Audit findings assigned against the common Area

The IMO publishes a regular summary report on the results of the III Code audits that it carries out whenever it has collected a reasonable set of audit reports to consider. The first one was published as Circ. 3772 in October 2017. The current one is Circ. 3879 published in October 2018. It covers the set of 15 previous audits in 2016/17 and reflects the four categories in the code of:

- *Common (findings or observations relating the strategy, organisation, and legal system).*
- *Flag State activities (findings or observations related to the registry of ships and their oversight),*
- *Coastal state activities (findings or observations related to the state's obligations as far as its coastal waters are concerned),*
- *Port state activities (findings or observations related to the state's obligations in ports)*

Scope of the common section.

The code requirements in this section cover a number of activities expected of the member state and these are set out in paragraph 7 of the code which says;

> "*7 The following areas should be considered and addressed in the development of policies, legislation, associated rules and regulations and administrative procedures for the implementation and enforcement of those obligations and responsibilities by the State:*
>
> - *jurisdiction;*
> - *organization and authority;*
> - *legislation, rules and regulations;*
> - *promulgation of the applicable international mandatory instruments, rules and regulations;*
> - *enforcement arrangements;*
> - *control, survey, inspection, audit, verification, approval and certification functions;*
> - *selection, recognition, authorization, empowerment and monitoring of recognized organizations, as appropriate, and of nominated surveyors;*
> - *investigations required to be reported to the Organization; and*
> - *reporting to the Organization and other Administrations. "*

Findings arising from initial actions.

This area relates to strategy, organisation and legal activities with the latter mainly related to the incorporation of mandatory IMO instruments into national law.

The report lists some 49 findings and 14 observations that have come up in the "common" area and for each one gives the accepted root cause analysis and the agreed corrective actions following the audit. Audit findings are expressed simply and as concisely as possible.

A typical finding in this area is:

> *"6 Transposition of amendments to the applicable mandatory IMO instruments into national legislation was not carried out in a timely manner, in order to provide the necessary legal basis for implementation and enforcement. Therefore, the associated investigative and penal processes were not adequate (SOLAS 1974, article I; MARPOL, article 1; LL 1966, article 1; COLREG 1972, article I; III Code, paragraph 8.1; III Code, paragraph 8.2). "*

This finding in various forms, depending on the make up of the audit team concerned, is typical of the findings related to the legislative aspects of the common section of the code. The wording the auditors have used here captures very well the scope of this part of the code.

"Transposition of amendments into national legislation not carried out in a timely fashion". This is a commonly found and fundamental aspect. The auditor has found that the regular amendments to the IMO instruments have not been transposed into the national legislation in time, so that after the amendment has come into force the national law does not reflect the amended version of the convention in question.

"Therefore the associated investigative and penal processes were not adequate." This is an inevitable follow on from the lack of transposition. If the requirement is not contained in national law, then the penal sanctions in that law cannot be applied to the convention requirement. The auditor here has also referenced the applicable instruments and specifically mentions, SOLAS, MARPOL, LL, and COLEG. This suggests that the whole process of giving effect to the instruments is at fault in this case as the finding applies to all the conventions.

This particular finding is accompanied by a root cause analysis that states:

> "*7 The legislative process involved, through the direct referencing method, to incorporate the numerous and successive amendments to IMO instruments into national law could not be achieved in a timely manner.*"

In this case the mention of "direct referencing" would suggest that this particular flag state uses the process of making a reference along the lines of, "All ships flying the flag of the state shall comply with the provisions of SOLAS/MARPOL/LL/COLREG etc."

This is a method that can actually work and is one that is commonly seen but it only works if there is a clear mechanism tor incorporating convention amendments into the main corpus of law. This is something that is hard to achieve in many constitutions.

To simply say; "including amendments" is not always constitutional as it creates a situation where a third party, the IMO, is effectively making subsequent laws for the state whenever it makes an amendment, which (outside of the EU) is fundamentally unconstitutional for all countries.

It is also a formulation that can cause problems aside from the III audit as there are parts of SOLAS, for example, that place duties on member states themselves. To have a law that includes a duty which possibly involves public expenditure by the member state and then to allow an external body to amend that law can cause real issues. It is manageable for ship technical requirements but a much harder proposition when the requirement in the convention places a duty on the state to provide an expensive service. Hence the approach of incorporation by reference can work but there are potential traps that must be avoided.

