

LEGISLATIVE COUNCIL BRIEF

MERCHANT SHIPPING (SECURITY OF SHIPS AND PORT FACILITIES) BILL 2004

INTRODUCTION

A At the meeting of the Executive Council on 2 March 2004, the Council ADVISED and the Chief Executive ORDERED that the Merchant Shipping (Security of Ships and Port Facilities) Bill 2004, at Annex A, should be introduced into the Legislative Council to give effect to the new provisions of the International Convention for the Safety of Life at Sea, 1974 (SOLAS) and the International Ship and Port Facility Security (ISPS) Code adopted by the International Maritime Organization (IMO).

JUSTIFICATIONS

2. As the Central People's Government is a contracting government to the SOLAS which is applicable to Hong Kong by extension, these security provisions will be binding on Hong Kong upon commencement on 1 July 2004. Hong Kong is required to give effect to the requirements through domestic legislation. The enactment of the Bill and its subsidiary regulation will provide the legal instrument for the Director of Marine to implement the security requirements on Hong Kong registered ships and port facilities in Hong Kong, and to impose security control measures on foreign ships visiting the port of Hong Kong.

3. The existing merchant shipping and port control legislations focus on maritime safety and pollution prevention only. They do not deal with security issues nor cover any port facilities that are located on land. As the new security provisions in SOLAS and ISPS Code will be applicable to ships as well as port facilities engaged in ship/port interface activities, a new piece of legislation (i.e. the Bill) encompassing security requirements for both ships

and port facilities rather than an amendment to the existing legislation is more appropriate to provide for clarity and consistent implementation of the security provisions. The Bill will have one subsidiary regulation entitled the Merchant Shipping (Security of Ships and Port Facilities) Regulation (“the Regulation”), which will stipulate in detail the specific requirements for ships and port facilities, offences and penalties, and appeal procedures.

4. Apart from complying with the obligation under SOLAS, it is also desirable to enhance the security of Hong Kong ships and port facilities to an agreed international standard, because enhancing maritime security is a priority issue perceived by many countries, for instance, USA and the EU, which are our major trading partners. Failure to legislate in Hong Kong will not only project a negative image but also jeopardize our trade with these countries, as Hong Kong may be perceived as a weak link in ensuring the security of the supply chain.

THE BILL

5. The main provisions of the Bill are –
- (a) to empower the Secretary for Economic Development and Labour to make regulations to implement Chapter XI-2 and the ISPS Code (as amended from time to time); and
 - (b) to confer on the Director of Marine various powers that are necessary to implement Chapter XI-2 and the ISPS Code, including the power to designate port facilities, authorize Recognized Security Organizations, set security levels and issue security instructions that every applicable ship and port facility in Hong Kong shall act upon.

The details of the Bill are set out at Annex A.

6. The main provisions of the Regulation are –
- (a) to stipulate the specific security requirements that ships engaged

on international voyages, their companies, and port facilities serving such ships are required to comply with;

- (b) to provide for the certification requirements and issuing arrangements for Hong Kong registered ships, making reference to the ISPS Code;
- (c) to stipulate that ships and port facilities shall act upon the security level set by the Director of Marine;
- (d) to stipulate that a ship intending to enter or whilst staying in Hong Kong waters is subject to control measures imposed by the Director of Marine according to Chapter XI-2;
- (e) to stipulate that port facilities are subject to verification by the Director of Marine on their compliance;
- (f) to provide for a port facility to report to the Director of Marine any major changes on its facility affecting the implementation of its security plan and to submit a revised plan for approval;
- (g) to stipulate that a Hong Kong registered ship and a port facility are required to keep declarations of security and security records; and
- (h) to provide for offences and penalties for non-compliances, and appeal arrangements.

7. Drafting work of the Regulation is in progress. A draft Regulation will be tabled with the Bill on the first reading date.

