *Ibid*., Art. 4, first sentence.
[189] *Ibid*., Art. 4, second sentence.
[190] *The Ratification of Maritime Conventions*, chapter I.2.30.
[191] Penal Jurisdiction Collision Convention, Art. 1.

Regulations apply to UK flagged vessels wherever they are.[192] As a result an investigation in case of GM v. AC could have been commenced both by Venezuelan authorities in Venezuela under Venezuelan law, and by the MCA in the UK under UK law.[193] It appears, though, that no criminal proceedings were instituted against the owner, master or any crew in any country.[194]

The circumstances suggest that in none of the three collision cases was a jurisdictional obstacle in place to prevent the MCA from instituting proceedings in any of those cases.

11.6. Conclusions

Despite the findings in this chapter that there were prosecutions for violations of the Colregs the general risk for a master or watchkeeper to become subject of a criminal investigation for such a violation appears to be rather insignificant. Over a period of five years only five masters/watchkeepers of UK flagged vessels were convicted for a Colreg violation in the UK. Furthermore, it seems that the further away from the UK the incident happens the less likely it would be that the incident was investigated by the MCA.[195]

It could also be observed that only one master[196] or watchkeeper of a foreign going UK flagged cargo or passenger vessel became subject to prosecution for a violation of Colregs during the sampled period.

Considering the risk to life a collision can cause the level of fines in comparison to pollution events[197] appears to be rather low.

Next I will discuss the last of the three selected triggers,[198] pollution.

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[192] The Prevention of Collision Regulations, reg. 2(1)(a).
[193] Although, it appears with some difficulty, see Captain Smart, Annex 16, question 21.
[194] Information from the chief officer of GM with whom I spoke several times in the Summer of 2001 after the collision.
[195] According to Captain Smart, "it [going overseas to investigate an accident] does happen but it is rare, there are legal hurdles to overcome and it is often done subsequent to a 'letter rogatoire'. Can't remember all cases but certainly the Boxer (Tug running over a diver), Dieppe (Pollution)", Annex 16, question 21. See also the reference to the budget of the EnU, Chapter 9.8.1.
[196] "Highland Pioneer", MCA file 66; see above, Chapter 11.4: one skipper of a class V passenger boat, one master of a Luxemburg flagged HSC, the second mate of a UK flagged fishing vessel and the master of a UK flagged dredger; the latter, however, was not prosecuted for a breach of the Colregs.
[197] See Chapter 12.
[198] For "enforcement triggers" see above, Chapter 1.6.

Chapter [12] – Prosecutions and pollution

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12.2. Oil pollution
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12.4.1. Prosecution for garbage dumping on the "Lotta Kosan"
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12.5. Conclusions

12.1. Introduction

The number of investigations under the trigger "Pollution"[1] amounted to 23 out of a total of 207 files which represents a share of 11.1%.[2] Prosecutions recorded on the MCA website show 8 successful convictions between 2001 and 2005 which represent a share of 12.3% out of a total of 65 recorded convictions.[3] Prosecution reports were taken from the MCA website and, where the relevant file was inspected, additional information - if available - was obtained from the file in question.

The MCA deals with pollution under three separate headings which are oil, chemicals and garbage.[4]

The majority of recorded investigations (20) were concerned with oil pollution, with only three investigations into garbage dumping and none for pollution by chemicals.[5] A similar picture arises when looking at the convictions. Six convictions for oil pollution[6] are followed by two successful prosecutions for garbage dumping and none for pollution by chemicals. It appears to be arguable, though, whether an illegal discharge of any chemical has never occurred, but it is probably rather a question of initial identification of the chemicals in the water and the subsequent problem to gather evidence which appears to be giving chemical tankers a complete "clean bill of health".[7]

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[1] See above, Chapter 1.6.
[2] Annex 1, s. 2 "Pollution".
[3] Annex 7, Categorised Prosecutions, s. 2.
[4] MEM chapter 1, s. 2.2.1. According to the MEM the division has been done in accordance with the three sets of Regulations (which are addressed below in Chapter 12, fn 11 (oil) and 13 (chemicals and garbage) covering these areas.
[5] See Annex 1, s. 2, "Pollution".
[6] Categorised Cases nos. 18/2002 (Annex 3), 22/2002 (Annex 3), 28/2003 (Annex 4), 55/2005 (Annex 6), 62/2005 (Annex 6) and 63/2005 (Annex 6).
[7] The "Advisory Committee On Protection Of The Sea" (ACOPS), March 2006, (http://www.mcga.gov.uk/c4mca/acops_2005_final_report.pdf - 4 November 2008), p. 7, in its 2005 report lists two discharges from vessels in the area of the UK continental shelf; both discharges, however, did not originate from a chemical tanker, 2005 report p. 16; the 2004 annual survey of reported discharges (http://www.mcga.gov.uk/c4mca/mcga_2004_acops-3.pdf) does not list any discharge from ships of substances other than mineral oil and garbage, p. 13; however, 43 chemical spills were recorded from offshore installations, p. 15, and the survey for 2003 showed one vessel, Appendix 1, p. 10, having spilled 5 litres of Ethanol; in 2002 three chemical discharges from vessels were recorded, Appendix 1, pp. 1,2 and 5; it also has to be kept in mind that the ACOPS survey relies on incidents reported to it by various different organisations (see, for example, 2004 survey, p. 48) and a vessel spilling chemicals will hardly ever report an incident if it cannot be visually detected.

When looking at the investigations and prosecutions brought by the MCA it needs to be kept in mind, though, that other institutions such as port and harbour authorities[8] and the Procurator Fiscal in Scotland also prosecute vessels for pollution offences.[9]

Discharge of oil from ships is partly regulated in the MSA 1995,[10] while the relevant MARPOL provisions on the discharge of oil are incorporated into English law by statutory instrument.[11] Apart from oil, the discharge of chemicals and garbage is not directly addressed in the MSA 1995. But the requirements of MARPOL[12] are given the force of law in the UK by statutory instruments[13] made under the MSA 1995.[14]

Discharges into coastal waters are also regulated by the Water Resources Act 1991. Coastal waters or "controlled waters" are all waters landward of the baseline as defined by the Act and also territorial waters which extend seaward for three miles.[15] A person breaches the provisions of the Water Resources Act 1991 when he "causes or knowingly permits any…polluting matter to enter any controlled waters".[16] The offence is one of strict liability[17] and the only defences are regulated under s. 89. A person committing an offence may be liable on summary conviction to a maximum of three months imprisonment and/or a fine not exceeding £20,000[18] and on conviction on indictment to a maximum of two years and an unlimited fine.[19] Penalties under the 1991 Act seem thereby significantly different from those under the MSA 1995 or the relevant merchant shipping pollution regulations.[20]

Lord Donaldson questioned in his "Sea Empress" review whether maritime pollution was supposed to be covered by the 1991 Act,[21] but it appears that the Court of Appeal did not have any such doubts. The Milford Haven Port Authority was found guilty under s. 85 of the Water Resources Act for having caused the "Sea Empress" oil pollution and was fined £750,000.[22]

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[8] See the MSA 1995, s. 143(1)(b).

[9] See, for example ACOPS 2005 report, p. 18; of a total of 13 prosecutions brought in 2005 only three were brought by the MCA, another three by port and harbour authorities and seven by the Procurator fiscal; four of the Scottish prosecutions were for pollution from offshore installations, and all other prosecutions by any of the three authorities were for pollution originating from vessels. Whether any prosecution was brought by the Environment Agency was not recorded in the report although the survey questionnaire had been distributed, amongst others, to the Environment Agency, ACOPS 2005 report, p. 3, para. 1.2.2. In 2005 the Environment Agency recorded no serious water pollution incident caused by the Marine Transport Industry but 26 less serious incidents (spreadsheet, no. 14, "Transport", on http://www.environment-agency.gov.uk/yourenv/eff/1190084/pollution/296030/298038/ - 4 November 2008). In 2004, however, three serious incidents were recorded (see spreadsheet for 2004, same website).

[10] Section 131, see Chapter 12.2.

[11] Annex I: The Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 (SI 1996 No. 2154) (hereafter "Oil Pollution Regulations").

[12] Annex II, Noxious Liquid Substances in Bulk; Annex V, Pollution by Garbage.

[13] Annex II: The Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996 (SI 1996 No. 3010) (hereafter "Chemicals Pollution Regulations"); Annex V: The Merchant Shipping (Prevention of Pollution by Garbage) Regulations 1998 (SI 1998 No. 1377) (hereafter "Garbage Pollution Regulations").

[14] Sections 85 and 86.

[15] Water Resources Act 1991, s. 104(1). The breadth of the territorial sea is 12 miles, see Territorial Sea Act 1987, s. 1(1)(a). "Controlled waters" under this Act thereby appear to be different from "controlled waters" as regulated in the Oil Pollution Regulations, reg. 1(2) in connection with the Merchant Shipping (Prevention of Pollution) (Limits) Regulations 1996 (SI 1996, No. 2128) (hereafter "Oil Pollution Limits Regulations"). "Controlled waters" as specified in the Oil Pollution Limits Regulations, Art. 2 and the attached Schedule, reg. 1, are areas adjacent to, but outside of, the territorial waters of the UK.

[16] Water Resources Act 1991, s. 85(1).

[17] *Environment Agency (Formerly National Rivers Authority) v. Empress Car Co. Ltd.* [1999] 2 AC 22, p. 32.

[18] Water Resources Act 1991, s. 85(6)(a).

[19] Water Resources Act 1991, s. 85(6)(b).

[20] See below: Oil Pollution, Chemical Pollution and Garbage Pollution in the merchant shipping legislation.

[21] Lord Donaldson, *Command and Control,* 1999, para. 3.47.

[22] *R v. Milford Haven Port Authority* [2000] 2 Cr. App. R.(S.) 423, p. 435. The fine was reduced from £4,000,000. It would appear that no UK prosecution action was brought against either owner/manager or master of the vessel. The Environment Agency's website only refers to the trial against the Milford Haven Port Authority, http://www.environment-agency.gov.uk/regions/wales/426317/610761/684758/815018/ (4 November 2008).

The prosecuting agency for violations of the Water Resources Act 1991 is the Environment Agency. The powers originally given to the National Rivers Authority[23] were transferred on the birth of that Agency.[24]

There was no evidence in the MCA files that any pollution incident was ever passed on, or considered to be passed on, to the Environment Agency for prosecution.

The three types of pollution addressed in the MCA Enforcement Manual will be dealt with in turn. In addition, a discussion of the 2005 EC Directive[25] which is most likely going to shape the future criminal and administrative law on shipboard pollution in European Union member States will follow.

The first type of pollution I will discuss is pollution by oil.

12.2. Oil pollution

It is internationally accepted that the coastal State has full sovereignty over its internal waters.[26] The UK, as a party to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL),[27] has made use of her right and applies different regimes for oil discharges landward and seaward of the baselines.[28] The MSA 1995, s. 131, regulates the discharge of oil and oily water in connection with ships into United Kingdom "national waters".[29] The MSA 1995, s. 131 reads as follows:

> "131(1) If any oil or mixture containing oil is discharged as mentioned in the following paragraphs into United Kingdom national waters which are navigable by sea-going ships, then, subject to the following provisions of this Chapter, the following shall be guilty of an offence, that is to say—
> (a) if the discharge is from a ship, the owner or master of the ship, unless he proves that the discharge took place and was caused as mentioned in paragraph (b) below;
> (b) if the discharge is from a ship but takes place in the course of a transfer of oil to or from another ship or a place on land and is caused by the act or omission of any person in charge of any apparatus in that other ship or that place, the owner or master of that other ship or, as the case may be, the occupier of that place.
> (2) Subsection (1) above does not apply to any discharge which—
> (a) is made into the sea; and
> (b) is of a kind or is made in circumstances for the time being prescribed by regulations made by the Secretary of State.
> (3) A person guilty of an offence under this section shall be liable—
> (a) on summary conviction, to a fine not exceeding £250,000;
> (b) on conviction on indictment, to a fine.
> (4) In this section "sea" includes any estuary or arm of the sea.
> (5) In this section "place on land" includes anything resting on the bed or shore of the sea, or of any other waters included in United Kingdom national waters, and also includes anything afloat (other than a ship) if it is anchored or attached to the bed or shore of the sea or any such waters.
> (6) In this section "occupier", in relation to any such thing as is mentioned in subsection (5) above, if it has no occupier, means the owner thereof."

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[23] Water Resources Act 1991, s. 2(1)(b) and s. 4(1)(b).
[24] Environment Act 1995, s. 2(1)(a)(ii); "It shall be the principal aim of the Agency (subject to and in accordance with the provisions of this Act or any other enactment and taking into account any likely costs) in discharging its functions so to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development…", s. 4(1). It would probably serve the clarity of the law and its application if the MCA and the Environment Agency were to prepare a Memorandum of Understanding similar to that between MCA, MAIB and HSE addressing the differences but also the shared responsibilities for pollution prevention and also actions to be taken in case of an incident.
[25] "Directive 2005/35/EC of the European Parliament and of the Council on ship-source pollution and on the introduction of penalties for infringements", 7 September 2005.
[26] As is laid down in UNCLOS Art. 2(1); also R R Churchill, A V Lowe, *The Law of the Sea,* 3rd ed., 1999, p. 61.
[27] See, for example, *The Ratification of Maritime Conventions*, Vol I, I.7.160 and 170, which show that MARPOL entered into force in the UK on 22 May 1980 (MARPOL, 1973) and on 2 October 1983 (MARPOL Protocol, 1978) respectively.
[28] "…the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large scale charts officially recognized by the coastal State", UNCLOS, Art. 5.
[29] Section 131.

UK "national waters" are waters landward of the baseline[30] and are also called "internal waters" in international law.[31] Discharges into the sea, seaward of the baseline, are regulated (in accordance with MARPOL) by the Oil Pollution Regulations.[32]

Discharges into the "national waters" constitute an offence for the owner or master of the ship[33] subject to certain exemptions such as securing the safety of any ship, preventing damage to any ship or cargo, or saving life.[34]

Even though national/internal waters may form part of the sea as defined in s. 131, sub-section (4), sub-sections (2)(a) and (b) clarify that sub-section (1) does not apply to discharges which are both made into the sea and are covered by separate Regulations.[35]

The kind of discharges into the "sea"[36] referred to in sub-section 2(b) are regulated by the Oil Pollution Regulations and are permitted subject to specified conditions being met.[37] The Regulations apply to UK flagged ships everywhere and also to foreign flagged ships when they are within the UK or her territorial waters.[38] But the Oil Pollution Regulations exclude their application to discharges landward of the baseline[39] which is consistent with the provisions of the MSA 1995, s. 131, above.

The discharges investigated by the MCA into both internal and waters seaward of the baseline led in 13 out of 20 cases to no further action being taken.[40] In six of those 13 cases vegetable oil or other substances allowed under MARPOL were pumped overboard,[41] and in the other seven a variety of reasons led to the file being closed. The seven cases where action was taken can be broken down as follows. In two cases[42] actions short of prosecution were taken, one case[43] was referred to the Dutch authorities, one case was tried in Denmark, and three prosecutions[44] resulted in fines.

Files where no further prosecution action was taken will be looked at next, followed by investigations which led to convictions.

12.2.1. No prosecution action

In this sub-section I will discuss the connection between a violation of the Oil Pollution Regulations which led to a detention, but not to a prosecution. I will also briefly analyse the six cases which neither led to a detention nor to a prosecution. I will begin with analysing the case of the vessel "Tosca".

The Singapore flagged car carrier "Tosca" was found during a port state control inspection to have "an illegal connection fitted to oily water separator discharge overboard", that the "oily water discharge overboard line contains oil", and to have "excessive oily water in engine room bilges".[45] The vessel was detained on these three grounds,[46] but it was

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[30] See MSA 1995, s. 313(2)(b).
[31] UNCLOS, Art. 8(1).
[32] Issued under s. 128 of the MSA 1995.
[33] MSA 1995, s. 131(1).
[34] *Ibid*., s. 132.
[35] Which are the Oil Pollution Regulations.
[36] "Sea" includes estuaries and arms, Oil Pollution Regulations, reg. 1(2); the definition is the same as in s. 131(4).
[37] Oil Pollution Regulations, reg. 11 *et seq*.
[38] *Ibid*., reg. 2(1)(a) and (b).
[39] *Ibid*., reg. 12(6); but despite the general exclusion of their application for internal waters, reg. 12(7) explicitly also prohibits discharges landward of the baselines which are not permitted to be made into the sea under reg. 12(4), i.e. discharges containing chemicals or other substances which are hazardous to the environment.
[40] Files MS 10/74, numbers 239, 250, 255, 272, 287, 288, 289, 300, 371, 378, 381 and 407.
[41] Files MS 10/74, numbers 239, 250, 287, 288, 300 and 381.
[42] Files 231 and 234.
[43] File 248.
[44] Files 238, 394 and 475.
[45] Report of Inspection, p. 2, on file MS 071/003/1815.

considered that the defence of the master would have been too good for a successful prosecution, because the ship had just passed a survey by Lloyd's Register, which had issued a new International Oil Pollution Prevention (IOPP) certificate, and there was no evidence of a discharge.[47]

A wrong installation of oil filtering equipment alone could be a contravention of the requirement to "be of an approved design in accordance with the specification for such equipment"[48] and would thereby constitute an offence.[49] An offence with a much higher penalty ceiling would have been committed if evidence of a discharge could have been established.[50]

As can be seen in this case, non-compliance with requirements stipulated by the Regulations was considered a sufficient reason to detain the vessel.[51] But it is not clear why it was decided by the EnU that the master would have a good defence when on the same token the non-compliance with the provisions led to a detention.[52]

The wording of the relevant Regulations establishing the breach do not appear to differ significantly. What differs seems to be the legal consequence of the same finding. The power to detain a vessel is worded as follows:

> "In any case where a ship does not comply with any other requirement [i.e. other than Regulations 12, 13 or 16] of these Regulations the ship shall be liable to be detained..."[53]

Owner and master are subject to a penalty under the following conditions:

> "If any ship fails to comply with any requirement of these Regulations (other than regulations 12, 13 and 16) the owner and the master of the ship shall each be guilty of an offence…"[54]

It does not appear that there is much difference between a ship which "fails to comply" and a ship which "does not comply" with the relevant requirement. Of course, after a detention, the evidence might not look so strong.

In the next two sub-sections I will therefore compare the requirements for a detention with those of a breach of the criminal provision, which seem to suggest that a prosecution ought to follow a detention.[55]

(a) Detention[56]

A ship in any UK port is subject to an inspection under the Oil Pollution Regulations.[57]

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[46] Detention Notice on file MS 071/003/1815.
[47] File 272.
[48] Oil Pollution Regulations, reg. 14(5).
[49] *Ibid*., reg. 36(1) makes a contravention of any requirement other than of regs. 12, 13 and 16 an offence punishable by a fine not exceeding the statutory maximum.
[50] Oil Pollution Regulations, reg. 36(2) makes a discharge in violation of reg. 12(2) an offence punishable by a maximum of £250,000.
[51] *Ibid*., reg. 35(2)(a)(ii) and tailpiece.
[52] Detention no. 98 on 4 December 2002, see Annex 10.
[53] Oil Pollution Regulations, reg. 35(2)(a)(ii) and tailpiece.
[54] *Ibid*., reg. 36(1).
[55] Even though I discussed a potential oil pollution risk in Chapter 6.7.2. (*(c) risk of pollution*) I decided not to have the following discussion in Chapter 6.7.2., as it appears that it would have been harder to follow the comparison of the requirements that have to be satisfied to detain a ship or to prosecute a person for a breach of the Regulations. In addition, none of the detentions discussed in Chapters 7.3. and 7.5. was for a breach of the Oil Pollution Regulations.
[56] For a more detailed discussion of "detention" in general see Chapter 5.2. A detention under the Oil Pollution Regulations was not discussed under Chapters 6 and 7 because none of the discussed vessels was detained under these Regulations.
[57] Oil Pollution Regulations, reg. 34(1)(a). However, a vessel and its oil filtering equipment is also subject to a port state control inspection. For port state control see above, Chapter 6 *et seq*.

> "(b) Any such inspection shall be limited to verifying that there is on board a valid IOPP[58] Certificate in the form prescribed by the Convention or a UKOPP[59] Certificate in a form prescribed by the Secretary of State, unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that Certificate. In that case, or if the ship does not carry a valid certificate, the Inspector shall take such steps as he may consider necessary to ensure that the ship shall not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment. The Secretary of State may in such a case permit the ship to leave the port or offshore terminal for the purposes of proceeding to the nearest appropriate repair yard.
>
> (c) Notwithstanding subparagraph (b) above, and without prejudice to any specific control provisions over operational procedures provided for in these Regulations, the Inspector may investigate any operation regulated by these Regulations if there are clear grounds for believing that the master or crew are not familiar with essential ship board procedures for preventing pollution by oil. In the event of any such inspection revealing deficiencies the Inspector shall take such steps as to ensure that the ship will not sail until the situation has been brought to order in accordance with the requirements of these Regulations."[60]

In the first case (ship does not match the certificate requirements) the inspection is initially limited to establish whether the vessel carries a valid oil pollution prevention certificate. Only when the Inspector[61] believes that the condition of the ship or its equipment differs significantly from the details in the relevant certificate and also poses an unreasonable hazard to the environment shall the Inspector stop the ship. He seems not to be required to detain the vessel but only to take measures which prevent the ship from sailing.[62]

The second option (unfamiliarity with procedures) gives the Inspector powers to investigate oil pollution prevention procedures[63] on board if he has clear reasons to believe that ship board personnel is unfamiliar with those procedures. If "deficiencies" (plural) are found the Inspector must prevent the vessel from sailing until the Regulations are complied with. It would appear that an unreasonable threat to the environment is not a precondition to stop the ship. It is unclear, though, whether a single deficiency would suffice to keep the ship in port as the text of the regulation uses "deficiencies" instead of the singular version of the word.[64]

For a detention of the vessel the requirements of reg. 35 have to be complied with.

> "35.(1) If a harbour master has reason to believe that a ship which he believes proposes to enter or leave the harbour does not comply with the requirements of these Regulations, he shall immediately report the matter to the Secretary of State who, if he is satisfied that the ship presents an unreasonable threat of harm to the marine environment, may deny the entry or exit of such ship to United Kingdom ports or offshore terminals.
>
> (2) In any case where:
> (a) a ship:

[58] International Oil Pollution Prevention Certificate.
[59] UK Oil Pollution Prevention Certificate.
[60] Oil Pollution Regulations, reg. 34(1)(b) and (c).
[61] An Inspector carrying out an inspection under the Oil Pollution Regulations has the powers of a Departmental Inspector which are set out in s. 259 of the MSA 1995, see above, Chapter 2.2.1.
[62] It would appear that such measures can be a voluntary agreement by the master not to sail, a prohibition notice issued to the ship or any other (legal) measure which would prevent the ship from sailing. To secure any voluntary agreement the Inspector can, for example, inform the pilots, the local vessel traffic management centre (if any) or the harbour authority. However, he may take the decision to detain the vessel, reg. 35(2)(b), see the discussion below. See also below, Chapter 6. It would, however, appear to be different if the inspection is carried out under the PSC regime. In that case an Inspector would seem obliged to detain the vessel if, when exercising his professional judgment, he establishes that there are deficiencies which are clearly hazardous to the environment, see Chapter 6.4.3.
[63] Such as testing the oily water separator.
[64] It is not clear whether the plural "deficiencies" could refer to several crew not being able to operate, for example, the oil filtering equipment. Several crew members would then appear to be "deficient" and would constitute "deficiencies". To avoid the discussion about the literal meaning of the word "deficiencies" it would probably be the easiest for an Inspector to record (at least) two defects if he believes it necessary to prevent the vessel from sailing: (1) that the equipment is not operational (which he can assume when the operation cannot be satisfactorily demonstrated to him) and, (2) that the crew is not familiar with its operation.

(i) is suspected of a contravention of the requirements of regulation 12, 13 or 16, or
(ii) does not comply with any other requirement of these Regulations[65]

(b) the steps to be taken by an Inspector under regulation 34(1)(b) or (c) involve detention of the ship,…"[66]

it "shall be liable to be detained".[67] Whether or not it will be detained appears to be at the discretion[68] of the MCA Inspector as the provision does not state "the ship shall be", but only that it is liable to be detained. The rather awkward wording of reg. 35(2)(b) ("steps to be taken…involve detention") also seems to clarify that a detention is not the only or even a compulsory means to stop a ship when it does not comply with reg. 34(1)(b)+(c).

If no violation of reg. 34 has been established the vessel can still be detained in accordance with reg. 35(2) for breaching any other obligation prescribed by the Regulations and particularly reg. 12.[69]

In the case of the "Tosca", for example, the reasons for detaining by the MCA were "an illegal connection fitted to oily water separator discharge overboard", that the "oily water discharge overboard line contains oil", and having "excessive oily water in engine room bilges".[70] These reasons would appear to constitute a breach of reg. 12(2) which prohibits the discharge of unfiltered oily mixture into the sea. In his discretion whether or not to detain the vessel the Inspector can probably resort to the qualification in reg. 35(1). The discharge of any oily mixture (other than vegetable oil) into the sea would seem to present "an unreasonable threat" to the environment.[71]

If there had been a discharge into the harbour,[72] constituting a breach under the MSA 1995, s.131, the power of detention would have been with the harbour master.[73] This appears to leave a jurisdictional gap for a detention where there are discharges into waters landward of the baseline which are not part of the relevant harbour.[74]

Whereas the jurisdiction for prosecuting illegal discharges covered by s. 131 into waters of the harbour is with the harbour authority[75] or the MCA,[76] and for discharges into internal waters and the territorial sea also with the Environment Agency,[77] no such solution appears to have been constituted for the *detention* of a polluting vessel. An MCA

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[65] The term "these Regulations", it is submitted, refers to the statutory instrument as a whole and not only to the regulations mentioned in the paragraph before (i.e. particularly reg. 35(2)(a)(i)). It would not make sense to only refer to the paragraph before as the same would be repeated. Furthermore "these Regulations" are spelled with a capital "R" as opposed to the use of lower case letters when single regulations of the statutory instrument are addressed.

[66] Oil Pollution Regulations, reg. 35(2)(a)+(b).

[67] *Ibid*., reg. 35(2) tailpiece.

[68] See also the discussion about the MAIB Chief Inspector's discretion, above, Chapter 4.2.5

[69] Reg. 13 only applies to oil tankers and reg. 16 to the operation of vessels in "special areas" such as the North Sea.

[70] See above, Chapter 12.2.1.

[71] See also the discussion on detention and human rights above, Chapter 3.3.

[72] "Harbour" is defined in MSA 1995, s. 151(1), and means the waters in respect of which a person or organisation is entitled by law to levy any charges other than charges for navigational aids or pilotage. R Douglas, P Lane and M Peto, *Douglas & Geen on the Law of Harbours Coasts and Pilotage*, 1997, para. 1.7, also state that "'harbour authority' in relation to a harbour generally means a 'statutory harbour authority' within the meaning of the Harbours Act 1964". According to s. 57(1) of that Act "harbour" except where used with reference to a local lighthouse authority, means any harbour, whether natural or artificial, and any port, haven, estuary, tidal or other river or inland waterway navigated by sea-going ships, and includes a dock, a wharf, … and, where used with reference to such an authority, has the [same meaning as in the Merchant Shipping Act 1995]." This would seem to suggest that a natural harbour only is a harbour under the MSA 1995 when its use is charged for by the relevant harbour authority.

[73] MSA 1995, s. 144(1).