For this finding the state in question has produced a corrective action plan that says:

> *"8 The State will implement the arrangements outlined in its Strategy to implement the III Code, which stipulates:*
>
> - *a comprehensive review of existing national maritime legislation to determine any gaps in the transposition of the applicable international conventions, which will include review of all sanctions and penalties in order to ensure effective enforcement of national laws; and*
>
> - *the establishment of a specialized permanent Committee for revision of national legislation and for ensuring its effectiveness regarding provisions of mandatory IMO instruments and related amendments. The Committee will oversees a process of monitoring and timely transposition into national legislation of requirements stemming from the applicable IMO instruments, including their amendments.*
>
> *This corrective action will be completed by 31 March 2020. "*

This should correct the problem, but it is also clear that it involves both a considerable amount of work and cost in reviewing all the existing law and in setting up a specialised permanent committee to revise and monitor.

Of the 49 findings related to the common areas in the CASR, 17 of them can be seen to be essentially similar to the the one examined above. The wording varies between auditors but they are all essentially the same. In each case the root cause is also essentially similar and the corrective action much the same.

This CASR relates to 15 audits so it must be concluded that some flags states have clearly received more than one finding related to this same topic, this comes about, almost certainly, because in some cases the auditors have found the national law not to be giving effect to the conventions, and then raised a second finding on the process of transposing amendments to the conventions into national law. Seventeen findings out of 49 is almost 35% which is a very high proportion of findings in this one area.

Previous CASRs have shown very similar results and this particular area - incorporation into national law, is obviously one that many states are struggling to achieve. Nevertheless it is fundamental to the III Code - "Implementation of IMO Instruments" when the only way that these conventions can be implemented is to transpose them into national law.

As mentioned above, direct reference is one method, often adopted but it is one that often fails without a great deal of care in addressing the issue of amendments, and the separation of technical prescriptive requirements for ship from the requirements that place a burden on member states.

Findings arising under communication of information.

Closely associated with the transposition of IMO instruments into national law is the requirement in those same instruments for reporting. A typical finding highlighted in the 2018 CASR is:

> *"123 The State did not communicate information to IMO as required by the relevant international instruments to which it is Party (e.g. text of laws, decrees and regulations, specimen of certificates, initial communications under STCW 1978). Besides, there were no policies or mechanism in place to assign responsibilities and instructions to ensure the collection of such information and to communicate them to IMO (SOLAS 1974, article III; MARPOL, article 11; STCW 1978, article IV; LL 1966, article 26; TONNAGE 1969, article 15; III Code, paragraph 9)."*

Virtually all of the conventions contain requirements on reporting, some of which are referred to in this finding. For example SOLAS says at Article III;

> *"The Contracting Governments undertake to communicate to and deposit with the Secretary-General of the Inter-Governmental Maritime Consultative Organization (hereinafter referred to as "the Organization"):*
>
> *(a) a list of non-governmental agencies which are authorized to act in their behalf in the administration of measures for safety of life at sea for circulation to the Contracting Governments for the information of their officers;*
>
> *(b) (b) the text of laws, decrees, orders and regulations which shall have been promulgated on the various matters within the scope of the present Convention;*
>
> *(c) (c) a sufficient number of specimens of their certificates issued under the provisions of the present Convention for circulation to the Contracting Governments for the information of their officers."*

The reference in this Article of the convention to the Inter-Governmental Maritime Consultative Organization is now a reference to the IMO as the organisation changed its official name. Very similar requirements can be found in virtually all the IMO instruments. Of the 49 findings analysed under "common" in this CASR , 15 of them can be associated with this particular requirement. (31%). Because the reporting requirement is a clear part of the articles to the convention, a failure to report is a clear breach of obligations. It might be noted that while the burden of sending copies of all legislation to the IMO can be considerable, the IMO secretariat has accepted the provision of a link to an official web address where all the laws and regulations can be seen as an acceptable way of meeting this requirement. Even more so now as the IMO has recently opened a new portal in the GISIS system for flag states to upload copies of laws etc.

The reporting requirements go beyond simply providing the texts of laws and regulations etc. There are, for example, other findings arising from a failure to submit the 5 yearly independent evaluations required by STCW, and there are findings related to the additional reporting requirements in the body of SOLAS and MARPOL in particular. There are a considerable number of them, ranging from tripartite agreements, and exemptions to substantial equivalents, authorisation of ROs and others. Some require reports to the IMO on a case by case basis, others require an annual summary report.

Typically the root cause analysis under this head says something like either:

> *"142 The lack of a documented procedure for the controlled and systematic communication of information to IMO by relevant entities.*
>
> *Or*
>
> *"124 There was a lack of knowledge on the scope and volume of the requirements related to the communication of information to IMO stemming from the international instruments to which the State is Party, such as laws, decrees and resolutions; as well as uploading of pertinent information to the relevant GISIS modules. "*

Variations on both are found associated with almost all the findings arising from reporting requirements. One suggests a lack of procedures the other a lack of knowledge. It might be suggested that the latter is probably the better analysis, as the lack of procedures suggests that there was an underlying lack of knowledge in the first place to say that procedures might be required.

