



中華人民共和國香港特別行政區  
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : THB(T)CR 9/1/16/581/99  
本函檔號 OUR REF : LS/B/7/17-18  
電話 TELEPHONE : 3919 3501

傳真 FAX : 2901 1297  
電郵 E-MAIL : ttso@legco.gov.hk

By Fax (2136 8016)

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Mr Andy LAM  
Prin AS for Transp & Housing(Transp)3  
Transport and Housing Bureau  
Transport Branch  
Division 1  
Land Transport Planning Section  
22/F, East Wing, Central Government Offices,  
2 Tim Mei Avenue, Tamar, Hong Kong

Dear Mr LAM,

**Guangzhou-Shenzhen-Hong Kong Express Rail Link  
(Co-location) Bill**

We are scrutinizing the legal and drafting aspects of the captioned Bill and shall be grateful for your clarifications on the following matters:

Constitutional issues

(1) We note the Preamble of the Bill which sets out the background to the Bill. Please explain, in the context of the Basic Law ("BL"), the legal status and effect of:

- (a) the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing the Co-location Arrangement (which was signed on 18 November 2017) ("Co-operation Arrangement") and
- (b) the Decision of the Standing Committee of the National People's Congress on Approving the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the

Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement (which was adopted on 27 December 2017).

(2) Clause 3(1) of the Bill proposes to define "reserved matter" and "non-reserved matter" with reference to Articles 3, 4 and 7 of the Co-operation Arrangement, which are set out in Schedule 1 to the Bill. In the light of BL 19, please clarify whether the courts of the Hong Kong Special Administrative Region ("HKSAR") would have jurisdiction to adjudicate whether a matter falls within the definition of "reserved matter" or "non-reserved matter" proposed under clause 3(1) which is based on Articles 3, 4 and 7 of the Co-operation Arrangement. Please also clarify whether the laws of Hong Kong or the laws of the Mainland would be applied in construing Articles 3, 4 and 7 of the Co-operation Arrangement.

(3) Under clause 6(1) of the Bill, the West Kowloon Station Mainland Port Area ("Mainland Port Area") would be regarded as an area lying outside Hong Kong but lying within the Mainland, except for reserved matters as set out in clause 3(1), for the purposes of (a) the application of the laws of the Mainland, and of the laws of Hong Kong, in the Mainland Port Area, and (b) the delineation of jurisdiction (including jurisdiction of the courts) over the Mainland Port Area. The effect is that the laws of the Mainland would apply to non-reserved matters (defined under clause 3(1)(b)) in the Mainland Port Area over which the Mainland would exercise jurisdiction. Please clarify the legal and constitutional basis (please cite specific article(s) of BL, if applicable) for regarding the Mainland Port Area (except for reserved matters) as being situated within the Mainland, to which the laws of the Mainland would apply.

(4) We note that the area proposed to be declared and delineated as the Mainland Port Area under clause 4 of the Bill is geographically situated within the HKSAR. We also note that clause 6(2) of the Bill proposes that the boundary of the administrative division of the HKSAR would not be affected by clause 6(1). However, the effect of clause 3(1)(b) and clause 6(1) is that the courts of the HKSAR would have no jurisdiction over non-reserved matters in the Mainland Port Area (which is within the boundary of the HKSAR) and that the laws of the Mainland would apply in the Mainland Port Area. In the light of the principles applicable to the interpretation of the BL as laid down by the Court of Final Appeal in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, please clarify how the above proposed provisions would be construed as those which could be enacted by the Legislative Council in accordance with the provisions of BL (such as BL 18, BL 19 and BL 22) pursuant to BL 73(1).

(5) Please explain whether the Administration has entered or will enter into any land lease agreement(s) with the Mainland in relation to the area proposed to be declared and delineated as the Mainland Port Area. Is the Government of Guangdong Province a party to such agreement(s)? Is it considered as "legal persons or organizations" under BL 7? Please also explain whether and how the terms of such agreement(s) would affect the interpretation and/or operation of the provisions of the Bill. In particular, please explain whether any land use right acquired or to be acquired by the Mainland is subject to an expiry date and if so, whether the provisions of the Bill would expire as and when the land use right expires.

