



A survey of the legal and policy framework for controlling, compensating and criminalizing ship-source pollution in Hong Kong



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ABSTRACT

Hong Kong (HK) has enacted laws providing: (1) Regimes that address pollution prevention responsibilities for parties involved in shipping activities to ensure that ships used in HK waters comply with applicable rules and standards; (2) civil damages remedy for wrongful death, personal injury or property damage caused by an environmental incident; and (3) a system of penalties to address the rare cases where the behavior of the polluter is considered intolerable and must be punished as a criminal offence. Being acquainted with this legal and policy framework is of beneficial interest for the maritime industry in HK. This article first summarizes the existing general legal framework, and later presents the results of an empirical study to determine what repercussions there could be within the HK maritime industry as a result of these laws and policies being applied in cases that result in civil liability compensation and criminal charges. The empirical research demonstrates that the laws and policies are in general sufficient and effective, but that flaws still remain in the limitation of liability scheme, as well as uncertainties as to which particular kinds of environmental violations should result in either civil or criminal enforcement. To address these concerns, it is first suggested that HK should impose greater liability in areas where prior law provided insufficient liability, as this will act as a more potent deterrent; and second, that HK should clearly delineate an appropriate role for criminal enforcement in the environmental regulatory scheme, so as to lessen concerns about over-criminalization.

1. Introduction

Thanks to its long coastline and deep natural harbors [1], Hong Kong (HK) has enjoyed a long history of human interaction with the sea, and today it is one of the busiest and most efficient international container ports in the world. For instance, during 2015 the ports of HK handled 20.1 million TEUs of containers, and provided about 340 container liner services per week, connecting to around 470 destinations worldwide [2]. However, HK's economic advancement has come at a price—it is not surprising that its coastal waters, such as the Victoria and Tolo Harbors, areas that are scheduled for even greater increase in population and number of businesses, are already dangerously polluted [3]. Hong Kongers have also suffered greatly from sulfur dioxide-related deaths, caused by ship emissions in the Pearl River Delta, waters that are shared with Guangdong Province [4].

It makes sense, therefore, that in order to secure HK's growth and sustainability as an international city of world prominence, the government is obliged to ensure, through proper conservation and management measures, that both environmental well-being and human health are not imperiled by HK's rapid economic and industrial development. Indeed, in order to combat the hazards resulting from

ship-source maritime pollution, of utmost importance is the establishment of specific laws defining and organizing the environmental protection regime, such as the series of civil and criminal environmental liabilities based on international laws and regulations. However, environmental liability is a relatively new concept in HK, and it is safe to say that as recently as the 1970s there was little awareness of environmental issues [5] on the part of the HK government, or of society in general. In other words, with regard to environmental protection, HK is still very much a developing region.

Against this background, this paper aims to solicit the views of interested parties through a questionnaire survey that explores the functional effectiveness and adequacy of HK's domestic legislative regime, which ranges from public to private law in terms of their respective positions within the continuum of control, civil remedial measures and criminal sanctions according to their particular characteristics. This is with a view to instigating law and policy reform in HK in the field of ship-source pollution law. To clarify, the public segments of the laws on ship-source marine pollution embrace the regulatory command-and-control rules adopted by HK that implement the standards and conventions adopted by the International Maritime Organization (IMO), together with the provisions of offences and

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Table 1
Hong Kong Laws Implementing IMO Conventions.

No.	International convention	Legislation implemented in Hong Kong
1.	MARPOL 73/78	See below
1A.	MARPOL Annex I: Regulations for the Prevention of Pollution by Oil	Merchant Shipping (Prevention of Oil Pollution) Regulations (Cap. 413 A) The Shipping and Port Control Ordinance (Cap. 313)
1B.	MARPOL Annex II: Regulations for the Prevention of Pollution by Noxious Liquid Substances	Merchant Shipping (Control of Pollution by Noxious Liquid Substances in Bulk) Regulations (Cap. 413 B)
1C.	MARPOL Annex III: Regulations for the Prevention of Pollution by Harmful Substances in Packaged Form	Merchant Shipping (Safety) (Dangerous Goods and Marine Pollutants) Regulation (Cap. 413 H) Dangerous Goods (Shipping) Regulations (Cap. 295 C)
1D.	MARPOL Annex IV: Regulations for the Prevention of Pollution by Sewage from Ships	Merchant Shipping (Prevention of Pollution by Sewage) Regulation (Cap. 413 K)
1E.	MARPOL Annex V: Regulations for the Prevention of Pollution by Garbage from Ships	Merchant Shipping (Prevention of Pollution by Garbage) Regulation (Cap. 413 J)
1F.	MARPOL Annex VI: Regulations for the Prevention of Air Pollution from Ships	Merchant Shipping (Prevention of Air Pollution) Regulation (Cap. 413 M) Shipping and Port Control Ordinance (Cap. 313) Merchant Shipping (Local Vessels) Ordinance (Cap. 548) Air Pollution Control (Marine Light Diesel) Regulation (Cap. 311Y) Dumping at Sea Ordinance (Cap. 466)
2.	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972	Waste Disposal Ordinance (Cap. 354)
3.	Basel Convention on the Control of Trans-boundary Movements of Wastes and their Disposal, 1989	

corresponding sanctions under the penal law. However, the compensatory legal schemes are classed as private law.

