

立法會
Legislative Council

LC Paper No. LS 52/03-04

**Paper for the House Committee Meeting
on 16 April 2004**

**Legal Service Division Report on
Merchant Shipping (Security of Ships and Port Facilities) Bill**

I. SUMMARY

- 1. Object of the Bill** To implement the new provisions of the International Convention for the Safety of Life at Sea, 1974 ("the Convention"), and the new International Ship and Port Facility Security Code ("the Code") to enhance security of ships and port facilities after the September 11 terrorist attacks.

- 2. Comments**

 - (a) The Bill empowers the Secretary for Economic Development and Labour ("the Secretary") to make Regulation for the purposes of the Ordinance as stated in the long title.

 - (b) It also empowers the Director of Marine to declare port facilities, recognize security organizations, inspect and control ships and port facilities, and grant exemption from any provision of the Ordinance.

- 3. Public Consultation** According to the Administration, three relevant committees comprising all major stakeholders of the local shipping and port industries have been consulted and the proposal has their support.

- 4. Consultation with LegCo Panel** The Administration briefed the Panel on Economic Services at its meeting on 16 December 2003. Members expressed concern that the mandatory measures might be too stringent for the industries but supported the Bill in principle.

- 5. Conclusion** Mandatory measures to implement the Convention and related offences are to be provided in the Regulation, drafting of which is in progress. The legal and drafting aspects of the Bill are not yet in order. A Bills Committee should be considered for scrutiny of the Bill.

II. REPORT

Object of the Bill

To implement the new provisions of the Convention, and the Code adopted by the International Maritime Organization ("IMO") to enhance security of ships and port facilities.

LegCo Brief Reference

2. MA 150/47 issued by the Economic Development and Labour Bureau dated 10 March 2004.

Date of First Reading

3. 24 March 2004.

Comments

4. After the terrorist attacks on 11 September 2001, new provisions of the Convention and the Code were adopted by the IMO to enhance maritime security. They will come into force on 1 July 2004. Hong Kong is an associate member of IMO and is obliged to give effect to the Convention and the Code through domestic legislation.

5. The Bill empowers the Secretary to make Regulation for the purposes as stated in the long title, i.e. to enhance security of ships and port facilities and for that purpose to implement the December 2002 amendments to the Convention and the Code and related provisions in the Convention; and to provide for incidental or related matters.

6. It also empowers the Director of Marine to -

- (a) declare port facilities;
- (b) recognize security organizations;
- (c) authorize officers to perform any function that is provided for in the Ordinance, the Convention and the Code;
- (d) inspect and control ships and port facilities; and
- (e) grant exemption from any provision of the Ordinance.

7. According to the LegCo Brief, mandatory measures such as requiring ships and port facilities to comply with the Convention and the Code, to act upon the security level set by the Director of Marine, to subject to control and verification are to be provided in the Regulation, drafting of which is in progress. The Regulation may provide for offences with penalty of imprisonment not exceeding 3 years and a fine not exceeding \$500,000.

8. On scrutinizing the legal and drafting aspects of the Bill, we have raised queries with the Administration on -

- (a) the validity of the Secretary's power to make Regulation before the gazettal of the principal Ordinance;
- (b) whether the different application of the Regulation is inconsistent with that of the Ordinance, and whether the Ordinance should be subject to the Regulation made thereunder;
- (c) the proposed extra-territorial effect of subsidiary legislation;
- (d) an administrative decision of the Director continuing to take effect during an appeal;
- (e) the differences between the relevant provisions of the Bill and the Convention; and
- (f) some other technical and drafting difficulties.

9. The Administration has responded to our letter on 14 April 2004 (see the correspondences in the **Annex**). Some amendments will be proposed but the text of the proposed amendments have not been provided. Further clarification will be sought.

10. A preliminary draft of the Regulation has been issued to Members on 24 March 2004. It is noted that some of the provisions in the draft Regulation are incomplete. We would therefore prefer to comment on the draft Regulation at a later stage.