#### Legal and drafting issues relating to the Bill

##### *Laws of the Mainland*

(6) We note that "the laws of the Mainland" is not defined in the Bill. Please clarify, in that connection, the proposed scope of the laws of the Mainland to be applicable in the Mainland Port Area. Please also explain why Mainland laws other than those relating to customs, immigration and quarantine procedures would need to be applied in the Mainland Port Area.

##### *Declaration of the West Kowloon Station Mainland Port Area – clause 4 and Schedule 2*

(7) Clause 4 of the Bill seeks to provide for the declaration of the Mainland Port Area. Regarding Plan No. 1 in Schedule 2 to the Bill, it is noted that there are areas coloured blue and marked "HONG KONG CLEARANCE AREA AND PASSENGER CORRIDOR". However there are no notes or legend to further explain such areas. Please clarify the nature and effect of those areas which are coloured blue on Plan No. 1 in Schedule 2 to the Bill.

(8) In Annex 1 to Plan No. 1 in Schedule 2 to the Bill, it is marked that there is an escalator connecting B4 level and B2 level on Section B-B and there appears to be another escalator connecting B3 level and B4 level (without any express marking). In Note 1 on this Annex, it is stated that "escalators/staircase connecting B4 level and B2 level or connecting B3 level and B2 level (as applicable)" (emphasis added). Please clarify whether there is in fact an escalator connecting B3 level and B4 level (as shown in Section B-B) and/or an escalator connecting B3 level and B2 level (as stated in Note 1). Please also clarify whether there are any staircase(s) connecting B2, B3 and/or B4 levels within the Mainland Port Area.

(9) Please clarify whether any area within the West Kowloon Station would be a closed area for the purposes of the Public Order Ordinance (Cap. 245) and any other enactment that applies to a closed area. In section 4 of the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591), it is stated that for the purposes of the Public Order Ordinance (Cap. 245) and any other enactment that applies to a closed area (as defined in section 2(1) of that Ordinance), the Hong Kong Port Area is a closed area so defined. If any area within the West Kowloon Station would be treated as a closed area, please clarify how this would be implemented and consider whether any provision similar to section 4 of Cap. 591 would be necessary.

*Savings provision – clause 7 and Schedules 4 and 5*

(10) Under clause 7(1) of the Bill, it is proposed that clause 6(1) would not affect, for instance, a right acquired or accrued because of an act that was done before the commencement date of the enacted Ordinance in the Mainland Port Area. Please clarify whether the intended effect is that under clause 7(1)(a), where a right is acquired or accrued in connection with the Mainland Port Area prior to the commencement date, for the purpose of determining the geographical scope for the pre-existing right, the Mainland Port Area would be regarded as an area lying within Hong Kong, regardless of whether the right is in relation to a reserved or a non-reserved matter.

(11) Regarding clause 7(1)(b), it is noted that the terms "investigation", "legal proceedings" and "remedy" are not defined. Please clarify:

- (a) whether "investigation" is intended to refer to investigations commenced and conducted by law enforcement agencies of the HKSAR, such as the Hong Kong Police Force and the Independent Commission Against Corruption, and whether "investigation" is also intended to cover investigations commenced and conducted by international or cross-jurisdictional law enforcement agencies;
- (b) whether "legal proceedings" is intended to refer to court proceedings in the HKSAR, or whether it is intended to also cover court proceedings outside the HKSAR, and other proceedings such as arbitral proceedings, disciplinary and regulatory proceedings under an enactment; and



- (c) whether "remedy" is intended to refer to, for example civil remedies awarded by the courts of the HKSAR, or whether it is intended to also cover other remedies granted by other bodies with adjudicative power.

(12) It appears that the effect of clause 7(3)(a) and (c) is that notwithstanding the disapplication of clause 6(1) to pre-existing rights and obligations by virtue of clause 7(1), in relation to certain pre-existing rights and obligations specified in the proposed Schedules 4 and 5, there would appear to be a reduction or an abridgment of the territorial limit of such rights and obligations, given that such rights and obligations would no longer take effect in the Mainland Port Area. The arrangement appears to be the opposite of sections 9(1) and 10(1) of Cap. 591, under which the territorial limit of the specified pre-existing rights and obligations is *extended* to include the Hong Kong Port Area, such that those rights and obligations would take effect in the Shenzhen Bay Port Hong Kong Port Area as if it is an area lying within Hong Kong. In view of the above, please explain the rationale for the proposed arrangement in clause 7(3)(a) and (c) of the Bill. Please also explain whether the orders specified in the proposed Schedules 4 and 5 adequately cover the types of orders which may be affected by the proposed declaration of the Mainland Port Area.