[74] This is the case in, for example, the Western Solent which is an area not controlled by any harbour authority, see Southampton Harbour Byelaws 2003, s. 3 "Interpretation" referring to the relevant chart, and http://www.southamptonvts.co.uk/files/sha%20limits.pdf (14 July 2008). The Lymington harbour does similarly not cover the relevant area, see http://www.lymingtonharbour.co.uk/Harbour%20limits/Frameset.html (5 November 2008).

[75] MSA 1995, s. 143(1)(b) in connection with s. 143(4).

[76] *Ibid*., s. 143(1)(c) in connection with s. 143(4)(a).

[77] See also above, Chapter 12.1.

Inspector only has jurisdiction to detain for illegal discharges under the Oil Pollution Regulations[78] for sea areas seaward of the baseline[79] so that internal waters between harbour limit and baseline would neither fall under the harbour master's nor the MCA's jurisdiction; and the Water Resources Act 1991 does not give the Environment Agency a right to detain a vessel and neither, it seems, does the MSA 1995 or any of the statutory instruments issued under ss. 85 and 86.

As a consequence it would appear that a change of the law is required to cover the gap between the outer limit of the area under the responsibility of a port authority and the relevant baseline unless it is considered sufficient to only apply the other instruments that may be available.[80] For practical purposes detention powers for pollution should probably be given to Surveyors who would usually be the persons to enforce pollution prevention provisions.[81] It appears that a change of the Oil Pollution Regulations, reg. 12(6) would be suited best to cover the required changes and a proposed new version could read as follows:

> (6) Subject to paragraph (7), this regulation does only apply to discharges which occur landward of the line which for the time being is the baseline for measuring the breadth of the territorial waters of the United Kingdom if the relevant internal waters are not under the jurisdiction of a competent harbour authority.

Next I will discuss the decision not to subject owner and master of the "Tosca" to criminal sanctions.

(b) Criminal sanctions

A breach of the criminal provisions is committed when the ship fails to comply with a requirement stipulated by the Oil Pollution Regulations[82] or when a discharge of an oily mixture occurred into UK national waters.[83] Under the Oil Pollution Regulations a discharge is not required and would, when proven, only raise the level of the fine but not affect any guilt.[84] When the ship fails to comply with the Regulations the owner and the master of the ship are guilty of an offence. It appears that a prosecution ought to follow when the twofold test (evidence and public interest) of *The Prosecutor's Code* has been met.[85]

It is not clear for which test the defence of the "Tosca's" master would have been good simply because the ship had just passed a survey and there was no evidence of a discharge.

It seems that the mere issuing of a certificate is not to be relied on by owners or masters in any manner,[86] and that as a consequence only master and owner, and not the certifying authority, are responsible for putting to sea and operating the vessel and its equipment. The classification society is not responsible for an illegal connection to or from the overboard discharge pipe. This is solely the responsibility of owner and master[87] or of "any other person"[88] whose act met the requirements of being an offence. But the other person cannot be the classification society or its Surveyor unless they have carried out the act which formed the basis of the breach and connected the illegal discharge pipe. Otherwise

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[78] According to reg. 12(2) a ship shall not discharge oil or an oily mixture unless the conditions of reg. 12(2) are satisfied.
[79] Oil Pollution Regulations, reg. 35 in connection with reg. 12(6).
[80] As there would be the MSA 1995, s. 95 (detention of a dangerously unsafe ship – see above, Chapter 5.2.) or for foreign flagged ships also the PSC Regulations, reg. 9(2)(a), see above, Chapter 6.4.3.
[81] See more on port state control in Chapter 6.
[82] Reg. 36(1) and (2).
[83] MSA 1995, s. 131(1).
[84] See above, Chapter 12.2.1.
[85] See above discussion on prosecution, Chapter 10.
[86] *Reeman v. Department of Transport* [1997] 2 Lloyd's Rep. 648, p. 680.
[87] See Oil Pollution Regulations, reg. 36(1).
[88] *Ibid*., reg. 36(4).

the class Surveyor, even if he had been negligent carrying out the survey, does not owe a duty of care to the owner, and thereby also not to the master as the agent of the owner.[89]

Whether or not there was a discharge is also of no relevance for ascertaining a breach.

As a contravention of the Regulations is an offence of strict criminal liability because it does not require *mens rea*[90] the existing evidence in the case of the "Tosca" appears to have been sufficient to overcome the first stage of the full *Prosecutors' Code* test in that the material facts of the case provided evidence which could be used and was reliable.[91] However, there would be a good argument for a lack of public interest despite the vessel having been detained, in that it appears that none of the factors in *The Prosecutors' Code* in favour of a prosecution supported proceedings.[92] One could argue that an illegal connection of the discharge pipe was a premeditated activity,[93] but this would be outweighed by factors against prosecution such as the possibility of a mistake having been made[94] or that no harm had been done.[95] Against this would stand the argument that oil in the overboard discharge pipe suggests that an illegal discharge had actually occurred. But as the location of that discharge was uncertain then there may have been no evidence that it occurred within the jurisdiction of the MCA.[96]

In summary it appears that the evidence test could have been passed but that the public interest test was probably insufficient to support a prosecution despite the ship having been detained. The detention is rather a further reason against a prosecution as the loss of time for the vessel plus the negative port state control record will probably have a harder economic impact on the company than any fine which would most probably not have been above £5,000 under the given circumstances.[97] In addition one may safely assume that the master and chief engineer will have had some uncomfortable questions of their shore management to answer unless they were advised to do what they did.

A prosecution was also not brought in the following cases.

12.2.2. Case studies where no prosecution action was brought

No action was taken where a fishing vessel was trailing an oil slick behind it because bilge water was pumped overboard, but the crew was able to use the defence of emergency discharges as they had a major engine room leak.[98]

In another case the Panamanian vessel "Mercator I" was seen in Liverpool Bay with traces of oil at its stern, but no evidence of a discharge could be found when the ship was inspected in its next port of call.[99]

The UK vessel "Northern Sea" was alleged to have pumped oily water overboard without having the required equipment on board. But as it turned out the classification society Det Norske Veritas had issued wrong certification and the investigation was closed.[100]

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[89] *Reeman v. Department of Transport,* p. 679.
[90] *Federal Steam Navigation* [1974] 1 Lloyd's Rep. 520, p. 532.
[91] *The Prosecutors' Code, s.* 5.3.
[92] *Ibid.,* s. 5.9.; see also the discussion above, Chapter 9.4.
[93] *Ibid.,* s. 5.9.g.
[94] *Ibid*., s. 5.10.c.
[95] *Ibid*., s. 5.10.d.
[96] The Oil Pollution Regulations only apply to foreign ships while they are in UK waters, reg. 2(1)(b), unless the flag State requests proceedings, reg. 38(1)(a), or the discharge was going to affect internal waters, territorial sea or controlled waters of the UK, reg 38(1)(b)..
[97] An offence under reg. 36(1) is subject to a fine not exceeding the statutory maximum; see also above, Chapter 12.2.1. (*(a) detention*).
[98] File 255; the Oil Pollution Regulations provide in reg. 11(a) that regs. 12, 13 and 16 do not apply to discharges to save life at sea or securing the safety of the ship and thereby practically allow discharges under these conditions.
[99] File 289.
[100] File 371.

After Dutch fishermen reported oil in the water and the only vessel present was the UK flagged "Ragnhild Knutsen" no further action was taken as there was a lack of evidence. A statement by the company also alleged that no discharge took place.[101]

A lack of evidence prevented the prosecution of what was probably the vessel "Autoline". It was seen by an aircraft in fog and low clouds trailing an oil slick. The vessel could not be properly identified.[102]

In the case of the "United Sage" a Procurator Fiscal had taken over from his predecessor and did not find the file was clear as to what was agreed in a meeting between the MCA enforcement officer and the previous Procurator Fiscal. The ship had been seen by an aircraft trailing an 11 nautical mile long oil slick 20 nautical miles north east of Rattrey Head. The Procurator Fiscal assumed that it had probably been agreed to monitor the progress of the particular vessel and serve papers on it if it entered a British port. The difficulties he saw in this approach were that a service on the appropriate captain/ship/company[103] would not guarantee that they would attend trial, which might result in a fine but could then not be enforced as none of the possible defendants held any assets in the UK. No further action appears to have been taken.[104]

It appears that not bringing any action could not drive home to any of the possible suspects that their actions have been noticed and that they may have violated the Oil Pollution Regulations. Any element of deterrence involved in any prosecution or in any measure short of bringing proceedings will thereby have been lost and the opportunity for the individuals to learn from their failure has been foregone.[105] A concerted EU prosecution process would probably have helped bringing the polluter to book.

Based on a report by the Dutch Authorities action short of prosecution was taken in that a letter of advice was sent to the owner of the "Oil Oynx". The keeping of the oil record book on board was inaccurate and bilge water was probably pumped overboard while the vessel was not en route. But the file stated that no offence was committed.[106]

Inaccuracies of entries in the oil record book constitute an offence.[107] Ships must have an oil record book on board[108] and also have to fully record each operation,[109] for example, discharging and transfer operations of oily bilge water and oil,[110] without delay.

A letter of concern[111] was sent to owners of the tanker "Bregen". The vessel was supposed to have pumped oil into the Channel but poor photographs by the surveillance aircraft did not clearly identify the ship. The fact that oil was found in the overboard discharge pipe and that the three-way valve[112] was not functioning was not considered to be enough evidence. However, the ship was detained.[113] Despite the evidence about the

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[101] File 378.
[102] File 269.
[103] A document required for the purpose of instituting proceedings against "the company as the owner of a ship shall be treated as duly served" when it is served on the master of the vessel, Oil Pollution Regulations, reg. 37(1). According to the Civil Procedure Rules 6.4.4. "A document is served personally on a company or other corporation by leaving it with a person holding a senior position within the company or corporation."; the Practice Direction – Service (PD 6) defines in s. 6.2. a person holding a senior position; reg. 37(1) clarifies that as regards an owner the master is the person on whom documents can be served.
[104] File 267.
[105] See also below, Chapter 15.
[106] File 231.
[107] Oil Pollution Regulations, reg. 36(1).
[108] *Ibid*., reg. 10(1).
[109] *Ibid*., reg. 10(4).
[110] *Ibid*., reg. 10(2).
[111] Which is the same as a "Notification of Concern", see Chapter 9.3.
[112] The valve that closes the overboard discharge pipe and re-routes the liquid to the bilge holding tank when an oil content higher than the permitted oil content of 15 ppm (Oil Pollution Regulations, reg. 12(2)(c)) is detected.
[113] File 234. Unfortunately no report of the detention can be found on the MCA website and the file could not be retrieved when asked for in February 2007. According to www.equasis.org the "Bregen" was detained on

overboard discharge pipe and that the three-way valve was not operational only action short of prosecution was taken. Under these conditions a conclusion that oil has been discharged appears to be inevitable as oil cannot be in the discharge pipe unless it has been pumped through a malfunctioning oil filtering system or through an illegal bypass pipe. Whereas there seems to have been no evidence for a bypass pipe it had been established that the three-way valve was inoperative.

But no case was found in which proceedings were commenced on the basis of having oil in the discharge pipe without additional evidence for an illegal discharge. In the case of "Finnreel"[114] a conviction (in Denmark) appears to have been based upon noting a discharge from an aircraft as well as establishing oily deposits in the discharge pipe.[115]

However, an inoperative three-way valve could be in contravention of the requirement for an arrangement for automatically stopping any discharge with an oil content of more than 15ppm if the vessel is of 10,000 gt and above.[116] "Bregen" had a gross tonnage of 10,012 gt. The file states that the evidence was not sufficient. It appears that if the evidence was sufficient for a detention, because the ship did not comply, it should also have been sufficient to establish a breach of reg. 36(1).

> "36.(1) If any ship fails to comply with any requirement of these Regulations (other than regulations 12, 13 and 16) the owner and the master of the ship shall each be guilty of an offence and punishable on summary conviction by a fine not exceeding the statutory maximum and on conviction on indictment by a fine.
>
> (2) If any ship fails to comply with any requirement of regulation 12, 13 or 16, the owner and the master shall each be guilty of an offence and section 131(3) of the Merchant Shipping Act 1995 shall apply as it applies to an offence under that section, so that each of the owner and the master shall be liable on summary conviction to a fine not exceeding £250,000 or on conviction on indictment to a fine."[117]

Whereas there might not have been enough evidence for a breach of reg. 36(2) it is suggested that the evidential test for a contravention of reg. 36(1) would have been passed. Thus, unless the public interest test would have been negative, a prosecution ought to have been contemplated.

Leaving aside where vegetable oil was discharged it appears that in the majority of cases where charges were not pressed the prosecution considered that insufficient evidence was available.[118] In my view, if a strong suspicion exists that oil has been illegally discharged within the jurisdiction of the MCA (e.g. in case of evidence of oil in the discharge pipe plus a malfunctioning three way valve) a more robust approach should be taken and a sample prosecution attempt to be made "to test the waters". Looking at the level of fines[119] it would seem that courts do not go lightly about sentencing even small polluters, and oil in a discharge pipe combined with an inoperative three way valve seems to clearly suggest that some pollution had occurred in the recent past.

In the following sub-sections I will discuss prosecutions brought for oil pollution by ships. The discussion of prosecutions is dealt with in two parts. First, I will deal with a prosecution for oil pollution in which the fine was not above £5,000. Secondly, I will address three cases where the fines were significantly higher. This distinction seems to be appropriate as the maximum level of fines for non-discharge breaches is set at the statutory maximum.[120]

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20 June 2002 because of one detainable deficiency with her oil filtering equipment and no further specification is mentioned.

[114] See below, Chapter 12.2.4.

[115] Convictions 2005, 55/2005 (Annex 6).

[116] Oil Pollution Regulations, reg. 14(2)(b).

[117] *Ibid*., reg. 36(1) and (2).

[118] Files 234, 269, 289 and 378.

[119] See Chapter 12.2.5.

[120] See Chapter 12.2.5.

12.2.3. Prosecutions for oil pollution

The seven successful prosecutions identified[121] between 2001 and 2005 on the MCA website saw by comparison with violations of other Merchant Shipping Regulations relatively high fines imposed for single oil pollution incidents in England.[122] It appears that in only five out of a total of 65 convictions[123] were financial penalties higher for non-pollution convictions than the minimum imposed fine for oil pollution incidents in England[124] for a single contravention of the law.[125] The other three fines imposed in England for a breach of the oil pollution provisions were £10,000,[126] £20,000[127] and £30,000.[128]

The Oil Pollution Regulations distinguish between non-compliance with the requirements of the Regulations[129] and violations of discharge prohibitions.[130]

In the following sub-sections I will first discuss prosecutions which led to fines within the statutory maximum followed by the prosecutions with penalties outside that range.

12.2.4. Prosecutions resulting in fines not above £5,000

This part deals with prosecutions and convictions for which the fines imposed were not over £5,000.

> One of the inspected files showed the Dutch vessel "Anna" having pumped slop without an oily water separator in operation. Entries in the oil record book were also incomplete. The case was referred to the Dutch authorities and an out of court settlement had the owners paying € 1,000.[131] This case, other than the two following foreign judgments, is not recorded on the MCA website.
>
> The UK ro-ro vessel "Finnreel" caused oil pollution in Danish waters, was successfully prosecuted in Denmark and owners had to pay a fine of about £5,000.[132] No further action was taken in the UK.[133] If no proceedings would have taken place in Denmark the UK as the flag State of the vessel would have been required to commence proceedings subject to the MCA being satisfied with the available evidence.[134]
>
> In the case of "St Jacques II"[135] the part owner and skipper of the fishing vessel was convicted both in France for breach of Colregs causing a collision in the English sector of the Dover Strait and subsequently in England for a contravention of the Oil Pollution Regulations.[136] The penalty in France

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[121] Excluding the case of the Dutch vessel "Anna" which I only found by reading the file, but which was not recorded on the MCA website, there may well be other similar cases documented in the files which I did not have access to.
[122] Prosecution 22/2002 (Annex 3) ended in a conditional discharge as the defendant had already been convicted to a fine of €7,500 for a breach of Colregs in France. In 55/2005 (Annex 6) the company was fined for oil pollution in Danish waters by a Danish court and the fine in Danish Kroner was said to be equivalent to £5,000. The four English cases were those of the "Borden", "Averity", "MSC Ariane" and "Bro Traveller", see all below.
[123] Between 2001 and 2005, see Annexes 2 to 6.
[124] The fine was £5,000, see Convictions 62/2005 (Annex 6 - "Borden").
[125] Categorised Cases (Annex 7), 4/2001 (£8,000, Colregs), 17/2002 (£6,000, Colregs), 35/2003 (£10,000, Unsafe Operation), 41/2004 (£14,000, Colregs), 45/2004 (£20,000, MSA 1995 s. 100, and £8,000, Health and Safety legislation).
[126] Categorised Cases 18/2002 (Annex 7).
[127] *Ibid*. 63/2005 (Annex 7).
[128] *Ibid*. 28/2003 (Annex 7).For comparison, in the case of the "Sea Empress", which ran aground in the approaches to Milford Haven, the fine for the Port Authority was £750,000 for a spill in excess of 70,000 tonnes, see *R v. Milford Haven Port Authority* [2000] 2 Cr. App. R.(S.) 423, pp. 425 and 435.
[129] Reg. 36(1) for which the statutory maximum applies.
[130] Reg. 36(2) for which the maximum fine is £250,000.
[131] File 248.
[132] Convictions 55/2005 (Annex 6).
[133] File 407.
[134] MARPOL, 1973, Art. 4(1); incorporated into English Law in the Oil Pollution Regulations, reg. 34(2).
[135] Reported as a collision case in *The Saint Jacques II* [2003] 1 Lloyd's Rep. 203.
[136] See in more detail above, Chapter 11.

> was €7,500 with half the fine not to be paid subject to good behaviour. The Magistrates' Court in Folkestone subjected the skipper and part owner to a 12 months conditional discharge.[137]

According to the file

> "an informal bilateral agreement with the French authorities allows for the flag state (either the UK or France) to administer criminal proceedings for navigation offences against its own vessels no matter where the offence occurred (UK or French territorial waters)".[138]

The oil pollution occurred because a cargo tank of the tanker "Gudermes" was ripped open at the collision by the "St Jacques II".[139] A deal was struck between MCA and the defendant skipper that he would only be prosecuted for the pollution and not again for the breach of the Colregs in UK.[140]

The summons for the skipper accused him of having breached regs. 12(2), 36(2) and 36(4) of the Oil Pollution Regulations.[141] The minute on file also recorded that "this is the first time that reg. 36(4) has been used to transport the culpability for pollution away from the owner or master."[142]

It appears that owner and master of the "Gudermes" were considered to have taken all reasonable precautions or to have exercised all due diligence to avoid the commission of the offence.[143] There is at least nothing on file which would suggest otherwise and the transcript of the French court case[144] does not mention any fault of the "Gudermes" for the collision.

> "When passing sentence the judge said she had considered the efficiency and age of the watchkeeper [of "St Jacques II"], the misuse of the South West Traffic Lane and the vessel being insufficiently equipped."[145]

As a consequence the defence of the owner and master of the "Gudermes" for an illegal discharge from their vessel must have been considered strong enough for there not to have been a contravention of reg. 36(2) of the Oil Pollution Regulations. The Court in Folkstone must have accepted that it was the "St Jacques II" skipper's "act or default"[146] which would otherwise have made the owner and master of the "Gudermes" have committed an offence under reg. 36.[147]

This outcome seems not to be completely satisfactory. Whereas one may argue that justice was done in the case of the skipper of the "St Jacques II" because he was convicted both in France (for the Colregs violation) and in England (for the oil pollution), the result for the "Gudermes" does not appear to take into account the poor performance of the OOW. Both vessels had been on a collision course for 16 minutes in a visibility of approximately 5 miles[148] and neither of them took any action.[149] Irrespective of the "St Jacques II's" "flagrant breach of the Collision Regulations"[150] it would also have been the "Gudermes'" duty to take avoiding action. When the "Gudermes" found "herself so close

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[137] Convictions 22/2002 (Annex 3); see also above under Colregs.
[138] File MS 10/74/143, brief to Counsel. Captain Smart, Head of the EnU, told me in September 2007 that no written evidence of such an agreement exists.
[139] File MS 10/74/143, minute of 1 August 2002.
[140] File MS 10/74/143, Attendance Note of Interview and minute of 1 August 2002, para. 5.
[141] File MS 10/74/143, Schedule.
[142] Minute on file 143, para. 6. It seems that the master referred to in the minute is the master of the "Gudermes" and that the remark focuses on the fact that the polluting vessel's owner or master was not held criminally liable, see below.
[143] Reg. 36(3).
[144] On file MS 10/74/143.
[145] File MS 10/74/143, English translation of the transcript of the trial of skipper at Boulogne on 14 December 2001.
[146] Oil Pollution Regulations, reg. 36(4).
[147] For a discussion of reg. 36(4) see also below, Chapter 12.2.4.
[148] MAIB report 5/2002, p. 13, para. 1.4; at a closing speed of approximately 20 knots (see MAIB report 5/2002, p. 27, para. 3.1.1.4, both vessels will have been in sight of one another nearly during the whole 16 minutes.
[149] *The Saint Jacques II*, para. 7.
[150] *Ibid.,* paras. 10 and 21.

that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision".[151] The decision to act is not at the discretion of the stand-on vessel as "in the end, act she must".[152] If the OOW did not establish that a risk of collision existed and later that he was in a close-quarters situation he appears to have been in breach of the look-out requirements[153] because keeping a proper look-out means actually seeing objects which are there.[154] A proper look-out also requires the bridge crew to have "a proper understanding of the position and behaviour of the vessels they were to pass",[155] and "if visual observation did not suffice, then radar plotting could have been undertaken".[156]

In conclusion, it is my view that the "Gudermes" was partly to blame for the collision and, as a consequence, also for the spilling of "up to 71 tonnes of oil" overboard.[157] The failure to prosecute the owner, master or OOW does not appear to do justice with respect to the involvement of the vessel in the collision.

> The smallest fine for oil pollution in England had to be paid by the owners of the ro-ro vessel "Borden". They were fined £5,000 plus £4,379 costs[158] for spilling about 80 litres of fuel oil overboard out of about 0.6 cbm which were spilled on deck.[159] This happened during the transfer of 80 cbm of fuel oil by the chief engineer and was only detected because the vessel was in that very moment taking a pilot on board. Even though a high level alarm was triggered the chief engineer believed that the alarm was for a high bilge alarm,[160] acknowledged and cancelled it. When the alarm re-activated he cancelled it again.[161]

When alongside the "Borden" was subjected to a port state control inspection which found 31 deficiencies. The vessel was detained because the "number and nature of deficiencies indicate failure of SMS".[162] The owners were prosecuted for the pollution but not for the non-compliance with the ISM Code. The minute on file[163] suggests that this approach was taken because the fine level for a violation of the ISM Regulations is only £5,000 whereas the maximum penalty for oil pollution is £250,000.[164] No proceedings were commenced against the master or the chief engineer despite the material facts suggesting a suspicion of negligence on part of the latter.

The broad question in cases such as this is whether or not the prosecution has a choice about whether it will charge the individual. In the following sub-sections I will examine this issue in the context of the "Borden" incident and consider whether or not the prosecution has the choice under reg. 36[165] not to charge the chief engineer, and also, whether it can decide only to charge the owner but not the master.

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[151] Colregs, Rule 17(b).
[152] *Marsden,* p. 272. In *The Petroship B* [1986] 2 Lloyd's Rep. 251, p. 256, it was held that the stand-on vessel "ought to have taken action to avoid collision".
[153] Colregs, Rule 5; the MAIB saw as a contributory factor to the collision that "The effectiveness of the look-out maintained was reduced between 0411 and 0423 when the OOW was busy at the chart table and the look-out was on the helm", MAIB investigation report 5/2002 ("Gudermes" and "St Jacques II"), p. 30, para. 3.3.2.1.
[154] *The City of Naples* 1921 1 S.L.T. 2, p. 14.
[155] *The Global Mariner* [2005] 1 Lloyd's Rep. 699, para. 81.
[156] *Ibid*., para. 82.
[157] MAIB investigation report 5/2002 ("Gudermes" and "St Jacques II"), p. 13, para. 1.3.2.
[158] Categorised Prosecutions (Annex 7), 62/2005.
[159] Minute of 23 December 2004 on file MS 10/74/475.
[160] A high level alarm in a tank indicates that the tank is about to overflow. A high level bilge alarm indicates that the bilges of the particular compartment of the vessel are filled to the extent that triggers the high bilge level alarm. The latter might not require the same immediate attention as a high level tank alarm during bunkering operations.
[161] File MS 10/74/475.
[162] Report of Inspection, p. 5 on file 475.
[163] File MS 10/74/475, minute of 23 December 2004.
[164] File MS 10/74/475, minute of 23 December 2004, para. 2, "Recommendations".
[165] Of the Oil Pollution Regulations.

(a) The prosecution and the owner and the master of the "Borden"

In the case of the "Borden" only the owner was prosecuted and also convicted. The summons[166] charged owners under the Oil Pollution Regulations,[167] and under the MSA 1995.[168]

Apart from the MSA 1995 s. 131(1) and any oil pollution prevention legislation prior to enacting the Regulations of 1983,[169] Parliament chose to stipulate in the Oil Pollution Regulations that "the owner and the master shall each be guilty of an offence".[170]

The following table sets out a synopsis of the "Oil in navigable waters" legislation since 1922 to give easier access to comparative texts.

[166] On file MS 10/74/475.
[167] Oil Pollution Regulations, reg. 12(2) and 36.
[168] Section 128. This regulation does not seem to provide a basis for a charge as its purpose appears to be to provide the powers for Her Majesty to make provisions by Order in Council.
[169] The Merchant Shipping (Prevention of Oil Pollution) Regulations 1983 (SI 1983 No. 1398) (hereafter "1983 Oil Pollution Regulations").
[170] Regulation 36(1) and (2).

