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(Attn.: Miss Anita Ho)

BY FAX (2877 5029) ONLY
(Total 7 pages)

Dear Miss Ho,

Merchant Shipping
(Security of Ships and Port Facilities) Bill

Thank you for your letter of 20 May 2004 concerning the captioned subject. Our responses to your queries are listed in the following paragraphs.

Clause 1

2. In anticipation of the International Ship and Port Facility Security (ISPS) Code ("the Code") coming into force on 1 July, the administration has been seeking clarification on how the Code could be implemented, both practically and legally. In parallel, we started drafting the Bill as soon as the IMO's subject committee issued the definitive interpretation in the second half of the last year and began working with port facility operators and shipowners for planning and execution of the requirements specified in the Code. At this stage, most of the preparatory work had been done including issuing security certificates to ships under the Hong Kong Shipping Register and approving port facility security plans, etc. This must be done in advance of the 1 July deadline to ensure the normal operation of the port and maritime industry would not be disrupted.

To enforce the Code after it comes into effect on 1 July, should the Bill could not be enacted on or before this date, we need to have retrospective provisions to allow the Director of Marine to have bare minimum power to carry out control on ships visiting and staying in Hong Kong, such as the power to inspect and deny entry of ships, and detain non-compliance ships. The amendment to clause 1 would depend on whether we can meet the deadline.

Clause 4

3. We will require ships intending to enter Hong Kong to provide pre-arrival security information. Hence, clause 10(b) of the Bill will apply to non-Hong Kong ships intending to enter Hong Kong. We intend to amend clause 4(1) to include non-Hong Kong ships intending to enter Hong Kong to provide for the same as proposed.

Clause 6

4. We propose to amend the wording of clause 6(1) to "The Secretary may make regulations for the purpose of giving effect to the Convention" similar to the precedents quoted.

5. We will re-arrange the long title to "To implement the December 2002 amendments to the International Convention for the Safety of Life at Sea, 1974 and the International Ship and Port Facility Security Code and related provisions in the Convention for enhancing security of ships and port facilities; and to provide for incidental or related matters."

6. Clause 6(3) – According to common law principles, "[t]here is no rule of law that the territorial limits of a subordinate legislature define the possible scope of its legislative enactments or mark the filed open to its vision" (Lord Uthwatt in *Wallace Brothers & Co Ltd V Commissioner of Income Tax, Bombay City and Bombay Suburban District* (1948) LR 75 Ind App 86, at page 98). The limitation on the legislative competence of a subordinate legislature imposed by the common law appears to be that there must be some "nexus" between the territory concerned and the provisions of the legislation. On such "nexus", Professor Wesley-smith is of the view that the test is whether the legislation bears a "real or substantial relation" to the territory. The clause concerned is intended to ensure that the regulations made under the Bill apply also to ships that are outside Hong Kong but intending to enter Hong Kong and Hong Kong ships that are outside Hong Kong. It appears that those ships, though outside Hong Kong, have sufficient connection with Hong Kong.

7. Regarding your points marked on the Bill, our initial views on your comments on the drafting aspect of the Bill are as follows:

(1) Same comments as in paragraph 5 above.

(2) Same comments as in paragraph 2 above.

(3) There are 2 precedents for the phrase "in the rank of". Please see the definition of "personal salary" in section 2 of the Public Officers Pay Adjustments (2004/2005) Ordinance (Cap 580) and section 3(a) of the Pensions (Special Provisions)(Customs Officers) Ordinance (Cap 35). We have no preference for "in the rank of" or "of the rank of".

(4) Agreed.

(5) To be amended as proposed in our letter of 14 April 2004.

(6) To be amended in line with the Convention.

(7) To add the definition of 'passenger ship' and amend the word 'exploitation'.

(8) No objection to include definition for the terms suggested except for the following:

(i) The terms "security level" and "security instruction" are referred to only in clause 6 of the Bill. Substantive provisions relating to security levels and security instructions are to be contained in the Merchant Shipping (Security of Ships and Port Facilities) Regulation ("the Regulation") made under the Bill. Accordingly, it appears more appropriate to define the terms in the Regulation instead of in the Bill so that readers of the Regulation do not have to refer to the Ordinance for the definitions.

(ii) "vessel" as it is used for general reference and SOLAS does not provide a definition for vessel.

(iii) "ship/port interface" as it does not appear in the Bill.

(9) No objection.

(10) Clause 4(2)(b) is about the scope of the application of the regulations made under clause 6. It is not providing for detail subject matters on which regulations may be made clause 6 does. In view of their different nature, clause 4(2)(b) should not be put under clause 6.

(11) There is no need to add "Contracting" before "government" in clause 4(3)(c) as SOLAS always refers to "contracting government". It does not apply to non-contracting governments. We have no objection to add "government" between "on" and "non-commercial service".

(12) (i) As the Bill can only apply to port facility in Hong Kong, it is superfluous to add the words "in Hong Kong" again.

(ii) No objection to delete "in his opinion".

