

立法會 *Legislative Council*

LC Paper No. CB(1)274/09-10

Ref: CB1/BC/8/08

Report of the Bills Committee on Bunker Oil Pollution (Liability and Compensation) Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Bunker Oil Pollution (Liability and Compensation) Bill (the Bills Committee).

Background

2. The International Convention on Civil Liability for Oil Pollution Damage, 1992, which provides for compensation to persons who suffer damage caused by pollution resulting from escape or discharge of persistent hydrocarbon mineral oil from tankers, was implemented in Hong Kong by the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap. 414). In 2001, the International Maritime Organization adopted the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunker Oil Convention) to allow payment of compensation for damage caused by bunker oil pollution from non-tankers and provide uniform international rules and procedures for determining the relevant liability. The Bunker Oil Convention entered into force in November 2008. As at 2 October 2009, 45 Member States, including the Mainland, denoting about 79% of the world tonnage have participated in the Bunker Oil Convention. The Convention cannot be extended to Hong Kong unless appropriate legislative measures to give effect to the Convention are put in place.

The Bill

3. The Bill seeks to establish a legal framework to implement the Bunker Oil Convention in Hong Kong by providing for a similar compensation regime for bunker oil pollution caused by non-tankers. It proposes, amongst other things, to impose liability on a shipowner as defined in clause 2 of the Bill for damage resulting from a discharge or escape of bunker oil from the ship and for damage resulting from a grave and imminent threat of damage caused by contamination that might result if there were a discharge or escape of bunker oil from the ship. Under clause 5 of the Bill, a liability is imposed on a shipowner for bunker oil pollution damage caused in Hong Kong and in any other place where the Bunker Oil Convention is in force.

4. The Bill applies to a ship as defined in clause 2 of the Bill, and includes a ship owned or operated by the Government. However, following the Bunker Oil Convention, the Bill does not apply to a warship, naval auxiliary, or any other ship that is owned or operated by a state and for the time being used by it only on government non-commercial service. Neither the Government, nor any public officer in the officer's capacity as such, is liable to be prosecuted for an offence against the Bill.

5. Clause 7 of the Bill provides for exemption from liability for bunker oil pollution damage resulting from an incident if the shipowner proves certain specified matters, e.g. the incident was resulted from an act of war or an exceptional, inevitable and irresistible natural phenomenon, or was due wholly to the negligence of the person who suffered the damage. Under clause 8, the shipowner who has incurred a liability for pollution damage under clause 5 may seek to limit the liability by bringing an action under Part III of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap. 434). Clause 10 provides that legal proceedings to enforce a claim in respect of the liability may be brought directly against the insurer.

6. As regards compulsory insurance against liability for bunker oil pollution damage, the main provisions in the Bill are summarized below:

- (a) The compulsory insurance scheme applies to a ship required under the Bunker Oil Convention to maintain insurance, namely a ship, other than a local vessel¹ operating exclusively within the river trade limits², that has a gross tonnage of more than 1 000 (clause 12);
- (b) A ship to which Part 3 applies is prohibited from entering or leaving the waters of Hong Kong unless there is in force a relevant insurance certificate (clause 13). The master of such a ship is required to keep on the ship a relevant insurance certificate that is in force in respect of the ship and to produce the insurance certificate for inspection on request by the relevant authority (clause 14); and
- (c) For enforcement purposes, enforcement officers are entrusted with the following powers: to board a ship; to request the master of a ship to which Part 3 applies to produce for inspection the relevant insurance certificate and/or any other document/information relating to the ship; and to make or take any copy of any document so produced (clause 27).

7. Offences are proposed under the Bill to deal with contravention of the requirements relating to compulsory insurance in clause 13 and the keeping of insurance certificates in clause 14. In case of any contravention of the requirements in clause 13, the master and the registered owner of the ship each commits an offence and is liable on conviction on indictment to a fine of \$500,000, or on summary conviction to a fine at level 6 (i.e. \$100,000). A person who contravenes the requirements in

¹ The expression "local vessel" has the same meaning as in section 2 of the Merchant Shipping (Local Vessels) Ordinance (Cap. 548).