Table 14: Oil in navigable waters

Oil in Navigable Waters Act 1922	Oil in Navigable Waters Act 1955	Oil in Navigable Waters Act 1963	Oil in Navigable Waters Act 1971	Merchant Shipping Act 1995
1(1) If any oil is discharged, or allowed to escape whether directly or indirectly, into any waters to which this Act applies from any vessel…**the master or owner** of the vessel, from which the oil is discharged or allowed to escape, …shall be guilty of an offence, be liable on summary conviction to a fine not exceeding one hundred pounds: Provided that it shall be a good defence to proceedings for an offence under this section to prove- **(a)** if the proceedings are against the owner or master of a vessel, that the escape of the oil was due to, or that it was necessary to discharge the oil by reason of, the vessel being in collision or the happening to the vessel of some damage or accident, and also, if the proceedings are in respect of an escape of oil, that all reasonable means were taken by the master to prevent the escape;… **8(3)** The waters to which this Act applies are the territorial waters of Great Britain and Northern Ireland and the waters of harbours therein.	**1(1)** If any oil to which this section applies is discharged from a British ship registered in the United Kingdom into a part of the sea which, in relation to that ship, is a prohibited sea area, or if any mixture containing oil to which this section applies is discharged from such a ship into such a part of the sea with the consequence that the oil in the mixture fouls the surface of the sea, **the owner or master** of the ship shall, subject to the provisions of this Act, be guilty of an offence under this section. **2.** *refers to* prohibited sea areas *for tankers and other ships; areas are specified in the schedule to the act.* **3(1)** If any oil or mixture containing oil is discharged into waters to which this section applies from any vessel, …then subject to the provisions of this Act – **(a)** if the discharge is from a vessel, **the owner or master** of the vessel… shall be guilty of an offence under this section. **4(1)** Where a person is charged with an offence under section one of this Act, or is charged with an offence under the last preceeding section as **the owner or master** of a vessel, it shall be a defence to prove that the oil or mixture in question was discharged for the purpose of securing the safety of the vessel, or of preventing damage to the vessel or her cargo, or of saving life:…	**2(1)** If any oil to which section 1 of the principle Act applies is discharged anywhere at sea from a British ship registered in the United Kingdom, being a ship of twenty thousand tons gross tonnage or more for which the building contract was entered into on or after the coming into operation of this section, or if there is so discharged from such a ship any such oily mixture as is mentioned in subsection (1) of that section, **the owner or master** of the ship shall, subject to the provisions of the principle Act, be guilty of an offence:…	**1(1)** If any oil to which this section applies or any mixture containing such oil is discharged from a ship registered in the United kingdom into any part of the sea outside the territorial waters of the United kingdom, **the owner or master** of the ship shall, subject to the provisions of this Act, be guilty of an offence under this section. **2.(1)** If any oil or mixture containing oil is discharged as mentioned in the following paragraphs into waters to which this section applies, then, subject to the provisions of this Act, the following shall be guilty of an offence under this section, that is to say- **(a)** if the discharge is from a vessel, **the owner or master** of the vessel, unless he … **The Merchant Shipping (Prevention of Oil Pollution) Regulations 1983** **34(1)** If any ship fails to comply with any requirement of these Regulations (other than regulations 12, 13 and 16**) the owner and the master of the ship shall each be guilty** of an offence and punishable on summary conviction by a … **(2)** If any ship fails to comply with any requirement of regulations 12, 13 and 16, **the owner and the master shall each be guilty of an offence**… **(3)** It shall be a defence for a person charged under this regulation to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.	**131(1)** If any oil or mixture containing oil is discharged as mentioned in the following paragraphs into United Kingdom national waters which are navigable by sea-going ships, then, subject to the following provisions of this Chapter, the following shall be guilty of an offence, that is to say— **(a)** if the discharge is from a ship, **the owner or master** of the ship, unless he proves that the discharge took place and was caused as mentioned in paragraph (b) below; **The Merchant Shipping (Prevention of Oil Pollution) Regulations 1996** **36(1)** If any ship fails to comply with any requirement of these Regulations (other than regulations 12, 13 and 16**) the owner and the master of the ship shall each be guilty** of an offence and punishable on summary conviction by a fine not exceeding the statutory maximum and on conviction on indictment by a fine. **(2)** If any ship fails to comply with any requirement of regulation 12, 13 or 16**, the owner and the master shall each be guilty of an offence** and section 131(3) of the Merchant Shipping Act 1995 shall apply as it applies to an offence under that section, so that each of the owner and the master shall be liable on summary conviction to a fine not exceeding £250,000 or on conviction on indictment to a fine.

As can be seen from the above synopsis, throughout the legislation from 1922 until the 1983 Oil Pollution Regulations came into force, Parliament had continuously legislated that "the owner or master...shall be guilty of an offence." This changed in 1983 into "the owner and the master…shall each be guilty of an offence" [1] but the old wording was kept in the MSA 1995.[2]

The old phrase ("owner or master") caused a problem the first time the courts had to deal with a prosecution for illegal discharges of oil in *R v. Federal Steam Navigation* in 1972.[3] In that case both owner and master were found guilty by the Central Criminal Court[4] and appealed on the grounds that once one of them had been found guilty the other one could no longer be convicted as it was either owner or master who committed the offence but not both.[5]

The Court of Appeal unanimously dismissed the appeal.[6] Lawton LJ found that Parliament clearly intended that the discharge of oil into the sea where it was prohibited should constitute an offence. If for this offence only owner <u>or</u> master would be found guilty "the other would be discharged from responsibility by operation of law immediately a conviction was recorded".[7] The Court concluded that was not what Parliament had intended.[8]

The case went to the House of Lords, and in a majority of three to two the Court of Appeal decision was upheld. Lord Wilberforce did not believe it to be constitutional

> "to say that either A or B--neither of whom may have caused the discharge, or possess any mens rea--is liable to be prosecuted at the choice of the Attorney General or of a Government Department, with the consequence that once the choice is made the other is innocent, appears to me to introduce a novel and offensive principle of law. No discrimen is stated, or suggested, according to which the choice is to be made".[9]

Whereas Lord Wilberforce seems to accept that a prosecutor has some discretion as to who to prosecute

> "there is a world of difference between it [constitutional limits] and a discretion quite uncontrolled, to fix an offence upon one of two persons to the exclusion of the other."[10]

Lord Salmon agreed that a prosecutor has discretion.

> "This discretion is, however, fundamentally different from the power of deciding whether, given certain facts, the statute means that A and not B is guilty of an offence."[11]

In consequence Lord Salmon stated that

> "what I am quite certain Parliament could not have intended is to have provided that either the master or the owner should be guilty of an offence--but not both--without giving any clues as to which was to be guilty".[12]

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[1] 1983 Oil Pollution Regulations, reg. 34.
[2] MSA 1995, s. 131(1). N Gaskell in *Current Law Statutes 1995,* p. 156, states that "Provisions of the Merchant Shipping Act 1995 with a more modern history tend to have been drafted more clearly to indicate that "each" may be guilty of an offence…". This comment acknowledges the lack of clarity using "or". See below for the point that "and…each" appears to make both owner and master guilty of the offence.
[3] *R v. The Federal Steam Navigation Co. Ltd (The Huntingdon)* [1974] 1 Lloyd's Rep. 8, CA, p. 8. This case dealt with a contravention of s. 1(1) of the Oil in Navigable Waters Act 1955. See also the initial discussion above in Chapter 9.6. I felt that although there is a slight overlap of the discussion here and in Chapter 9.6. the details ought to be in this Chapter as they help clarifying the development of the Oil Pollution legislation.
[4] *Ibid*.
[5] *Ibid*., p. 9.
[6] *Ibid.,* CA, p. 10.
[7] *Ibid*.
[8] *Ibid*.
[9] *Federal Steam Navigation,* HL, p. 530.
[10] *Ibid*.
[11] *Ibid*., p. 533.
[12] *Ibid*.

It would appear that what both the Court of Appeal and the House of Lords had decided is not that the discretion of the prosecution as to whom to prosecute is restricted. The decision would simply appear to mean that "or" in this context means "and", and that the conviction of either of the two defendants does not depend on who has been arraigned first.[13]

The wording adopted in the 1983 Regulations and kept for the 1996 Regulations was the one contended for in the case by the respondent Department for Trade and Industry.[14] Lord Reid, though dissenting, appeared to accept that using the combination "and…each" would achieve the effect desired by the respondent.[15] The latter result was arrived at by the majority of the House when it decided that "or" in the old wording should be substituted by "and" as a matter of construction.[16]

The literal consequence of the 1983 introduction of the new wording ("owner and master … shall each be guilty")[17] for a prosecution under the 1996 Oil Pollution Regulations therefore initially appears to be that if a prosecution is about to be brought, both owner and master ought to be prosecuted as each of them would be guilty of the offence. But this conclusion would seem to depend on whether or not the prosecution is needed in the public interest.[18] Falling short of giving the prosecution the choice as to who to prosecute, the requirement for the establishment of the public interest still leaves the decision about the bringing of charges against all or only a particular defendant with the prosecution. This would appear to have been effectively determined by Parliament[19] through the introduction of *The Code for Crown Prosecutors*[20] in 1986.[21] Subject to the guidance in *The Prosecutors' Code* it seems to be clear that a prosecution can only go ahead when both the evidential and the public interest test is satisfied.[22]

But once the public interest has been established after balancing the factors against and in favour of a prosecution[23] it would appear that the prosecution no longer has a choice but must prosecute the relevant offender(s).[24] It would seem to follow that the MCA policy only to prosecute an individual when he is "personally culpable"[25] cannot be applied unless such a decision is based on the consideration of the relevant factors in the *Prosecutors' Code.* The public interest test does not only focus on the question of the personal culpability of a defendant, but requires the prosecution to fairly balance several factors for and against a prosecution.[26] The *Prosecutors' Code* lists 17 factors as guidance in favour of a prosecution in addition to the criterion of how serious the offence was.[27] These and the nine factors[28] against a prosecution ought to be considered, depending on the facts of each case, before a decision is made. The *Prosecutors' Code* also highlights that the list is not exhaustive.[29] Thus, using only personal culpability as a decision making factor might seem to be a fetter on the wider discretion required by the *Prosecutors' Code*.

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[13] *Federal Steam Navigation,* CA, pp. 9 and 10.
[14] *Federal Steam Navigation,* HL, p. 521.
[15] *Ibid*.
[16] Lord Simon, *ibid*., p. 531.
[17] 1996 Oil Pollution Regulations, reg. 36(1).
[18] See above, Chapter 9.3.
[19] A requirement which Lord Wilberforce in *Federal Steam Navigation,* HL, p. 530, expressly stated was then not the case.
[20] See above, Chapter 9.3.
[21] See J A Fionda, A Ashworth, *The new Code for Crown Prosecutors: Part 1: Prosecution, Accountability and the Public Interest*, 1994, p. 894.
[22] See also the discussion above, Chapter 9.2.
[23] See *The Code for Crown Prosecutors,* s. 5.7 to 5.10.
[24] Which would seem to follow from *The Code for Crown Prosecutors,* s. 5.1.
[25] MEM, chapter 2, s. 2, last paragraph.
[26] *The Code for Crown Prosecutors,* s. 5.8. See also above the discussion in Chapter 9.4.
[27] *Ibid.,* s. 5.9.
[28] *Ibid.,* s. 5.10.
[29] *Ibid.,* s. 5.8.

This would not seem to be different when it is "owner or master" who are guilty of an offence of strict criminal liability[30] despite the ruling of the House of Lords in *Federal Steam Navigation*. The prosecution would still have to go through the two stage test. If, therefore, in a case of strict criminal liability the "owner or master" is liable it would appear to be within the discretion of the prosecution as to whether or not it is in the public interest[31] to prosecute one, or the other, or both.[32]

Thus the MCA policy would only appear to be appropriate if the factors of the *Prosecutors' Code* have been applied accordingly before it is decided that a person will, or will not, be charged.

I will now turn to the question of whether or not the chief engineer ought to have been prosecuted.

(b) The Prosecution and the Chief Engineer of the "Borden"

It appears that the Oil Pollution Regulations provide for the option that the chief engineer of the "Borden" could have been charged irrespective of whether or not proceedings were brought against the owner and master.

> "(4) Where an offence under this regulation is committed, or would have been committed save for the operation of paragraph (3), by any person due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of an offence by virtue of this paragraph whether or not proceedings are taken against the first-mentioned person."[33]

It would seem that this paragraph covers two scenarios. In the first scenario an offence is committed for which the regulation does not offer any defence. This would appear to be an offence under reg. 36(2) if a discharge has occurred.

The second option, in case no discharge has occurred, seems to be that reg. 36(1) was not complied with, but that the defence of reg. 36(3) is available.

> "(3) It shall be a defence for a person charged under paragraph (1) of this regulation to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence."[34]

The case of the "Borden" would seem to fall under the first scenario and the "other person", who, by his omission to stop pumping on activation of the high level alarm, caused the discharge,[35] was the chief engineer. In those circumstances the regulation appears to suggest that the choice exists only to find the chief engineer guilty without considering either, or both, the owner and the master.[36] It would appear that both are guilty of an offence,[37] and the owner of the "Borden" was found guilty, for an act of another person (i.e. the chief engineer), when that other person did or omitted to do something which stopped the ship complying with reg. 12, 13 or 16. According to reg. 36(2) in such a

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[30] See, for example, the MSA 1995, s. 131(1)(a), where, "if the discharge is from a ship, the owner or master of the ship" shall be guilty of an offence.
[31] Provided, of course, that the relevant breach has been established.
[32] It was from a practical point of view not in question for Mr. A Lower, Deputy District Crown Prosecutor, North Hampshire, 3 June 2008, that the choice as to whom to prosecute would be that of the prosecution.
[33] Oil Pollution Regulations, reg. 36(4).
[34] *Ibid*., reg. 36(3).
[35] "Caused" in the sense of Lord Hoffmann's speech on causation in *Environment Agency (Formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd* [1999] 2 AC 22, p. 30 where he, referring to *National Rivers Authority v. Yorkshire Water Services Ltd* [1995] 1 AC 444, Lord Mackay on p. 452, said that the fact that the person who put the chemical into the sewer would undoubtedly have caused the pollution in as much as the sewage treatment company Yorkshire Water Services.
[36] Oil Pollution Regulations, reg. 36(4) "…that other person shall be guilty of the offence…whether or not proceedings are taken against the first-mentioned person."
[37] *Ibid*., reg. 36(2).

case s. 131(3) of the MSA 1995 shall apply "as it applies to an offence under that section".[38]

But it would seem that somebody can only be guilty of an offence under s. 131(3) if the person has no defence under s. 132. That section does, however, only offer a defence to owner or master.[39]

> "132 (1) Where a person is charged with an offence under section 131 as the owner or master of a ship, it shall be a defence to prove that the oil or mixture was discharged for the purpose of—
> (a) securing the safety of any ship;
> (b) preventing damage to any ship or cargo, or
> (c) saving life,
> unless the court is satisfied that the discharge of the oil or mixture was not necessary for that purpose or was not a reasonable step to take in the circumstances.
>
> (2) Where a person is charged with an offence under section 131 as the owner or master of a ship, it shall also be a defence to prove—
> (a) that the oil or mixture escaped in consequence of damage to the ship, and that as soon as practicable after the damage occurred all reasonable steps were taken for preventing, or (if it could not be prevented) for stopping or reducing, the escape of the oil or mixture; or
> (b) that the oil or mixture escaped by reason of leakage, that neither the leakage nor any delay in discovering it was due to any want of reasonable care, and that as soon as practicable after the escape was discovered all reasonable steps were taken for stopping or reducing it."[40]

The defences under s. 132 fall into three categories. First there is the scenario of an emergency in which the oil was discharged to safe the ship, the cargo or life.[41] Secondly, it is a defence if the oil escaped as a result of a damage to the ship and speedy, reasonable measures were taken to stop or reduce the discharge.[42] The third defence is that the escape of oil occurred due to a leakage and was not "due to any want of reasonable care".[43]

As regards the three potential defendants, the owner, the master and the chief engineer, it would seem that they had no defence under s. 132. First, the chief engineer did not fall into the group of owner and master. Secondly, none of the three would have had a defence anyway as none of the three options of a possible defence applied. The omission of the chief engineer did not occur because he wanted to safeguard ship, cargo or life. The vessel was not damaged, and the oil did not escape due to a leakage but because it was pumped through the tank ventilation head. To have "escaped by reason of leakage"[44] would, in my understanding, suggest that no person caused[45] the discharge, but that either the ship's hull or any other equipment was faulty which led to the escape of any oil. Thirdly, it would seem that the discharge occurred due to the "want of reasonable care"[46] because the chief engineer did not stop the pumping when the high level alarm went off. The transfer of fuel, the parallel monitoring of relevant tank filling gauges, and appropriate responses to high level alarms, are essential tasks of any marine engineer in that situation. Even without the ISM Code being in force such responsibilities of an engineer were essential for the prevention of any oil spill when pumping fuel on board.

As a result there would not appear to have been a defence for the owner, master, or the other person (the chief engineer) under either reg. 36 or s. 132. Thus it would seem that after a discharge has occurred in violation of, for example, reg. 12, for which the chief

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[38] *Ibid*.
[39] "Where a person is charged with an offence under section 131 as the owner or master of a ship…", s. 132(1).
[40] MSA 1995, s. 132.
[41] *Ibid*., s. 132(1).
[42] *Ibid*., s. 132(2)(a).
[43] *Ibid*., s. 132(2)(b).
[44] *Ibid*., s. 132(2)(b).
[45] I use the word "caused" in the sense of Lord Hoffmann's speech in *Environment Agency v. Empress Car Co*, p. 36, where he said "If the defendant cannot be said to have done anything at all, the prosecution must fail".
[46] MSA 1995, s. 132(2)(b).

engineer is to blame, all three, owner, master and chief engineer would have to be considered guilty. The prosecution would then have to establish if the public interest requires one, two or all three of them to be prosecuted.

In the case of the "Borden" there was no suggestion on file that a prosecution of the chief engineer was considered at any stage, nor was there any reference suggesting that it had been considered to charge the master. But a prosecution is needed when it is in the public interest,[47] and thus it appears that strong consideration ought to have been given to establishing whether a public interest existed to also charge the chief engineer and the master.

If the MCA decision not to prosecute the chief engineer and the master had been made without considering whether or not they were, first, personally culpable, and, secondly it was in the public interest to prosecute them, it would appear to have been made in violation not only of the principles provided by *The Code for Crown Prosecutors,* but also by not following its own policy to apply *The Prosecutors' Code*. If the evidence, as suggested by the file, is unambiguous, it should not have been ignored.[48] On the basis that the chief engineer was personally culpable[49] a prosecution was not out of the question.

The case summary on file confirms that the prosecution believed that it had established that alarms were acknowledged and cancelled by the chief engineer.[50] This suggests that he should have been considered as being personally culpable because "it is of great concern that an experienced engineer ignored repeated alarms".[51] As a consequence of the enforcement policy[52] a prosecution of the individual should therefore have been seriously contemplated.

The discussion about the prosecution of owner, master and any third person would appear to leave the following simplified guide for the decision to prosecute.

The following is based on the premise that a person, other than the owner or the master, has due to his act caused a non-compliance with the Oil Pollution Regulations as a result of his own act or omission.[53]

(1) If the failure to comply falls under reg. 36(1) the owner, master or that other person could have a defence under the Oil Pollution Regulations.[54] If any of the three potential defendants did not take all reasonable precautions[55] that person is guilty of an offence. If it is proven that he took all reasonable precautions he is exonerated and ought not to be prosecuted. In case of a person who has apparently been guilty of a strict liability offence the prosecution must establish whether or not a prosecution is needed in the public interest. If so, that person ought to be prosecuted.

(2) In the case of a discharge which is covered by reg. 36(2), only the owner and master, but no third person, appear to have a defence in accordance with the MSA 1995, s. 132.[56] Without such a defence all three of them are guilty of an offence. The prosecution has to establish for each of them individually whether or not a prosecution is needed in the public

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[47] *The Code for Crown Prosecutors,* s. 5.1.
[48] *Ibid.,* s. 5.5.
[49] According to *R v. Director of Public Prosecutions, ex parte Manning* [2001] QB 330, para. 22, the standard of proof for such a finding would not have had to be the same a court would have to find before conviction.
[50] Case Summary on file MS 10/74/475.
[51] Minute of 23 December 2004 on file MS 10/74/475.
[52] MEM, chapter 2, s. 2, Annex C.
[53] Oil Pollution Regulations, reg. 36(4).
[54] Regulation 36(3).
[55] As required by the Oil Pollution Regulations, reg. 36(3).
[56] This appears to be subject to a change in accordance with the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations, SI 2009 No. 1210, reg. 36A(2) as of 1 July 2009 when the new Regulations come into force. In future the same conditions will apply to owner, master and "any person who causes or contributes to that discharge".

interest. If no public interest exists the individual ought not to be prosecuted irrespective of their guilt.

12.2.5. Prosecutions resulting in fines above £5,000

This subsection deals with prosecutions and convictions for which fines of more than £5,000 were imposed.

The three cases which led to fines of £10,000, £20,000, and £30,000 respectively all saw owners as defendants. In none of the cases was the master or any other person charged.

> The owners of the tanker "Averity" were fined £10,000 on 20 May 2002 for a spillage of approximately 155 tons of Ultra Low Sulphur Diesel (ULSD) and Kerosene at Stanlow Oil Refinery on the Manchester Ship Canal on 26 September 2001. Charges are said to have been brought under MSA 1995.[57]

It appears that although s. 131 refers the guilt to "owner or master" both will have been guilty in accordance with the ruling of the House of Lords in *Federal Steam Navigation*[58] in 1974. If the evidential test has been passed and the public interest had been established the prosecution ought to have prosecuted both owner and master.

The report on the MCA website actually suggests that the chief officer and a seaman of the "Averity" were negligent during the loading operations. The text does not make it very clear why the discharge occurred,[59] but it can probably be safely assumed that the act or default of both mate and seaman were causative for the discharge. But no action seems to have been taken against anybody but the owner.[60]

> The Panamanian registered container vessel "MSC Ariane" was observed on 3 July 2002 by a navy helicopter trailing an oil slick. According to the file "the discharge consisted of 100 litres of lub oil in 3.3 m³ of water".[61] Southampton Magistrates' Court fined the company £100,000 which was reduced to £30,000 on appeal.[62] The handwritten report on file, partly reproduced on the website, quotes the Appeal Court in stating that "sloppy and inadequate working practice on 'Ariane' and [by] engineers on board lead to lengthy slick with consequences".[63] According to the report the Recorder with his two Magistrates held that mitigating circumstances were found in that the discharge was one of light as opposed to heavy oil, that there has been no risk for health and safety, however, rather by good fortune than by action of the crew, and that it was an act of negligence and was not deliberate and not in order to make profit.

There is no suggestion on file that the master and/or any other crew members were considered for prosecution even though the master,[64] chief officer and chief engineer denied the discharges for quite some time.[65] Whereas a "prompt admission of responsibility"[66] or a "timely guilty plea"[67] is considered a mitigating factor for sentencing a

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[57] Section 131. All information was taken from the MCA webpage, see Convictions 18/2002 (Annex 3). The relevant file was not available at the time of researching the other files.
[58] See above, Chapter 12.2.4.
[59] Convictions 18/2002 (Annex 3): "The Seaman went down into the pumproom and found that both of the sea valves were open. After closing them the AB informed the Mate, who was in charge of loading operations. Unfortunately there was a misunderstanding between the Mate and AB and loading was not stopped. In fact shortly afterwards loading of the Kerosene commenced."
[60] MSA 1995, s. 131(1) appears to restrict the guilt to owner or master. Negligence or fault of any crew member would not seem to make that person guilty of an offence. It would seem, though, that s. 85(1) of the Water Resources Act 1991 may have applied. Under that section the person who causes the pollution commits an offence. If the mate or the other seaman would have caused the pollution they would have been guilty of an offence. Enforcement agency, however, is not the MCA but the Environment Agency, see above, Chapter 12.1.
[61] File MS 10/74/238, minute of 18 June 2003.
[62] Convictions 28/2003 (Annex 4).
[63] Handwritten report on file MS 10/74/238 about the verdict.
[64] *Ibid*.
[65] Only on 27 January 2003 a statement under caution by the defendant stated that the discharge was accidental; Outline of Prosecution Case, para. 3.2. on file MS 10/74/238.
[66] *R v. F. Howe and Son (Engineers) Ltd* [1999] 2 Cr. App. R.(S.) 37, p. 44.
[67] *Sentencing Guidelines 2003,* p. 82.

lack of co-operation should not have such a positive influence, and ought not to prevent a prosecution in the first place. Justice done without involving the actual decision makers on board denies them their obligation to own up to their negligence, and deprives the public of an assurance that all culprits have successfully been dealt with.
A note on file states that "Fine will be reimbursed to owner by Mediterranean Shipping Company" (MSC).[68] The context of this statement is not clear and it is particularly not known on what basis the reimbursement was supposed to take place. The ownership and responsibility structure is also not clear from the file. At the material time the Panamanian registered Freedom Investments SA was the registered owner, the defendant, of the "MSC Ariane". However, the admission of the discharges was made by a representative of Pacific Marine Services Limited, based in Hong Kong, who stated that he was authorised to speak and act on behalf of registered owners.[69] The connection with MSC is nowhere addressed.[70]

The prosecution of the registered owner appears to be in line with the literal interpretation of the law in question addressing "the owner".[71] However, as seen, it does not seem to deliver the right result in that it is not the operator and person responsible for the ship who is held criminally liable but the registered owner who may or may not have anything to do with the operation of the ship. It can probably be assumed that Freedom Investments SA was nothing but a single ship company which never fulfilled any role of a proper shipowner other than acting as a ship registration entity.[72] The "Outline of the Prosecution Case" states that the defendant owns the ship but that it is "run as part of a larger fleet which is managed by a multi national corporation Pacific Marine Services based in Hong Kong"[73] which was probably the contracted ship manager.

One can only assume that MSC was going to reimburse Freedom Investments because (i) Freedom did not have any assets other than the ship itself,[74] and (ii) MSC was the beneficial owner[75] and the corporate group[76] owning Freedom and is thereby really responsible. It may simply be that the reimbursement of any fine was regulated in an agreement between MSC and Freedom Investments and probably also between Freedom and Pacific Marine Services. If such an agreement bound one party to pay fines for criminal offences of the other person/entity, it would, however, appear to be void under English law and may not be enforceable.[77] In any case one may say that justice is done

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[68] File MS 10/74/238, minute of 18 June 2003, para. 2.
[69] Voluntary statement under caution on file MS 10/74/238.
[70] "MSC" is not just a trade name but stands for "Mediterranean Shipping Company" which calls itself "one of the leading global shipping lines of the world", see http://www.mscgva.ch/ (9 November 2008). "Equasis" records "Freedom Investment SA" of Panama as the registered owner and "MSC Shipmanagement Hong Kong Ltd" as ship manager. This information was last updated on 20 November 2006 (according to "Equasis" website (www.equasis.org) on 9 November 2008).
[71] See also the discussion above in Chapter 9.7.2.
[72] Law firms or accountancy firms are often acting on behalf of these companies and simply act as the keeper of the registration documents for an annual fee of a few hundred US dollars per ship. These firms have nothing to do with the operation of the vessel. "Today a growing number of shipowners hide behind myriad offshore brass plate companies and contract their ships out to faceless management companies and crewing agencies to run", International Commission on Shipping, *Ships, Slaves and Competition,* 2000, para. 5.11. "From the owner of a ship or ships, it [the maritime entrepreneur] becomes either the shareholder of companies owning ships in a horizontal structure, or the shareholder of a holding company which becomes the major or sole shareholder of single ship companies in a vertical corporate structure. Such transformation would not make sense unless in fact control over the ships remained in the hands of the same individual or company despite their changed position. Control can be achieved if the maritime entrepreneur becomes not only a shareholder, but also the controlling, usually the major or sole, shareholder, thus fully controlling the single ship companies which in the eyes of the law are now considered to be the 'shipowners'. In other words, single ship companies are essentially 'one-man' companies." D P Christodoulou, *The Single Ship Company,* 2000, p. 6.
[73] On file MS 10/74/238, para. 1.8.
[74] And thereby is a "single asset company", D P Christodoulou, *The Single Ship Company*, 2000, p. 8.
[75] "Beneficial owner" as in "real" owner, i.e. the company holding the majority of the shares in Freedom Investments.
[76] D P Christodoulou, *The Single Ship Company*, p. 8.
[77] See above, Chapter 9.7.2., discussion on "owner" and "manager". For the illegality see *Beresford v. Royal Insurance Company Limited* [1938] AC 586*,* p. 598. If Freedom Investment is just a brass plate owned by

as long as the "real" owner (in this case probably MSC) pays the fine.[78] But what is not achieved in doing so is that the company behind the operation of the relevant vessel takes the public blame attached to the violation of the law.[79] Although, in the case of the "MSC Ariane", public knowledge of the company behind Freedom Investments was achieved by the MCA in addressing in the relevant press release that the "Mediterranean Shipping Company" would be paying the fine.[80]

The single ship company problem appears to leave the law very inefficient if piercing the corporate veil for criminal purposes is not possible when both the "real" owner (the company owning the registered owner) decides not to co-operate by not having the registered owner (or rather its representative) attend any court case, and the prosecution is not able to get hold of the ship because it does not call at any UK port.

