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Hong Kong Special Administrative Region of the People's Republic of China

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LEGISLATIVE COUNCIL SECRETARIAT
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3 June 2004

BY FAX
Fax No. : 2523 0030
Total Nos. of Pages : (17)

Dear Mr Chan,

Draft Merchant Shipping (Security of Ships and Port Facilities) Rules

I refer to the draft Rules and send you herewith my comments on the legal and drafting aspects of the Rules as marked-up in the Enclosure for your consideration.

Yours sincerely,

(Anita HO)
Assistant Legal Adviser

Encl

c.c. Department of Justice (Attn: Mr. Gilbert MO, DLD(BD&A) and
Miss Amy CHAN, GC)

LA
CCS(1)3

MERCHANT SHIPPING (SECURITY OF SHIPS AND PORT FACILITIES) RULES

(Made under section 6 of the Merchant Shipping (Security of Ships and Port Facilities) Ordinance (of 2004))

PART 1

GENERAL PROVISIONS

2. Interpretation

In these Rules, unless the context otherwise requires –

“company” (公司), in relation to a ship, means –

- (a) the owner of the ship; or
- (b) any person who has assumed responsibility for the operation of the ship and, on assuming that responsibility, agreed to take over all duties and responsibilities imposed in respect of the ship by the International Safety Management Code;

② What is the purpose of this phrase? Does this term

appear in “company security officer” (公司保安官員) means a person designated under the Ordinance? ^{② a.} rule 10(1) for the purposes of this Ordinance? Should this be deleted?

③ “Declaration of security” (保安聲明) means an agreement reached between a

② cf. Cl. 22. ship and a port facility or a ship with which it interfaces specifying the security measures that each will implement; “security” or “Security”?

“Interim Security Certificate” (臨時保安證書) means an Interim International Ship Security Certificate issued under rule 17;

“International Safety Management Code” (國際安全管理規則) means the International Management Code for the Safe Operation of Ships and for Pollution Prevention;

“management” (管理人), in relation to a port facility, means the owner, occupier or operator of the port facility;

"port facility security officer" (港口設施保安官員) means a person designated
 pls. refer to Pt. ① under rule 25(1) ^{① b.} for the purposes of this Ordinance]

"port facility security plan" (港口設施保安計劃) means a plan referred to in
 section 16 of part A of the Code;

"Security Certificate" (保安證書) means a certificate issued or endorsed under

④ Does it mean rule 15;

that the "security instruction" (保安指示) means an instruction that the Director may
 Director can only give
 instruction give when security level 3 is set under rule 3;

when "security level" (保安級別) means ^{the} qualification of the degree of risk that any ^⑤ suspicious
 security level to set at
 3 and not at 2 or 1? act or circumstance threatening the security of a ship or port facility will
 occur as set under rule 3; (cf. definitions of "security incident" and
 what is "security level 3" ? or 1 and 2? ^⑥ in Regulation XI-1 of the Convention)

⑥ Chapter or Regulation? 10(1) ^{③ c.} for the purposes of this Ordinance]

"ship security officer" (船舶保安官員) means a person designated under rule

"ship security plan" (船舶保安計劃) means a plan referred to in section 9 of
 part A of the Code.

⑦ 2A. Director may exercise power under the
 Why 2 A and Convention or the Code

or 3?

(1) Any power that is exercisable by a Contracting Government or an
 Administration pursuant to Chapter XI-2 of the Convention or the Code shall, in
 relation to Hong Kong, be exercisable by the Director subject to the provisions
 of Chapter XI-2 of the Convention and the Code.

(2) [The Director/ An authorized officer] shall be an officer duly
 authorized by the Government as a Contracting Government for the purposes of
 Chapter XI-2 of the Convention and the Code.