LEGISLATIVE TIMETABLE

8. The Bill will be gazetted on 12 March 2004 and introduced into the Legislative Council on 24 March 2004.

IMPLICATION OF THE PROPOSAL

B

9. The proposal has economic implications as set out at Annex B. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no productivity, civil service and environmental implications. Although there will be revenue generated from services provided for implementing the requirements under the Bill and the Regulation, the amount to be collected on cost recovery basis is expected to be very small and hence the financial implication is negligible. The Marine Department will absorb the additional work through its existing staff and resources. The proposal does not have major sustainability implications but would help Hong Kong shipping and port industries maintain a leading position in the region. The Bill will be binding on the Government.

10. The proposal arises from amendments to SOLAS, an international convention which is applicable to Hong Kong. Failure to comply with the convention requirements will not only undermine the security standard for our ships and port facilities, breach the international obligations under SOLAS but also cause serious adverse effect on the commercial operations of the shipping and port industries of Hong Kong. For example, Hong Kong registered ships to which Chapter XI-2 applies and which do not carry a valid International Ship Security Certificate may be delayed, detained or expelled from a foreign port.

PUBLIC CONSULTATION

11. The proposal has the support of the Shipping Consultative Committee, the Port Operations Committee and the Port Area Security Advisory Committee, which comprise all major stakeholders of the local shipping and port industries. The Economic Services Panel of the Legislative Council has been consulted and supports the proposal.

PUBLICITY

12. A press release will be issued on 10 March 2004. A spokesman will be available to handle press enquiries.

BACKGROUND

13. The development of the maritime security provisions under SOLAS and the ISPS Code were triggered by the terrorist attacks on 11 September 2001. It aims to establish an international framework through which government agencies and the shipping and port industries work together to detect and deter acts that threaten security in the maritime transport sector.

14. In brief, ships engaged on international voyage and port facilities serving such ships are required to conduct security assessments, and to have approved security plans and procedures in place to react to different security levels. A Contracting Government is required to ensure ships flying its flag, port facilities within its jurisdiction, as well as foreign ships visiting its ports or within its territorial waters are in compliance with the requirements. The Contracting Government is also required to assess the degree of risk that a security incident may occur, and set security levels accordingly for ships and port facilities under its jurisdiction to follow.

15. All applicable ships are required to carry an International Ship Security Certificate that is issued by the ship's flag administration or its authorized Recognized Security Organization whilst all applicable port facilities shall have their security plans approved by the authority appointed by its Government. Ships failing to comply with the requirements, or ships having interfaced with a port facility not in compliance with the requirements, may be subject to refusal of entry into a port, detention or expulsion from a port. Under the provisions, a Contracting Government has the obligation to provide the IMO with details of the authorities responsible for implementing the requirements, together with a list of port facilities under its jurisdiction that meet the new security requirements.

16. For the implementation of the provisions in Hong Kong, the Director of Marine is the authority for the administration of Hong Kong registered ships and control of ships visiting the port of Hong Kong in respect of

compliance with international convention requirements. Since the application of the security requirements on port facilities is focused on ship/port interface, we, in consultation with the Security Bureau, have agreed that the Director of Marine should be the appropriate authority to ensure implementation of the requirements on port facilities. The Hong Kong Police Force will provide expert advice, in particular, in the setting of security levels and approval of security assessments and plans for port facilities.

ENQUIRIES

17. Any enquiries on this brief can be addressed to Mr K L LEE, Chief, Marine Accident Investigation of the Marine Department (Tel: 2852 4603) or Mr H B CHAN, Assistant Secretary of the Economic Development and Labour Bureau (Tel: 2121 2304).

Economic Development and Labour Bureau
10 March 2004

**MERCHANT SHIPPING (SECURITY OF SHIPS AND PORT
FACILITIES) BILL**

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A BILL

To

Enhance security of ships and port facilities and for that purpose 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; and to provide for incidental or related matters.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Merchant Shipping (Security of Ships and Port Facilities) Ordinance.

(2) Subject to subsections (3) and (4), this Ordinance comes into operation on the day on which it is published in the Gazette.

(3) The power under section 6(1) may be exercised before the day on which this Ordinance is published in the Gazette.