Although a defendant may be convicted in his absence[81] it would be very difficult to enforce a judgment for a fine unless the defendant has assets in the UK. A sequestration order against the ship and its equipment[82] requires the ship to be in the UK, and a warrant of distress[83] would only prove successful if other assets, e.g. other ships owned by the same defendant would appear in the UK. However, unless Freedom Investments owned more than one ship or the ship in question calls in a UK port such development is highly unlikely as it would be very easy for the ship to be re-registered with a different entity. The consequence would be "to forgetting all about it and saying goodbye to the defendant and to any fine which might be imposed".[84] EU wide enforcement procedures for any successful conviction could be a solution for this problem.[85]

If, therefore, owner[86] means only "registered owner",[87] achieving justice would always depend on the co-operation of the defendant. As a consequence it would appear that the

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MSC any question of enforcing an illegal contract clause would, however, not arise as financially MSC and Freedom would be the same entity.

[78] See above, file MS 10/74/238, minute of 18 June 2003, para. 2.

[79] "The state's judgments of penal censure purport to speak not just on behalf of victims or their sympathizers, but on behalf of the wider community of citizens", A von Hirsch, *Proportionate Sentencing,* 2005, p. 30; this penal censure, however, does not appear to be achieved if the real wrongdoer is not publicly seen to be punished.

[80] Convictions 28/2003 (Annex 3);

[81] Magistrates' Court Act, s. 11(1).

[82] MSA 1995, s. 146(1)(a).

[83] Magistrates' Court Act, s. 76(1).

[84] As Lord Widgery put it when discussing whether a master could be summoned at 1030 hours of the day of departure for a trial at 1430 hours on the same day without having had any notice of the proceedings against him prior to 1030 hours on that day, *R v. Thames Magistrates' Court, Ex parte Polemis (The Corinthic)* [1974] 2 Lloyd's Rep. 16*,* p. 20.

[85] A more detailed discussion of such a solution is beyond the scope of this thesis. But as consistent port state control procedures are in place EU wide which may in the worst case scenario result in the detention of a vessel the path seems already to have been laid for extending such control and enforcement to the execution of fines on a European wide basis.

[86] As in the Oil Pollution Regulations, reg. 36(1) and (2).

[87] For the general discussion about "owner" see above, Chapter 9.7.2. The discussion here focuses on the particularities in oil pollution incidents. In my opinion the term is not restricted to "registered owner". The construction of "owner" depends on the circumstances and the purpose of the statute. For instance, the "owner" under Colregs who has bareboat chartered the vessel to another operator cannot control the master and crew on board. Similarly, an "owner" under the Oil Pollution Regulations does not have the opportunity to prevent oil pollution when he is not actually operating or managing the ship but has, for example, bareboat chartered it to another company. "Owner" would therefore appear to be the person who is operating and managing the vessel, such as the manager or bareboat charterer. It may be argued against this view that the Merchant Shipping (Prevention of Pollution by Garbage) Regulations 1998, SI 1998 No. 1377 (hereafter "Garbage Pollution Regulations"), in reg. 15(1)(a) specifically clarify that, when referring to MSA s. 143(6) and the procedure to serve documents for an offence under MSA 1995, s. 131, in respect of an offence, "owner" means "owner, manager or demise charterer" which the Oil Pollution Regulations do not. However, not to hold responsible, for example, the bareboat charterer for his operation of the vessel would deny the purpose of the Oil Pollution Regulations as addressed in reg. 12(2). That purpose is to prevent illegal discharges, and to achieve this objective a person must be in a position to actively influence the operation. An owner who has chartered his ship to a charterer by demise is not in this position and as such, that owner cannot legally contract out his criminal responsibility. It would therefore be unjust to hold him responsible and not the real culprit.

law needs clarification and that a provision similar to the Garbage Pollution Regulations[88] should be introduced into the Oil Pollution Regulations. Another option would be to use the definition of the ISM Code and replace the term "owner" by the word "company".[89] The latter option would appear to be appropriate throughout the Merchant Shipping Regulations to achieve uniformity and certainty for any possible defendant.

> The last successful prosecution for oil pollution before the end of 2005 left the owners of the Swedish registered tanker "Bro Traveller" £20,000 out of pocket for a fine plus £11,344 in costs. It was estimated that 0.5 m³ heavy fuel oil went overboard within the Firth of Forth on 17 March 2004 during an internal fuel oil transfer operation. In addition the vessel was observed a day later by a helicopter trailing a 5 mile slick which was the result of washing the decks after the initial spill.[90]

The owners were charged under two counts[91] and according to the District Judge "the incident was caused by error and negligence".[92] Neither master nor any engineer was charged despite the finding of negligence and the statement in the press release on file[93] that

> "the problem causing the spill was identified as a breakdown in procedure following maintenance to a transfer pump. This was when a system allowing automatic shutdown of the bunker transfer system on the initiation of a high level alarm had been de-activated."[94]

If there was a breakdown in procedure it suggests that the on-board management did not follow its own procedures. Independent of the liability for the master and the relevant engineer under the Oil Pollution Regulations this suggests a contravention of the safety management system according to which the master did not operate his vessel,[95] and which would have made him guilty of an offence[96] in addition to the breach of the Oil Pollution Regulations. The personal criminal responsibility of any crew member on board, such as an engineer, is not provided for in the ISM Regulations.[97]

By way of summary, in none of the convictions between 2001 and 2005 was any master or crew member ever subjected to prosecution under the oil pollution legislation. No evidence was found that this was ever contemplated by the prosecution. But it is probably arguable that the crew member responsible for the act or default which caused the pollution ought to have been prosecuted together with owner and master or by himself once the two stage test of *The Code for Crown Prosecutors* has been passed.[98]

Even though the law provides for the strict option to prosecute and thereby criminalise the master and crew the reality seems to demonstrate the opposite.

When comparing the cases for fines up to the statutory maximum with the other three cases it appears that there exists no consistent line of fining for pollution incidents. First, it could be observed that no prosecution was brought for any violation of reg. 36(1) but that all prosecutions were for discharge incidents. Secondly, and probably due to a lack of a written reasoning In the Magistrates' Court cases it does not seem to be clear why the different levels of fines were applied. When, for example, comparing the "Borden" case with the "Bro Traveller" the only obvious difference appears to be the quantity of the oil which reached the water. For the "Borden" it was 80 litres which reached the water out of

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[88] Where in reg. 14(1)(a) owner, manager and demise charterer are explicitly named as possible defendants.
[89] ISM Code, s. 1.1.2, which includes "any organisation or person…who has assumed the responsibility for operation of the ship".
[90] File MS 10/74/394, letter to the listings officer at Kingston Upon Hull Magistrates' Court.
[91] MSA 1995, s. 131 for the oil spill, and under the Oil Pollution Regulations, regs. 12(2) and 36, for washing the oily decks; see Schedule Information on file.
[92] Convictions 63/2005 (Annex 6).
[93] Which is different from the release copied under Convictions 63/2005 (Annex 6).
[94] Press Notice No. 348/05 on file MS 10/74/394.
[95] ISM Regulations (SI 1998 No. 1561), reg. 7.
[96] *Ibid.*, reg. 19(3).
[97] *Ibid.*, reg. 19.
[98] When asked why no master or engineer has been prosecuted Captain Smart stated "See our policy on prosecuting owners and operators, what personally has the Master or CE [chief engineer] got to gain by polluting, only the company gains and the company is responsible for the culture that makes the officers think it is appropriate to pollute", Annex 16, question 26.

0.6 cbm which in total overflowed. In case of the "Bro Traveller" it was 0.5 cbm which was pumped overboard. The latter, however, "cost" £15,000 more than the former in the fine. It appears that in both cases negligence of the relevant engineer caused the spill, but in case of the "Borden" luck appeared to have prevented more than 80 litres reaching the water.

When considering the seriousness[99] of both offences they would not appear to differ significantly. Neither the environmental, nor the social or the economic impact[100] would appear to justify such a significant distinction in the fines. Such differences could be avoided if databanks would be created and a consultation of them made mandatory for Magistrates' Courts before passing sentence.[101]

12.3. Chemical pollution

As no documents could be found in the files referring to an investigation, and therefore also to a prosecution, this section will only outline the requirements for owner and master to follow.

Chemical discharges are only regulated for ships carrying noxious liquid substances or unassessed liquid substances in bulk,[102] for chemical tankers carrying dangerous substances in bulk,[103] and for oil tankers carrying pollution hazard substances in bulk.[104] Any "non-bulk" material discharge overboard is not covered under these Regulations but under the Garbage Pollution Regulations.[105]

Any discharge of one of the substances mentioned into the sea is prohibited unless permitted by MSN 1703.[106] "Sea" in this context includes all waters which can be navigated by sea-going ships.[107] Other than the Oil Pollution Regulations the Dangerous Liquids Regulations thereby regulate discharges into the sea both landwards and seawards of the baseline.

It is the owner's and master's responsibility to ensure that equipment and condition of the ship accord to the legal requirements and that the ship does not pose an unreasonable threat of harm to the safety of other ships or their crews or to the marine environment. [108]

Non-compliance with the Regulations could lead to prosecution or detention.

12.3.1. Detention[109]

An Inspector who discovers deficiencies after having had clear grounds for believing that master or crew are unfamiliar with essential shipboard pollution prevention procedures shall take steps which ensure that the ship will not sail unless the situation has been

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[99] Magistrates Association, *Costing the Earth,* s. 4.1.
[100] *Ibid.,* s. 3.1.
[101] The Magistrates' Court Sentencing Guidelines, for example, do not specifically refer to any pollution or merchant shipping offences, see the Guidelines of 2003 and also the latest version of May 2008 (the latter can be found on http://www.sentencing-guidelines.gov.uk/docs/magistrates_court_sentencing_guidelines_update.pdf (9 November 2008).
[102] The Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996, SI 1996 No. 3010, (hereafter "Dangerous Liquids Regulations"), reg. 3(1)(a)(i). "in bulk" means "without intermediate form of containment", reg. 2(1).
[103] *Ibid.*, reg. 3(1)(a)(ii).
[104] *Ibid.*, reg. 3(1)(a)(iii).
[105] The Merchant Shipping (Prevention of Pollution by Garbage) Regulations 1998, see below para. 5.1.3.
[106] Dangerous Liquids Pollution Regulations, reg. 5(a) and (b).
[107] MSN 1703, p. 3.
[108] Dangerous Liquids Pollution Regulations, reg. 10(1).
[109] Similar to the discussion under oil pollution (see Chapter 12, fn 55) I am addressing detention here and not in Chapters 6 and 7 because none of the vessels was detained under the Dangerous Liquids Pollution Regulations.

brought to order.[110] This does not make it mandatory for the Inspector to detain the ship, a measure, however, which he could consider,[111] but forces him to take measures that ensure deficiencies get rectified before departure. If, for example, a ship would not be scheduled to sail soon after the inspection such measures could be re-inspecting the ship or having the master report back to the Inspector before departure that the relevant deficiencies have been rectified.[112]

In addition a ship shall be liable to be detained[113] when it does not comply with the requirements of the Regulations,[114] when an accident or a defect substantially affects the integrity or the efficiency or completeness of the equipment of a non-UK ship[115] and a full report about the situation has not been made to the appropriate authority,[116] and when the MCA is not satisfied that sufficient corrective action has been taken.[117]

Whether or not a ship will actually be detained is thereby at the discretion of the relevant officer entitled to enforce a detention.[118]

The Inspector has jurisdiction to detain a vessel independently of where the detaining grounds arise. Other than under the MSA 1995, s. 131, a harbour master is not entitled to detain a vessel under the Dangerous Liquids Regulations.[119]

12.3.2. Criminal sanction

Owner and master shall each be guilty of an offence punishable either on summary conviction or by indictment for any violation of the Regulations.[120] For a violation of reg. 5, i.e. for any illegal discharge, the fine level on a summary conviction is increased to £25,000.[121]

A contravention of the Regulations constitutes an offence of strict criminal liability and owner and master have only got the defence option available of showing that they took all reasonable steps to make sure that the provisions were complied with.[122]

Other than under the Oil Pollution Regulations a crew member causing the pollution cannot be charged under these Regulations. As a consequence it will always be both owner and master who will be liable once it has been established that an offence has been committed.

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[110] Dangerous Liquids Pollution Regulations, reg. 15(2).
[111] *Ibid.*, reg. 15(3)(b).
[112] But see above for foreign ships, Chapters 6.4.2 and 8.
[113] Dangerous Liquids Pollution Regulations, reg. 15(3) tailpiece.
[114] *Ibid.*, reg. 15(3)(a).
[115] A UK flagged ship is liable to detention under reg. 25(1) of the Merchant Shipping (Survey and Certification) Regulations 1995 (SI 1995, No. 1210 – hereafter "Survey Regulations") when it does not comply with the requirements of the Survey Regulations; one of the requirements is that owner and master shall ensure (reg. 8(1)) that "whenever an accident occurs to a ship or a defect is discovered, either or which affects the safety of the ship or the efficiency or completeness of its life-saving appliances or other equipment" (reg. 8(1)(c)) "it is reported at the earliest opportunity to the appropriate Certifying Authority" (reg. 8(1)(c)(i)).
[116] Dangerous Liquids Pollution Regulations, reg. 15(3)(c). "Appropriate authority" is not defined by the regulations but in the context of a UK flagged ship an "appropriate certifying authority" means the Secretary of State (MCA) or a listed classification society – see reg. 2(1). It is therefore suggested that a similar definition applies to non-UK ships.
[117] *Ibid.*, reg. 15(3)(d).
[118] As listed in MSA 1995, s. 284(1), according to reg. 15(3) tailpiece; see also above Chapter 6.
[119] The harbour master is not listed under MSA 1995, s. 284(1) as one of the officers entitled to detain a ship and the Dangerous Liquids Regulations, reg. 15(5) provide for substituting in MSA s. 144(4)-(6) "harbour master" (reg. 16(5)(a)) and "harbour authority" (reg. 16(5)(b)) by "any person" and "Secretary of State" respectively. A harbour master does also not have the right of detention under the Dangerous Vessels Act 1985. But that Act does under s. 1(1) give a harbour master the power to deny entry to a dangerous vessel or have it removed from the harbour.
[120] Dangerous Liquids Pollution Regulations, reg. 14(1).
[121] *Ibid.*, reg. 14(1A)(a).
[122] *Ibid.*, reg. 14(2).

12.4. Garbage pollution

The investigated files show investigations into illegal garbage dumping on three occasions[123] and the record of convictions shows two convictions[124] one of which was also covered by the investigated files. The two incidents investigated but not prosecuted were those of the "Klondyke" and the "Isarstern".

> The French fishing vessel "Klondyke" was photographed dumping garbage off Ramsgate and the case was supposed to be given to the French authorities. As the responsible person in the French administration could not be tracked down the file was eventually closed with no further action being taken. [125]

> The Isle of Man flagged vessel "Isarstern" was accused by an ex-crew member to have dumped canisters of hydraulic waste oil off Lizard Point. No evidence was available and the case was closed after the owners were informed of the allegations.[126]

Whereas the first case ("Klondyke") seems to be asking for co-ordinated European prosecution and enforcement action the second case would seem to justify that the case was closed.

In the following subsections I will discuss the prosecution for garbage dumping in the cases of the "Lotta Kosan" and the "Lynden II".

12.4.1. Prosecution for garbage dumping on the "Lotta Kosan"

> A cadet on board the Isle of Man flagged "Lotta Kosan", anchored in the Western Solent in Thorness Bay, had dumped a plastic bag filled with rags[127] over board which was witnessed by a group of boat drivers.[128] The company pleaded guilty[129] and Southampton Magistrates' Court, considering this to be a serious offence, fined both of what appears to be owners and also the managers a total of £10,000 plus costs of £5,258.[130]

The Garbage Pollution Regulations apply to UK ships wherever they are[131] and to other ships as regards disposal of garbage when they are in UK waters, controlled waters or "any other waters which are sea".[132]

A UK ship is a ship registered in the UK[133] under Part II of MSA 1995[134] and is thereby different from a ship which is registered under the law of a relevant British possession.[135]

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[123] Files MS 10/74/245, 353 and 524.
[124] Convictions 51/2004 (Annex 5) and 64/2005 (Annex 6).
[125] File MS 10/74/245.
[126] File MS 10/74/524.
[127] According to a letter by the superintendent of the company, file MS 10/74/353, quoted in the Counsel Briefing.
[128] File MS 10/74/353, Counsel Briefing.
[129] Under the Garbage Pollution Regulations, reg. 14(2)(a). "Company" is to be understood as in the ISM Code, s. 1.1.2. In this case it was "The Lauritzen Group", i.e. "Lauritzen Fleet Management" and "Lauritzen Kosan", who pleaded guilty and were fined – see MCA Press Notice No. 157/04.
[130] File MS 10/74/353, MCA Press Notice No. 157/04. The amount of the fine appears to be rather high and it can only be assumed that the Court considered the fine to be a strong incentive for the company to ensure its crew on board follows proper garbage treatment procedures – see below the discussion on culpability. The news release by the MCA (Press Notice No. 157/04) does not provide any details as to what the judge said but only that "this was a serious offence and any damage to the environment should be taken seriously". Comparing the violation with, for example, a violation of the Colregs (see Chapter 11) where, when violating Rule 5 or 10, lives may actually be at risk and fines for breaches of Rule 5 were in the range of £1,000 to £5,000, a fine of £10,000 for the dumping of a plastic bag filled with rags appears to be disproportionate, even though is was imposed on the owner and not a crew member who would usually have significantly less financial resources.
[131] The Garbage Pollution Regulations, reg. 3(a).
[132] *Ibid.*, reg. 3(b).
[133] *Ibid.*, reg. 2(1)(a).
[134] MSA 1995, s. 1(3).
[135] *Ibid.*, s. 1(1)(c).

The Isle of Man is one of the relevant British possessions.[136] It follows that an Isle of Man flagged ship is not a UK flagged ship and that therefore "Lotta Kosan" was not covered by reg. 3(a) of the Garbage Pollution Regulations, but by reg. 3(b) if it was in the relevant waters.
UK waters mean any waters landward of the outer limit of the territorial sea[137] and thereby cover the Western Solent.

Disposal of garbage from a ship into the sea is regulated by regs. 4 to 7. "Sea" in these Regulations is any estuary or arm of the sea which includes the Western Solent, and therefore the Garbage Pollution Regulations apply to the "Lotta Kosan"[138] if a breach of any of those Regulations has been committed.

Any violation of the provisions in regs. 4 to 7 constitutes an offence by owner, manager, demise charterer, and master,[139] and each of them shall be liable to a penalty.[140] A member of the crew cannot be subject of a prosecution under these Regulations.

Regulation 4 prohibits the disposal of any plastics into the sea outside any Special Area. A Special Area is an area as defined by the Regulations which does not include the Western Solent.[141] It follows that the dumping of the plastic bag was prohibited.

In addition the bag contained rags the disposal of which is not permitted within 12 miles, if ground or comminuted not less than 3 miles, from the nearest land.[142] The "Lotta Kosan" was inside the prohibited sea area.

As this was an offence of strict criminal liability the company was prosecuted and convicted despite the Magistrates' having accepted that the company had proper procedures in place. According to the defence the offence was committed by a cadet who had subsequently been dismissed for failing to comply with the company's procedures.[143]

By only prosecuting the owner and manager the prosecution appears deliberately to have left out the master again. Even though the wording in the Garbage Pollution Regulations is different from the wording applied in the Oil Pollution Regulations (the latter is "the owner and the master shall each be guilty of an offence"[144] which is different from "any breach…shall be an offence on part of the owner, manager, demise charterer and master"[145]) it appears that once an offence has been established all four namely owner, manager (if any), demise charterer (if any) and master are guilty and ought to be prosecuted unless the public interest stands against such a prosecution. The rule of the House of Lords in *Federal Steam Navigation* that the prosecution does not have a choice as to who to prosecute,[146] but only discretion in deciding whether or not it is in the public interest to bring proceedings, ought to apply to any statutory instrument. In my view this is particularly supported by the fact that the Garbage Pollution Regulations do not hold the person itself criminally liable whose act constituted that an offence was committed by the four mentioned parties.[147] None of the four is required to personally commit the offence and, as was the situation for the owner/manager in this case, they may even have proper procedures in place and still be found guilty. Safeguarding procedures and overseeing their proper implementation is as much the duty of the master as it is of owners or

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[136] *Ibid.*, s. 313(1).
[137] *Ibid.*, s. 313(2)(a).
[138] The Garbage Pollution Regulations, reg. 3(b).
[139] *Ibid.*, reg. 14(2)(a).
[140] *Ibid.*, reg. 14(2) tailpiece.
[141] *Ibid.*, reg. 2(2).
[142] *Ibid.*, reg. 5(b).
[143] Press Notice 157/04 on file MS 10/74/353. See also Conviction 51/2004 (Annex 5).
[144] Oil Pollution Regulations, reg. 36(2).
[145] Garbage Pollution Regulations, reg. 14(2)(a).
[146] *Federal Steam Navigation,* HL, p. 532, Lord Salmon: "It would be a sad day for this country were Parliament to abdicate those functions by writing words into a statute giving a Minister, or anyone else, the power to choose who is to be guilty of a statutory offence." See the discussion above, Chapter 12.2.5.
[147] Unless, of course, any of the four parties personally carried out the act establishing the breach.

managers. As no *mens rea* is required it appears that there is not really any difference between owner, manager, and master, as all are held responsible in their supervisory role.

Again, by not charging the master his position on board would appear to be diminished to the same role as a crew member.[148] But the outcome not to charge the master does not seem to be unfair as the master probably did not have anything to do at all with the incident. But not even considering the master[149] does not provide any incentive (or deterrent effect) for other masters to keep a closer control of compliance with on board garbage handling procedures.[150] An investigation ought to have covered explicit reasons why the public interest was in favour of the owner's but not the master's prosecution when both appear not to have attracted any culpability other than strict criminal liability.

However, the prosecution system as such appears to be lacking as the real culprit is only dealt with in the private but not in the public context.

It appears that in the case of the "Lotta Kosan" the disciplinary (or quasi penal) measure was transferred from the public into the private sector where it is both no longer visible, and not directly controlled by the democratic institutions of the State.[151] The fact that the cadet was allegedly sacked as a consequence of his failure to obey company procedures which led to a violation of the criminal law by his employer may have satisfied the owner but not the public interest.

> "It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say "Well, even if the case had been properly conducted, the result would have been the same". That is mixing up doing justice with seeing that justice is done…"[152]

One may argue that whether or not criminal proceedings were taken against the cadet would probably not have changed the employer's view, and the cadet would have been dismissed anyway. But this would be inasmuch beside the point as was the judgement by the Magistrates' Court against the master of the "Corinthic".[153]

In that case the master had been fined £5,000 by the Magistrates' Court for an illegal discharge of oily bilge water.[154] The judge hearing the motion for a quashing order said

> "that there was considerable evidence to identify the oil in the water as being the kind of oil which might have been found in the *Corinthic's* bilges".[155]

Yet, as that case was not an appeal but a case for certiorari the Court's decision was based upon the defendant not having had reasonable time to prepare his case despite the apparent obvious responsibility for the pollution.[156] The trial against the master had not been conducted according to the rules of natural justice and therefore the conviction was quashed.[157]

As regards the cadet it appears to be irrelevant for justice to be done whether or not the employer takes any action against the wrongdoer.[158] It therefore seems appropriate to

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[148] See also above, Chapter 9.6. and below Chapter 15.
[149] And, may be added, let him know that he is considered to be a suspect by requesting him for an interview under caution.
[150] This information should then be publicised as part of the news release of the conviction.
[151] In this case the alleged dismissal, Conviction 51/2004 (Annex 5), of the cadet only became known because the defence probably thought the information they provided would help to exonerate the defendants or at least reduce their fines.
[152] Lord Widgery in *The Corinthic,* p. 19, where the master was discharged not because he was not guilty but because "he had not been treated in accordance with the rules of natural justice", also p. 19.
[153] *The Corinthic* [1974] 2 Lloyd's Rep. 16.
[154] *Ibid.,* p. 18.
[155] *Ibid.*
[156] *Ibid.,* p. 20.
[157] *Ibid.,* p. 21; see details above, Chapter 12.2.5., fn 84.
[158] See as an example for the impact on the sentence also *R v. Dorian Rees and Alan Moss* (1982) 4 Cr. App. R. (S.) 71, p. 74, where the court did not consider the facts that one of the defendants was about to lose his

demand a change in the Regulations so that the real culprit can be held publicly responsible.[159] In case of the "Lotta Kosan" the cadet who broke the law was the one not being disadvantaged by its enforcement as no public punishing action was taken against him yet in effect he was punished in that he got sacked from his job.

12.4.2. Detention[160]

A detention is possible when an Inspector is satisfied that neither master nor crew are familiar with on board procedures for preventing pollution by garbage. However, it is at the discretion of the Inspector as to whether he detains the ship or employs other measures which would prevent it from sailing until the situation has been brought in order again. [161]

A ship may also be detained when the harbour master or the Inspector have reason to believe that an offence was committed under any of the regulations dealing with the disposal of garbage.[162] In such case jurisdiction for any disposal into waters of the harbour is with the harbour master whereas for an offence in any other waters the Inspector has powers to detain the vessel.[163] This solution, other than the legislation for oil pollution[164] does not leave a jurisdictional gap.

"Lotta Kosan" was not detained.[165]

12.4.3. Prosecution for garbage dumping on the "Lynden II"

> A crew member on board "Lynden II", a fishing vessel, was seen to be dumping garbage including sleeping bags, polystyrene and plastic bags into the sea near the oil production platform "Ocean Princess".

The Peterhead Sheriff Court fined the owners on 9 November 2005 an amount of £2,000. It appears that although the Sheriff considered the offence to be a serious one, he held in favour of the defendant that it was the first offence and that it had been done by a "rogue crew member".[166]

It seems that no attempt was made to charge the master.

In summary the same observation can be made as for investigations and prosecutions for illegal oil discharges in that no master has been convicted and it seems has also not been charged. The MCA, showing consistency in its approach by following its own policy. But by doing so the MCA probably fettered the wider discretion of *The Code* unless the public interest had been properly considered.

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army career and his family was going to lose their "married quarters", to be mitigating factors which should be considered to reduce the sentence. In the "Lotta Kosan" case any action by the employer would have to based upon the employment contract. Even though the sacking may be perceived to be a punishment it is nothing more than ending a commercial relationship between cadet and company for a breach of contract.

[159] This approach would also appear to have been behind EC Council Directive 2005/35/EC, see discussion below, Chapter 13.

[160] Similar to the discussion under oil pollution (Chapter 12, fn 55) and chemical pollution (Chapter 12.3, fn 109) I am addressing detention here and not in Chapters 6 and 7 because none of the vessels was detained under the Garbage Pollution Regulations.

[161] The Garbage Pollution Regulations, reg. 12(3); But see also below, Chapter 6.4.2

[162] *Ibid.*, regs. 4, 5, 6 and 7.

[163] *Ibid.*, reg. 17(1).

[164] See above, Chapter 6.

[165] See www.equasis.org.

[166] Convictions 64/2005 (Annex 6).