3. Setting of security levels

The Director shall set security levels in accordance with regulation 3 of Chapter XI-2 of the Convention and section 4.1 of part A of the Code. (cf. Regulation XI-2/3 of the Convention; section 4.1 of part A of the Code)

4. Security instructions

(1) Where security level 3 is set under rule 3, the Director may give such security instructions as he considers appropriate to –

- (a) a Hong Kong ship;
- (b) a non-Hong Kong ship in the waters of Hong Kong; or
- (c) a port facility. (cf. section 4.2 of part A of the Code)

(8) other public officer? (2) The Director may delegate his power under subrule (1) to any person as he thinks fit.
As see S.43 of Cap.1

(3) A ship or a port facility to which a security instruction is given shall act in accordance with the instruction without delay. (10)

(9) How can a ship which is a dead object to "act"? (4) If subrule (3) is contravened in relation to a ship in the waters of Hong Kong and the company or the master of the ship fails to notify the Director of the contravention, the company and the master of the ship each commits an offence and each is liable on conviction to a fine at level 5. (12) (cf. DI (15.2))

(10) There may be arguments on (5) The management of a port facility that contravenes subrule (3) commits an offence and is liable on conviction to a fine [of \$500,000 and to imprisonment for 3 years]. (cf. DI (15.3))
What is "delay"? cf. S.61(3) of Cap.313?

(11) only in H.K.? Can Director give an instruction to prohibit a ship entering H.K. waters?

(12) To be put into law? 5. (8) Delegation of powers to recognized security organizations

(13) Subject to the exceptions specified in section 4.3 of part A of the Code, the Director may, in writing, delegate to a recognized security organization his

CSA? functions relating to security of ships or port facilities under Chapter XI-2 of the Convention and part A of the Code. (cf. section 4.3 of part A of the Code)

6. Declaration of closed area

(1) If the Director reasonably believes that, in order to abate or contain any security threat, it is necessary to close any area of the waters of Hong Kong

(14) Is "the person who is in control of the vessel" not to all vessels or any class or type of vessels, he ⁽¹⁵⁾ may declare that area to be an area closed to those vessels or that class or type of vessels, as the case may be.

(2) If a vessel, without reasonable excuse, enters a closed area in contravention of a declaration under subrule (1), the person who is in control of the vessel commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

(15) Does it mean that the Director has a discretion not to give notice of a declaration but then the master of a vessel be held criminally liable for something he has no notice of? (3) ⁽¹⁵⁾ The Director shall give such notice of a declaration under subrule (1) as he thinks fit. PART 2 SHIPS

7. Hong Kong ships to comply with the Convention and the Code

A Hong Kong ship shall comply with regulations 4, 6 and 8 of Chapter XI-2 of the Convention. (cf. paragraph 2 of Regulation XI-2/4 of the Convention, DI(5.2))

8. Non-Hong Kong ships to comply with Convention and the Code

(1) A non-Hong Kong ship in Hong Kong shall comply with regulations 4, 6 and 8 of Chapter XI-2 of the Convention. (cf. paragraph 2 of Regulation XI-2/4 of the Convention, DI(5.3))

(2) A non-Hong Kong ship intending to enter Hong Kong shall comply with regulations 4 and 9.2 of Chapter XI-2 of the Convention. (cf. paragraph 2 of Regulation XI-2/4 of the Convention, DI(5.4))

9. Companies to comply with the Convention and the Code

(1) The company of a ship shall comply with regulations 4, 5 and 8 of Chapter XI-2 of the Convention. (cf. DI(5.1))

(2) The company of a ship shall provide the master, company security officer and ship security officer of the ship with such supports as are necessary for each of them to perform their respective functions under Chapter XI-2 of the Convention and part A of the Code. (cf. section 6.2 of part A of the Code)

10. Ship security officers and company security officers

(1) The company of a ship shall designate for the ship -

(a) a ship security officer ~~as required under section 12.1 of part A of the Code~~; and (cf. section 12.1 of part A of the Code)

(b) a company security officer ~~as required under section 11.1 of part A of the Code~~ (cf. section 11.1 of part A of the Code)

(2) A ship security officer and a company security officer shall comply with the provisions of part A of the Code that respectively apply to each of them and take into account the guidance contained in part B of the Code.