(iii) It does not require to publicize the specification notice by Legal Notice in gazette as it is administrative in nature that the Director decides the extent of application to certain port facilities, of which will only be relaxation but not imposing any additional restriction.

(13) Clause 6(1) – Same comments as in paragraph 4 above.

(14) Clause 6(2)(b) – We propose to amend the clause to "(b) create offences for the purpose of paragraph (a) and provide for imprisonment not exceeding 3 years and a fine not exceeding $500,000;".

(15) No objection to delete "supplementary". "recognized security organization" is a specified term with definition.

(16) Clause 6(2)(f) – The clause as it is gives flexibility. If the clause specifies the person who is going to make a decision pursuant to the Convention and the Code, it has to be amended on every occasion when there is a change to the title of the decision-making person.

(17) It is not unusual to confer the power for the Secretary himself.

(18) It should refer to "an administration" instead of "the administration".

(19) No objection to delete this clause.

(20) Same comments as in paragraph 6 above.

(21) No objection to delete "For the avoidance of doubt".

(22) The land or sea area covered by an individual port facility may be varied, i.e. a plan delineated the boundary of port facility as deposited in the Director's office.

(23) Clause 7(3) – "Subsidiary legislation" is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean an instrument made under or by virtue of any Ordinance and having "legislative effect". The following are the main principle to decide whether an instrument has "legislative effect":

(a) whether the instrument extends or amends existing legislation (*Williams v Government of Island of St Lucia* [1970] AC 935 at 937; *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 635; *The commonwealth & Others v Grunseit* (1943) 67 CLR 58 at 83);

(b) whether the instrument has general application to the public or a class as opposed to individuals (*Fowler v AG* [1987] 2 NZLR 56 at 74; *Jackson Standsfield & Sons v Butterworth* [1948] 2 All ER 558 at 564);

(c) whether the instrument formulates a general rule of conduct without reference to particular cases (*The Commonwealth v Grunseit* (1943) 67 CLR 58 at 83).

Given that a declaration of port facilities does not amend or extend existing legislation or have general application to the public or formulate a general rule of conduct, it is therefore considered that a notice to declare a port facility does not have legislative effect and is accordingly not subsidiary legislation.

Besides, we propose to amend clause 7(3)(a) to "to declare or not to declare the port facility; or"

(24) The term "person" is given a wide definition in section 3 of the Interpretation and General Clauses Ordinance (Cap 1). It "includes any public body and any body of persons, corporate or unincorporated". The term "organization" is considered to be a more restrictive term and its use in the Bill will limit the classes of those who may be recognized by the Director under clause 8 of the Bill.

(25) A RSO will perform functions on behalf of the government that are statutory in nature. If the Director decides to revoke the recognition of a RSO which has failed to perform or deliver its service as required, but the Director's decision cannot take effect because of an appeal, either the service to ships will be adversely affected or that RSO will continue to perform the function in a substandard manner. Either case will put security as well as safety of ships at stake and also it will cause serious administrative problems to the government as well as operational difficulties to ships and their companies.

(26) "ascertaining" should mean identifying whether there is any non-compliance while "ensuring" should include the ability to take rectification actions if any non-compliance is detected.

(27) "recordings" should be given a wider meaning in the Bill. Beside voice recordings, it should also include recording in writing, sketching on paper etc.

(28) Under SOLAS XI-2/9, if a ship is detained the flag administration of the ship needs to be informed, not the consular office. This is already a standard practice of port state control and hence the Bill does not require a specific provision for that. Clause 16(2) covers the compensation aspect of undue delay or detention of ships.

(29) There is no relevance to S 60A(2) of Cap 313.

(30) No objection to the deletion of the phrase.

(31) We propose to amend the word "provides" in the clause to "produces" to achieve consistency with clause 10(b) and 11(b).

(32) Clause 14(1) – It does not cover any agreement between Hong Kong and the Central People's Government or Macau, since voyages between HK, Macau and Chinese ports are domestic voyages to which SOLAS XI-2/ISPS Code are not applicable. Clause 14(1)(a) – We need to specify "areas of land or sea outside Hong Kong which fall within the description of section 7(1)(a)" as "port facility" is referred to an area of land or sea declared as a port facility under clause 7.

(33) Clause 14(2) gives effect to SOLAS XI-2/12.1 and follows its wording. The exemption clause S.63 of Cap. 313 appears too general/broad in the context of the Bill.

(34) "A class of port facilities" means a class of port facilities with the same type of operation/business, e.g. a group of container terminals, passenger terminals etc. We will refine it to avoid confusion with the definition.

(35) To be deleted as proposed in our letter of 14 April 2004.

(36) Clause 16(2) – The clause is intended to provide a clear cause of action for the public. It may serve as a precedent for future legislation if the Legislative Council considers that the circumstances of the case warrants.

(37) We will consider to delete clause 17 to minimize unnecessary confusion.

(38) We propose to delete clause 18(1) to avoid copy right issue.

Yours sincerely,

(H B Chan)
for Secretary for Economic Development and Labour

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