² The expression "river trade limits" has the same meaning as in section 2 of the Shipping and Port Control Ordinance (Cap. 313).

clause 14 which relates to the keeping of insurance certificates commits an offence and is liable to a fine at level 3 (i.e. \$10,000).

8. The Bill, if enacted, shall come into operation on a day to be appointed by the Secretary for Transport and Housing by notice published in the Gazette.

The Bills Committee

9. The House Committee agreed at its meeting on 26 June 2009 to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Hon Fred LI Wah-ming, the Bills Committee has held four meetings, including a meeting with representatives of the shipping trades. The list of the organizations which have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

10. The Bills Committee supports the Bill which aims to provide a compensation regime for pollution damage caused by discharge or escape of bunker oil from non-tankers or for threat of such damage. The Bills Committee has considered some policy and legal issues related to the Bill. It also noted the views of the shipping industry on early implementation of the Bunker Oil Convention to enable owners of ocean-going vessels registered in Hong Kong to obtain the necessary insurance certificates locally. The deliberations of the Bills Committee are summarized in the ensuing paragraphs.

Liability for pollution damage

11. According to clause 5(3) of the Bill, the shipowner of a ship is not liable under clause 5(1) or (2) for any damage attributable to the impairment of the environment unless the damage is loss of profits from the impairment of the environment, or is cost of any reasonable measures of reinstatement of the environment actually taken or to be taken. Hon Audrey EU has enquired about the scope and justification of the circumstances under which the shipowner will not be held liable. The Administration has advised that the wordings in clause 5(3) follow that in the Bunker Oil Convention, which seeks to give a more concrete and quantifiable interpretation of "damage" for the purpose of limiting liability and determining compensation. Disputes between the shipowners and claimants over the "damage" caused by oil spillage, if any, will be judged by the court on individual merits.

12. Hon Audrey EU has asked whether a shipowner whose ship has caused pollution damage after being collided by another ship will be held wholly liable for the damage even if he is not at fault. The Administration has explained that pursuant to clause 5, this shipowner will be liable for the damage caused by its ship. In case the pollution damage is not reasonably separable (e.g. caused by oil discharged by more than one ship), the shipowners of the ships concerned (unless exonerated) shall be jointly and severally liable for all such damage. Whether there will be apportionment of liability among shipowners involved in an incident will depend on the facts of the

case concerned. However, by virtue of clause 6(3) of the Bill, section 21 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) on apportionment of liability in case of contributory negligence will apply, and the shipowner in question may recover contribution under section 3 of the Civil Liability (Contribution) Ordinance (Cap. 377) from the other shipowner who has caused the collision.

13. As regards the query on whether a shipowner would be liable if the pollution damage is due partly to the shipowner's fault such as poor maintenance of the ship, and partly to conditions beyond his control such as an exceptional, inevitable and irresistible natural phenomenon, the Administration has advised that according to the exemption under clause 7(a), which seeks to implement Article 3.3(a) of the Bunker Oil Convention, a shipowner is not liable in respect of any damage resulting from an incident if he can prove that the incident was resulted from, inter alia, an exceptional, inevitable and irresistible natural phenomenon., and such exemption is absolute. A regular natural phenomenon such as a typhoon under which ships usually stay unharmed will unlikely be regarded as an exceptional, inevitable and irresistible natural phenomenon subject to the circumstances of each case.