11. Control of ships in Hong Kong

(1) A ship in the waters of Hong Kong is subject to the control measures that may be imposed by the Director ^{as mentioned (?)} under regulation 9.1 or 9.3 of Chapter XI-2 of the Convention.

(i) A "request" is not mandatory and can be refused by a master of a ship. (2) The master of a ship shall, without delay, act upon the request (or) direction (made or) given under the regulation referred to in subrule (1) by the Director.

(ii) Subrule 4) has not mentioned any request or direction.

12. Control of ships intending to enter Hong Kong

(1) A ship intending to enter the waters of Hong Kong is subject to the control measures that may be imposed by the Director under regulation 9.2 or 9.3 of Chapter XI-2 of the Convention.

(16) (2) The master of a ship shall, without delay, act upon the request or direction made or given under the regulation referred to in subrule (1) by the Director.

13. Maintenance of Hong Kong ships

The company and the master of a Hong Kong ship shall ensure that the security system and the associated security equipment of the ship that have been verified are properly maintained as required under section 19.1.4 of part A of the Code. (cf. section 19.1.4 of part A of the Code)

14. Certificates for Hong Kong ships

(18) (1) The company and the master of a Hong Kong ship shall ensure that ^{has on board} the ship ~~holds~~ a valid Security Certificate or an Interim Security Certificate.

(2) ^{has} A Hong Kong ship shall not engage on international voyage unless it ~~holds and keeps~~ on board either of the certificates referred to in subrule (1).

Where there is a ^{contravention} of subrule (2), (3) ^L The master of a ship that ~~contravenes subrule (2)~~ commits an offence and is liable on conviction to a fine at level 3. (cf. DI (15.1))?

15. International Ship Security Certificates

(19) Subrule 1 also (1) Subject to subrule (2), an International Ship Security Certificate refers to may, on application by the company of a Hong Kong ship, be issued or endorsed Certificate in respect of the ship by –

- issued by another Contracting Government
- (a) the Director;
 - (b) a recognized security organization that ^{has been (?)} is authorized [in writing] by the Director ~~to issue or endorse the Certificate,~~ or (cf. section 19.2.2 of part A of the Code)

whilst subrule (2) only refers to Certificate issued by the Director

Why is the whole subrule (1) subject to subrule (2)?

Is that application can only be made by the company of a H.K. ship?

What if some other places request HKG to issue such certificate?

(20)

(c) ~~upon the request of the Director, another Contracting Government~~ or any person authorized by that Contracting Government] (cf. section 19.2.3 of part A of the Code)
 not s 19.2.3 of the Code. Which section?

(2) A Security Certificate shall not be issued or endorsed in respect of a Hong Kong ship unless –

- (a) a ship security plan of the ship has been approved by the Director or a recognized security organization; and
- (b) the requirements of verification in accordance with section 19.1 of part A of the Code have been complied with in relation to the ship. (cf. section 19.2.1 of part A of the Code)

(3) If the Director refuses to issue or endorse (as the case may be) a Security Certificate, he shall notify the applicant ~~by a notice~~ in writing stating the reasons for his refusal.

(21)

(4) A Security Certificate is valid for such period as specified in the Certificate ~~by the person who issued or endorsed the Certificate.~~ (cf. section 19.3.1 of part A of the Code)

(5) A Security Certificate ceases to be valid if any of the events mentioned in section 19.3.8 of part A of the Code occurs. (cf. section 19.3.8 of part A of the Code)

16. Obligations of companies in relation to ships

Where a Security Certificate has been issued or endorsed in respect of a ship, the company of the ship shall, on transferring its responsibility for the operation of the ship to another company –

(22)

the receiving
Administration
in s. 19.3.9.1 of
the Code.

