

# 立法會

## *Legislative Council*

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### **Paper for the House Committee**

#### **Report of the Subcommittee on Merchant Shipping (Control of Harmful Anti-Fouling Systems on Ships) Regulation and Merchant Shipping (Prevention and Control of Pollution) (Fees) (Amendment) Regulation 2015**

#### **Purpose**

This paper reports on the deliberations of the Subcommittee on Merchant Shipping (Control of Harmful Anti-Fouling Systems on Ships) ("the AFS Regulation") and Merchant Shipping (Prevention and Control of Pollution) (Fees) (Amendment) Regulation 2015 ("the Fees Amendment Regulation") ("the Subcommittee").

#### **Background**

##### International Convention on the Control of Harmful Anti-fouling Systems on Ships

2. Anti-fouling paints are used to coat the bottoms of ships to prevent sealife such as algae and molluscs attaching themselves to the hull – thereby slowing down the ship and increasing fuel consumption. In the early days of sailing ships, lime and arsenic were respectively used to coat ships' hulls, until the modern chemicals industry developed effective anti-fouling paints using metallic compounds. But studies have shown that these chemicals persist in the water, killing sealife, harming the environment and possibly entering the food chain.

3. On 5 October 2001, the International Maritime Organization ("IMO") adopted the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001 ("the Convention") which prohibits the use of organotin compounds in anti-fouling systems of ships for the protection of marine environment. The Convention entered into force on 17 September 2008. China ratified the Convention in March 2011. Subject to the enactment of the AFS Regulation, the Administration will request the Central People's Government to notify IMO the extension of the Convention to Hong Kong.

## The AFS Regulation

4. The AFS Regulation is made by the Secretary for Transport and Housing ("the Secretary") under section 3(2) of the Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413) ("the Ordinance") to implement the Convention in Hong Kong by setting out the relevant requirements that are applicable to non-Hong Kong ships within Hong Kong waters as well as Hong Kong ships<sup>1</sup> wherever they are.

5. Under the AFS Regulation, a ship must not bear any organotin compounds in its anti-fouling system. The AFS Regulation requires a ship of 400 gross tonnage or above and engaged in an international voyage or a ship engaged in an international voyage that is less than 400 gross tonnage but is 24 meters or more in length to carry on board a valid International Anti-fouling System Certificate or a declaration in respect of anti-fouling system respectively, and the penalty of failing to comply with the requirements. It also provides for the issuance of an IAFS Certificate to Hong Kong ships and endorsement on an International Anti-Fouling System Certificate by the Director of Marine ("the Director") upon being satisfied on completion of a survey by a Government surveyor. The Director may recognize organizations to survey ships and issue certificates.<sup>2</sup>

6. Section 3A of the Ordinance allows for the adoption of "direct reference approach" ("DRA") in its regulations for the purpose of giving effect to provisions of international agreements applicable to Hong Kong. DRA means making direct reference to provisions of international agreements in local legislation so as to apply those provisions locally. DRA enables timely implementation of international requirements that are technical in nature and are commonly applied in other jurisdictions across the world. If Hong Kong ships cannot comply with those requirements, they may be denied entry to other ports. However, DRA may not be appropriate for implementing all requirements under international agreements. When adopting this approach, various factors as set out in paragraph 7 of the Legislative Council Brief (File Ref: THB(1)PML R8/10/70/3) ("LegCo Brief") must be taken into account. Annex C to the LegCo Brief contains the provisions of the AFS Regulation, being reviewed against the aforesaid factors, that have been identified to be suitable for the application of DRA.

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<sup>1</sup> Section 2 of the Ordinance defines "Hong Kong ship" to mean a ship registered in Hong Kong; and a vessel required to be certificated under the Merchant Shipping (Local Vessels) Ordinance (Cap. 548).

<sup>2</sup> Recognized organizations are international bodies specialized in the technical areas of ships, such as ship construction, equipment, operation and surveys, etc. At present, the Marine Department entrusted Recognized organizations through contractual agreements to carry out certain services, such as to survey ships and to issue certificates for these ships etc.