2. The status quo of the legal and policy framework for combating ship-source pollution

There is a general perception that HK is quite active in enacting marine pollution laws in respond to the persistent problem of ship-source pollution [6]. Within the existing legal framework, the subject of ship-source pollution in HK is perceived in terms of preventive and remedial measures adopted pursuant to prescriptive and mandatory requirements embodied in international convention instruments [7]. Preventive and control measures are put into place to eliminate or reduce the chances of pollution occurring (see Table 1); while remedial measures are pursued when preventive measures fail and pollution takes place (see Table 2).

The above two Tables reflect the enterprising approach taken by HK to incorporate the international dimensions of ship-source pollution issues, so as to comply with internationally uniform regulations and thus maintain its position as one of the world's leading maritime centers. In addition, to strengthen its measures for combating ship-source pollution, the Marine Department (MD)¹ has also introduced

¹ The Marine Department of the Hong Kong Government is responsible for maintaining safety and environmental protection of the harbor and of both HK registered and foreign ships in HK, as well as monitoring shipping traffic in HK waters, and search and rescue operations for large waters of the South China Sea. It also conducts investigations

Table 2
Hong Kong Laws implementing ship-source pollution liability conventions.

1.	1992 CLC and the 1992 Fund Convention	Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap. 414) Amended in 2003 to reflect changes in the CLC and Fund Convention
2.	Convention on Limitation of Liability for Maritime Claims 1976 (the Limitation Convention) and its 1996 Protocol	Merchant Shipping (Limitation of Shipowners' Liability) Ordinance (Cap. 434) (the Limitation Ordinance) Amended in 2005 to implement the 1996 Protocol to 1976 LLMC
3.	Bunker Convention, 2001	Bunker Oil Pollution (Liability and Compensation) Ordinance (Cap. 605)

additional measures, such as regulating the smoke emission from vessels.² As shown, HK's civil liability regime is a fairly comprehensive system of liability which resembles the CLC 1992 and the Fund Convention 92. However, unlike the international civil liability regime, the legal framework for criminal sanctions in the context of ship-source pollution is instead left to the direction of individual states [8].

To summarize, it appears at first glance that HK has adequate laws in place to combat the threat of marine pollution from ships. However, liability for environmental harm under HK law has been a matter of controversy for some time now. This prompts the question as to whether or not the existing civil and criminal sanctions for ship-source pollution are in fact sufficiently stringent so as to ensure the highest level possible of marine environmental protection in HK. The need to evaluate both civil and criminal liabilities for ship-source pollution in HK thus becomes apparent.

3. Research methodology

The empirical data presented in the paper were collected through a questionnaire survey of 113 selected shipping and shipping-related companies of various sizes and disciplines. There were three main categories of participants: 1) Shipowners, ship managers and ship operators (n=90; Group (1), drawn from the membership directory of the Hong Kong Shipowners Association³; (2) marine insurers, especially P & I Clubs (n=20; Group 2); (3) other institutions for mariners' welfare, mainly including the seamen's union (n=3; Group 3). It was assumed that each group would represent different interests in a ship-source pollution event: Shipowners (including ship managers and operators) would seek to save on costs, and would be concerned about the safety and unimpeded movement of their vessels; insurers would be concerned over their ultimate financial responsibilities; and the seamen's unions would be interested in the welfare of their members among the crews. It was thus expected that these participants would

(footnote continued)

into marine accidents. The website for the Marine Department is < <http://www.mardep.gov.hk/en/home.html> > (accessed on July 7, 2016).

² The Government has not only implemented the MARPOL Annex VI requirements but it also upgraded the quality of local marine diesel in April 2014 and by legislation in July 2015 mandated that ocean going vessels switch to cleaner fuel while berthing. The Air Pollution Control (Marine Light Diesel) Regulation has introduced regulatory control on the quality of marine light diesel (MLD), with a view to reducing emissions from local vessels. Following the approval of the Legislative Council, the Regulation took effect on April 1, 2014. The Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation mandated ocean going vessels (OGVs) to use clean fuels while berthing in Hong Kong, in order to reduce their emissions and thus improve air quality. Following the approval of the Legislative Council, the Regulation took effect on July 1, 2015. See also MARINE DEPARTMENT NOTICE NO. 56 OF 2015 (Statutory Requirements) Switch to Clean Fuel While At Berth for Ocean-Going Vessels, < <http://www.mardep.gov.hk/en/notices/pdf/mdn15056.pdf> > (accessed on 1 August 2016).

³ The Hong Kong Shipowners Association, < http://www.hksoa.org/members_directory/shipmanagers.php > (accessed on May 20, 2016).

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