- (a) ~~as soon as practicable transmit to that another company~~ all information relating to the Certificate; or
- (b) facilitate the verifications ^{to be (?)} carried out for the ship. (cf. section 19.3.9.2 of part A of the Code)

17. Interim International Ship Security Certificates (cf. section 19 of part A of the Code)

(23) Any need for consistency with S.15? (1) ^{see?} [Subject to subrule (2), ~~in a case falling within section 19.4.1.1, 19.4.1.2, 19.4.1.3 or 19.4.1.4 of part A of the Code~~, an Interim International Ship Security Certificate may on application by the company of a Hong Kong ship be issued in accordance with section 19.4.2 of part A of the Code in respect of the ship by -

(24) The Director has to observe S.19.4.2 before issuing a Certificate under Subrule (1). Why is it then necessary to have subrule (2)? (a) the Director; or (b) a recognized security organization that is authorized [in writing] by the Director to issue the Certificate. (cf. section 19.4.3 of part A of the Code) (2) An Interim Security Certificate shall not be issued in respect of a Hong Kong ship unless the requirements specified in section 19.4.2 of part A of the Code are verified to have been complied with in relation to the ship. (cf. section 19.4.2 of part A of the Code)

(25) notify by a notice? (3) If the Director refuses to issue an Interim Security Certificate, he shall notify the applicant ~~by a notice~~ in writing stating the reasons for his refusal. (cf. S.19.4.4 of the Code) (4) An Interim Security Certificate is valid ~~until~~ ^{for} (a) ~~the expiration of 6 months from its date of issue~~; or (b) ^{until} a Security Certificate is issued in respect of the ship, whichever first occurs. (cf. section 19.4.4 of part A of the Code)

18. Cancellation of certificates

(26) cf. S.40, 41 of Cap.1. Power to approve includes the power to withdraw approval. Why is it necessary to have this clause? (1) The Director may, by notice in writing to the company of a ship, cancel a Security Certificate issued or endorsed in respect of the ship under rule 15 if he has reason to believe that - (a) regulation 4, 6 or 8 of Chapter XI-2 of the Convention has not been complied with in relation to the ship; or (b) the Certificate was issued or endorsed on the basis of false or erroneous information.

(2) The Director may, by notice in writing to the company of the ship concerned, cancel an Interim Security Certificate issued in respect of a ship under rule 17 if he has reason to believe that –

- (a) any of the requirements specified in section 19.4.2 of part A of the Code has not been complied with in relation to the ship; or
- (b) the Certificate was issued on the basis of false or erroneous information.

(3) The Director shall, in the notice referred to in subrule (1) or (2), state the reasons for cancelling the Security Certificate or the Interim Security Certificate, as the case may be.

**19. Hong Kong ships outside Hong Kong to
comply with requirements of security levels**

(1) Subject to subrule (2), where a security level is set under rule 3, a

27

Hong Kong ship outside Hong Kong shall without delay –

How can the
Govt. enforce
this S.19?

- (a) comply with the requirements specified in section 7 of part A of the Code in respect of the security level; and (cf. *regulation 4 of Chapter XI-2 of the Convention and section 7 of part A of the Code*)
- (b) implement the preventive and protective measures specified in its ship security plan in respect of the security level. (cf. *section 7 of part A of the Code*)

(2) If a Hong Kong ship is in the waters of another party to the Convention and the security level set by the government of that party is higher than that set under rule 3, the ship shall act on the security level set by that government as if the security level was set under that rule.

20. Ships in Hong Kong waters to comply with requirements of security levels

(1) Subject to subrule (2), where a security level is set under rule 3, a ship in the waters of Hong Kong shall without delay –

- (a) comply with the requirements specified in section 7 of part A of the Code in respect of the security level; and (*cf. regulation 4 of Chapter XI-2 of the Convention and section 7 of part A of the Code*)
- (b) implement the preventive and protective measures specified in its ship security plan in respect of the security level. (*cf. section 7 of part A of the Code*)

(2) Subrule (1) does not apply if a ship referred to in that subrule has complied with the requirements specified in section 7 of part A of the Code in respect of a security level higher than that set under rule 3 and has implemented the preventive and protective measures specified in its ship security plan in respect of that higher level.