What is well established is that the reporting requirements are quite onerous and often missed. Typically the corrective action plans agreed for findings under this topic are something like:

"The responsible government entity will carry out a restructuring programme to assign its Legal Division as the responsible focal point for communicating mandatory information to IMO and develop a mechanism:

- *to identify all communication of information requirements in the applicable IMO instruments;*
- *to identify the current status of the communication of information by the State;*
- *to identify other State's entities responsible for communication of information under applicable IMO instruments;*
- *to establish an effective coordination with relevant government entities, so that required information is forwarded to the main responsible State's entity for onward transmission to IMO; and*
- *to consider the necessary communication of information through GISIS and assign the respective authorizations and passwords."*

Like the corrective actions proposed for dealing with a lack of national legislation and the lack of effective transposition of amendments, this type of corrective action is not a simple task. In this example the flag state is proposing to restructure its legal division, identify the problem, identify other state bodies with reporting obligations and set up effective coordination with them. This reflects the need to cover all the reporting aspects as some of them fall outside the normal remit of a maritime administration, for example, the MARPOL requirements to report on oil reception facilities. Within a typical government this is no small task. So this finding inevitably brings a major state commitment to undertake significant action.

Findings arising under continuous improvement and review.

While there is no specific requirement in the III Code for a state to have a quality management system in the formal sense, it is undoubtedly true that the requirements in the code for continuous improvement, performance monitoring, overall strategy, record keeping etc. collectively make up the normal content of any effective quality management system. So, while a certificated quality management system is not required, a system that looks very similar is actually necessary to meet the specific requirements in the Code.

One clear requirement in the III Code is for the state to have a mechanism for monitoring performance and bringing about continuous improvement. This is also a fundamental requirement in any effective quality management system and a key part of the ISO:9001 standard. The auditors look for this type of management system and as a result a typical finding is:

> *"15 There was no methodology for overall continuous performance monitoring of the State. No formal system was put in place to periodically evaluate and improve the effectiveness of the State in conducting general, flag, coastal and port State activities (III Code, paragraph 11; III Code, paragraph 12; III Code, paragraph 13)."*

Altogether 11 out of the 49 findings under "common" can be assigned to the head of performance review and improvement this amounts to some 22% of the common area findings which is a significant number.

While it is true that the III Code does not require a certificated quality management system it is also true that the IMO auditors are drawn almost universally from a background of formal ISM and ISO auditing. There is an expectation of a more formal system and this is clear from the wording of many of the findings - *"No formal system was put in place to periodically evaluate",* for example. Similar expressions occur repeatedly in the set of findings in this area.

When the root cause analysis for any of these findings is examined the auditors approach to formal quality management systems is readily seen. A typical example is:

> *"88 There was no documented procedure in place for the evaluation and improvement of performance and measures which are taken to give effect to the IMO instruments. Besides, no culture was in place for improvement of performance".*

The code actually says:

> *"States should continually improve the adequacy of the measures which are taken to give effect to those conventions and protocols which they have accepted. Improvement should be made through rigorous and effective application and enforcement of national legislation, as appropriate, and monitoring of compliance.*
>
> *Further, the State should take action to identify and eliminate the cause of any non-conformities in order to prevent recurrence,…*
>
> *The State should determine action needed to eliminate the causes of potential non-conformities in order to prevent their occurrence. "*

Non of these sections mention documented processes, unlike section 10 on records which does clearly specify that a documented procedures should be established and it must be concluded that in terms of performance monitoring and review the code does not mandate a documented procedure but merely an effective system that can demonstrate review and monitoring.

However the auditors remain very fixated on their previous experience in ISM and ISO and it needs to be accepted that a documented procedure is going to be something that is expected and without it, a finding is likely.

Findings and root cause analyses in the area of continuous improvement and review tend to follow a similar pattern and a typical example for the set of findings in Circ. 3879 is:-

> *"89 The maritime administration will implement the following corrective actions:*
>
> - *a documented procedure will be developed and implemented by all relevant Government entities in order to evaluate the effectiveness of the implementation of the mandatory IMO instruments to which the State is Party;*
> - *key performance indicators will be incorporated into the National Maritime Strategy for performance evaluation;*
> - *joint audits will be conducted to evaluate the performance of the State in the implementation of the mandatory IMO instruments;*
> - *the relevant Government entities will ensure that the penalty processes are instituted where appropriate. Specific roles have also been assigned to agencies and entities to apply and enforce the provisions of national legislation stemming from the mandatory IMO instruments; and*
> - *educational and sensitization programmes for all stakeholders, including shipping companies, will be undertaken. In addition, a policy will be developed involving all relevant entities of the State to ensure that joint drills on safety and pollution prevention are carried out. The roles of those entities are captured in the National Maritime Strategy, while the scope of the policy will relate to the legal mandate of the specific entities."*

Corrective action plans for other findings in this area follow a very similar approach. All the examples clearly show that the necessary action is extensive. But performance monitoring and review is wholly dependent on having the necessary data on performance measures and that means defining the required measures, collecting the data associated with them and developing a consolidated data repository from which the overall data that assigns values to the indicators can be drawn. Then there needs to be a process to review those indicators and their trends and take action where necessary to address aspects that are trending the wrong way.