12.5. Conclusions

The MCA files again suggest that the MCA strictly follows its policy to prosecute owners rather than individuals. This only appears to be appropriate when the consideration of the public interest led the prosecution to elect who to prosecute. It would seem that a decision not to bring charges against the master or a crew member, the latter only if referred to in the relevant regulations, can only be made when it has been established that a prosecution is not in the public interest. The lack of proceedings, or at least pre-trial procedures such as interviews under caution, would also not provide a dissuasive measure for masters and crew members not to trigger illegal discharges.

I would criticise the apparently accepted standard in the MCA, the Crown Prosecution Service, the courts and the industry that the master should usually not be charged. As said before[167] the introduction of a culpability test for individuals for offences of strict criminal liability, whether dressed up as a public interest test or not, appears to undermine Parliament's intention to have those punished who are considered guilty when the *actus reus* occurs. Particularly in cases where proper procedures are in place in the company and/or on board of the vessel, and neither the owner nor the master have a direct grip on the activity[168] of the individual crew member, it seems rather arbitrary and unfair to fine any of them but not the real culprit,[169] notably if the owner and/or master have done "everything they could".[170] I can only see a proper solution if a breach of the law triggers as a consequence the punishment of the real offender provided he did it intentionally or was "seriously negligent".[171] This, however, would apparently require a change of the Garbage Pollution Regulations as the Oil Pollution Regulations and the amended version of the Dangerous Liquids Pollution Regulations already provide for the option of charging a crew member for an illegal discharge.[172]

In addition, the investigated pollution legislation for oil, noxious liquid chemicals in bulk and for garbage is not consistently drafted. This may lead to situations where owners may not be prosecuted because they are not covered under the term "owner". On the other hand individuals may not be prosecuted because the MCA policy could pose an obstacle for prosecuting them. But, more importantly, the current Dangerous Liquids Pollution Regulations and the Garbage Pollution Regulations do not offer the opportunity to prosecute individuals on board other than the master.[173]

In my opinion, therefore, it is necessary to change the legislation and practice of the MCA so that the real benefiting operator of the vessel, and the individual causing the pollution, can be charged if the public interest so requires, i.e. if the relevant entity or person has acted with intent or was seriously negligent.

Inefficient co-operation within the EU would also appear to be an impediment to a successful prosecution. The case of the "Klondyke",[174] where communication between the MCA and the French maritime administration failed because the correct person could not be tracked down, seems to suggest that maritime enforcement actions should be dealt with at a central EU level to avoid both national administration inefficiency and national protection for vessels contravening environmental legislation.

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[167] Above, Chapter 9.8.
[168] See, as an example, above the case of the "Lotta Kosan", Chapter 12.4.1
[169] Even though Lord Salmon in *Federal Steam Navigation* supported the system of applied strict criminal liability in general for pollution cases, p. 533: "The object of making the owners liable is to discourage them from taking a tolerant attitude towards a master who causes pollution. The object of making the master personally liable is to ensure that he will do everything he can to avoid pollution. I can see nothing unfair in making the master guilty for any contravention of s. 5."
[170] Admittedly a crew member cannot be charged under the Garbage Pollution Regulations, see reg. 14.
[171] See the discussion below, Chapter 15.
[172] For the Dangerous Liquids Pollution Regulations this is about to change as the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations, SI 2009 No. 1210, reg. 5, will as of 1 July 2009 make "any person who causes or contributes to that discharge" guilty of an offence.
[173] But see above, fn 172.
[174] See above, Chapter 12.4.

This leads to a slight deviation from the discussion of national aspects of prosecution. The effect of EU law on UK legislation would appear to make it inevitable that the more recent EC Directive on ship source pollution finds attention within the context of this thesis.

Chapter [13] – EC law and ship source pollution

13.1. Directive 2005/35/EC on pollution
13.2. Crew acting on master's orders
13.3. Crew acts on own judgment
13.4. Conclusions

13.1. Directive 2005/35/EC on pollution[1]

The EC Directive "on ship-source pollution[2] and on the introduction of penalties for infringements"[3] came into force on 1 October 2005.[4] One of the main purposes was "to give standards set out in the MARPOL Convention 'more teeth' at internal Community level".[5] Member States had to comply with the Directive at the latest by 1 March 2007.[6]

The Directive did not find the approval of "responsible organisations within the marine shipping industry",[7] amongst them the International Association of Independent Tanker Owners (Intertanko), representing "nearly 80% of the world's tanker fleet".[8] These organisations doubted the jurisdiction of the EU under international law to legislate in accordance with Directive 2005/35/EC requesting permission for judicial review.[9] In *Intertanko v. DfT*[10] the judge stated on 30 June 2006 that the Directive had not been implemented by the UK.[11] It appears that no changes have been made to relevant UK merchant shipping pollution regulations since that date.[12] Furthermore, there does not

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[1] This Chapter is now (14 June 2009) largely of historical value for two reasons. First, the Directive 2005/35/EC is going to be amended by a new Directive. The proposal to amend Directive 2005/35/EC (COM (2008) 134 final of 11 March 2008) has been accepted by the European Economic and Social Committee (2009/C77/17 – published on 31 March 2009). This amendment does away with the "specific criminal penalties" (A Mandaraka-Sheppard, *Modern Admiralty Law,* 2007, p. 1009) and instead requires that the relevant criminal offences "are punishable by effective, proportionate and dissuasive criminal penalties", Art. 5a(2). Secondly, in the UK the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations, SI 2009 No. 1210, will come into force on 1 July 2009. Other than the amended Directive which only requires intent, recklessness or serious negligence to be penalised, the new Regulations stick with the UK approach to make an illegal discharge (reg. 4 in respect of oil, and reg. 5 in respect of dangerous liquid substances in bulk) subject to strict criminal liability for owner, master and "any person who causes or contributes to that discharge".

[2] "Polluting substances" in the context of the Directive are only substances covered by MARPOL, Annex I (oil) and Annex II (noxious liquid substances in bulk), Art. 2(2).

[3] Directive 2005/35/EC.

[4] *Ibid.*, Art. 17.

[5] S Boelaert-Suominen, *The European Community, the European Court of Justice and the Law of the Sea,* (2008) 23 IJMCL 643, p. 702.

[6] Directive 2005/35/EC, Art. 16.

[7] *The Queen on the application of the International Association of Independent Tanker Owners (Intertanko) v. The Secretary of State for Transport (DfT)* [2006] EWHC 1577 (Admin), para. 2.

[8] *Ibid.*

[9] *Ibid.,* para. 3.

[10] *The Queen on the application of the International Association of Independent Tanker Owners (Intertanko) v. The Secretary of State for Transport (DfT)* [2006] EWHC 1577 (Admin).

[11] *Intertanko v. DfT,* para. 4, where the judge also erroneously states that the Directive has to be implemented only by 1 April 2007. It would appear that after the ruling of the ECJ in *International Association of Independent Tanker Owners (Intertanko) v. Secretary of State for Transport*, case C-308/06, 3 June 2008, see below, there should be no obstacle preventing the UK and any other member State to adapt their legislation accordingly. The non-compliance appears to have triggered legal action of the European Commission against the UK. According to a press release of 16 October 2008 (IP/08/1536 on http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1536&format=HTML&aged=0&language=EN&guiLanguage=en (9 November 2008)) "the United Kingdom has failed to notify its national measures fully transposing Directive 2005/35/EC. This piece of legislation aims at ensuring that all persons responsible for polluting discharges at sea are subject to adequate penalties. These penalties should be effective and dissuasive and may be of criminal or administrative nature. Their application to any person found responsible for an infringement is expected to enhance the protection of the marine environment from pollution by ships and to improve maritime safety. Member States should have transposed the Directive into their national law by 1 April 2007".

[12] The last amendment to the Oil Pollution Regulations appears to have been made on 4 August 2005 (The Merchant Shipping (Prevention of Oil Pollution) (Amendment) Regulations 2005). The Dangerous Liquids Pollution Regulations appear to have been amended last on 20 April 2004 (The Merchant Shipping

appear to be in existence any publicly available advice for European flag State administrations by the European Maritime Safety Agency (EMSA).[13]

The High Court followed the request of the shipping organisations and put five questions to the European Court of Justice. The questions concerned the validity of Art. 5(2) insofar as it limits the exceptions in MARPOL of Art. 4 in so far as it stipulates "serious negligence" as a test for liability, of Art. 5(1) insofar as it excludes the exceptions in MARPOL, of Art. 4 insofar as it breaches the right of innocent passage under UNCLOS, and of Art. 4 insofar as the term "serious negligence" violates the principle of legal certainty.[14]

The ECJ decided on 3 June 2008[15] that the EU is not bound by MARPOL "in the absence of a full transfer of the powers previously exercised by the Member States."[16] As regards UNCLOS the Court found that

> "UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States".[17]

Therefore

> "the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of that Convention".[18]

The last point in question concerned the claim by the Greek government that "Article 4 of Directive 2005/35 breaches the general principle of legal certainty" [19] because the term "serious negligence" is not defined in the Directive and therefore unclear.[20] In the eyes of the ECJ, however, such a concept is a full part of the Member States' legal systems.[21] The idea of negligence "refers to an unintentional act or omission by which the person responsible breaches his duty of care"[22] and "the concept of 'serious' negligence can only refer to a patent breach of such a duty of care".[23] Consequentially the Court did not question the validity of the Directive on the grounds of the questions asked,[24] and held that Art. 4 of the Directive

> "does not infringe the general principle of legal certainty in so far as it requires the Member States to punish ship-source discharges of polluting substances committed by 'serious negligence', without defining that concept".[25]

Addressees of the Directive are the Member States[26] which must ensure that discharges "if committed with intent, recklessly or by serious negligence" are seen as criminal offences as outlined in Framework Decision 2005/667/JHA which aimed to supplement the Directive.[27] As noted Member States were compelled to adopt the required measures to comply with the Framework Decision by 12 January 2007.[28]

(Dangerous or Noxious Liquid Substances in Bulk) (Amendment) Regulations 2004) and the Garbage Pollution Regulations seem not to have been amended since they came into force on 1 July 1998.

[13] See http://www.emsa.europa.eu/end185d007d002d004.html, 24 June 2008.

[14] Official Journal of the European Union, case C-308/06, para. 1-4.

[15] *International Association of Independent Tanker Owners (Intertanko) v. Secretary of State for Transport*, ECJ, case C-308/06, 3 June 2008.

[16] *Ibid.*, para. 49.

[17] *Ibid.*, para. 64.

[18] *Ibid.*, para. 65.

[19] *Ibid.*, para. 68.

[20] *Ibid.*

[21] *Ibid.*, para. 74.

[22] *Ibid.*, para. 75.

[23] *Ibid.*, para. 76.

[24] *Ibid.*, para. 81.

[25] *Ibid.*, para. 79.

[26] Art. 18.

[27] Directive 2005/35/EC, Art. 4.

[28] Framework Decision 2005/667/JHA, Art. 11(1).

The Framework Decision, however, has been annulled by the ECJ[29] on the basis that it is encroaching on the legislative procedure for Community legislation.[30] The current situation therefore is that the Directive is in force but the Framework Decision is not.

I believe that the Framework Decision is still very relevant as it has not been annulled because of its contents but because of procedural mistakes during the legislative process. It appears that I am not alone in thinking that the Framework Decision represented important legislation which will therefore probably re-surface.

> "If the European Union wishes to retain the provisions of the annulled Framework Decision on shipping pollution, it must adopt EC legislation on the issue by using the EC's maritime transport competence. Conversely, the remaining provisions of the Framework Decision can be readopted in the form of a Framework Decision."[31]

On the assumption that the Decision (or something very like it) is later adopted, it will be useful to examine how it might operate. I will therefore discuss the Framework Decision impact together with the Directive as if both were in force.

According to the Preamble of the Directive the rules of MARPOL

> "are being ignored on a daily basis by a very large number of ships sailing in Community waters, without corrective action being taken."[32]

The Preamble continues to explain that there is a need for effective, dissuasive and proportionate penalties in order to achieve effective protection of the environment.[33] These dissuasive effects, it is said,

> "can only be achieved through the introduction of penalties applying to any person who causes or contributes to marine pollution."[34]

"Any person" should thereby include not only the ship owner or master, but also the cargo owner, the classification society or any other person involved.[35]

Consequently the purpose of the Directive is twofold. First, it is to incorporate international standards for ship-source pollution into Community law, and secondly, it is to make sure that "persons responsible for discharges are subjected to adequate penalties".[36]

The Directive is set to apply in internal waters,[37] the territorial sea,[38] straits used for international navigation,[39] the exclusive economic zone,[40] and the high seas.[41]

> "Article 5
>
> Exceptions
>
> 1. A discharge of polluting substances into any of the areas referred to in Article 3(1) shall not be regarded as an infringement if it satisfies the conditions set out in Annex I, Regulations 9, 10, 11(a) or 11(c) or in Annex II, Regulations 5, 6(a) or 6(c) of MARPOL 73/78.
>
> 2. A discharge of polluting substances into the areas referred to in Article 3(1)(c), (d) and (e) shall not be regarded as an infringement for the owner, the master or the crew when acting under the master's

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[29] *Commission of the European Communities v. Council of the European Union*, on 23 October 2007, Case C-440/05, para. 74.
[30] *Ibid.,* particularly para. 69 and 71.
[31] S Peers, *The European Community's criminal law competence: the plot thickens*, E.L. Rev. 2008, 33(3), 399, p. 408.
[32] Directive 2005/35/EC, Preamble, para. 2.
[33] *Ibid.*, para. 4.
[34] *Ibid.*, para. 7.
[35] *Ibid.*
[36] Art. 1(1).
[37] Art. 3(1)(a).
[38] Art. 3(1)(b).
[39] Art. 3(1)(c).
[40] Art. 3(1)(d).
[41] Art. 3(1)(e).

> responsibility if it satisfies the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b) of MARPOL 73/78."[42]

Discharges are not considered to be an offence in any of the aforementioned areas when they follow the conditions set out by MARPOL.[43] It is also not an offence for owner, master or crew who are acting under the master's responsibility if the discharge into straits, the exclusive economic zone or the high seas are made in accordance with Annex I, reg. 11(b)[44] – i.e. discharges resulting from damage to the ship or its equipment – or Annex II, reg. 6(b)[45] – i.e. again, discharges resulting from damage to the ship or its equipment.[46]

As the Directive does not stop Member States from taking stricter measures[47] discharges allowed under the Directive into internal waters may still be prohibited as they currently are in the UK.[48]

Whereas it appears that any person shall be liable if covered by both Art. 4 and Art. 5(1),[49] only persons other than owner, master or crew (the latter when acting under the master's responsibility)[50] shall be criminally liable for discharges into straits, the EEZ or the high seas when the conditions of MARPOL, Annex I, reg. 11(b) or Annex II, reg. 6(b) are met.[51] As a consequence a classification society or a salvor might be criminally liable for a discharge when having acted intentionally, recklessly or with serious negligence.[52]

> "Article 4
>
> Infringements
>
> Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences by, and in the circumstances provided for in, Framework Decision 2005/667/JHA supplementing this Directive."[53]

The Directive and the supplementing Framework Decision will have to affect UK enforcement measures. In light of the defined purpose that "persons responsible for discharges"[54] are to become subject to penalties all crew members involved in any discharge could be potentially liable if they were to be considered "persons responsible" and the UK law would have to provide for it accordingly. It is submitted that "persons responsible" include the master and any crew member of the ship. This follows from the application of the Framework Decision, Art. 2.[55]

> "Article 2
>
> Criminal offences

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[42] Directive 2005/35/EC, Art. 5.
[43] Art. 5(1), referring to Annex I, regs. 9, 10, 11(a) or 11(c) or Annex II, regs. 5, 6(a) or 6(c); see next footnote about changes in numbering of regulations in Annex I and II.
[44] Which is reg. 4.2. in the amended version of MARPOL, Annex I (in force since 1 January 2007); the wording of reg. 4.2. and reg. 11(b) in the old version are identical; to avoid confusion - as the Directive 2005/35/EC still addresses reg. 11(b) – I have kept the reference to reg. 11(b) instead of to reg. 4.2.
[45] Which is now reg. 3.1.2. in the amended version of MARPOL, Annex II (in force since 1 January 2007); the wording of reg. 3.1.2. and reg. 6(b) in the old version are identical; to avoid confusion - as the Directive 2005/35/EC still addresses reg. 6(b) – I have kept the reference to reg. 6(b) instead of to reg. 3.1.2.
[46] Art. 5(2).
[47] Art. 1(2).
[48] MSA 1995, s. 131 for oil and the Dangerous Liquid Pollution Regulations, reg. 5(a) and (b) for noxious liquid chemicals.
[49] The Preamble of the Directive in para. 7 clearly requires "penalties applying to any person". Framework Decision 2005/667/JHA, Art. 2(1) in connection with Directive 2005/35/EC, Art. 4 and 5(1) does not restrict infringements to a particular group and this appears also to be the opinion of the Court in *Intertanko v. DfT,* para. 24.
[50] Directive 2005/35/EC, Art. 5(2).
[51] *Intertanko v. DfT,* para. 26. MARPOL, Annex I, reg. 11(b) is set out below in Chapter 13.2.
[52] *Intertanko v. DfT,* para. 26.
[53] Directive 2005/35/EC, Art. 4.
[54] *Ibid.*, Art. 1(1).
[55] Assuming, as aid above, that the Framework decision will be applied as is.

> 1. Subject to Article 4(2) of this framework Decision, each Member State shall take the measures necessary to ensure that an infringement within the meaning of Articles 4 and 5 of Directive 2005/35/EC shall be regarded as a criminal offence.
>
> 2. Paragraph 1 shall not apply to crew members in respect of infringements that occur in straits used for international navigation, exclusive economic zones and on the high seas where the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b), of the MARPOL 73/78 Convention are satisfied."[56]

According to that Article it is mandatory for each Member State to institute measures that guarantee that an offence of Art. 4 and 5 of the Directive constitutes a criminal offence.[57] Art. 2(2) of the Framework Decision, however, exempts crew members[58] for circumstances in which the conditions of MARPOL, Annex I, reg. 11(b), or Annex II, reg. 6(b), are satisfied. The exemption applies irrespective of whether they acted reasonably or not. This would not appear to satisfy the purpose of the Directive.[59]

Crew members would not have to be exempted if they would not have been considered possible wrongdoers in the first place. It follows in my view that relevant UK legislation[60] and enforcement practice[61] which does not consider crew members to be possible culprits will have to be amended accordingly, and any restriction to "owner or master"[62] and "owner and master"[63] ought to be amended by adding, for example, "and/or[64] any other person".

It is not initially clear, though, whether the master would fall under the term "crew member".[65] In the absence of a definition of the term "crew member", it would not appear that the master is considered to be part of that group. "Master" and "crew" are specifically addressed as separate persons in one provision[66] and this seems to point towards a deliberate distinction between the terms, as otherwise they would not have had to be distinguished.

It follows that what is not considered an infringement for crew acting under the master's responsibility[67] still remains an infringement and thereby a criminal offence for the owner or master under the Framework Decision.[68] Under the Directive,[69] however, all acts of owner, master or crew acting under the responsibility of the master would not be considered an infringement if they satisfy relevant MARPOL conditions.[70] Despite this inconsistency it means that once the requirements for the exceptions under the Directive are satisfied[71] such discharge does not become an infringement in the first place and the

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[56] Framework Decision 2005/667/JHA, Art. 2.
[57] *Ibid.*, Art. 2(1).
[58] But excludes internal waters and the territorial sea, although the latter may be covered by "straits used for international navigation", Framework Decision 2005/667/JHA, Art. 2(2). It follows, in my view, that any discharge caused by a crew member in internal waters and the territorial sea (as long as it is not a "strait used for international navigation") is still required by the Framework Decision to constitute a criminal offence under any circumstances whether or not it would fall under the MARPOL exceptions should they apply. What appears to be difficult in this context, though, is the exact demarcation of straits and that part of the territorial sea which is not considered to be part of a strait.
[59] Directive 2005/35/EC, Art. 1(1). See the discussion below, Chapter 13.3.
[60] That appears to be the Dangerous Liquids Pollution Regulations, but not, e.g., the MSA 1995, s. 131(1)(a) because the Directive only applies "in so far as the Marpol regime is applicable", Directive 2005/35/EC, Art 3(1)(a).
[61] I.e. the MCA enforcement principle to "prosecute owners rather than individuals", MEM, chapter 1, s. 1.2.4.
[62] MSA 1995, s. 131(1)(a).
[63] Dangerous Liquids Pollution Regulations, reg. 14(1A).
[64] As the case may be.
[65] MSA 1995, in s. 313(1), for example, excludes the master from being a seaman, a term, which includes every person employed on a ship.
[66] Directive 2005/35/EC, Art. 5(2).
[67] *Ibid.*
[68] Framework Decision 2005/667/JHA, Art. 2(1).
[69] Directive 2005/35/EC, Art. 5(2).
[70] Which, according to the Directive, Art. 5(2), are set out in MARPOL Annex I, reg. 11(b) or in Annex II, reg. 6(b).
[71] Directive 2005/35/EC, Art. 5(2).

Framework Decision would accordingly not apply.[72] Consequently, when the Framework Decision does not apply, an offence has not been committed.[73] As a result the owner or master would not be criminally liable for a discharge satisfying the conditions set out in the relevant MARPOL regulations.[74] In the UK this does, however, not apply for national[75] or internal waters because the Directive only covers internal waters "in so far as the MARPOL regime is applicable".[76] But MARPOL is not applicable landward of the baseline,[77] and therefore the stricter regime of the MSA 1995, s. 131(1), with its strict criminal liability provisions, applies.[78]

A further lack of clarity surrounds the words "crew when acting under the master's responsibility".[79]

In my view it is not clear whether this means "crew acting within their employment" as opposed to "crew whose act outside their employment would have triggered a discharge".[80] It could also mean, for example, crew who act directly on orders of the master as opposed to orders from, say, the chief engineer. Furthermore, it could mean a crew member acting on orders from the master instead of following their own judgment which in essence would seem to be the same as the chief engineer giving orders to a crew member.

The scenarios mentioned would appear to leave two main options. Under option one the crew member acts on the master's orders, and under option two the crew member follows his own judgment (or that of someone other than the master) without any direct order by the master.

Option one (crew acts on master's orders) then seems to leave another four possibilities whereas option two (crew acts on own judgment) seems to be restricted to only one possibility.

13.2. Crew acting on master's orders

(1) Under option one the first possibility is that both master and crew act reasonably. It appears that once the exceptions of MARPOL, Annex I, reg. 11(b)[81] are satisfied, no infringement has taken place and both, master and crew member are exonerated.

> "11. [now reg. 4] Regulations 9 [now reg. 15] and 10 [now reg. 34] of this Annex shall not apply to:
>
> (a) [now reg. 4.1] the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or
>
> (b) [now reg. 4.2] the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:

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[72] *Ibid.*, Art. 4, according to which any discharge committed with intent, recklessly or by serious negligence would constitute an infringement which has to be regarded as a criminal offence by the Framework Decision; conversely it would have to mean that when no infringement occurs a discharge cannot become a criminal offence.
[73] Because only "an infringement within the meaning of Articles 4 and 5 of Directive 2005/35/EC shall be regarded as a criminal offence", Framework Decision 2005/667/JHA, Art. 2(1).
[74] MARPOL Annex I, reg. 11(b) or in Annex II, reg. 6(b).
[75] MSA 1995, s. 313(2)(b), which are waters landward of the baseline.
[76] Directive 2005/35/EC, Art. 3(1)(a).
[77] Oil Pollution Regulations, reg. 12(6).
[78] See above, Chapter 12.
[79] Directive 2005/35/EC, Art. 5(2) which according to Art. 3(1) applies to discharges into straits (c), the exclusive economic zone (d) or the high seas (e).
[80] "Acting outside their employment" as in crew who during their leisure time cause a discharge.
[81] Which is now reg. 4.2 under the MARPOL, Annex I amendment of 1 January 2007. The references to regulations following in square brackets all refer to the amended version of MARPOL, Annex I. As the Directive still refers to the old numbering I have kept those numbers throughout this discussion and any reference in the text refers to the old numbers.

(i) [now reg. 4.2.1] provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimizing the discharge; and

(ii) [now reg. 4.2.2] except if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or

(c) [now reg. 4.3] the discharge into the sea of substances containing oil, approved by the Administration, when being used for the purpose of combating specific pollution incidents in order to minimize the damage from pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur."[82]

The consequence of the application of reg. 11(b) is that what would otherwise be illegal discharges violating regs. 9 and 10[83] are no longer considered to be in breach of the provisions when ship or equipment have been damaged and two conditions are satisfied. First, all reasonable precautions must have been taken and, secondly, owner or master must not have acted with intent or recklessly and with knowledge that damage would probably result.[84]

(2) The second possibility is that the master acts reasonably but the crew member acts recklessly.[85] The master would in this scenario satisfy the requirement of MARPOL, Annex 1, reg. 11(b)(ii). The crew member who is not addressed under that MARPOL regulation and therefore cannot influence the result of its application would not commit an infringement and consequently could not be charged.

(3) The third possibility would be where there is a reckless master and a reasonable crew member. An infringement thereby takes place,[86] and shall be regarded as a criminal offence,[87] because reg. 11(b)(ii) is not satisfied. It could be arguable that the crew member who was involved in the damage causing the discharge, but was not reckless, could not have a defence for he is not exonerated by Framework Decision Art. 2(2) because of the non-compliance with reg. 11(b)(ii) by the master. On balance, however, it would probably be the master who would be held guilty. The crew member ought not to be charged as that would otherwise appear to be against the objective of Art. 4 of the Directive which makes it plain that discharges are regarded as infringements if carried out with intent, recklessly or by serious negligence.

(4) The fourth scenario would see a reckless master and a reckless crew member. Regulation 11(b)(ii) is not satisfied and both would probably be considered guilty of an offence.

The construction appears to be that possibilities two and three do not match the purpose of the Directive which aims to penalise any person responsible for a discharge.[88] Under

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[82] MARPOL, Annex I, reg. 11 (reg. 4 in amended MARPOL Annex I version); annex II, reg. 6(b) (reg. 3.1.2 in the amended version as of 1 January 2007) will not be referred to as its wording is identical save for the reference to noxious liquid substances instead of oil.

[83] The amended MARPOL, Annex I, divided up regs. 9 and 10 in reg. 15 (operational discharges from machinery spaces) and reg. 34 (operational discharges of oil tankers). As the detailed discharge requirements are not subject of this section, and in addition all existing references refer to the old numbering of the regulations, I continue to use the old numbers and cross references.

[84] The phrase "recklessly and with knowledge that damage would probably result" is probably derived from the Warsaw Convention as amended at The Hague, 1955, and sets the threshold for a claimant who wants to break the limited liability of a carrier. The phrase is also used in maritime civil law conventions such as the Convention on Limitation of Liability for Maritime Claims 1976, see Art. 4. It was said that this wording "imposes upon the claimant a very heavy burden", see *The Leerort* [2001] 2 Lloyd's Rep. 291, para. 10. Translated into the context of the Directive 2005/35/EC and MARPOL, Annex I, it would appear to mean that in the case of a discharge the heavy burden would be on the prosecution to prove that the owner or master acted not only recklessly, but also with knowledge that damage to their ship would probably result. This would seem to require foresight of the type of damage that would occur, but not of the very damage that occurred, cf. *The Leerort,* para. 13.

[85] "Reckless" is used as a synonym for the whole phrase used in MARPOL, Annex I, reg. 11(b)(ii) "recklessly and with knowledge that damage would probably result".

[86] Directive 2005/35/EC, Art. 5(2).

[87] Framework Decision 2005/667/JHA, Art 2(1).