Compulsory insurance of liability

Scope of application

14. The Bill provides that all non-tankers are subject to the proposed compensation regime and limitation of liability. However, the compulsory insurance scheme does not apply to a ship if its gross tonnage is 1 000 or below or it is a local vessel that operates exclusively within the river trade limits. Such a ship is not required to take out the compulsory insurance for pollution damage. Hon WONG Yung-kan has expressed concern that the shipowner of such a ship may not be able to meet the compensation cost should there be an incident. The Administration has advised that it is not a mandatory requirement for such a ship to acquire the insurance under the Bunker Oil Convention. However, the shipowner of the ship can still take out insurance against oil spillage of their own accord. The Administration has further advised that there have been few bunker oil pollution incidents relating to local vessels and the extent of pollution damages resulted is relatively minor probably because these vessels use cleaner fuel.

Exemption granted by the Director of Marine

15. Under clause 23 of the Bill, the Director of Marine (the Director) may, in a particular case, exempt in writing any person or ship from the application of any provision of clause 13 or clause 14 regarding the keeping of a valid insurance certificate. Some members, including Hon Miriam LAU, have expressed views that the exemption in question should be granted only when necessary and under stringent considerations. The Administration has apprised members that clause 23 empowers the Director to consider granting exemption to ships which do not carry a valid insurance certificate required to be issued in compliance with the Bunker Oil Convention but have to enter Hong Kong waters due to exceptional circumstances, such as on humanitarian grounds during inclement weather conditions. Exemptions may also be granted for ships registered in a place to which the Bunker Oil Convention

is applicable and having a valid insurance certificate for a certain period issued by another party to the Bunker Oil Convention.

16. As regards the liability of the Government for the pollution damage, if any, caused by the ship which was given the exemption to enter Hong Kong waters without the insurance certificate, the Administration has affirmed that the Bill does not have the effect of changing the extent of Government's liability in the circumstances mentioned and other applicable law and procedure should continue to apply. The Bills Committee has noted that parties aggrieved by the Government's decision and suffered from the pollution damage thus resulted may lodge civil claim for compensation against the Government.

17. Hon Miriam LAU has expressed concern about the authority in exercising the power of exemption. The Administration has explained that the exemption power will be exercised solely by the Director or the officer acting in the post who is ultimately responsible for the decision, even though the Director may have acted on the basis of the assessment made by staff of the Marine Department. The Secretary for Transport and Housing will clearly state such intention in her speech during the resumption of the Second Reading debate on the Bill.

Definition of "owner" in relation to a vessel

18. According to proposed section 10(6)(b) for the Oil Pollution (Land Use and Requisition) Ordinance (Cap. 247) under clause 39 of the Bill, "owner", in relation to a vessel, means "the person registered as the owner of the vessel or, if no person is registered as the owner of the vessel, the person who owns the vessel". The Bills Committee has requested the Administration to clarify how the "owner" of a vessel could be traced and identified if no person is registered as the owner of the vessel.

19. The Administration has advised that information relating to the "owner" of a vessel will usually be available from the relevant records/registers kept by the Marine Department. The Marine Department will in general consider and handle a request for information with reference to the requirements under the Code on Access to Information and/or the Personal Data (Privacy) Ordinance (Cap. 486). Depending on the circumstances of each request, the Marine Department will normally release the information if it is satisfied that the information is to be used for civil proceedings.

Service of notice

20. According to clause 30 of the Bill, a notice or other document under the Bill is to be regarded as having been duly served if it is delivered or sent by post or by registered post to the appropriate address. Hon Cyd HO and Hon Miriam LAU have expressed concern about the need to serve the notice and documents promptly. They asked whether the documents sent by electronic means will be regarded as having been duly served. The Administration has advised that clause 30 does not preclude a document under the Bill to be sent or served by electronic means and the application of the provisions of the Electronic Transactions Ordinance (Cap. 553) (ETO) that relate to the sending or service of documents will apply generally to other legislation as appropriate, including the proposed Ordinance.

21. In this connection, Hon Miriam LAU and Hon Cyd HO have suggested including in clause 30 an express provision on the application of ETO to the Bill. The Administration does not consider this appropriate as it will be a departure from the drafting convention and may have a read-across implication on other enactments, in particular those statutes that have a provision similar to clause 30. Moreover, it will be inconsistent with the approach contemplated under the ETO, which is an enactment of general application. Hon Cyd HO has suggested that the Administration should review the drafting practice for all enactments in respect of the general application of ETO, and consider adding a standard provision in the relevant legislation to facilitate readers' reference.