(3) If this rule is contravened in relation to a ship, the company and the master of the ship each commits an offence and each is liable on conviction to a fine at level 5. (*cf. DI (15.2)*)

21. Duty to notify the Director of non-compliance

(1) If –

- (a) any of the requirements specified in respect of a ship referred to in rule 19 ~~in that rule~~ has not been complied with;
- (b) any of the requirements specified in respect of a ship referred to in rule 20 ~~in that rule~~ ^{ee} has not been complied with; or
- (c) any of the security instructions given to a ship referred to in rule 4 ~~under that rule~~ has not been complied with,

(28)

the master of the ship shall notify the Director of the details of such non-compliance without delay. (cf. paragraph 5 of regulation 4 of the Convention)

(29) N. offence (2) If this section is contravened in relation to a non-Hong Kong ship, for a the master of the ship commits an offence and is liable on conviction to a fine at Hong Kong level 5. (cf. DI (15.2))

22. Ships to complete and keep Declarations of Security

(1) If a ship is requested under section 5 of part A of the Code by the Director to complete a Declaration of Security, the master or ^{the} ship security officer of the ship shall, without delay, complete the Declaration ^{of Security} in the manner specified in that section. (cf. sections 5.2-5.5 of part A of the Code)

(2) After completing a Declaration of Security in respect of a Hong Kong ship, the master or ^{the} ship security officer, as the case may be, of the ship shall keep the Declaration ^{of Security} on board ^{for} during the next 10 calls ^{for} of the ship at port facilities. (cf. Code ?)

23. Duty to keep information and records

(1) A ship intending to enter the waters of Hong Kong shall keep on board the information specified in –

- (a) regulation 5 of Chapter XI-2 of the Convention; and
- (b) regulation 9.1.2.1 of Chapter XI-2 of the Convention on –
 - (i) where the ship has previously called at not less than 10 port facilities, the last 10 occasions where the ship called at port facilities immediately before it intends to enter the waters of Hong Kong; or
 - (ii) where the ship has previously called at less than 10 port facilities, all occasions where the ship called at port facilities immediately before it intends to enter the waters of Hong Kong.

- (2) A Hong Kong ship shall keep on board –
- (a) a ship security plan of the ship developed and approved in accordance with section 9 of part A of the Code (*cf. section 9.1 of part A of the Code*)
 - (b) all approvals (if any) for amendment to the ship security plan given pursuant to section 9 of part A of the Code (*cf. section 9.5.1 of part A of the Code*)
 - (c) the information specified in regulation 5 of Chapter XI-2 of the Convention; and (*cf. regulation 5 of Chapter XI-2 of the Convention*)
 - (d) in the manner specified in section 10 of part A of the Code, the records specified in section 10.1 of that part for a period not less than 3 years.

PART 3

PORT FACILITIES

24. Port facilities to comply with the Convention and the Code

A port facility shall comply with regulation 10.1 of Chapter XI-2 of the Convention. (*cf. paragraph 1 of Regulation XI-2/10 of the Convention; D1 (5.5)*)

25. Port facility security officers

(1) The management of a port facility shall designate a security officer for the port facility ~~as required by section 17.1 of part A of the Code~~. (*cf. section 17.1 of part A of the Code*)

(2) A port facility security officer shall comply with the provisions of part A of the Code that apply to him and take into account the guidance contained in part B of the Code. (*cf. section 17.2 of part A of the Code*)

26. Port facility security plans

The port facility security officer of a port facility shall ensure that a port facility security plan is prepared for the port facility and submitted to the Director for approval in accordance with section 16 of part A of the Code. (*cf. section 16 of part A of the Code*)

27. Duty to notify the Director of material change in circumstances

If, since a port facility security plan of a port facility has been approved, there has been any material change in the circumstances that may affect the security of the port facility or the implementation of the port facility security plan, the port facility security officer of the port facility shall without delay –

- (a) report the details of the change to the Director;
- (b) cause the port facility security plan to be revised to take into account the change; and
- (c) submit the revised port facility security plan to the Director for approval. (*cf. DI (12.1)*)

28. Withdrawal of approval of port facility security plans

(1) If the Director has reason to believe that a material change referred to in rule 27 has occurred in respect of a port facility but the port facility fails to comply with the requirements specified in that rule, the Director may, by a notice in writing to the management of the port facility, withdraw his approval of the port facility security plan of the port facility.