[88] Directive 2005/35/EC, Art. 1(1).

possibility two the crew member who is responsible would not be regarded as having committed a criminal offence whereas under possibility three it is the opposite. It would seem that the literal construction of option two would have to be applied as it is not clear whether or not that result (i.e. not charging a crew member who recklessly caused damage to the ship[89] which resulted in a foreseeable discharge) was aimed at by the legislature. It would appear to be different under (3) where the literal construction would in that case (i.e. a crew member who is not to blame for the damage to the ship causing the discharge) not seem to apply because Art. 4 of the Directive would appear to provide a reasonable defence.

13.3. Crew acts on own judgment

Option two (crew acts on own judgment) only appears to leave one possibility. Because the condition of Art. 5(2), which requires crew to be acting under the master's responsibility (or here: acting on their own judgment), is not fulfilled, the exemption of Art. 5(2) does not apply. When Art. 5(2) does not apply any discharge would appear to be an infringement as long as Art. 4 of the Directive is satisfied. The requirements of Art. 4 are met if the discharge was committed with intent, recklessly or by serious negligence. However, despite the establishment of an infringement a criminal offence is not committed by a crew member because the Framework Decision, Art. 2(2), re-introduces the defence of Art. 5(2) of the Directive. This defence exempts crew members irrespective of whether they acted reasonably or recklessly because MARPOL Annex I, reg. 11(b) only applies to the owner and master but not to a crew member.[90] A crew member could therefore not be charged.

It would seem that an owner or master could neither be charged unless any of them had acted with intent, recklessly or by serious negligence in the circumstances.

The consequence of this discussion would appear to be that if a crew member, not acting under the master's responsibility, has caused a discharge, be it with or without intent, recklessness or serious negligence, nobody would be criminally liable. If such legislation would be implemented in the UK it would appear that the current requirement of the Oil Pollution Regulations in reg. 36(4) which is based on strict criminal liability would then no longer be applicable because criminal liability would require at least "serious negligence"[91] and would only affect the owner or the master but not a crew member. It would seem that such a change would not meet the purpose of the Directive "that persons responsible for discharges are subject to adequate penalties".[92]

13.4. Conclusions

I consider that it is essential for the law makers to clarify the criminal liability for owners, masters and crews.

In the light of the EC Directive of 1 October 2005 it appears necessary to change the relevant UK law so that the actual individual causing the pollution can be held criminally responsible. As long as the owner and/or master are the only chargeable persons for discharges occurring under the MARPOL regime, and as long as no active prosecution steps were taken to convict the real culprit, UK legislation and practice would not appear to comply with EU requirements. The Framework Decision on the other hand does not

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[89] My understanding of MARPOL, Annex I, is that the "damage" referred to in reg. 11(b)(ii) is the same "damage" as addressed in reg. 11(b). This "damage" is the damage to the ship resulting from an accident or an action done by the master or any crew member (e.g. the OOW, the helmsman or an engineer).
[90] See also possibility two and three in Chapter 13.2 above where the discrepancy between persons addressed under MARPOL and persons addressed under the Directive cause a similar problem.
[91] See the ECJ definition above, Chapter 13.1; see also the discussion of reg. 34(4) of the Oil Pollution Regulations above, Chapter 12.2.4.
[92] Directive 2005/35/EC, Art. 1(1).

appear to follow the purpose of the Directive in that crew members are exempted from criminal liability when they caused discharges into straits, the EEZ or the high seas irrespective of whether they acted with intent, recklessly or with serious negligence.

The problems encountered seem to be twofold. First, they lie in the fact that possible culprits are not identical under the Directive and MARPOL. Whereas the Directive addresses infringements for owner, master or crew, MARPOL restricts inappropriate behaviour to owner or master only.[93] Incorporating the MARPOL restrictions into the Directive by establishing a direct cross reference to MARPOL thereby inevitably causes confusion as to whether or not crew are covered by the exceptions or whether their act affects owner or master. This shortcoming can be healed by incorporating the relevant MARPOL regulations but seemingly only subject to replacing "owner or master" in reg. 11(b)(ii) with "owner, master or crew".

Secondly, it should be defined that "acting under master's responsibility" only covers acts of the crew which are carried out as part of their ship board duties[94] when acting on direct orders of the master or as his authorised delegate (e.g. the chief engineer when instructed by the master). Such a clarification[95] would ensure that other than owner or master the real culprit could be prosecuted if he acted with "serious negligence", recklessly or with intent.

[93] Compare Directive 2005/35/EC, Art. 5(2) with, for example, MARPOL, Annex I, reg. 11(b)(ii) (reg. 4.2.2 in the amended version of 1 January 2007); the same would apply for the Annex II exception.
[94] The ship board duty of each crew member ought to be found in their employment contract and/or in their job description on ships where the ISM Code applies (ISM Code, s. 6.3).
[95] Provided that "owner or master" in, for example, MSA 1995, s. 131(1)(a) has been amended by adding "or any other person", see above, Chapter 13.1.

Part D – Conclusions

In this Part I will summarize and highlight the main findings of the thesis and will discuss a way forward having in mind the policy applied by the MCA.

I will show where I consider shortcomings in legislation and practices to be. This will be followed by a discussion of the relationship between prosecutions and detentions. I will suggest that enforcement measures should focus more on personal culpability rather than on a personal error. The recent European Directive on pollution[1] would appear to offer suitable guidance.

[1] Directive 2005/35/EC. See above, Chapter 13.

Chapter [14] – The thesis: findings

The thesis has investigated both administrative and criminal enforcement measures in considerable detail. It may be helpful, at this stage, to draw together specific findings discussed in the relevant chapters before (in Chapter 15) looking more to the future. These findings need to be presented serially and I will start with Chapter 2.

Chapter 2

(Chapter 2.2.)[2] The number of different officers of the Secretary of State and their relevant titles does not make it easy for a reader of the MSA 1995 to get an understanding of their role and powers. The lack of clarity and the additional allocation of powers through statutory instruments leave a confusing array of complex inspection and power arrangements.

(Chapter 2.5.) A comparison with the HSE indicated a common frustration amongst enforcers about the lack of understanding of their particular trade by lawyers and magistrates. A different approach appears to exist in the practice of prosecutions. Whereas on land the Inspector frequently handles his case himself, in merchant shipping the MCA has a central unit for such work.

(Chapter 2.2.3.) A Surveyor would appear normally to wear three (but possibly sometimes four) different hats. Apart from being appointed as a Surveyor he is usually also appointed as an Inspector under s. 256(6), which entitles him to serve improvement and prohibition notices. In addition, Surveyors as a rule are PSC Inspectors provided they satisfy the relevant criteria. When auditing under the ISM Regulations or investigating under reg. 34 of the Oil Pollution Regulations a Surveyor may also have the powers of a Departmental Inspector. It appears that, in extending the powers of a Surveyor by the use of a statutory instrument to be effectively those of a Departmental Inspector, the government may have acted *ultra vires*. For the MSA 1995 does not appear to provide the power to the Secretary of State to amend the MSA 1995 by regulation in this respect.

(Chapter 2.2.7.) It is not quite clear why such a confusing array of officers still exists in contemporary merchant shipping law. It would appear to be impossible for a master, certainly a master who does not have a UK certificate of competency, to understand who he is confronted with, what the powers of that officer are, and what information he has to provide in order to prevent getting himself into trouble. It seems that a revision of the law is required which ought to clarify particularly function and powers of the relevant officer.

(Chapter 2.3.) But a desire to prosecute appears to be rather rare amongst Surveyors. The option of a prosecution, will usually depend on the outcome of the Surveyor's inspection, his recommendation, and the opinion formed by the SIC after reading the Surveyor's report.

(Chapter 2.4.2.) It appears that a Surveyor carrying out an inspection,[3] who is not expressly given the authority as laid down in s. 259(2) for Departmental Inspectors, would not have the powers to take photographs or to collect samples unless acting as a Departmental Inspector or PSC Inspector. The PSC Inspector on a foreign flagged vessel would appear to be entitled to take photos, copies, samples or collect any other physical evidence as long as it serves the objective of ensuring the safety of the vessel. The understanding of "inspect" does not seem to cover such activities.

[2] For ease of identification of the relevant text in the main body of the thesis (Chapters 2 to 13) I will at the beginning of each paragraph identify the relevant section of the chapter in question.
[3] This is probably different from a survey which an owner has asked and paid for to obtain relevant certification for his vessel.

(Chapter 2.5.) Compared to an HSE Inspector, a MCA Surveyor with the option for a detention has the benefit of having a tool at hand which remains within the Inspector's control, is a "relatively quick fix",[4] and also has the effect of a "financial penalty"[5] for the owner.

(Chapter 2.4.1.) It would appear that the scope of any inspection by a Departmental Officer will have to be defined by Parliament. With regard to a Surveyor in his role as enforcement officer, the relevant merchant shipping legislation serves to define the limits of powers given to him when carrying out an inspection.

(Chapter 2.4.2.) A master of a ship which is subject to an inspection may therefore refuse a Surveyor the request to take photos or collect samples. For the same reason a master appears to have the right not to answer questions of a Surveyor asked outside of his power as Departmental Officer, unless the law specifically requires the master to do so. It also seems to be the case that seamen who are not under the same obligation as a master are not required to answer any question of a Surveyor/Departmental Officer at all. This is of interest as the master and crew may at a later stage be interviewed as witnesses by a Departmental Inspector and be required to sign a declaration of the truth of their answers. Any statement a person makes towards a Surveyor will may later form the basis of an investigation and possible prosecution by EnU.

(Chapter 2.4.2.) Yet, a master would still have to answer questions asked in accordance with s. 257(2)(d).[6] But it appears that if masters fear that they may incriminate themselves, they could have the right to remain silent. The decision to remain silent is a difficult one to make at that stage as a Departmental Officer will not necessarily question a master under caution and will not suggest to the master that he is interviewed as a suspect. If a master decides not to answer questions asked in accordance with s. 257(2)(d) he makes himself liable to prosecution. If, however, the master's statement taken by the Departmental Officer can be used against him at a later trial a master might have incriminated himself against his will.

The discussion about a possible abuse of powers made it necessary to discuss the implications of the human rights legislation. This was undertaken in Chapter 3.

Chapter 3

(Chapter 3.2.2.) The discussion in this chapter appears to support the conclusion that *Saunders* is not the leading case on the right to silence and the right not to incriminate oneself, when the issue is about documents and not personal statements. Compulsory powers alone do not appear to be sufficient to legally obtain documents against the will of a suspect, but in addition a warrant would seem to be required.

(Chapter 3.2.2.) If documentary or other material evidence was obtained because the master did not know better, and believed he had to produce the documents, the evidence would similarly appear not to contribute to a fair trial unless it could have been obtained independently of his participation. For it cannot be expected for a master to have such a detailed knowledge of the law.

(Chapter 3.2.2.) It appears that only if a master voluntarily and with knowledge allows a Surveyor to obtain documents or other items, and accepts that the evidence he produced may be used in court, should such evidence be admissible. It would therefore appear that a Surveyor carrying out a "fact finding mission" ought to inform the master about his rights, the legislation the Surveyor is acting under and what hat he is wearing at the time. For a master would appear to have different rights depending on whether the Surveyor acts as a Departmental Inspector, a "s.256(6) Inspector", a Surveyor, a Departmental Inspector or a

[4] Annex 15, Surveyor answer 2.7.
[5] *Ibid.*, Surveyor answer 2.15.
[6] See discussion below Chapter 3.2.4.

PSC Inspector. This statement of the ideal conduct of the Surveyor presupposes that the latter himself understands his own role and emphasises the need (addressed in Chapter 2.2.7.) for there to be a clarification of roles.

(Chapter 3.2.3.) It seems that in English law it is left to the discretion of the trial judge to include or exclude answers in or from evidence. The ECtHR judgments appear only to serve as support in argument as long as the judgments fit the policy applied by the English Courts.

(Chapter 3.2.3.) I conclude that the law of the ECtHR ought to prevent the use of the evidence collected by a Surveyor against the will of a defendant if the Court would apply its own dicta in *Funke* and *Saunders*. However, it appears that the ECtHR has moved away from its dicta in *Funke* and *Saunders*. It would seem that particularly by weighing the public interest as a decisive factor for using the evidence "to secure the applicant's conviction"[7] the Court acts in contradiction with its own decisions that the public interest cannot serve to justify the use of compulsorily obtained evidence.[8]

(Chapter 3.2.3.) English Courts appear generally to have decided that the general public interest outweighs the upholding of the implied human rights of silence and not to incriminate oneself (the interest of the defendant).

(Chapter 3.2.4.) A strong suggestion that any statements which the Surveyor may have obtained from the master ought to be excluded can be found when analysing the interview procedure of the MSA 1995, s. 259(2)(i). Section 259(12) also appears to give a clear indication that a judge should respect the general privilege not to be compelled to answer questions from people in authority. It would seem to be wholly inappropriate and against the spirit of a fair trial to have compulsorily obtained oral statements excluded from any evidence by statute, whereas it would be permitted to use unlawfully obtained or otherwise compulsorily obtained answers outside of that provision.

(Chapter 3.2.4.) Seamen, i.e. all crew members other than the master, would appear not to have to answer any question by a Surveyor or Inspector if they do not want to. However, seamen, and also the owner, have to produce the documents required under s. 257(2)(a).[9] When confronted by a Departmental Inspector seamen have to comply with his instructions within the limits of s. 259.

(Chapter 3.3.) As regards the interference with property and possessions, it seems that as long as the detaining officer balances the personal possessions interest with the public interest as addressed in Protocol 1 Art. 1, and can reasonably conclude that an unfair imbalance exists, his interference with the right under Protocol 1 Art. 1 would seem to be justified.

The findings so far seemed to require an analysis in Chapter 4 of the impact of MAIB investigations on enforcement issues, as MAIB inspectors have all encompassing rights to obtain any information from master and crew of any affected vessel.

Chapter 4

(Chapter 4.2.1.) As regards any statement or declaration made by a potential defendant, there appears to be a negligible risk for him of any disclosure of information obtained by an MAIB Inspector. If the case law of the ECtHR were to be applied. But an interviewee might have to face an increasing risk for an order of disclosure as regards the accident

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[7] *Jalloh v. Germany*, para. 119.
[8] *Saunders v. UK*, para. 74; *Heaney and McGuinness v. Ireland*, para. 57, but also *Jalloh v. Germany* in the rather confusing para. 97.
[9] "Any official log-books or other documents relating to the crew or any member of the crew in their possession or control".

report sent to the MAIB by the vessel, any existing medical records and any preliminary report by the Chief Inspector.

(Chapter 4.2.1. and 4.2.2.) In consequence, this means that a master who is going to be interviewed by an MAIB Inspector finds himself in a similar dilemma to a master who is interviewed by an Inspector for a possible breach of the law relating to navigation. The master will have to answer all questions on threat of prosecution for not doing so unless, if questioned by an MAIB Inspector, he has a reasonable excuse.

(Chapter 4.2.2.) It may still be concluded that it is fairly unlikely (albeit possible) that a statement compulsorily made to an MAIB Inspector by a master (or other person) will ever be used against him in criminal proceedings. But the obstacles for a prosecutor to obtain information (other than a statement or declaration made by a master) from the MAIB with the help of a court would seem less difficult to overcome. Yet, it seems that, despite the residual risk that information provided by the master may get and assist the prosecution, he would be well advised to satisfy the requirements of MSA 1995, s. 259 in order to avoid criminal proceedings under s. 260. It seems that it will be rather difficult, if not impossible for the master to establish a defence of reasonable excuse not to comply with such a request.

(Chapter 4.2.3. and 4.2.4.) The master's personal interest could also be compromised by the co-operation of the MAIB with marine investigators of foreign investigation institutions if files containing statements and transcripts of interviews are exchanged. When two States have agreed to co-operate, the lead investigating State should allow representatives of the other State's organisation amongst others to question witnesses, view and examine evidence and take copies of documentation, and, particularly, be provided with transcripts, statements and the final report relating to the investigation.

(Chapter 4.2.3.) The MAIB 2005 Regulations do not seem to advocate full co-operation as required under UNCLOS and restrict the co-operation requirement to incidents involving ro-ro ferries and high-speed passenger craft only.[10] Under the current law it appears that the MAIB 2005 Regulations neither fully comply with UNCLOS 1982 nor address the requirement for the MAIB to apply the IMO Code for all its co-operation with other States.

(Chapter 4.2.3.) It appears, therefore, to be a breach of the international consensus for the MAIB not to follow the IMO Code in all investigations with international involvement. If the MAIB is not sharing interview transcripts[11] with co-operating investigation authorities of other States, for investigated incidents which occurred on the high seas independent of the type of ship involved, it appears neither to follow UNCLOS 1982 nor the IMO Code.

(Chapter 4.2.3.) This practice, however, has the effect of protecting the individual master of a vessel which was involved in an accident investigated by the MAIB. The risk of information being passed on via the MAIB to any UK prosecutor is further minimised. But, as the following discussion demonstrates, such a risk still continues to exist.

(Chapter 4.2.5.) As regards specific VDR information, it is at the discretion of the Chief Inspector of the MAIB to release this information to the MCA or the police. Under the IMO VDR Guidelines the shipowner has access to the VDR information[12] and thereby to vital evidence which he can use for his defence should there be a prosecution. But such access is not guaranteed to the master or any watchkeeper under the MAIB 2005 Regulations, the IMO VDR Guidelines or the IMO Code on casualty investigation.[13] This

[10] This, however, would appear to have to be subject to a change of legislation in the future when applying the new Directive 2009/18/EC of 23 April 2009. In Art. 7 the Directive requires that "in cases of safety investigations involving two or more Member States, the Member States concerned shall therefore cooperate". Safety investigations must be carried out "after very serious marine casualties", see Art. 5(1).
[11] See above, Chapter 4.2.4.
[12] IMO VDR Guidelines, para. 5.
[13] The latter is only concerned with access of investigators to VDR data, e.g. s. 5.5.

appears to be of some significance as the Prevention of Collisions Regulations specifically hold the owner and the master (and any person for the time being responsible) criminally liable for any contravention.[14]

(Chapter 4.2.5.) It is submitted that the problem of possibly depriving a suspect of his right of access to VDR data ought to be solved by ensuring that there is guaranteed access to the VDR data not only the shipowner, but also to all other persons who may become defendants over the same incident.

(Chapter 4.2.6. and 4.2.7.) It is also not clear in what way the Chief Inspector would come to his conclusion to provide VDR information to the police or the MCA.

(Chapter 4.2.6.) It appears that the initial concern that handing over sensitive information to the police or the MCA, which "will undermine the MAIB's position",[15] has not been satisfactorily dealt with by the MAIB 2005 Regulations. Consequentially it seems that reg. 12(7) is technically a contravention of Art. 8 of the Human Rights Convention, in as much as the discretion granted is "expressed in terms of unfettered power".[16] As a consequence of the lack of clarity in the Regulations, Art. 8(2) seems to be violated because the Chief Inspector's discretion is not in accordance with the law. The release of VDR data to the police or MCA would inevitably reveal names of possible suspects (albeit indirectly through linking, for example, voices heard on the bridge with crew lists or log books) and names of anybody who has given evidence.[17]

(Chapter 4.2.7.) Although there are remaining doubts, the fairness criteria seem to imply that a Chief Inspector of the MAIB would not violate Art. 6 even though a breach of Art. 8 may occur when he decides to provide data to the police or MCA. A breach "of the rights of privacy enshrined in article 8 does not of itself mean that the trial is unfair".[18] Such a breach does not require a remedy in accordance with Art. 13 of the Human Rights Convention "to be given within that trial".[19]

(Chapter 4.2.7.) As long as the defence has the opportunity to challenge the recording and oppose its use (in a hypothetical case in which the Chief Inspector has handed VDR data over to the police or MCA), , it is hard to imagine that a court would decide that such evidence was automatically inadmissible. In addition, such data, if voices are recorded on it, would not be the only evidence as there would - usually - always be the other party to whom the suspect was talking.

(Chapter 4.2.8.) If the master or his advisors contemplate bringing a judicial review, a very likely outcome would seem to be that the court might decide to acknowledge the violation of a human right, but leave the decision as to the admissibility of the evidence to the trial judge. The judicial review would seem to be rather costly for an individual master or crew member unless he has financial support from his employer, his trade union or any other source.

(Chapter 4.2.9.) A master may as a result find himself confronted with evidence, and conclusions based upon it, collected by the MAIB as an involuntary right hand of the prosecution. It also appears that the rights of the master to remain silent would in such scenario have been circumvented, particularly if he had to answer questions of an Inspector operating with the powers given under MSA 1995.[20] It appears that the decision as to whether reports are admissible in evidence will again be at the discretion of the judge under English law.[21] As long as the parameters used by the ECtHR[22] and by the

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[14] Prevention of Collision Regulations., reg. 6(1); see also above, Chapter 10.
[15] *Regulatory Impact Assessment,* para. 4.3.1.
[16] *Malone v. UK,* para. 68..
[17] Such information shall only be disclosed subject to reg. 12(2)-(7), MAIB 2005 Regulations, reg. 12(1).
[18] *R v. P,* p. 161.
[19] *Ibid.,* p. 162, in reference to the ECtHR in *Schenk v. Switzerland.*
[20] In s. 259(2).
[21] See above, Chapter 3.2.3.

House of Lords[23] are followed, a master or any other interviewee should, however, not really be disadvantaged.

(Chapter 4.2.10.) When looking at access to the master by either an MAIB inspector or an MCA Departmental Officer it is either advantageous or disadvantageous (depending on one's starting point) for the master to be interviewed first by an MAIB Inspector rather than by an MCA enforcement officer. It appears to be advantageous for the individual master who may also be a suspect if he is interviewed first by the MAIB Inspector; this, however, may not be in the interests of justice.

After the general structural discussion in Part A, I moved on to analyse in more detail administrative enforcement measures. Chapter 5 dealt specifically with detentions.

Chapter 5

(Chapter 5.2.2.) It is not the task of the court to undertake a merits review when judging the discretion exercised by an Inspector who detains a vessel. A court should not substitute its own view for that of the Inspector. It would seem to follow that an Inspector who is of the opinion that a ship is dangerously unsafe is entitled to hold this view unless it is perverse or held in bad faith. The view of the Inspector, however, must be subject to him having established and properly balanced the qualifying element of "serious danger to human life"[24] before he can detain the ship. The test would appear to be whether the Inspector is of the opinion that a fact has been established which is serious enough to make the ship dangerously unsafe.[25] An Inspector could not come to the opinion that the ship is dangerously unsafe without establishing circumstances that lead him to believe that the relevant requirement of the MSA 1995, s. 94(1) were satisfied.

(Chapter 5.2.2.) The Inspector would only have the option to detain a vessel as dangerously unsafe when it is proportionate to do so, which would appear to mean that there is no other option to eliminate the risk. If, for example, the ship could not sail anyway because the engine would first require major repairs, or the owner is prepared voluntarily to stay in port (and this could be verified) would a detention not seem to be a proportionate measure. Such an option, however, would not appear to be open to an Inspector operating under the PSC regime, as under it detention is compulsory. This contrasts, for example, with the position of a Surveyor conducting [a survey?] of a UK flagged vessel.

(Chapter 5.3.) When comparing numbers of detentions of foreign and UK flagged ships it would be a worrying factor for merchant shipping law enforcement if there were different standards under the same statutory requirements which, in effect, would then serve to discriminate on the basis of nationality (flag) only. However, the argument in favour of such discrimination is that UK owners and their vessels are known by the MCA Surveyors who visit them more or less regularly whereas no history, other than technical information kept on the official databases, is known of a vessel being subject to port state control, and no other (follow-up) visit may happen in the near future. If a more "customer friendly approach" of educating, as opposed to detaining, delivers the result of having safe ships operating under the UK flag, it would appear that the end justifies the means.

As detention of a vessel is the ultimate measure taken under the PSC regime a discussion of detentions and general aspects of port state control followed in Chapter 6.

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[22] As, for example, done in *Botmeh v. UK,* see above.
[23] In *H and Others,* see above.
[24] MSA 1995, s. 94(1).
[25] See above, *Banks v. Secretary for the Environment,* para. 10.

(Chapter 6.2.) It would seem that a detention, which is an administrative enforcement measure, inevitably contains a punitive element. A detention can have serious commercial consequences for a company and the loss of use of the ship for a day, depending on its size, will usually be greater than the maximum fine under a summary conviction. Evidence of owners contesting a detention is still rather sparse, though.

(Chapter 6.3.1.) A survey of administrative (non-maritime) case law would suggest the following requirements for a Detention Notice:

1. Even if the legal instrument in question does not provide for the identification of a section or regulation that has been breached, such a specification would seem to be required unless the recipient of the notice is in no doubt about his particular breach without that information. The recipient is entitled to know the ground for the issue of the Detention Notice.
2. The Detention Notice ought to say what the recipient has done wrong. The alleged offender is entitled to be informed about the particular allegation.
3. A Detention Notice is not invalid because it carries an inaccuracy or misdescription as long the recipient knows what he has done wrong.
4. The allegation or requirement of the notice ought to be clear and easily understood. The latter would appear to refer to a professional mariner who is not a lawyer.

(Chapter 6.3.1.) It would not appear to be an absolute and detailed requirement for an Inspector's Detention Notice to state exactly how to put the defect right as long as there are several ways to remedy the relevant deficiency. It is, in the end, the obligation of the owner and master to ensure that their vessel complies with relevant safety provisions. It appears to follow that as long as the master and owner know in sufficient detail what is wrong, and why, they ought to be in a position to know how to rectify the deficiency.

(Chapter 6.3.2.) The recorded breaches of statutory requirements on the face of the Detention Notice constitute the matters or grounds for which the vessel is detained. These apply independently of the defects recorded in the Report of Inspection (ROI) to which "Action Codes"[26] are applied. The defects recorded in the ROI only provide explanations given for reasons of non-compliance. But as an arbitrator in a detention appeal must also have regard to matters not specified in the Detention Notice it will probably be both the Detention Notice and the Report of Inspection which in their combined weight have to be judged when a detention becomes subject to an appeal.

(Chapter 6.4.1.) The wording of the Paris MoU does not give clear instructions to the port state control officer (PSCO) as to a detention other than declaring possible future intentions of an Inspector (e.g. the PSCO "will exercise his professional judgment",[27] "the ship will be detained if",[28] the PCSO "will assess whether"[29] or "the ship will be strongly considered for detention"[30]). It appears that the decision as to how to implement the intentions of the Paris MoU was left to its members. In the EU this has been done by Council Directive 95/21/EC which in the UK has been transferred into national law by the Port State Control Regulations.

(Chapter 6.4.2.) Directive 95/21/EC clearly instructs the administration of the Member (port) State to detain a vessel when deficiencies (plural)[31] are clearly hazardous to safety,

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[26] See above Chapter 6, fn 24 and also Annex 19, form MSF 1601A.
[27] Paris MoU, s. 9.1.
[28] *Ibid*. s. 9.3.2.2.
[29] *Ibid*. s. 9.3.3.
[30] *Ibid*.
[31] Although the new Directive 2009/16/EC of 23 April 2009 still uses the plural ("deficiencies", Art. 19(2)) the definition of the term "detention" in Art. 2(15) appears to suggest that a ship can be detained on the basis of a

health or the environment. The Inspector does not appear to have a choice where the Directive makes it obligatory to detain a vessel.[32] If Surveyors apply alternative measures to detentions these could violate European law, as being a form of illegal State aid, despite their attraction of flexibility.