## The Fees Amendment Regulation

7. Under the Fees Amendment Regulation, the Marine Department ("MD") is empowered to charge fees in relation to survey of ship by a Government surveyor and issue of an IAFS Certificate by the Director under the AFS Regulation. On the basis of cost-recovery principle, the fees for survey carried out by a Government surveyor within Hong Kong are currently set at \$3,270 for the first hour or part hour, and \$1,115 for each subsequent hour or part hour. The fee for the issue of a certificate is currently set at \$565.

8. Both regulations come into operation on a day to be appointed by the Secretary by notice published in the Gazette.

## **The Subcommittee**

9. At the House Committee meeting held on 10 April 2015, members agreed that a subcommittee should be formed to study the two items of subsidiary legislation in detail.

10. Under the chairmanship of Hon Frankie YICK, the Subcommittee held one meeting. The membership list of the Subcommittee is in **Appendix I**.

11. To allow more time for the Subcommittee to scrutinize the subsidiary legislation, Hon Andrew LEUNG, Chairman of the House Committee, moved a resolution at the Council meeting of 15 April 2015 to extend the scrutiny period of the subsidiary legislation to the Council meeting of 13 May 2015.

## **Deliberations of the Subcommittee**

### The AFS Regulation

#### *Application*

12. Members have noted that according to section 3, the AFS Regulation does not apply to (a) a warship; (b) a naval auxiliary; or (c) any other ships owned or operated by a government (of a party to the Convention) and used only on government non-commercial service (collectively known as "exempted ships"). Dr Hon Kenneth CHAN has asked about their respective definitions and whether the anti-fouling paints used by the exempted ships contain any organotin compounds.

13. According to the Administration, "warship" and "naval auxiliary" refer to "military vessel" in general which belong to the naval establishment. "Ship owned or operated by a government and used only on government non-commercial service" can be understood by its ordinary meaning. The Administration further explained that according to a paper provided to the Subcommittee on Air Pollution Control (Marine Light Diesel) Regulation (vide LC Paper No. CB(4)476/13-14(01)), when enforcing the legislation concerned, the relevant departments would consider the following factors in determining whether the vessels are military vessels –

- (a) whether the vessels belong to the armed forces of a state;
- (b) whether the vessels bear external marks that distinguish the nationality of such ships; and
- (c) whether the vessels are under the command of an officer commissioned by the government of the state.

These considerations are consistent with international practices and the same factors will be applied in determining whether the concerned vessel is a military vessel under section 3(2) of the AFS Regulation.

14. The Administration has further advised that although the AFS Regulation does not apply to the exempted ships, vessels owned or operated by the Government of the Hong Kong Special Administrative Region ("HKSAR") have complied with the Convention by using anti-fouling systems that do not bear any organotin compounds. In fact, the Director of Agriculture, Fisheries and Conservation has stopped issuing permit for the import, supply and sales of anti-fouling paints containing organotin compounds since 2004.

15. Given that members of the Hong Kong Garrison should abide by Hong Kong laws under the Law of the People's Republic of China on the Garrisoning of the HKSAR ("Garrison Law"), Hon Cyd HO considers it self-contradictory if the AFS Regulation does not apply to warships or naval auxiliaries under the Hong Kong Garrison.

16. The Administration has responded that the provisions of the Convention have been worked out by all contracting parties of IMO. The exemption in Article 3(2) of the Convention applies to warships and naval auxiliaries of all the contracting parties.

17. Dr Hon Kenneth CHAN has noticed that according to Article 3(2) of the Convention concerning its exemption to warships, naval auxiliaries, or other ships owned or operated by a contracting party, it is also provided that

"[H]owever, each Party shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with this Convention."

18. Dr Hon Kenneth CHAN has expressed concern on the reason for not including this provision in the AFS Regulation as it could ensure that the Government of HKSAR will monitor the anti-fouling paints used by the exempted ships.

19. The Administration has explained that the said provision is not to empower jurisdictions to monitor the performance of other parties to the Convention in respect of the use of anti-fouling paints by their exempted ships. It only seeks to set out the obligation of individual parties to ensure, so far as is reasonable and practicable, that their exempted ships act in a manner consistent with the Convention. Whether and how far the exempted ships of a party to the Convention have complied with the Convention as required by paragraph (2) of Article 3 is outside the regulatory authority of other parties under the Convention. In such circumstances, it would not be appropriate to include the above provision in the AFS Regulation.