Public Consultation

11. According to the LegCo Brief, the proposal of the Bill 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.

Consultation with LegCo Panel

12. The Administration briefed the Panel on Economic Services at its meeting on 16 December 2003. Members expressed concern that the proposed measures such as to conduct security assessments for developing security plans, to act upon the different security levels set by the Director of Marine might be too stringent for the port operators. Ships without an International Ship Security Certificate might be subject to refusal of entry into Hong Kong, detention in or expulsion from Hong Kong. They enquired whether the industries, in particular, port operators had been consulted as the new provisions might affect their operation. The Administration explained that they had consulted the industries. In summing up, the Chairman remarked that the Panel supported the proposal in principle.

Conclusion

13. This Bill mainly empowers the Secretary to make Regulation to implement the new provisions of the Convention and the Code in combating terrorists. Mandatory measures and related offences are to be provided in the Regulation, the drafting of which is in progress. The legal and drafting aspects of the Bill are not yet in order. A Bills Committee should be considered for scrutiny of the Bill.

Encl.

Prepared by

HO Ying-chu, Anita
Assistant Legal Adviser
Legislative Council Secretariat
14 April 2004

LS/B/13/03-04

2877 5029

Secretary for Economic Development and Labour
(Attn: Mr H B Chan, AS (Port, Maritime & Logistics)4)
Economic Development and Labour Bureau
38/F Two Exchange Square
Connaught Place
Central
Hong Kong

31 March 2004

BY FAX

Fax No. : 2523 0030
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Dear Mr Chan,

Merchant Shipping (Security of Ships and Port Facilities) Bill

I am scrutinising the legal and drafting aspects of the above Bill and would like to seek your clarification on the following-

Clause 1

2. Sub-clause (2) states that "Subject to subsections (3) and (4), this Ordinance comes into operation *on* the day on which it is published in the Gazette." Sub-clause (3) states that the Secretary for Economic Development and Labour may make regulations *before* the day on which this Ordinance is published in the Gazette. Similarly, sub-clause (4) states that a recognized security organization may perform any function *before* the day on which this Ordinance is published in the Gazette.

3. Article 76 of the Basic Law provides that a bill passed by the Legislative Council may take effect after it is signed and promulgated by the Chief Executive. The Ordinance only comes into operation upon gazettal. Would empowering the Secretary to exercise his power to make regulation and a recognized security organization to perform its function *before* then contravene that Basic Law provision?

Clause 3

4. Under the Clause,

- (a) "international voyage" is proposed to mean "a voyage from a party to the Convention to a place outside the party....." Should "a place of" be added before the word "a party" so that "international voyage" means a voyage from a place to another place and not from a party to a place? In Merchant Shipping (Safety) Ordinance (Cap. 369), "international voyage" is defined to mean a voyage from a port in one country to a port

in another country;

- (b) "port facility" is proposed to mean "an area of land or sea declared as a port facility under section 7". Does it include an area comprising both land and sea? This definition differs from the definition in the International Convention for the Safety of Life at Sea, 1974 (the Convention) in which "port facility" is defined to mean "a location ... where the ship/port interface takes place. This includes areas such as anchorages, waiting berths and approaches from seaward". Are there any special reasons for the drafting differences? Will there be any implication on Hong Kong's compliance with the Convention?
- (c) "ship" is proposed to mean "a passenger ship (including a high-speed craft which carries more than twelve passengers) that is engaged on international voyages". Does it include a passenger ship which is a non high-speed craft carrying less than twelve passengers? Does it include river trade vessels? A "ship" is further defined to include "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". Is there a misspelling in this definition? Should the word be "exploitation of" and not "exploration of"?
- (d) Key terms such as "security levels", "the Administration", "security instructions" are mentioned in the Bill but not defined. Please clarify.

Clause 4

5. A regulation shall be consistent with the provisions of an ordinance. Sub-clause (1) states that "Subject to subsections (2) and (3), this Ordinance applies to a Hong Kong ship, whether or not it is in Hong Kong; and a non-Hong Kong ship while it is in Hong Kong". Sub-clause (2)(a) then states that the regulation made under the Ordinance may apply to non-Hong Kong ships intending to enter Hong Kong. Will the different application in the regulation be inconsistent with that of the principal ordinance? Further, please provide the rationale for making the Ordinance subject to the regulation made thereunder and precedents, if any.

Clause 5

6. The word "vessels" is used in paragraph (a) but the word "ships" is used in (b). The word "ship" is defined. Should there be a definition of "vessel" as well if the word has different meaning?