(Chapter 6.4.2.) Although Directive 95/21/EC has as its purpose the drastic reduction of substandard shipping, it does not actually define "substandard shipping". It aims to achieve the purpose set out in Art. 1 by increasing compliance with international and EU legislation. The inference may be drawn that a ship would be substandard when the defects make the vessel clearly hazardous because, at that stage, the vessel would have to be detained. By contrast, I would therefore conclude that a ship which is clearly hazardous is substandard, and substandard shipping would be reduced when the vessel is prevented from sailing, i.e. is detained. It follows that if more than one answer to any of the 14 assessments[33] is negative the Inspector would have to detain the ship and would not have discretion as outlined in Annex VI. This is perhaps a surprising conclusion and might be uncomfortable for some port State administrations.

(Chapter 6.4.3.) It appears that Directive 95/21/EC encompasses a wider scope of clearly hazardous scenarios than the PSC Regulations. It would seem that restricting a detention only to the Convention enactments as addressed by the PSC Regulations, reg. 9(2)(a) constitutes a breach of the EC Directive requirements in that they do not restrict the identification of clearly hazardous defects to a breach of Convention enactments.

(Chapter 6.7.2.) A decision for a detention under any of the merchant shipping regulations usually gives the Inspector some discretion. It would seem, though, that that the decision is not entirely that of the Inspector. He will, first, not only have to make a rational and reasonable decision but will also have to ensure that he strikes a balance between the interest of the State and the individual. Secondly, the balancing interests will have to be weighted so that it becomes clear which considerations ought to prevail. Thirdly, if an interference with a human right is at stake it might not be sufficient that the decision is reasonable within the balancing act carried out by the Inspector. What appears to be important under such circumstances is that the State in pursuing its interest not only ensures "the use of the least drastic means, and no disproportionately severe effect on those to whom the restriction applies",[34] but in addition must balance the individual human right, which may go beyond the pure freedom of the individual, with the interest of the State or rather the impact on the larger community.

(Chapter 6.7.2.) The consequence seems to be as follows. First, it is not the question whether or not the ship conforms to the standards of health and safety required by the UK, but only whether or not the Inspector is satisfied that the vessel does not so conform. It would, however, not suffice that the Inspector's decision is rational, i.e. not outrageous in its defiance of logic or accepted moral standards or is perverse; an Inspector will have to make his decision within the given parameters of the law. Secondly, if the law offers him some discretion, the decision to detain is only his to the extent that it is proportionate. The detention is only proportionate when a balance has been struck between the interest of the State and the individual taking particularly into account that a human right is affected.

(Chapter 6.8.) The detention of the "Ocean Glory 1" was examined in some detail in Chapter 6. Even though it would appear that the detention was based on a defective Detention Notice, because the deficiencies were not satisfactorily specified, the sheer number of defects suggests that the ship was unsafe. A decision to detain the vessel

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single defect. "'Detention' means the formal prohibition for a ship to proceed to sea due to established deficiencies which, individually or together, make the ship unseaworthy."

[32] Although there is an indication that the MCA believes that "fault" on part of the master, owner or operator of the vessel is required to justify a detention, see above, Chapter 6, fn 160.

[33] MSN 1775, Annex VI, s. 2.

[34] *Elloy de Freitas,* p. 80.

would still appear to have been proportionate when considering both the Detention Notice and the Report of Inspection with regard to all defects. As a result, the detention ought to have stood a fair chance of being modified in an appeal procedure. For if an arbitrator actually takes into account all circumstances the state of the vessel ought to make it clear that a detention was justified.

It was necessary next, in Chapter 7, to examine the legality of ship detention practice in the UK.

Chapter 7

Chapter 7 contains the only systematic analysis ever undertaken of UK ship detention practice, based on over 100 detention files. Chapter 7.6. provides a detailed set of conclusions resulting from that analysis, so it is only necessary here to highlight the salient points.

Out of some 200 different existing merchant shipping statutory instruments only 13 have been applied to detain vessels in the "multi-defect detention" cases. This pattern is repeated when looking at the single defect detentions.

The analysis of all inspected Detention Notices suggests that more than half of all notices were defective in some way. However, it is submitted that a defective Detention Notice does not make the relevant detention invalid, as long as an arbitrator finds enough evidence in all the circumstances surrounding the matter(s) that led to the detention which show that the Inspector had a valid basis for his opinion. That evidence might become apparent from the Report of Inspection, for example, and might appear to allow him to modify the Detention Notice and thereby validate the relevant detention.

When attempting to categorise the reasons why the analysed Detention Notices were defective three grounds appear to emerge, which are that:

1. the law was incorrectly applied or there was no statutory provision identified,[35] or
2. not enough detail was provided to identify what was wrong, or
3. the discretion applied was unreasonable and made the detention disproportionate.

This picture changes slightly when analysing the potentially defective Detention Notices where only two categories seem to exist. Those are that:

1. not enough technical clarification was provided, or
2. the discretion applied could potentially make the detention disproportionate.

The analysis of all the detentions between 2001 and 2005 seems to allow the following conclusions to be drawn for the work of the MCA as an enforcement agency.

1. The technical clarification and specification of the defect, or rather clearly identifying what was wrong, seems to emerge as one of the key problems.
2. The lack of understanding of the application of merchant shipping regulations is of equal concern.
3. Misuse of discretion or, possibly, rather a lack of understanding of the limits of discretion, would seem to suggest a lack of understanding of the applicable legal and administrative procedures for detaining a ship.

[35] In the sense which was explained above, Chapter 7, fn 147, the lack of a statutory provision does not relate to the powers of an Inspector but to the description of a defect.

Some further mechanisms of quality control for the MCA would seem to be appropriate when considering and executing a detention. It seems that there are at least six such mechanisms.

1. Detaining officers seem to require training in the basics of public law and a more detailed tuition in the use and application of merchant shipping legislation.

2. It would probably be advantageous if the form of the Detention Notice were subjected to an overhaul. What the format of the Detention Notice ought to require before the notice is issued is a verification of whether or not it is precisely clear to everybody involved, but particularly the master and/or owner, what the defect is, why it is considered to be a defect, and what led to the conclusion that a detention is required.

3. The detention form ought to require the compulsory filling in of fields and therefore needs to provide the space on its face for the relevant details.

4. To avoid illegibility on the face the Report of Inspection and on the Notice of Detention, and to provide more space for the description of the defect on the notice it would seem to be appropriate for the Inspector to be equipped with modern mobile office technology which would at least allow the Detention Notice and the Report of Inspection to be typed and printed *in situ*. Access to electronic databases with relevant legislation might in addition be appropriate.

5. For quality management purposes it would seem advisable to require the Inspector, where possible, to verify every detention with a senior colleague in his office or, if not available there, in headquarters.[36] This would require sufficient trained and experienced staff and suitable working arrangements to cover any out-of-hours needs PSC inspections may trigger.

6. A “streamlining” of merchant shipping regulations would make it easier for the individual Inspector to come to his decision but, equally importantly, would also offer clarity to the master and owner prior to any inspection which itself could always potentially result in a detention of the vessel. Alternatively, the MCA could set out to create a databank of “approved” detentions, i.e. detentions which have been analysed in-house and found to constitute good practice. Even though this will not create law it could have a similar effect as MGNs which are accepted by the courts as valid guidance.[37] Over time such a databank would probably cover most of the relevant issues. It might even be worthwhile to consider such a collection of information on an EU or even wider international level.

Whatever measures may or may not be taken the existing case law suggests the following minimum requirements for a Detention Notice:

1. At the time the Inspector is issuing the Detention Notice he has to have in his mind what standards the relevant statutory instruments require.
2. The Detention Notice must tell the recipient what it is wrong and why.
3. The Detention Notice must be clear in that the recipient must understand what he has to do to rectify the identified defects.

The findings in this Chapter suggested the need to discuss the remedies available for invalid detentions. Chapter 8 deals with detention appeals and arbitration.

[36] In Southampton.
[37] See below, Chapter 10, fn 307.

Chapter 8

(Chapter 8.2. and 8.4.) The MSA 1995 and the PSC Regulations require detention appeals to be subjected to statutory arbitration. It would seem that a statutory arbitration under the PSC Regulations or the MSA 1995 could potentially violate Art. 6 of the ECHR. Yet the rights, under Art. 6, of the party to the Detention Notice arbitration will probably not be affected by a statutory arbitration. This is because the possible infringement of Art. 6 is probably not engaged in respect of the party to the proceedings, but only in connection with an interested public who would not have the opportunity to observe the arbitration.

(Chapter 8.4.4.) Compared to a rather straightforward appeal to a court (where the judge cannot be chosen, court procedures do not have to be agreed and public access to both hearing and judgment is usually not in question), a party to an arbitration has more influence on the set up of the proceedings as a whole. A statutory arbitration about a detention may have to deal with relatively uncommon problems of public law, in addition to technical maritime matters. The choice of an arbitrator with relevant qualifications may not be an easy one, especially for a foreign shipping company which is reluctant to instruct local lawyers.

(Chapter 8.4.4.) Even if the final conclusion is that a statutory arbitration under the PSC Regulations (or the MSA 1995) does not in any way violate Art. 6(1), the whole concept of statutory arbitration does not appear to be right as a matter of policy. If one assumes that the outcome of any judicial process is that justice and fairness ought to prevail, it is the State has a role to ensure that this happens. While doubts remain that the process of statutory arbitration may not be fair, because one party to the proceedings may be disadvantaged, it would not really appear to matter whether it is the State or the individual party which instigates the arbitration proceedings. The eventual objective ought to be satisfactory compliance of the vessel in question with health and safety obligations. If there is a risk that statutory arbitration might not deliver such a result it could be advantageous for all parties involved, i.e. the State, the MCA and the claimant to resort to proven ways of dealing with appeals against the decision of a public body. An example of such established ways would be appeals against prohibition notices under the HSWA 1974. Those appeals are dealt with by an employment tribunal, and according to s. 24(4) one or more assessors may be appointed for the proceedings. It might be an acceptable compromise to have a permanent panel of, say, QC's who are Lloyd's arbitrators, and master mariner members of Trinity House[38] and/or, as the case may be, engineer members of, say, the Institute of Marine Engineering, Science and Technology (IMAREST).

(Chapter 8.6.2.) The second aspect of a detention arbitration concerns compensation. It seems that it may be difficult for a claimant to obtain compensation for any future economic losses,,, and that damages might be restricted to the direct loss suffered by an owner. Whether the arbitrator ought to allow for the recovery of economic losses generally would seem to depend on the particular circumstances of the case. This would appear to be in line with the position of the Court of Appeal in *Harris v. Evans* ("so be it")[39] which seems to suggest that some loss has to be accepted as part of a system which is set up to protect the members of the public.

This chapter concluded the analysis of administrative enforcement measures under Part B. Part C concerned criminal proceedings and Chapter 9 examined the underlying criminal law issues.

[38] Who, for example, sit as assessors in collision cases in the Admiralty Court, see CPR 61.13(a).
[39] Above, Chapter 8, fn 377.

Chapter 9

(Chapter 9.1.) It was surprising to see that a pattern seemed to exist in that in none of the cases (more than 500) in which a vessel was detained during the investigated period it was seemingly even considered to bring a prosecution.

(Chapter 9.3. and 9.4.) *The Code for Prosecutors* requires sufficient evidence and the consideration of the public interest before a prosecution can be commenced. The MCA files hardly ever address the public interest expressly, but during the decision making process consideration is usually given as to what action is deemed to be the most appropriate. The six factors the MCA is supposed to apply when deciding about whether or not to charge a person do not instil much confidence as to their usefulness. This is not least because nearly all merchant shipping regulations apply the concept of strict criminal liability which would suggest that, for example, the mental state of the defendant is more or less irrelevant.

(Chapter 9.5.) When assessing whether or not an offence is subject to strict liability the following four elements would seem to give relevant guidance: first, the language of the statute; secondly, the nature of the offence (prevention of mischief); thirdly, the objective of the provision; and, fourthly, any other circumstances which may assist in determining the intention of Parliament.

(Chapter 9.4.2.) While discussing the factor of a significant sentence it appeared to be a general problem for Magistrates' Courts that there is no policy document for merchant shipping offences as there is for sentencing in general. Even though the maritime prosecution sector is tiny compared to land based offences it would still seem to serve fairness and consistency in Magistrates' Courts trials if, for example, a central UK data bank would be available for the courts which would hold information about trials, convictions and sentencing in the shipping industry.

(Chapter 9.4.3.) The discussion of the factors which a prosecutor ought to consider also brought to light that there seems to be a significant difference between the two categories of sleeping watchkeepers and unattended bridges on the one hand, and the intoxicated watchkeeper on the other. In all but one case the intoxicated watchkeeper was – successfully – prosecuted whereas none of the sleeping watchkeepers or those who left the bridge were charged.

(Chapter 9.4.3.) It is not clear why a drunken watchkeeper appears to be seen as more of an offender than a sleeping or deliberately missing watchkeeper. This is particularly puzzling since in all but one of the alcohol related cases no accident, material damage or even injury occurred, whereas the sleeping watchkeepers caused three groundings and one close encounter, and the missing watchkeepers caused three collisions and one grounding. Leaving the bridge unattended even requires intention and falling asleep on watch which, although not necessarily immediately representing "an enormous danger"[40] if the ship is not in densely populated waters or near a coast, may actually create a worse risk as there might not be anybody else awake on board. If in addition the Working Time Regulations are breached this would appear to add an aggravating factor to the offence.

(Chapter 9.4.3.) The files are silent as to the reason for a different approach between the categories, but a consideration of a master being in a position of trust does certainly not seem to be the driving element for a prosecution. It is rather more likely that alcohol related cases present no obstacle for the introduction of convincing evidence when it has been proven that the defendant's blood alcohol level was above the permitted limits. A question would seem, though, why alcohol offences seem always to be prosecuted. A conviction could possibly make sense if a conviction resulted in other measures such as

[40] Which falling asleep presents to other users of the road, *Attorney General's Reference No. 56 of 2002 (Nnamdi Megwa)*, para. 25.

informing the flag State (or rather the State which issued the certificate), and if that State would be required to look into a disqualification or a compulsory rehabilitation measure,. However, such consequences do not even appear to happen within the UK.

(Chapter 9.4.3.) As doing nothing would not seem to be an option when a master or watchkeeper is found to be intoxicated on board, a prosecution appears, under the current rather unsatisfactory conditions, to be the only realistic option to take for an enforcement agency. However, the MCA ought (in my view) to adopt a practice of regularly informing the State issuing the certificate about a conviction and should press at the IMO for international measures to be established aiming to disqualify (but also rehabilitate) drunken masters or watchkeepers.

(Chapter 9.4.5.) The criteria which will figure strongly in the final decision whether or not to prosecute can be found in the Marine Enforcement Manual. It is not clear why the MEM is not yet publicly available as knowledge about the procedural matters would rather be of benefit for the enforcement agency because it can prevent requests or manoeuvres by the defendant which would unnecessarily delay the outcome of investigations or prosecutions.

(Chapter 9.6.1.) In the discussion of the Hours of Work Regulations it transpired that company and master do not necessarily share the same criminal liability for a breach of reg. 4 even though both are allocated the duty to ensure that a seafarer is provided with the minimum rest period. A master would only appear to be violating the Regulations when the time management system applied on board is in reality not complying with the legal requirements, and he does not do anything about it.

(Chapter 9.6.1.) Analysis of a particular case suggested that a breach of the Hours of Rest Regulations was not followed up by the prosecution in that nobody was charged for the breach. If, as it appears, fatigue plays such an important role for shipping safety, a decision not to prosecute the company for a breach of the Hours of Work Regulations seems to be rather inappropriate and not in the public interest. The master was not charged either. If the master has "the overriding responsibility for the safety of his ship"[41] he should not only be required but also be allowed to stand up for his actions. By not holding him responsible the prosecution "fails to address the actor as a moral agent",[42] meaning that overall responsibility without accountability lacks the justification for such a role.

(Chapter 9.6.2.) Enforcement through prosecution by the MCA appears not to target masters and crew members, by contrast with corporate entities. The MCA policy is not in favour of charging seafarers when they have not attracted any personal culpability. The case discussed seemed to be one in which in MCA policy terms the master had attracted personal culpability. If that was so he ought to have been charged. It would appear that a seriously negligent approach does not deserve protection. Those who deserve protection are all those seafarers and members of the society who would suffer and are potential victims of a criminal approach to the operation of a ship.

(Chapter 9.8.1.) Whether agreeable or not, the policy approach of the MCA suggests a systemic failure in the enforcement of merchant shipping health, safety and environmental legislation. The majority of contraventions are offences of strict liability which Parliament created to have persons punished regardless of their "knowledge, state of mind, belief or intention".[43] By re-introducing an analysis of a suspect's culpability the MCA ironically uses the prosecutor's discretion to bypass the will of Parliament. This would appear to suggest that either the MCA is wrong in applying such a policy or the concept of strict

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[41] *Whistler International Ltd v. Kawasaki Kisen Kaisha Ltd, (The Hill Harmony)* [2001] 1 Lloyd's Rep. 147, HL, p. 155.

[42] Quoted in analogy to A von Hirsch's discussion on general prevention, in: *Proportionate Sentencing*, 2005, p. 15.

[43] *R v. Milford Haven Port Authority* [2000] 2 Cr. App. R.(S.) 423, p. 432-433

liability in merchant shipping health and safety legislation is outdated and needs overhauling.[44]

(Chapter 9.7.2.) The other person who is usually guilty in merchant shipping legislation is the owner. Many statutory instruments use the term "owner". The authorities have dealt with the problem of defining the term "owner" on a large number of occasions in different areas of the law. But it was held by the House of Lords in *BP Exploration Operating Co Ltd v. Chevron Shipping Co* [45] that a definition which is not specific to the statute in question is not necessarily applicable.

(Chapter 9.6.1.) If it is "owner or master" who are guilty under strict criminal liability the meaning of "or" would appear to be "and". It does, however, not necessarily follow that both master and owner have to be, or rather will be, prosecuted.[46]

(Chapter 9.8.1.) Even if the MCA policy of rarely instigating prosecutions against master or crew was wrong the EnU does not seem to be staffed or equipped in a manner that would allow extensive investigations of all breaches of merchant shipping legislation. The annual budget of the EnU is currently £182,000. This amount has to be balanced against the average cost of trials and the additional operational cost of investigations. Although overseas investigations seem hardly ever to take place because of the legal hurdles to overcome, the budget does not seem to allow for extensive investigatory activity.

(Chapter 9.8.1.) In addition to these potential financial restrictions Surveyors appear to be rather reluctant to recommend prosecutions.[47]

(Chapter 9.8.1.) It would seem to follow that despite the uncertainties for a master and seafarer as to the collection and use of evidence for a prosecution (as examined in Part A, in particular) the practical risk of being prosecuted would seem to be rather small.

(Chapter 9.8.2.) It would also appear that out of the six criteria which are said to figure strongly in the decision to prosecute it is only those which do not refer to the *mens rea* of the defendant that ought to be used to establish the public interest. The only criteria that may fall into the latter bracket appear to be "the seriousness of the offence" and that "the defendant's previous convictions or cautions are relevant to the present offence". The other four criteria, i.e. the likelihood for a significant sentence, the defendant being in a position of trust, proof that the contravention was premeditated and the fact that the defendant may continue to pose a danger if not prosecuted, seem to include an assessment of guilt.

Chapters 10-12 deal with the three main trigger points for prosecution which are investigated in the thesis. Chapter 10 deals with the first of these, namely, groundings.

Chapter 10

(Chapter 10.3.1. and 10.3.2.) It is submitted that both the Prevention of Collision, and the Watchkeeping, Regulations impose strict liability on an accused. The only defence for the two watchkeepers in the discussed case, the master and the OOW, would have been to prove that all reasonable steps, or to show that all reasonable precautions, were taken to avoid commission of the offence.

(Chapter 10.3.2.) By applying its own policy to prosecute the company instead of the master or crew the MCA may correctly follow its own procedures. But the prosecution does not appear to address all guilty persons in the two incidents investigated in Chapter 10. Furthermore, a prosecution of the company only under the Prevention of Collision

[44] See below, Chapter 15.
[45] [2003] 1 AC 197.
[46] For more details of this discussion see also above Chapter 12.2.4.
[47] Because they prefer detention as a means of enforcement, see above, Chapter 2.3.

Regulations appears to be diverting the attention from the underlying cause, which I consider to be fatigue, although perhaps not from the correct defendant.

(Chapter 10.4.) When investigating the hours of rest requirements an Inspector would only be able to identify a breach by consulting the ship's records. But he would only be forced to inspect those records when he has reason to believe that a seafarer may be fatigued. This seems to be a *circulus vitiosus* in that to be forced to investigate the Inspector must believe that the seafarer is fatigued which the Inspector could, in most cases, only have reason to believe when he has inspected the records.

(Chapter 10.4.) The MCA itself seems to be concerned about fatigue, going by the fact that a study into seafarer fatigue by the Seafarers International Research Centre (SIRC) was supported by the UK flag State administration. Fatigue is also dangerous because, according to the IMO's Maritime Safety Committee, people are poor judges of their level of fatigue. Still, it seems, concrete steps on a national or on an international level are still outstanding and rhetorical measures appear so far to be the only method applied to combat fatigue.

(Chapter 10.5.2.) When analysing a breach of ISM Regulations which caused damage it seems that such a breach will by default almost always constitute a criminal violation of the law. On the other hand, a breach of the Regulations which does not cause, or contribute to, damage will not trigger any civil liability, and will therefore probably be irrelevant for the outcome of a claim. A breach of the ISM Regulations, however, does not seem to provide the basis for a detention unless very specific circumstances are met.

(Chapter 10.5.1.) It would appear that a detention of a ship is only possible when a company, rather than a master, does not comply with its tasks set by the ISM Code. It would not seem part of those requirements to ensure the daily compliance with the ISM Code by the master and crew beyond the company's obligations. Master and crew not following their SMS would not appear to provide a ground for a detention under the ISM Regulations.

(Chapter 10.8.) The files covered in this Chapter all suggest that the MCA sticks solidly to its policy not to prosecute seafarers unless they are personally culpable. The risk of prosecution for a master would appear to be negligible. This does also not seem to be affected by other public policy considerations as, for example, they appear to exist for combating fatigue.

(Chapter 10.8.) If the concept of deterrence is the driving force for prosecutions on health and safety matters the MCA practice would suggest that it has limited application in respect of individual seafarers. This probably raises the question as to whether prosecutions have any role to play at all within the enforcement of merchant shipping legislation.[48]

Chapter 11 dealt with the second enforcement trigger point, namely the Collision Regulations.

Chapter 11

(Chapter 11.3.2. and Chapter 11.3.3.) In the analysed case of the "Northern Merchant" it appeared that the vessel did not navigate with extreme caution. The "Northern Merchant" should probably "have reduced speed to little more than steerage way and felt her way past the other vessel".[49] By not prosecuting any owner, master or watchkeeper of the "Northern Merchant" a message seems to have been sent that the "Northern Merchant's"

[48] See for more of this discussion below, Chapter 15.
[49] *The Maloja II,* p. 379.

navigation and manoeuvring was free of blame. This, however, does not appear to have been the case.

(Chapter 11.4.) It is not completely clear why no investigation was carried out in three other sample cases discussed. It would seem that there was no jurisdictional impediment.In general I found that out of 41 collisions the MAIB investigated between 2000 and 2005 apparently only 22 of them were also investigated by the MCA. The reason provided for this discrepancy appears to be that the collisions not having been investigated had not been reported to the MCA. A question remains, though, as accidents of UK flagged ships have to be reported to the MCA at the earliest opportunity.[50]

(Chapter 11.6.) Despite the findings in this Chapter that there were some prosecutions for violations of the Colregs, the general risk for a master or watchkeeper of becoming subject to a criminal investigation for such a violation appears to be rather insignificant. Over a period of five years only five masters/watchkeepers of UK flagged vessels were convicted for a Colreg violation in the UK. Furthermore, it seems that the further away from the UK the incident happens the less likely it would be that the incident was investigated by the MCA.

(Chapter 11.6.) It could also be observed that only one master[51] or watchkeeper of a foreign going UK flagged cargo or passenger vessel became subject to prosecution for a violation of the Colregs during the sampled period. It also transpired that in the period of the study there has never been a prosecution for a violation of the Colregs which did not involve a collision.

Chapter 12 deals with the third enforcement trigger point, namely pollution.

Chapter 12

(Chapter 12.2.1.) It would appear that a detention is not legally possible by either an MCA officer or a harbour master for an illegal discharge between the outer limit of the area under the responsibility of a port authority and the relevant baseline, unless it is considered sufficient only to apply the other instruments that may be available[52]. For practical purposes detention powers for pollution should probably be given to Surveyors who would usually be the persons to enforce pollution prevention provisions.[53] It appears that a change of the Oil Pollution Regulations, reg. 12(6) would be suited best to cover the required changes and a proposed new version could read as follows:

> (6) Subject to paragraph (7), this regulation only apples to discharges which occur landward of the line which for the time being is the baseline for measuring the breadth of the territorial waters of the United Kingdom if the relevant internal waters are not under the jurisdiction of a competent harbour authority.

(Chapter 12.2.2.) Leaving aside the discharge of vegetable oil, it appears that in the majority of cases where charges were not pressed in pollution cases the prosecution considered that insufficient evidence was available.[54] It is submitted that if a strong suspicion exists that oil has been illegally discharged within the jurisdiction of the MCA (e.g. in case of evidence of oil in the discharge pipe plus a malfunctioning three way valve) a more robust approach should be taken and a sample prosecution should be attempted “to test the waters”. Looking at the level of fines[55] it would seem that courts do not go lightly about sentencing even small polluters, and oil in a discharge pipe combined

[50] The Survey Regulations, reg. 8(1)(c)(i).
[51] “Highland Pioneer”, MCA file 66.
[52] As there would be the MSA 1995, s. 95 (detention of a dangerously unsafe ship – see above, Chapter 5.2.) or for foreign flagged ships also the PSC Regulations, reg. 9(2)(a), see above, Chapter 6.4.3.
[53] See more on port state control in Chapter 6.
[54] Files 234, 269, 289 and 378.
[55] See also Chapter 12.2.5.

with an inoperative three way valve as in the discussed case of the "Bregen" seems to clearly suggest that some pollution had occurred in the recent past.

(Chapter 12.2.4) It would seem that once both the evidence and the public interest test have been passed the prosecution no longer has a choice but must charge the offender.[56]

(Chapter 12.2.4.) If a person other than the owner or the master has due to his act caused a non-compliance with the Oil Pollution Regulations as a result of his own act or omission the following two conclusions would appear to apply under the current law.

> (1) If the failure to comply falls under reg. 36(1) the owner, master or that other person could have a defence under the Oil Pollution Regulations. If any of the three potential defendants did not take all reasonable precautions that person is guilty of an offence. If it is proven that he took all reasonable precautions he is exonerated and ought not to be prosecuted. In case of a person who has apparently been guilty of a strict liability offence the prosecution must establish whether or not a prosecution is needed in the public interest. If so, that person ought to be prosecuted.
>
> (2) In the case of a discharge which is covered by reg. 36(2), only the owner and master, but no third person, appear to have a defence in accordance with the MSA 1995, s. 132.[57] Without such a defence all three of them are guilty of an offence. The prosecution has to establish for each of them individually whether or not a prosecution is needed in the public interest. If no public interest exists the individual ought not to be prosecuted irrespective of their guilt.

(Chapter 12.2.5.) It was observed that in none of the convictions between 2001 and 2005 was any master or crew member ever subjected to prosecution under the oil pollution legislation. No evidence was found that this was ever contemplated by the prosecution. But it is probably arguable that the crew member responsible for the act or default which caused the pollution ought to have been prosecuted together with owner and master or by himself once the two stage test of *The Code for Crown Prosecutors* has been passed.