Findings related to record keeping

A closely related area of the code is section 10 on record keeping. This threw up nine findings from the total set of 49, (18%). The code is actually quite specific at section 10 and says:

> *"10 Records, as appropriate, should be established and maintained to provide evidence of conformity to requirements and of the effective operation of the State. Records should remain legible, readily identifiable and retrievable. A documented procedure should be established to define the controls needed for the identification, storage, protection, retrieval, retention time and disposition of records."*

This is one place in the code where it specifically says, a documented procedure. As a result the auditors fully expect to find, and are entitled to find, a documented procedure for dealing with this. The requirement is closely allied with the requirements in sections 11, 12 and 13 on review and continuous improvement as it is self evident that without records to review, there is no way that performance can be assessed and reviewed.

Hence while a documented procedure for review and monitoring may not be an absolute requirement, a documented procedure for the keeping of effective records certainly is. The findings being recorded include typically:-

> *"There was no documented procedure to define the controls needed for the identification, storage, protection, retrieval and retention time of records (III Code, paragraph 10). "*

This is simple and direct. The associated root cause analysis says:-

> *"Lack of regulatory provisions and documented procedures for the management and identification of records.""*

And the proposed and agreed corrective action plan is:

> *"The following actions will be implemented:*
>
> - *the responsible Ministry will develop and implement a documented management system within the regulatory framework and, based on documented procedures to be adopted for record keeping, identify records and define methods for their storage and protection, as well as the retention time and disposition of records; and*
>
> - *material resources will be provided under the projects funded by international donors."*

Again, the action to close out the finding is quite extensive; developing a documented management system is not a fast exercise. This flag state has also identified a need to acquire material resources to be funded by international donors. Other corrective action plans are essentially similar.

Observations.

This CASR also highlights some 14 observations made during the set of audits. All the observations relate to paragraph 3 of the III Code which is closely related to the areas considered in this document and which says:

"3 In order to meet the objective of this Code, a State is recommended to:

- *develop an overall strategy to ensure that its international obligations and responsibilities as a flag, port and coastal State are met;*
- *establish a methodology to monitor and assess that the strategy ensures effective implementation and enforcement of relevant international mandatory instruments; and*
- *continuously review the strategy to achieve, maintain and improve the overall organizational performance and capability as a flag, port and coastal State."*

This section is a recommendation hence the issue of observations rather than findings. The set of issued observations are, however, very similar and typically say for example:

> *"It was established that the State had not developed an overall strategy to ensure that all its obligations and responsibilities under the mandatory IMO instruments to which it is Party are met (III Code, paragraph 3)."*

For this observation the agreed root cause was stated to be:

> *"The lack of understanding of the full scope and level of requirements of paragraph 3 of the III Code relating to overall strategy. "*

All the other 14 observations were essentially similar; meaning that, taken with the 49 findings, these 14 observations mean that out of a total of 63 some 14 or 22% of the total set arose from the lack of an overall strategy.

An overall strategy is something that is again fundamental to a good quality management system and in general terms the set of findings in the areas of review, monitoring and improvement taken together with the observations on overall strategy mean that for any state contemplating the III Code audit, it becomes essential to create an effective quality management system across all the maritime entities of the state and aimed at fulfilling a clearly defined maritime strategy.

Summary

The areas of legislation and reporting amount to a total of around 66% of the findings under the common area of the code in this CASR. In other words two thirds of the problems relate to the making and updating of national legislation and the follow on reporting to the IMO.

For any state contemplating a forthcoming IMO audit under the III Code this is clearly the area on which to place the greatest effort in preparations for an audit.

Collectively the areas of record keeping, review and performance monitoring amount to some 30% of the findings in this CASR from the common area.

What should be noted is that, while the development of legislation and the incorporation of amendments is something for the flag state, perhaps with external assistance, the other areas considered in this document - monitoring and review and record keeping are very much areas that can be enhanced by effective use of electronic record keeping systems.

Such systems allow comprehensive records to be maintained, accurate statistics and trends to be immediately available, and performance weaknesses immediately identified. With a good system it is possible to undertake the essential monitoring, see how well the business is working and when the time comes, demonstrate to the auditors just how that is being done.

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