20. In this connection, members have exchanged views with the Administration on the approaches used to implement international conventions and agreements. Please refer to paragraphs 37 and 39 below.

21. Hon Albert CHAN is concerned whether the governments of parties to the Convention, including those of HKSAR, the People's Republic of China and the United States of America, will issue internal guidelines or adopt measures on the use of anti-fouling paints by the exempted ships. He also expressed concern about the actions to be taken by the Government of HKSAR to ensure exempted ships flying non-Hong Kong flags, including those under the Hong Kong Garrison, would follow the internal guidelines or take the adopted measures at the time of or before entering Hong Kong waters.

22. As advised by the Administration, in respect of other exempted ships in Hong Kong waters, it has no information on their compliance or otherwise with the Convention since, due to their exempted status under the Convention and the AFS Regulation, they do not fall within Hong Kong's regulatory remit. The Administration has written to its contacts at IMO of the respective governments to enquire whether they have promulgated internal guidelines or adopted measures on the use of anti-fouling paints by their exempted ships, and are awaiting their response. In the absence of legal authority, the HKSAR Government is not in a position to take any actions to ensure compliance with such internal guidelines or measure, if any, by the exempted ships of these governments whilst they are within Hong Kong waters.

### *Unwanted organisms*

23. Members have noted that the Chinese renditions for "unwanted organisms" in the definition of "anti-fouling system" under section 2, in LegCo Brief, and in both paragraph 2 of a Chinese document<sup>3</sup> issued by MD as well as the Chinese version of the Convention attached to it are "不利航行的生物", "不利的生物" 及 "不利生物" respectively. The Administration has explained that from the law drafting perspective, the term "不利生物" may not be entirely clear when used to explain the meaning of "防污底系統" in the "Interpretation" section of the Chinese text of the AFS Regulation. Therefore, the phrase "不利航行的生物" has been adopted to clarify the meaning of "不利" in the context of anti-fouling systems on ships.

### *Endorsement of International Anti-Fouling System*

24. Under section 8, if 25% of more of a ship's anti-fouling system has been changed, replaced or affected by a repair, the ship's International Anti-Fouling System Certificate is not to be regarded as valid for the purpose of the AFS Regulation until it has been endorsed by one of the issuing authorities. Members have noted that 25% referred to the surface area of the system and that the surveyors would make their professional judgment by visual inspections.

25. Members have further noted that sections 16 and 17 seek to implement Regulation 3 of Annex 4 of the Convention. Section 16 provides that the Director may, at the request by any Convention country, survey a non-Hong Kong ship that is within the waters of Hong Kong and issue an IAFS Certificate or endorse an International Anti-Fouling System Certificate in respect of non-Hong Kong ship. Section 17 allows the Director to request any Convention country/party to survey a Hong Kong ship, and issue or endorse an International Anti-Fouling System Certificate in respect of a Hong Kong ship.

### *Cancellation of International Anti-Fouling System Certificate*

26. Section 9 provides for the Director's power to cancel certain International Anti-Fouling System Certificates in respect of Hong Kong ships. There is a concern whether it would be justified to provide for a mechanism for the certificate holder to apply to review the Director's decision.

27. In response, the Administration has advised that the Director may cancel an International Anti-Fouling System Certificate of a Hong Kong ship only if he

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<sup>3</sup> Issued by the Multi-lateral Policy Division of Marine Department (LVAC Paper No. 5/2007) on 13 November 2007 to Local Vessels Advisory Committee about "Implementation of the AFS Convention on Local Vessels".

has reasonable grounds to believe that the Certificate was issued or endorsed on the basis of false or erroneous information. To satisfy the "condition" for cancellation, the Director must conduct investigation for fact-finding purpose to establish, with evidence, that the information provided by the ship-owner in his application for the issue or endorsement of the Certificate is false or erroneous. Besides, section 9 obliges the Director to give reasons for cancelling the Certificate in his notice issued to the owner or master of the ship. Since the Director may only cancel the Certificate based on the facts of the case which involve no value judgment and the ship-owner, if not satisfied, may dispute the grounds for cancellation through available legal or administrative means (such as judicial review or a complaint against the department's administration or decision), the Administration does not think that it is necessary to provide for a separate appeal/review mechanism in the statute.