(4) A recognized security organization may perform any function referred to in section 6(2)(c) before the day on which this Ordinance is published in the Gazette.

2. Ordinance binds the Government

This Ordinance binds the Government.

3. Interpretation

(1) In this Ordinance, unless the context otherwise requires -
“authorized officer” (獲授權人員) means –

- (a) any officer of the Marine Department in the rank of Marine Inspector Class II or above;
- (b) any police officer in the rank of sergeant or above; or
- (c) any other public officer authorized under section 9.

“the Code” (《規則》) means the International Ship and Port Facility Security Code adopted by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 on 12 December 2002;

“Contracting Government” (締約政府) means the government of a party to the Convention;

“the Convention” (《公約》) means the International Convention for the Safety of Life at Sea, 1974 (SOLAS);

“Director” (處長) means the Director of Marine;

“high-speed craft” (高速船) means a craft capable of a maximum speed in metres per second equalling to or exceeding $3.7V^{0.1667}$ where V is the displacement corresponding to the design waterline (m^3);

“Hong Kong ship” (香港船舶) means a ship which is registered in Hong Kong under the Merchant Shipping (Registration) Ordinance (Cap. 415);

“international voyage” (國際航程) means a voyage from -

- (a) a party to the Convention to a place outside the party; or
- (b) a place outside a party to the Convention to the party;

“non-Hong Kong ship” (非香港船舶) means a ship other than a Hong Kong ship;

“port facility” (港口設施) means an area of land or sea declared as a port facility under section 7;

“recognized security organization” (經認可的保安組織) means a recognized security organization recognized under section 8;

“Secretary” (局長) means the Secretary for Economic Development and Labour;

“ship” (船舶) means -

- (a) a passenger ship (including a high-speed craft which carries more than twelve passengers) that is engaged on international voyages; or

- (b) a cargo ship (including a high-speed craft) of 500 gross tonnage or upwards that is engaged on international voyages,

and includes a mechanically propelled vessel capable of engaging in drilling operations for the exploration for or exploration of resources beneath the sea-bed such as liquid or gaseous hydrocarbons, sulphur or salt, not on location.

(2) A reference in this Ordinance to the Convention or the Code is a reference to the Convention or the Code, as the case may be, as amended from time to time.

4. Application to ships

- (1) Subject to subsections (2) and (3), this Ordinance applies to –
 - (a) a Hong Kong ship, whether or not it is in Hong Kong; and
 - (b) a non-Hong Kong ship while it is in Hong Kong.
- (2) The regulation made under section 6 may –
 - (a) apply to non-Hong Kong ships intending to enter Hong Kong; and
 - (b) impose restriction in relation to any vessel for the purposes of abating or containing any security threat.
- (3) This Ordinance does not apply to –
 - (a) warships;
 - (b) naval auxiliaries; and
 - (c) other ships owned or operated by a government and used only on non-commercial service.

5. Extent of application to certain port facilities

The Director may specify the extent of application of the Convention and the Code in relation to any port facility which, in his opinion –

- (a) are used primarily by vessels not engaged on international voyages; and
- (b) are required occasionally to serve ships to which this Ordinance applies.

6. Regulation

(1) The Secretary may make regulation for the purposes of this Ordinance as stated in the long title.

(2) Without prejudice to the generality of subsection (1), regulation made under this section may –

- (a) require compliance with the Convention and the Code in relation to ships and port facilities;
- (b) create offences for the purpose of paragraph (a) and provide for penalty in the form of imprisonment not exceeding 3 years and a fine not exceeding \$500,000;
- (c) empower the Director to authorize any recognized security organization to perform any function that may be performed by such recognized security organization under the Code;
- (d) make supplementary provision for –
 - (i) the recognition of recognized security organization under section 8; and
 - (ii) authorization of such organization pursuant to paragraph (c);
- (e) provide for the setting of security levels by the Director;
- (f) make provision for appeal against a decision made pursuant to the Convention and the Code;
- (g) empower the Director or any person designated by him to give security instructions when the highest security level is set;