(Chapter 12.2.5.) Even though the law provides for the strict option to prosecute, and thereby criminalise the master and crew, the reality seems to demonstrate the opposite when looking at the cases in the UK during the investigated period.

(Chapter 12.2.5.) When comparing the cases for fines up to the statutory maximum with the other three cases where fines were above the statutory maximum it appears that there exists no consistent line of fining for pollution incidents. First, it could be observed that no prosecution was brought for any violation of reg. 36(1), but that all prosecutions were for discharge incidents. Secondly, and probably due to a lack of a written reasoning in the Magistrates' Court cases, it does not seem to be clear why the different levels of fines were applied. For example, when comparing the "Borden" case with the "Bro Traveller" the only obvious difference appears to be the quantity of the oil which reached the water. For the "Borden" it was 80 litres which reached the water out of 0.6 cbm which in total overflowed. In case of the "Bro Traveller" it was 0.5 cbm which was pumped overboard. The latter, however, "cost" £15,000 more than the former in the fine. It appears that in both cases negligence of the relevant engineer caused the spill, but in case of the "Borden" luck appeared to have prevented more than 80 litres reaching the water.

(Chapter 12.4.1.) When turning to the Garbage Pollution Regulations any violation of the provisions in regs. 4 to 7 constitutes an offence by owner, manager, demise charterer,

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[56] See also above, the conclusions under Chapter 9.6.1. and particularly the discussion in Chapter 12.2.4.

[57] This appears to be subject to change in accordance with the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations, SI 2009 No. 1210, reg. 4 as of 1 July 2009 when the new Regulations come into force. In future the same conditions will apply to owner, master and "any person who causes or contributes to that discharge".

and master, and each of them shall be liable to a penalty. A member of the crew cannot be subject of a prosecution under these Regulations.

(Chapter 12.5.) It seems justifiable to criticise the apparently accepted standard in the MCA, the Crown Prosecution Service, the courts and the industry that the master should usually not be charged. The introduction of a culpability test for individuals for offences of strict criminal liability, whether dressed up as a public interest test or not, appears to undermine Parliament's intention to have those punished who are considered guilty when the *actus reus* occurs. Particularly in cases where proper procedures are in place in the company and/or on board of the vessel, and neither the owner nor the master have a direct grip on the activity of the individual crew member, it seems rather arbitrary and unfair to fine any of them but not the real culprit, notably if the owner and/or master have done "everything they could".[58] I can only see a proper solution if a breach of the law triggers as a consequence the punishment of the real offender provided he did it intentionally or was "seriously negligent".[59] This, however, would apparently require a change of the Garbage Pollution Regulations as the Oil Pollution Regulations and the amended version of the Dangerous Liquids Pollution Regulations already provide for the option of charging a crew member for an illegal discharge.[60]

(Chapter 12.2.5.) Fines for pollution incidents seem to be generally higher than for other violations, such as in cases of alcohol abuse, groundings or Colreg violations. This is to a certain extent surprising as particularly relatively insignificant incidents[61] attract high penalties, even though they do not pose the same risk to life as, for example, an intoxicated or fatigued watchkeeper. Whereas I do not want to make a case for letting polluters get away with nominal fines, I am of the opinion that a potentially disastrous behaviour by a drunk or sleeping watchkeeper ought to be classed as more dangerous to the public than a spill of 80 litres of fuel oil.

(Chapter 12.5.) In addition, the investigated pollution legislation for oil, noxious liquid chemicals in bulk and for garbage is not consistently drafted. This may lead to situations where owners may not be prosecuted because they are not covered under the term "owner". On the other hand individuals may not be prosecuted because the MCA policy could pose an obstacle for prosecuting them. But, more importantly, the Dangerous Liquids Pollution Regulations and the Garbage Pollution Regulations do not offer the opportunity to prosecute individuals on board other than the master.[62]

(Chapter 12.5.) Inefficient co-operation within the EU would also appear to be an impediment to a successful prosecution. The case of the "Klondyke",[63] where communication between the MCA and the French maritime administration failed because the correct person could not be tracked down, seems to suggest that maritime enforcement actions should be dealt with at a central EU level to avoid both national administration inefficiency and national protection for vessels contravening environmental legislation.

This leads to a slight deviation from the discussion of national aspects of prosecution. The effect of EU law on UK legislation was therefore discussed in Chapter 13.

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[58] Admittedly a crew member cannot be charged under the Garbage Pollution Regulations, see reg. 14.
[59] See the discussion below, Chapter 15.
[60] For the Dangerous Liquids Pollution Regulations this is about to change as the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations, SI 2009 No. 1210, reg. 5, will as of 1 July 2009 make "any person who causes or contributes to that discharge" guilty of an offence.
[61] For example, the case of the "Borden" where 80 litres of fuel were spilled overboard and the fine for the owners was £5,000 plus nearly another £5,000 in costs, see above, Chapter 12.2.4.
[62] For the Dangerous Liquids Pollution Regulations this is about to change as the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations, SI 2009 No. 1210, reg. 5, will as of 1 July 2009 make "any person who causes or contributes to that discharge" guilty of an offence.
[63] See above, Chapter 12.4.

Chapter 13

As a result of recent and forthcoming changes in the law[64] Chapter 13 now has mainly historical value. The new Regulations 11A and B which are to be introduced into the Oil Pollution Regulations[65] do not pose the problem of a person "acting under the master's responsibility".[66]

Under the old version of the Directive 2005/35/EC[67] and the Framework Decision 2005/667/JHA[68] it was not initially clear whether the master would fall under the term "crew member".[69] In the absence of a definition of the term "crew member", it would not appear that the master is considered to be part of that group. "Master" and "crew" are specifically addressed as separate persons in one provision[70] and this seems to point towards a deliberate distinction between the terms, as otherwise they would not have had to be distinguished.

It follows that what is not considered an infringement for crew acting under the master's responsibility still remains an infringement and thereby a criminal offence for the owner or master under the Framework Decision.[71]

A further lack of clarity surrounds the words "crew when acting under the master's responsibility".[72]

The problems encountered in Directive and Framework Decision seem to be twofold. First, they lie in the fact that possible culprits are not identical under the Directive and MARPOL. Whereas the Directive addresses infringements for owner, master or crew, MARPOL restricts inappropriate behaviour to owner or master only.[73] Incorporating the MARPOL restrictions into the Directive by establishing a direct cross reference to MARPOL thereby inevitably causes confusion as to whether or not crew are covered by the exceptions or whether their act affects owner or master. This shortcoming can be healed by incorporating the relevant MARPOL regulations but seemingly only subject to replacing "owner or master" in reg. 11(b)(ii) with "owner, master or crew".

Secondly, it should be defined that "acting under master's responsibility" only covers acts of the crew which are carried out as part of their ship board duties[74] when acting on direct orders of the master or as his authorised delegate (e.g. the chief engineer when instructed by the master). Such a clarification[75] would ensure that other than owner or master the real culprit could be prosecuted if he acted with "serious negligence", recklessly or with intent.

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[64] See above, Chapter 13, fn 1.
[65] The Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations, SI 2009 No. 1210, reg. 4.
[66] Directive 2005/35/EC, Art. 5(2).
[67] The Directive will be amended in the near future, see fn 1 in Chapter 13.
[68] Which has been annulled by the ECJ, see *Commission of the European Communities v. Council of the European Union*, on 23 October 2007, Case C-440/05, para. 74.
[69] MSA 1995, in s. 313(1), for example, excludes the master from being a seaman, a term, which includes every person employed on a ship.
[70] Directive 2005/35/EC, Art. 5(2).
[71] Framework Decision 2005/667/JHA, Art. 2(1).
[72] Directive 2005/35/EC, Art. 5(2) which according to Art. 3(1) applies to discharges into straits (c), the exclusive economic zone (d) or the high seas (e).
[73] Compare Directive 2005/35/EC, Art. 5(2) with, for example, MARPOL, Annex I, reg. 11(b)(ii) (reg. 4.2.2 in the amended version of 1 January 2007); the same would apply for the Annex II exception.
[74] The ship board duty of each crew member ought to be found in their employment contract and/or in their job description on ships where the ISM Code applies (ISM Code, s. 6.3).
[75] Provided that "owner or master" in, for example, MSA 1995, s. 131(1)(a) has been amended by adding "or any other person", see above, Chapter 13.1.

The new UK Regulations do not appear to pose the same problems as it is clearly defined who the possible culprits are when a discharge occurs after damage to the ship.[76]

Taking an overview of all the findings I believe the most surprising one was that more than half of all Detention Notices were defective, that only one detention was appealed against and that not one prosecution was found which followed a detention for any of the detention grounds. Although I am aware that this thesis is not a quantitative analysis it was also interesting to see that there is an indication that detentions and port state control in general may have a bigger impact on the shipping community than prosecutions. It must be kept in mind, though, that other parameters have not been analysed such as the total number of vessels inspected or the total number of defects found both in the UK or internationally.

I would, furthermore, assess the following three findings as ranking high in terms of their significance. First, there is a strong case to modernise the law about enforcement officers, which would allow better understanding by both enforcer and possible defendant. Secondly, the impact of the European Convention on Human Rights would appear not only to affect a Surveyor's work during a fact finding mission, but also the decision of the Chief Inspector of the MAIB when considering to release VDR data and the detention appeal proceedings before an arbitrator. Thirdly, the level of fines for the different breaches of merchant shipping legislation do not appear to show any particular pattern – not even within a specific category such as oil pollution. It seems desirable to provide a more consistent approach throughout the country by introducing sentencing guidelines for violations of merchant shipping legislation.

[76] The Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations, SI 2009 No. 1210, reg. 4. The new reg. 11C which is inserted into the Oil Pollution Regulations clearly stipulates the possible defendants.

Chapter [15] – Administrative v. criminal enforcement

I have demonstrated in this thesis that two main strands dominate maritime enforcement practice in the UK. First, there are prosecutions,[1] but secondly, and seemingly of more frequent use and importance, detentions of vessels which do not comply with the legislation.[2] This conclusion would appear to be documented not only by the number of prosecutions per year compared with the number of detentions, but also by the attitude of the MCA Surveyors and Inspectors.[3]

In the following table, for which I extended the study period to include the years of 2006 and 2007, I compared the number of prosecutions and detentions over the last seven years.

Table 15: Prosecutions and detentions per year between 2001 and 2007

Year	Prosecutions	Detentions[4]
2007	9	80
2006	18	84
2005	15	86
2004	16	92
2003	9	113
2002	8	109
2001	13	100

The number of prosecutions cannot be fully compared with the number of detentions because prosecutions cover any violation of merchant shipping legislation including, for example, the forging of certificates of competency,[5] which would only trigger a detention when the culprit is found on board a ship. But the numbers suffice, in my opinion, to demonstrate the large gap between the two enforcement tools. Because prosecutions also cover matters for which ships would not be detained, the difference between the two columns is actually bigger than the table shows.

The above numbers and the findings in this thesis would appear to show clearly that the MCA policy of not prosecuting seafarers unless they are personally culpable[6] is working satisfactorily in practice.[7] It also suggests that the complaints[8] about criminalisation of seafarers[9] are not really supported by the facts in the UK over the investigated period. But

[1] As dealt with in Chapters 10, 11 and 12.
[2] There are also the options for Inspectors to use Improvement or Prohibition Notices (MSA 1995, ss. 261 and 262). However, no central records of the use of these instruments exists, and it is impossible to estimate the times they have been made use of unless each Surveyor would give their own record as to when and how often they issued an Improvement or Prohibition Notice.
[3] Annex 15, question 2.
[4] Foreign flagged merchant vessels only – data for 2006 and 2007 were obtained from MCA website (www.mcga.gov.uk) on 27 June 2008; other data were downloaded from the MCA website in the course of 2006 – see Annexes 9 to 13. The number of detentions of UK flagged seagoing cargo vessels is usually very small, e.g. for 2007 it was only a total of nine. Three of these detentions were for the same vessel in different months ("Antic" – May, June, December), one was for a diving boat ("Sea Quest" – September), and all but one ("Celtic Ambassidor" [sic] – September, 3,739 gt) were vessels of less than 1,000 gt. See also the discussion in Chapter 5.3.
[5] For example, in 2006 three of the prosecutions were about forgery of personal certification documents and another prosecution was for a hoax 999 call – all on www.mcga.gov.uk.
[6] MEM, chapter 2, s. 2, Annex C.
[7] This may sound paradoxical in the light of my earlier findings (see Chapter 9.8.) that the policy can only be considered appropriate if the decision not to prosecute is based on the lack of public interest. But the policy appears to deliver the results it aims at. However, the policy disguises the inherent weakness of the system which potentially makes owners, masters and sometimes crew members criminals throughout their working day. For a way forward see the discussion below in this sub-section.
[8] See above introduction to Part C.
[9] At least as regards the UK. See above, introduction to Part C.

even though the MCA applies a policy which would not appear to justify complaints about criminalisation the tools for a prosecution exist in all relevant statutory instruments.

It seems that two facts clearly emerge. First, if a prosecution is brought it is mainly against owners and operators. Secondly, more breaches of merchant shipping legislation are dealt with by administrative measures as opposed to criminal measures. This result would seem to beg the question why all sets of Regulations do not only provide the option of a prosecution, but in addition make most violations offences of strict criminal liability. The latter are easier to prosecute because they do not require the defendant to have *mens rea.* Once the fact has been established, and the breach occurred, the relevant person, mainly owner and master, is guilty, save for a possible application of a defence clause.[10]

Generally two main reasons in favour of a prosecution would seem to lie in the wish to punish offenders and, on the same token, to reduce crime.

> "142 Purposes of sentencing
>
> (1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing-
>
> (a) the punishment of offenders,
> (b) the reduction of crime (including its reduction by deterrence),
> (c) the reform and rehabilitation of offenders,
> (d) the protection of the public, and
> (e) the making of reparation by offenders to persons affected by their offences."[11]

In shipping the more or less unchanged numbers of prosecutions over the past seven years,[12] however, do not seem to indicate that much of an improved deterrent effect has been achieved during the period observed in the UK. That deterrence is a primary objective[13] or a major purpose[14] of prosecutions under health and safety legislation is not only the opinion of academic writers or "a substantial minority of HSE Inspectors",[15] but, as can be seen above, also found its way into the statutory law.[16] However, deterrence would appear to be only a vehicle to help reach the objective of reducing crime.

It would seem justified to ask why then, if a reduction of offences[17] is not achieved by prosecutions, is a system not applied which improves compliance with legislation? The changing numbers of detentions at least suggested that the use of this administrative enforcement instrument actually made a difference.[18] What a detention, rather than a prosecution, entails for the master of a vessel is usually a detailed discussion as to why the vessel is detained, particularly when the master or chief engineer wants to challenge

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[10] For example, Hours of Work Regulations, reg. 20(5), "In any proceedings for an offence under these Regulations it shall be a defence for the defendant to show that all reasonable steps had been taken by him to ensure compliance with the Regulations."
[11] See, e.g., the Criminal Justice Act (CJA) 2003, s. 142(1).
[12] One could even conclude that the number of prosecutions have gone up whereas the number of detentions has gone down.
[13] N Gunningham, R Johnstone, *Regulating Workplace Safety,* p. 187. K Hawkins, *Law As Last Resort,* p. 283 writes that "Deterrence is the central form of instrumental theory in regulatory enforcement".
[14] According to K Hawkins, *Law As Last Resort,* p. 293.
[15] *Ibid.*
[16] Deterrence also plays a significant role for a prosecution by the MCA. "Part of the purpose of a prosecution is deterrent, not only for the company / individual who has been prosecuted, but also to others that might be likely to commit similar offences", Captain Smart, Annex 16, question 9.
[17] And I include here all breaches of merchant shipping legislation, particularly those which lead to detentions.
[18] That port state control makes a difference is maintained by K X Li, H Zheng, *Enforcement of law by the Port State Control (PSC)*, 2008, p. 67. Although the recent Annual Report of the Paris MoU, p. 20, suggests that the detention rate is on the rise again: "In 2007 the number of inspections resulting in a detention amounted to 1,250. This compares with 1,174 detentions in 2006, 994 in 2005 and 1,187 in 2004. The average detention percentage for all inspections in 2007 is 5.46% compared with 5.44% in 2006, 4.67 % in 2005 and 5.84% in 2004. The increase of 6.5% in the number of detentions is similar to the increase in the number of inspections." The total number of deficiencies has also gone up compared to 2006 and "reflects more deficiencies per inspection", ibid. on http://www.parismou.org/upload/anrep/PSC_annual_report_20071.pdf (23 November 2008).

the findings and judgments of a PSC Inspector. If the paper work is done in accordance with the legal requirements the master will also be left with a proper written reasoning for the detention decision which will inevitably have an educational effect for him and his crew. A prosecution, on the other hand, takes matters completely out of the hands of both the Inspector and the master.[19] Decision making about the subject of the prosecution moves on to another level with other actors involved. The focus is no longer to make the ship safe but to succeed in getting the defendant punished.

The policy of the MCA not to prosecute seafarers who are not personally culpable does not define what makes a person personally culpable.[20] Does culpability require intent or is negligence sufficient? If the latter, is minor as opposed to major or serious[21] negligence required? Staying with the example used by the Head of the EnU[22] of the fatigued watchkeeper does his negligence become more serious when somebody gets killed by the vessel? Was the sleeping master of "RMS Ratingen" which approached the Shoreham pilot[23] less negligent than the lorry driver who seriously injured a four year old child and killed the mother because he fell asleep at the wheel?[24] Probably not, but under the current law the sentence for the latter would be significantly more severe.[25] However, the basic fact which only appears to be of relevance in this context, is that a violation which does not cause serious injury or death stays within the remits of the MCA investigation responsibility because any death caused by negligence (or intent) on board would usually see the police and the CPS in charge of the investigation and the decision to prosecute.[26]

When leaving aside the possible damage to property and individuals, fatigue would not appear to be different for a lorry driver compared to a master. Both will have had to deal with the same symptoms.

> "But the aggravating features there were not only the number of deaths, but also the fact that the court was not prepared to treat falling asleep at the wheel as momentary inattention, since the onset of drowsiness leading to sleep would have been obvious to the driver."[27]

If the understanding of the government agency is that despite such similarities with road traffic it is not the individual but the management system and its owner which/who are culpable,[28] a deterrent effect for the master or other seafarers would seemingly be lacking. With no deterrence there is also unlikely to follow any learning result for the master or watchkeeper in question, and it seems open to doubt that the protection of the public[29] is achieved.[30]

As with alcohol offences,[31] I am of the opinion that "doing nothing" is not an option for a

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[19] "This [an enforcement technique remaining within the Inspector's control] contrasts strongly with the decision to prosecute which sees the ultimate control of the case pass into the hands of the courts, losing much of the problem–solving character of a notice", K Hawkins, *Law As Last Resort,* p. 172.
[20] The example given by Captain Smart, Head of the EnU is that "if they [master or watchkeeper] were given sufficient rest time but chose not to take it and subsequently fell asleep", Annex 16, question 16.
[21] As in *Intertanko v. Secretary of State,* ECJ, case C-308/06, 3 June 2008, para. 76, "the concept of 'serious' negligence can only refer to a patent breach of such a duty of care", see discussion above, Chapter 13.
[22] See above, Chapter 15, fn 20.
[23] See above, Chapter 10.
[24] For example, *Attorney General's Reference No.146 of 2006 (Yvan Vandermeulen)* [2007] 2 Cr. App. R. (S.) 74, para. 7.
[25] *R v. Cooksley* [2003] 2 Cr. App. R. 18, para. 11(ii).
[26] MEM, chapter 3, s. 2.1, which, however, does not refer to negligent death but to "Manslaughter or general criminal behaviour".
[27] *R v. Andrew Shaun Evans* [2003] EWCA Crim 3485, para. 9.
[28] Asked about the decision not to prosecute master and/or watchkeeper on "RMS Mulheim" and "RMS Ratingen" Captain Smart said "We concluded that the Master and Chief Officer were not working in a safe environment and that environment was put in place by the company", Annex 16, question 19.
[29] As required to be considered for purposes of sentencing, CJA 2003, s. 142(1)(d).
[30] I would agree with L Bluff, N Gunningham, *Principle, Process, Performance or What? New Approaches to OHS Standards Setting*, in L Bluff, N Gunningham, R Johnstone, *OHS Regulation, For a Changing World of Work,* 2004, p. 14, that "responsibility properly lies with those who control the generation of risks and who are in a position to eliminate or minimise them". The master, the watchkeeper or the chief engineer of a ship would certainly fall into that category.
[31] See above, Chapter 9.4.

breach of merchant shipping legislation. I accept that in the "RMS Ratingen" case the company was prosecuted, so something had been done. However, this "something" does not seem to deal properly with the problem which appears to exist in the triangular tension between the statutory law, the MCA policy, and the industry and trade union perception of criminalisation of seafarers.[32]

With the aims of sentencing in mind what would appear to be required is that the five objectives in s. 142(1) of the CJA 2003 are satisfied. Any actions taken ought to ensure that

(1) offenders get punished,[33]
(2) the contraventions of merchant shipping legislation is reduced in future,
(3) individuals directly involved in the breach need to learn from their failures to improve their behaviour and actions for the future,
(4) public safety will benefit, and
(5) that persons involved in the violation pay for any damage created.

Guidance for the MCA policy, and thereby also consistency as to which offender ought to get punished, can probably be derived from the recent ECJ decision[34] about the validity of the EC Directive on ship source pollution.[35] The Directive requires member States to regard intent, recklessness and the weakest of the three qualifications,[36] serious negligence, as criminal offences. Offences of strict liability, I would suggest, could then fall in two groups. In the first group a prosecution should usually[37] be brought because the defendant was at least seriously negligent, i.e. he committed a "patent breach of … a duty of care".[38] In the second group would be cases where the negligence is not similarly obvious. Charges would only be brought if a strong public interest exists in favour of a prosecution.

This, however, does not mean that the offenders in the second group should get away without having to face any action. They would be the prime target for a conditional caution as soon as that instrument is available for the MCA.[39] Rehabilitation measures which would not only facilitate a "reduction of crime"[40] but also better protect the public in future could be compulsory attendance of training courses. This alternative to a prosecution could also be in the public interest in cases of serious negligence where Community law does not force the member States to treat a breach as a criminal offence.

This is not an argument against prosecutions *per se*. They are vital, as if they were not to exist at all a measure such as a conditional caution would completely loose its effect.[41]

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[32] See above, introduction to Part C.
[33] I would include under this heading any administrative measures (e.g. detentions, prohibition notices) which force a possible defendant to invest into remedial action or even loose revenue due to a loss of time, see above, Chapter 8, fn 350.
[34] *Intertanko v. Secretary of State,* ECJ.
[35] Directive 2005/35/EC. See the discussion above, Chapter 13.
[36] Understanding intent, for example, in accordance with the CA in *R v. Nedrick* (1986) 83 Cr. App. R. 267, p. 271, that "Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result". An example of the definition of recklessness is "(i) a circumstance when he [the offender] is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk", *R v. G* [2004] 1 AC 1034, para. 41. See also the discussion above, Chapter 9.4.
[37] Unless other strong public interest factors against a prosecution exist.
[38] *Intertanko v. Secretary of State,* ECJ, para. 76.
[39] "Conditions attached to cautions must either facilitate the rehabilitation of the offender or ensure that the offender makes reparation for the offence, or both. Where the circumstances of a particular case or offender readily suggest conditions of this type, and where such conditions will provide a proportionate response to the offence bearing in mind the public interest, a Conditional Caution will usually be appropriate", Conditional Cautioning Code of Practice, s. 3.2.
[40] CJA 2003, s. 142(1)(b).
[41] "Yet ironically one reason why prosecution is so important in regulation is that while it is the ultimate formal expression of the law – a sort of legal sanction in its own right,… – it is the device that makes all other law enforcement possible by granting credibility to more private and informal practices and thereby, in the great

But it is an argument for a selective use of prosecutions combined with measures which would actually suggest that they help achieving the main objective to make the public safe and reduce violations of the law. Why, for example, does a master who navigates his vessel in the English Inshore Traffic Zone[42] have to be sentenced to pay a fine of £500 with costs of £1,500[43] instead of being required to attend a Colregs training course which he has to pay for himself? The fine and the costs may make him aware of his breach but he has not necessarily learned anything about the Colregs other than that he breached the relevant Rule. Training would not only contribute to his "rehabilitation" but would also increase the safety of the public.

I accept that training will not happen immediately but only after the master will have left his vessel. But this situation is not much different to him paying a fine after which he also continues sailing without any improved knowledge. It may also be argued that in case of foreign nationals or foreign flagged vessels the UK authorities do not have a direct control over the offender once he has left the country. If it is made clear to the seafarer that unless he complies with the requirement, and sends a course attendance certificate as documentary proof to the MCA, he will have to face a prosecution when he next returns to the UK the failure rate might be expected to be very low. After all the enforcement agency is not dealing with criminals but with professional seafarers who have made an error during their duties on board.

The international problem would also be overcome if the port States would co-operate more with the flag State authorities of the relevant vessel. This may be difficult in case of "rogue flag States"[44] which "lack competent personnel and financial resources, and a lack of political will"[45] to implement such enforcement measures, but should not cause a problem, for example, amongst member States of the EU.

The problem of publicising the wrong doing[46] would also not appear to be an obstacle for the training approach.[47] As conditional cautions must have the consent of the offender[48] it would not seem to cause a problem agreeing with him that his wrong will be published like a full prosecution. A concession could possibly be made to agree that his name will not be made public.

Moving seafarers visibly out of the criminal sphere for errors of judgment during their duties and instead make them learn necessary lessons from their mistakes may also help stopping the deterrence of people being interested in a seafaring career.[49]

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majority of cases, foreclosing the possibility of costly prosecution and trial", K Hawkins, *Law as last resort,* p. 13.

[42] Colregs, Rule 10(d)(i).

[43] See prosecutions news release for 2006 about the master of the vessel "Union Arrow" on http://www.mcga.gov.uk/c4mca/mcga07-home/newsandpublications/prosecutions07/mcga-ops-enforcement-prosecution06.htm (28 June 2008).

[44] UK shipping minister Keith Hill in November 2000, quoted in ICS, *Ships, Slaves and Competition,* para. 2.25.

[45] ICS, *Ships, Slaves and Competition,* para. 2.25.

[46] "The more we can publicise the consequences of such actions [prosecutions] the better the deterrent effect will be", Captain Smart, Annex 16, question 9.

[47] An approach which, for example, was already applied on an informal level in one MCA Marine Office (I have no evidence of similar activities in other offices but have to assume that this is not the only case): A domestic ferry had two successive engine room fires which were neither reported to MAIB nor to MCA. The MCA was tipped off and the subsequent investigation by a Surveyor revealed serious maintenance, training and managerial shortcomings. Prosecution was considered on Marine Office level and in consultation with the relevant Director. EnU did not become involved and the internal report suggested a 'commercial penalty' as amongst other reasons a criminal prosecution 'would not address the problem of managerial and system failures quickly enough, if at all'. It was briefly considered to take both administrative and criminal measures but in the end a decision was made to withdraw the ISM certification until certain safety management system improvements had been implemented, and require the crews to undergo additional fire fighting training before a set deadline. Information taken from a temporary file in the relevant Marine Office. See also the example about the collision of a local tanker and a domestic ro-ro ferry above, Chapter 11, fn 2.

[48] Conditional Cautioning Code of Practice, s. 3.2.

[49] See also I Gooch, a director of the managers of the London P&I Club, quoted in Lloyd's List, 4 February 2008, p. 11.

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