28. Dr Hon Kenneth CHAN has asked about the administrative procedures involved if a holder of an International Anti-Fouling System Certificate complained against the Director's decision for cancelling his/her Certificate. The Administration has advised that in cancelling the Certificate, MD will, as part of the due process, conduct sampling and analysis of the ship's anti-fouling system to ascertain if it contains any organotin compounds contrary to the information provided in the Certificate and in the Record of Anti-Fouling System(s) held by the ship. MD will cancel the Certificate only if the results of sampling indicate that the ship's anti-fouling system contains organotin compounds in contravention of the AFS Regulation. Any complaints lodged by the ship-owner or ship master against the Director's decision will be considered by MD as part of its investigation process in deciding whether to initiate prosecution actions against the ship-owner and the ship master. MD will respond to the complaints as appropriate without jeopardizing the legal process.

*Means of control of anti-fouling systems on ships*

29. Under section 4(2), if a ship bore any organotin compounds that act as biocides in its anti-fouling system before the commencement date, it must, as from that date, bear a coating that forms a barrier to the compounds. Members have noted the Administration's explanation that the compounds are toxic and require special treatment for proper disposal, and hence it is not recommended to remove the compounds from the ships concerned. As required by the Convention, a coating should be added to form a barrier to the compounds.

30. Hon SIN Chung-kai is concerned about the means of control on anti-fouling systems. He asked about the detailed procedures involved in issuing an IAFS Certificate. In particular, whether the initial survey of the ship that has been carried out by a Government surveyor in accordance with section 7(3)(a) involves only paper work. The Administration has been requested to provide supplementary information to enable members to understand the detailed

procedures involved in the inspection, examination and investigation of (a) Hong Kong ships and (b) non-Hong Kong ships for the purpose of ascertaining whether the AFS Regulation has been or is being complied with.

31. Members have noted that under section 13 of the AFS Regulation, a Government surveyor may inspect any ships within the waters of Hong Kong, and make any examination and investigation as are considered necessary for the enforcement of the AFS Regulation. In conducting inspection of either Hong Kong ships or non-Hong Kong ships, MD will follow the "2011 Guidelines for Inspection of Anti-Fouling Systems on Ships" ("the Guidelines") adopted by IMO, with the key steps set out in paragraphs 32 and 35 below.

32. According to the Guidelines, MD would check the validity of the IAFS Certificate or Declaration on Anti-Fouling Systems, and the attached Record of Anti-Fouling Systems, if appropriate. Since the only practical way to apply paint to the ship's bottom (underwater part) is in a dry dock, MD would check the date of application of paint on the IAFS Certificate by comparing the period of dry-docking with the date on the certificate. If the paint has been applied during a scheduled dry-dock period, it has to be registered in the ship's logbook. Furthermore, MD can verify this scheduled dry-docking by checking against the survey record and the endorsement date on the Safety Construction Certificate. In case of an unscheduled dry-dock period, MD can verify it by the registration in the ship's logbook, and by the endorsement date on the Hull Certificate, the dates on the Manufacturer's Declaration or by confirmation of the shipyard. MD would also verify that the survey for the issuance of the current IAFS Certificate matches the dry-dock period listed in the ship's logs.

33. MD will carry out a more detailed inspection, and request for and examine further information when there have been clear grounds to believe that the ship does not meet the requirements of the AFS Regulation. For the purpose of ascertaining whether there has been any contravention of the AFS Regulation, the Government Surveyor may –

- (a) require the ship-owner, master and crew of the ship and/or operator of the dockyard, etc. to provide further information about the anti-fouling system;
- (b) inspect additional documents such as the initial survey report prepared by the recognized organization and the dry-docking report; and
- (c) conduct sampling and analysis of the ship's anti-fouling system based on scientific testing procedures.