- (h) require compliance with requirements of the security levels referred to in paragraph (e) in relation to ships and port facilities;
- (i) require compliance with security instructions referred to in paragraph (g);
- (j) confer on the Secretary or the Director any power that may be exercised by –
 - (i) a Contracting Government;
 - (ii) the Administration; or
 - (iii) any person who is authorized by a Contracting Government,under Chapter XI-2 of the Convention or the Code;
- (k) make administrative provision for –
 - (i) specification of extent of application under section 5; and
 - (ii) declaration of port facility under section 7;
- (l) empower the Director to charge fees and make provision for the recovery of such fees;
- (m) empower the Director to declare any area of the waters of Hong Kong to be an area closed to all vessels or to any class or type of vessel for security reasons.

(3) The regulation made under this section may have effect outside Hong Kong.

(4) The regulation made under this section may amend the Schedule to the Administrative Appeals Board Ordinance (Cap. 442) to make any decision made under the regulation subject to appeal under that Ordinance.

(5) For the avoidance of doubt, the regulation made under this section may refer to the provisions of the Convention and the Code without setting them out.

7. Declaration of port facility

- (1) The Director may by notice published in the Gazette –
 - (a) declare as a port facility any area of land or sea (including any building or structure on such area) at which interactions that occur when a ship is directly or immediately affected by actions involving the movement of persons or goods or provisions of port services to or from the ship take place;
 - (b) vary any such port facility; or
 - (c) declare that any such port facility ceases to be a port facility.

(2) A notice published under subsection (1) is not subsidiary legislation.

(3) The owner, occupier or operator of a port facility may appeal to the Administrative Appeals Board against a decision of the Director –

- (a) to declare the port facility; or
- (b) not to declare that the port facility ceases to be a port facility.

(4) An appeal under subsection (3) does not prevent this Ordinance from applying or continuing to apply to the port facility concerned.

(5) The Director shall make, in such manner as he thinks fit, available for inspection free of charge by the public a list of all port facilities.

8. Recognized security organization

- (1) The Director may in writing recognize any person who –
 - (a) has appropriate expertise in security matters and appropriate knowledge of ship and port operations; and
 - (b) is widely recognized in the international maritime community as having good standing,

as a recognized security organization.

(2) The Director may revoke a recognition given under subsection (1) if he is satisfied that the recognized security organization concerned does not meet the requirements prescribed in subsection (1)(a) and (b).

(3) The Director shall not exercise his power under subsection (2) without –

- (a) giving adequate prior notice of his intention to do so to the recognized security organization concerned; and
- (b) giving the organization an opportunity to make representation.

(4) Any person aggrieved by a decision of the Director to revoke a recognition under subsection (2) may appeal to the Administrative Appeals Board against the decision.

(5) An appeal under subsection (4) against a decision does not prevent the decision from taking effect.

9. Authorized Officers

(1) The Director may authorize in writing any public officer to be an authorized officer.

(2) An authorized officer may perform any function that is provided for in this Ordinance, the Convention and the Code.

10. Inspections and control of ships

Subject to sections 12 and 13, an authorized officer may, for the purposes of ascertaining whether and ensuring that the provisions of this Ordinance which relate to ships are complied with, exercise one or more of the following powers –

- (a) to board and inspect a ship;
- (b) to require the master or owner or charterer of a ship or any person who is responsible for the operation of the ship or any other person on board the ship to produce such

- documents and give such information as specified by an authorized officer;
- (c) to examine and copy any document referred to in paragraph (b);
 - (d) to take such measurements and photographs and make such recordings as he considers necessary;
 - (e) to direct any person referred to in paragraph (b) to take such actions as are necessary to ensure that the provisions are complied with;
 - (f) if the master contravenes a direction made under paragraph (e), to detain the ship until the direction is complied with.