Clause 6

7. Sub-clause (1) specifies that the Secretary may make regulation for the purposes as stated in the long title. What is the need for making the regulation-making power as co-extensive as the scope of the principal Ordinance?

8. Sub-clause (2)(b) states that "regulation made under this section may create offences ... and provide for penalty in the form of imprisonment not exceeding 3 years and a fine not exceeding \$500,000". In view of the limitation provided in section 28(1)(e) of the Interpretation and General Clauses Ordinance (Cap. 1) that subsidiary legislation may create offences punishable on summary conviction by a fine of not exceeding \$5,000 or by a term of imprisonment not exceeding 6 months, what is the rationale for expanding that power?

9. Sub-clause (3) states that the regulation may have effect outside Hong Kong. Please elaborate on how the regulation is to have effect outside Hong Kong and the rationale for a regulation to have extra-territorial effect.

Clause 7

10. Should the word "or" in Sub-clause (1)(a) be "and" in "directly *or* immediately affected"?

11. Sub-clause (4) states that an appeal under subsection (3) does not prevent this Ordinance from applying or continuing to apply to the port facility concerned. In other statutes, a decision of the Administration is usually suspended when an appeal is lodged. Please explain the rationale for this provision and Clause 8(5).

Clause 8

12. The Director may recognize any person as a "recognized security organization". Is the "person" restricted to and should it therefore be described as "an organization"?

13. Sub-clause (2) states that the Director may revoke a recognition if the organization does not meet the requirements prescribed. If an organization does not meet the requirements, why did the director recognize that organization in the first place?

Clause 9

14. Under Sub-clause (2), an authorized officer may perform any function that is provided for in the Convention. It does not seem to be clear from the Convention what these functions are.

Clauses 10 to 13

15. These clauses relate to the power of an authorized officer in the inspection of ships and port facilities. Are these powers similar to powers conferred under other merchant shipping ordinances?

Clause 14

16. Sub-clause (1)(a) mentions "areas of land or sea outside Hong Kong which fall within the description of section 7(1)(a)". Clause 7(1)(a) seems to refer to port facilities inside Hong Kong and not outside Hong Kong. Please clarify.

Clause 15

17. This Clause states that if a master of a ship takes or executes a decision to maintain the security of the ship, the taking or execution of that decision shall not constitute a breach of any duty owed to any person by him under any contract and he does not incur any civil liability for the taking or execution of that decision. This provision differs from that provision in the Convention. Please explain the rationale of this provision. Did any other country enact similar provision?

Clause 17

18. The Government may request any Contracting Government outside Hong Kong to perform any function that may be performed at such request under the Convention. Is there any Contracting Government that would be inside Hong Kong?

19. The above are some of my queries on the English version of the Bill. Your reply in both English and Chinese before 13th April 2004 will be appreciated.

Yours sincerely,

(Anita HO)
Assistant Legal Adviser

cc: DoJ (Attn: Mr Gilbert MO, DLD(BD&A) and Miss Amy CHAN, GC)

MA 150/47
LS/B/13/03/04

Tel : 2121 2304
Fax : 2523 0030

14 April 2004

Legislative Council Secretariat
Legal Service Division
Legislative Council Building
8 Jackson Road
Central
Hong Kong
(Attn.: Miss Anita Ho)

BY FAX (2877 5029) ONLY
(Total 5 pages)

Dear Miss Ho,

Merchant Shipping
(Security of Ships and Port Facilities) Bill

Thank you for your letter of 31 March 2004 concerning the captioned subject. Our responses to your queries are as follows:

Clause 1

2. The main purpose of sub-clause (3) and (4) is to ensure that the implementation works performed administratively prior to the enactment of the Bill, including authorizing recognized security organizations for issuing certificate to Hong Kong ships, approving port facility security plans etc., will have the legal status as if they were performed under the powers conferred by the Bill. We will propose to amend sub-clause (3) and (4) to provide for the same.