34. If the results of sampling indicate that the ship's anti-fouling system contains organotin compounds in violation of the AFS Regulation, MD may cancel its IAFS Certificate where the ship involved is a Hong Kong registered ship. In respect of a local vessel which is not required to carry an IAFS Certificate, MD may cancel its operating licence. In both cases, the ships concerned cannot proceed to sea until the problems have been rectified and new certificates are issued on satisfactory completion of survey. In respect of non-Hong Kong ships which are found to be in breach the AFS Regulation, MD will notify the relevant authorities of the ship's flag state for them to take necessary enforcement actions.

35. As regards the actions to be taken for the ships that are found to be incompliant with the requirements, the Administration advised that in all cases where there is sufficient evidence to show that the ship concerned (whether it is a Hong Kong ship or non-Hong Kong ship) has breached the AFS Regulation while it is in Hong Kong waters, MD will initiate prosecution actions against the owner and master of the ship. If the ship concerned has left Hong Kong waters, MD will put the ship on its monitoring list and take necessary enforcement actions when it enters Hong Kong waters again.

#### The Fees Amendment Regulation

36. Members have noted the Administration's advice that the fees in relation to survey of ships and issue of an IAFS Certificate would be charged and adjusted on a cost-recovery basis.

#### Other issues

##### *Drafting approach*

37. Hon Cyd HO has noted that there are different approaches to implement international conventions or agreements in local legislation, viz., making direct reference to provisions under the international convention/agreement in local legislation, appending the international convention/agreement in a schedule to the local legislation, or including only certain provisions of the international convention/agreement in the local legislation. She expressed concern on the need to adopt the same approach and drafting practice for the sake of consistency.

38. The Administration has advised that the approach used to implement international conventions/agreements in local legislation will depend on the nature of the convention/agreement. Generally speaking, direct reference approach will be used for those conventions/agreements that were technical in nature or they will be appended in a schedule to the local legislation. Some others will be adapted locally and the AFS Regulation is a case in point.

39. According to the subsequent information provided by the Department of Justice (LC Paper No. CB(4)897/14-15(02)), different drafting methods have been used to implement international agreements in the domestic system to suit different types of international agreements and different policy needs. Broadly speaking, there are three approaches, viz, incorporating texts of international agreements and adding supplementary provisions, transforming the texts of international agreements, and referring to the requirements under international agreement. In practice, the method to be adopted is decided on a case by case basis by the Administration, after carefully consideration of the policy objectives and requirements and the nature and substance of the international agreement in question. As such, it is considered unfeasible to adopt a uniform approach in drafting domestic legislation to implement international agreements.

*Delay in implementing international conventions/agreements in local legislation*

40. Having regard that the Convention entered into force in September 2008 and China ratified it in March 2011, Hon POON Siu-ping and Hon SIN Chung-kai have expressed concern about the delay in implementing marine-related international conventions in local legislation.

41. The Administration has explained that marine-related legislative tasks to be made are frequent and voluminous, and considerable time and efforts are required for the deliberations and preparation of detailed proposals for them. To expedite the relevant work, the Administration has obtained the approval of Finance Committee on 7 February 2014 the establishment of a dedicated legal team in the Department of Justice, comprising, amongst others, one Deputy Principal Government Counsel and five Senior Government Counsels for about 28 months from February 2014, to support the Transport and Housing Bureau and MD in taking forward the outstanding marine-related legislative exercises for the relevant international conventions.

**Recommendation**

42. The Subcommittee supports the two items of the subsidiary legislation.

**Advice sought**

43. Members are invited to note the deliberations of the Subcommittee.

**Subcommittee on Merchant Shipping (Control of Harmful Anti-Fouling Systems on Ships) Regulation and Merchant Shipping (Prevention and Control of Pollution) (Fees) (Amendment) Regulation 2015**

**Membership list**

**Members**

Hon Cyd HO Sau-lan, JP  
Hon Albert CHAN Wai-yip  
Hon Steven HO Chun-yin  
Hon Frankie YICK Chi-ming  
Hon WU Chi-wai, MH  
Dr Hon Kenneth CHAN Ka-lok  
Hon SIN Chung-kai, SBS, JP  
Hon POON Siu-ping, BBS, MH  
Hon Tony TSE Wai-chuen, BBS

(Total : 9 members)

**Clerk**

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Miss Winnie LO