11. Inspections of port facilities

Subject to sections 12 and 13, an authorized officer may, for the purposes of ascertaining whether and ensuring that the provisions of this Ordinance which relate to port facilities are complied with, exercise one or more of the following powers –

- (a) to enter and inspect a port facility;
- (b) to require the owner, occupier or operator of a port facility to produce such documents and give such information as specified by an authorized officer;
- (c) to examine and copy any document referred to in paragraph (b);
- (d) to take such measurements and photographs and make such recordings as he considers necessary;
- (e) to direct any person referred to in paragraph (b) to take such actions as are necessary to ensure that the provisions are complied with.

12. Magistrate's warrants

(1) An authorized officer shall not enter any part of a ship or port facility which is used solely for dwelling purpose pursuant to section 10 or 11 except by virtue of a warrant issued by a magistrate under subsection (2).

(2) If a magistrate is satisfied on oath by an authorized officer that it is necessary, for the purposes of ascertaining whether and ensuring that the provisions of this Ordinance which relate to ships or port facilities are complied with, to enter any part of a ship or port facility which is used solely for dwelling purpose pursuant to section 10 or 11, he may issue a warrant to an authorized officer to effect entry.

13. Further provisions as to powers of inspection

(1) As far as it is practicable, an authorized officer shall produce proof of his identity and authority upon request before or on exercising his powers under sections 10 and 11.

(2) An authorized officer may, if necessary, use reasonable force in exercising his powers under sections 10 and 11.

(3) A person who fails to comply with a requirement or direction made under sections 10 and 11 commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

(4) A person who obstructs an authorized officer in exercising his powers under sections 10 and 11 commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 3 months.

(5) If, in response to a requirement made under sections 10(b) and 11(b), a person –

- (a) produces or gives to an authorized officer any document or information that he knows to be false in a material particular; or

- (b) recklessly provides or gives to an authorized officer any document or information that is false in a material particular,

the person commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

14. Exemption

(1) The Director may grant exemption from any provision of this Ordinance for –

- (a) ships engaged on short international voyages on fixed routes between port facilities in Hong Kong and areas of land or sea outside Hong Kong which fall within the description of section 7(1)(a); or
- (b) such port facilities,

if they are covered by an agreement between the Government and another Contracting Government on alternative security arrangements.

(2) The Director may grant exemption from any provision of this Ordinance for a Hong Kong ship or a class of Hong Kong ship if he is satisfied that security measures which are at least as effective as those provided for in the provision have been implemented in relation to the ship or class of ship.

(3) The Director may grant exemption from any provision of this Ordinance for a port facility or a class of port facility which is not covered by an agreement referred to in subsection (1) if he is satisfied that security measures which are at least as effective as those provided for in the provision have been implemented in relation to the port facility or class of port facility.

15. Master's discretion for ship safety and security

If the master of a ship takes or executes any decision which, in his professional judgment made in good faith, is necessary to maintain the safety and security of the ship –

- (a) the taking or execution of that decision shall not by itself constitute a breach of any duty owed to any person by him under any contract (including an employment contract); and
- (b) he does not incur any civil liability for the taking or execution of that decision.

16. Duty to avoid undue detention or delay

- (1) When the Government –
 - (a) imposes control measures under paragraph 1 of Regulation XI-2/9 of the Convention; or
 - (b) takes steps under paragraph 2 of that Regulation,

it has a duty to make all possible efforts to avoid a ship being unduly detained or delayed.

(2) Failure to discharge the duty under subsection (1) shall, for the purpose of the law of tort, be a breach of statutory duty.

17. Co-operation with other Contracting Governments

- (1) The Government may –
 - (a) request any Contracting Government outside Hong Kong to perform; or
 - (b) perform at the request of any Contracting Government outside Hong Kong,

any function that may be performed at such request under the Convention or the Code.

(2) The power conferred by subsection (1) may be exercised through the Director.

18. Access to Convention and Code

(1) The Director shall put the English and Chinese texts of Chapter XI-2 of the Convention and the Code in a website on the Internet for browsing free of charge.

(2) The Director shall –

- (a) keep a copy of the English and Chinese texts of Chapter XI-2 of the Convention and the Code at his office; and
- (b) allow the public to inspect such texts during normal business hours free of charge.