.../2

Clause 3

3. Interpretation:

- (a) “international voyage” – we propose to amend the definition to:
 [“international voyage” means a voyage from –
 (a) **a place of** a party to the Convention to a place outside the party; or
 (b) a place outside a party to the Convention to **a place of** the party;]
- (b) the definition of “port facility” will be amended to bring it in line with the Convention.
- (c) “ship” – “a passenger ship that is engaged on international voyage” does not include ships which carry less than twelve passengers, and river trade vessels. We propose to define “passenger ship” in the interpretation in accordance with the International Convention for the Safety of Life at Sea, 1974 (SOLAS) for clarity. In addition, “exploration of resources” should read “**exploitation** of resources”.
- (d) “security levels” and “security instructions” – it will be provided for in the Regulation. We may consider to include in the Bill.
- (e) “the Administration” – means the Administration within the meaning of the Convention and the Code. Hence, no definition is required.

Clause 4

4. The Ordinance is not subject to the Regulation. Clause4(1) states the general rule and allows making an exception in the Regulation. The exception is authorized by the Ordinance. This is perfectly in order.

Clause 5

5. We define “ship” in Clause 3 and have to use “vessel” for general reference. There is no need to define “vessel” unless the lack of definition renders the expression unclear, which does not appear to be the case.

Clause 6

6. Sub-clause (1) gives flexibility for implementing the requirements of the Convention and the Code. There are many precedents, such as s 27 of the Freight Containers (Safety) Ordinance (Cap 506), s 30 of the Civil Aid Service Ordinance (Cap 518), s 46 of the Chief Executive election Ordinance (Cap 569) and ss 148 and 149 of the Securities and Futures Ordinance (Cap 571).

7. Sub-clause (2)(b) – The rationale is that we are leaving most of the substantial provisions to the Regulation. If heavier penalty is not provided for, the Regulation will have little deterrent effect. As SOLAS imposes a lot of obligations on shipping companies and port facilities for the protection of lives and properties, the penalty must reflect the interest we are seeking to protect.

8. Sub-clause (3) – Specific provisions will be made in the Regulation. It is a general empowering provision. If it is too specific, we will have no flexibility for individual provisions in the Regulation. There may be new requirements introduced into SOLAS and the Code in the future.

Clause 7

9. Sub-clause (1)(a) – It should read “directly **and** immediately” instead of “directly or immediately”.

10. Sub-clause (4) – It is not uncommon that a decision made under a statutory authority takes effect notwithstanding that an appeal is made against it, particularly when safety is at stake. Examples are regulation 23(4) of the Gas Safety (Registration of Gas Supply Companies) Regulations (Cap 51, sub. leg.), section 21(3) of the Bedspace Apartment Ordinance (Cap 447) and section 132A(1) of the Banking Ordinance (Cap 155).

Clause 8

11. Sub-clause (1) – “person” as defined in Interpretation and General Clauses Ordinance (Cap 1) covers “organization”.

12. Sub-clause (2) – It is possible that an organization met the requirements when it was recognized but ceased to do so afterwards.

Clause 9

13. Sub-clause (2) – This is a general provision stating the function of an authorized officer. Specific power will be conferred by individual provisions in the Ordinance (which includes the Regulation).

Clause 10 to 13

14. The powers are similar to the statutory power conferred on law enforcement personnel by other ordinances.

Clause 14

15. Clause 7(1)(a) is a general description. It has effect in Hong Kong, but overseas facilities similar to our port facilities as defined may fall within the description. We can only rely on general description as we cannot use the expression “port facilities” for overseas facilities.

Clause 15

16. This clause intends to give effect to Regulation 8 of Chapter XI-2. We cannot simply copy the wording of SOLAS because the legal effect of “... shall not be constrained by ...” would be unclear. Paragraph (b) is proposed for fending off civil claims against the master other than those based on contracts. However, we are not aware of any similar provision enacted by other countries. We will consider to delete paragraph (b).

Clause 17

17. The words “outside Hong Kong” are added to state clearly a contracting government other than the Hong Kong Special Administration Region Government (HKSARG). If we simply adopt “any Contracting Government”, HKSARG itself is theoretically included. Since the Director of Marine, acting as the maritime administration within the HKSAR, has been cooperating with other administrations in ship surveys and other statutory functions under SOLAS from time to time, we will consider to delete the clause to minimize unnecessary confusion.

Yours sincerely,

(H B Chan)

for Secretary for Economic Development and Labour

c.c.	D of J (Law Draftsman)	(Attn.: Mr Gilbert Mo)	Fax – 2869 1302
		(Attn.: Miss Amy Chan)	Fax – 2869 1302
	D of Marine	(Attn.: Mr K L Lee)	Fax – 2542 4841