(2) The Director shall in a notice referred to in subrule (1) state the reasons for withdrawing his approval of the port facility plan.

29. Port facilities to comply with requirements of security levels

(1) Where a security level is set under rule 3, a port facility shall without delay –

(a) comply with the requirements specified in section 14 of part A of the Code in respect of the security level; and (cf. section 7 of part A of the Code)

(32)

How about:

Where there is a
contravention...

(b) implement the preventive and protective measures specified in its port facility security plan in respect of the security level. (cf. section 14 of part A of the Code)

(2) The management of a port facility that contravenes this rule commits an offence and is liable on conviction to a fine at level 5. (cf. DI (15.3))

30. Port facilities to complete and keep Declarations of Security

(1) If a port facility is requested under section 5 of part A of the Code by the Director to complete a Declaration of Security, the port facility security officer of the port facility shall, without delay, complete the Declaration in the manner specified in that section. (cf. sections 5.3-5.5 of part A of the Code)

(2) After completing a Declaration of Security in respect of a port facility, the port facility security officer of the port facility shall keep the Declaration for a period not less than 1 year.

31. Rectification of non-compliance

(1) If the Director has reason to believe that any requirement of the port facility security plan of a port facility is not complied with, he may direct the management of the port facility to rectify the condition of non-compliance within such period as he specifies.

What does
it mean by
"the condition
of non-
compliance"?

(2) If the non-compliance is not rectified to the satisfaction of the Director within the period specified under subrule (1), the management of the port facility concerned commits an offence and is liable on conviction to a fine at level 5.

↓
Rarely found in law.

PART 4

MISCELLANEOUS PROVISIONS

32. Appeals

(1) If a company of a ship is aggrieved by a decision of the Director made in respect of the ship under any of the following provisions, it may appeal to a court of survey in accordance with the Merchant Shipping (Court of Survey) Regulations (Cap. 369 sub. leg. A) –

- (a) rule 15 (refusing to issue or endorse a Security Certificate);
- (b) rule 17 (refusing to issue an Interim Security Certificate);
- (c) rule 18(1) (cancelling a Security Certificate);
- (d) rule 18(2) (cancelling an Interim Security Certificate).

(2) If the management of a port facility is aggrieved by a decision of the Director made in respect of the port facility under rule 28, the management may [].

(3) An appeal referred to in subrule (1) [or (2)] may only be made within [14 days] after –

- (a) the applicant has received a notice referred to in rule 15(4);
- (b) the applicant has received a notice referred to in rule 17(4);
- (c) the company has received a notice of cancellation referred to in rule 18(1) or (2); or
- (d) the management has received a notice of withdrawal referred to in rule 28(1),

as the case may be.

(4) The lodging of an appeal under this rule does not by itself operate as a stay of execution of a decision of the Director unless the court of survey or [], as the case may be, otherwise orders.

33. Fees

an authorized officer includes any police officer. His fee will be so charged ?
(1) The Director may charge fees in respect of the time spent by an authorized officer on providing services relating to any of the following matters –

- (a) issuing or endorsing a Security Certificate;

- (b) issuing an Interim Security Certificate;
- (c) approving a port facility security plan;
- (d) inspecting for the purposes of removal of detention of ships.

(2) The fee under subrule (1) is charged on an hourly basis and the fee is -

- (a) in the case where an authorized officer is required to inspect a ship or a port facility in the course of providing services, \$3,270 for the first hour or part hour and \$1,115 for each subsequent hour or part hour; or
- (b) in any other case, \$1,115 for each hour or part hour.

Secretary for Economic Development
and Labour

2004