Consequential Amendments

Administrative Appeals Board Ordinance

19. Schedule amended

The Schedule to the Administrative Appeals Board Ordinance (Cap. 442) is amended by adding –

<p>“64. Merchant Shipping (Security of Ships and Port Facilities) Ordinance (of 2004)</p>	<p>A decision of the Director of Marine under section 7(1)(a) or (c) or 8(2).”.</p>
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Explanatory Memorandum

The object of this Bill is to implement the International Ship and Port Facility Security Code (“the Code”) and the amendments to the International Convention for the Safety of Life at Sea, 1974 (“the Convention”) that were adopted by the Diplomatic Conference on Maritime Security held in December 2002.

2. Clause 1 states the short title of the proposed Ordinance and provides for its commencement. Clause 2 makes the proposed Ordinance binding on the Government.

3. Clause 3 sets out the definitions necessary for interpreting the proposed Ordinance.
4. Clause 4 states the extent of application of the proposed Ordinance to ships.
5. Clause 5 empowers the Director of Marine (“the Director”) to specify the extent of application of the Convention and the Code to certain port facilities.
6. Clause 6 empowers the Secretary for Economic Development and Labour to make regulations for the purposes of the proposed Ordinance.
7. Clause 7 empowers the Director to declare any area of land or sea to be or ceases to be a port facility. It also provides for the appeal mechanism available to the owner, occupier or operator of a port facility that is affected by a decision of the Director.
8. Clause 8 empowers the Director to recognize any person who satisfies certain criteria as a recognized security organization. The Director may revoke a recognition given to a person after giving adequate prior notice and opportunity to make representation to that person. Any person aggrieved by a decision of the Director may appeal to the Administrative Appeals Board.
9. Clause 9 empowers the Director to authorize any public officer to be an authorized officer for the purpose of enforcing the proposed Ordinance.
10. Clause 10 sets out the investigation powers that an authorized officer may exercise in respect of a ship for the purpose of the proposed Ordinance.
11. Clause 11 sets out the investigation powers that an authorized officer may exercise in respect of a port facility for the purpose of the proposed Ordinance.
12. Clause 12 imposes a restriction on an authorized officer in exercising his powers under clauses 10 and 11. In this connection, it empowers a magistrate to issue a search warrant in certain circumstances.
13. Clause 13 creates offences in respect of the failure to comply with a requirement or direction made by an authorized officer, obstructing an authorized officer in exercising his powers and producing or giving false information to an authorized officer.

14. Clause 14 empowers the Director to grant exemption from any provision of the proposed Ordinance for certain ships and port facilities.
15. Clause 15 provides that a master of a ship may exercise his discretion in respect of the safety and security of the ship.
16. Clause 16 imposes a duty on the Government to avoid undue detention or delay of ships. Failure to discharge the duty is actionable as a breach of statutory duty.
17. Clause 17 provides that the Government may co-operate with any government of a party to the Convention in performing any function under the Convention or the Code.
18. Clause 18 imposes a duty on the Director to ensure public access to the English and Chinese texts of the Convention and the Code.
19. Clause 19 makes consequential amendment to the Administrative Appeals Board Ordinance (Cap. 442).

IMPLICATIONS OF THE PROPOSAL

Economic implications

As most ships and port facilities engaged on international trade already have certain existing security arrangements to guard against common crimes or illegal activities such as theft, smuggling, illegal immigrants etc., enhancing security measures according to the Bill and its subsidiary regulation will only incur a small amount of additional cost to them. Such additional cost is insignificant compared to their total operation cost, and it applies to the global shipping and port industries instead of just the local industries. Failure to implement the proposal in Hong Kong will have serious adverse effect on the business of the local industries. If Hong Kong is seen not in compliance with the international convention requirements, the majority of ships registered in Hong Kong will switch to other flags and port facilities such as container terminals will lose their competitive edge over other competitors in the region. On the other hand, the ability to implement the requirements effectively and efficiently will be an advantage over other competitors, as shippers would prefer those carriers and port facilities that can provide a secured and smooth service to move their cargoes.