Application fee

22. Under clause 33 of the Bill, the Financial Secretary may by regulations prescribe the fee to be paid on an application to the Director for an insurance certificate to be issued by him. Hon Miriam LAU considers that the proposed fee of HK\$535 is relatively high and the Administration should take into account the viability of small shipowners. Nevertheless, the Administration has agreed to provide information on the rationale for the proposed fee, the consultation results as well as the fees charged in other jurisdictions in the paper when it consults the Panel on Economic Development on the proposed application fee.

Drafting issues

Long title

23. Members, including Hon Audrey EU, have requested the Administration to consider specifying in the long title that, inter alia, the Bill is to give effect to the Bunker Oil Convention. The Administration has indicated that the Bill serves the policy objective to cover provisions necessary to give effect to the Bunker Oil Convention and to allow some flexibility for accommodating requirements under other international conventions and resolutions (such as the Resolution of Protection for Persons Taking Measures to Prevent or Minimize the Effects of Oil Resolution as implemented by clause 9), as well as local requirements on the subject (such as the limitation on the amount of judgment given by the court of a place other than a Bunker Oil Convention place that may be enforced in Hong Kong). Moreover, similar practice has been adopted in other legislations, such as the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap. 414) and the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap. 434) which have made no reference in the long title to the international conventions they seek to implement.

Clause 3

24. Hon CHEUNG Hok-ming is of the view that the use of the term of "government" in the Bill is ambiguous as it may refer to the government of a country or a place as in clause 3(1) or the Hong Kong Special Administrative Region Government as in clause 3(4). In response, the Administration has agreed to propose

Committee Stage amendments to change the term in the Chinese text³ of clauses 3(1) and 25(2) from "政府" to "特區政府".

Clause 7

25. In response to members' enquiry whether "terrorist act" is a kind of "hostility" referred under clause 7(a), the Administration has explained that as defined in section 2(1) of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575), "terrorist act" does not necessarily fall within the category but it will depend on the facts and circumstances of a particular case. Upon further review, the Administration has noted the slight difference in meaning for the terms "hostility" and "hostilities", and will move amendment to change the word "hostility" in clause 7(a) to "hostilities" to tie in with that used in the Bunker Oil Convention.

Committee Stage amendments

26. The Bills Committee has examined the proposed Committee Stage amendments to be moved by the Administration and raised no objection. The Bills Committee will not move any amendments to the Bill.

Consultation with the House Committee

27. The Bills Committee reported its deliberations to the House Committee on 23 October 2009. The House Committee noted that the Administration intended to resume the Second Reading debate on the Bill at the Council meeting on 11 November 2009.

Council Business Division 1
Legislative Council Secretariat
5 November 2009

³ There is no ambiguity of the term in English because "government" and "Government" will be used to distinguish the two.

**Bills Committee on
Bunker Oil Pollution (Liability and Compensation) Bill**

Membership List

Chairman	Hon Fred LI Wah-ming, SBS, JP
Members	Hon WONG Yung-kan, SBS, JP
	Hon Miriam LAU Kin-yea, GBS, JP
	Hon Audrey EU Yuet-mee, SC, JP
	Hon CHEUNG Hok-ming, GBS, JP
	Hon Cyd HO Sau-lan
	Hon Tanya CHAN
	(Total : 7 members)
Clerk	Ms Debbie YAU
Legal Adviser	Ms Kitty CHENG
Date	15 July 2009

**Bills Committee on
Bunker Oil Pollution (Liability and Compensation) Bill**

List of organizations that have submitted views on the Bill

1. The Hong Kong Shipowners Association Limited
2. The Marine Excursion Association Limited
3. Unique Shipping (H.K.) Limited