(13) Clause 7(3)(b) and (d) proposes that for the purpose of determining the geographical scope for the specified pre-existing rights and obligations relating to non-reserved matters, the Mainland Port Area would be regarded as an area lying outside Hong Kong but lying within the Mainland. Please clarify whether clause 7(3)(b) and (d) is subject to clause 6(1) such that the Mainland Port Area would be regarded as an area lying within Hong Kong in respect of rights or obligations which may be exercised or discharged in relation to reserved matters.

(14) In the case of a dispute over whether a pre-existing right or obligation falls within clause 7(3)(b) or (d), or whether such right or obligation may be exercised or discharged in relation to a reserved matter such that clause 7(3)(b) or (d) may have no application, please clarify whether the courts of the HKSAR would have jurisdiction to adjudicate the matter, in particular, whether the courts of the HKSAR would have jurisdiction to adjudicate on issues involving the interpretation of Articles 3, 4 and 7 of the Co-operation Arrangement.

(15) In respect of rights and obligations that have arisen by virtue of pre-existing contractual or other private arrangements (i.e. contracts or other

arrangements made before the commencement date of the enacted Ordinance), please clarify whether parties would be at liberty to come to their own agreement as to the geographical scope for the rights and obligations arising from such contracts or other arrangements.

(16) It is noted that Part 3 of the Bill does not seek to specify whether clause 6(1) would affect future rights and obligations. In this regard, we note that section 11 of Cap. 591 limits the operation of section 5(2), which provides that the Hong Kong Port Area is regarded as an area lying within Hong Kong for the purpose of applying the laws of Hong Kong in the Hong Kong Port Area, in respect of future rights and obligations. In the case where a future right permits a person to do an act in the Mainland and such permission does not provide whether it encompasses the Mainland Port Area, please clarify whether clause 6(1) of the Bill is intended to operate to extend the geographical scope for the right to include the Mainland Port Area where the right concerned relates to a non-reserved matter. Please explain whether the Administration would consider including in the Bill a provision similar to section 11 of Cap. 591.

*Interpretation of future documents – clause 8*

(17) It is proposed that clause 8 does not apply to a future document that is an enactment, a statutory authority or a Court order. Please explain the rationale for this arrangement. Please also clarify whether in relation to any reference to Hong Kong or part of Hong Kong in a future enactment, statutory authority or Court order, the Mainland Port Area would be regarded as an area lying within Hong Kong irrespective of whether a reserved or non-reserved matter is involved.

(18) In relation to clause 8(2) of the Bill, where a future document refers to Hong Kong or part of Hong Kong to describe the geographical scope for a right or obligation and dispute arises over whether such right or obligation is in relation to a reserved or a non-reserved matter, please clarify whether the courts of the HKSAR would have jurisdiction to adjudicate whether a matter falls within the definition of "reserved matter" or "non-reserved matter" provided in Articles 3, 4 and 7 of the Co-operation Arrangement.

(19) In respect of clause 8(3) of the Bill, please clarify whether in proposing to provide parties with an option to displace the proposed default interpretation rule under clause 8(2), it is intended that such parties would be at liberty, in respect of future documents even for non-reserved matters, to provide for exceptions to override the delineation of the respective jurisdictions of the HKSAR and the Mainland under Articles 3, 4 and 7 of the Co-operation Arrangement.

*Schedule 1*

(20) It is noted that there is a note at the end of Schedule 1 to the Bill. Please clarify whether the note forms part of the Co-operation Arrangement. Please also clarify the status of this note and whether it has legislative effect.

It is appreciated that your reply in both English and Chinese could reach us as soon as practicable, preferably before the second meeting of the Bills Committee.

Yours sincerely,



(Timothy TSO)  
Senior Assistant Legal Adviser

c.c. DoJ (Attn: Mr Lawrence PENG, Sr Asst Law Draftsman  
(By Fax: 3918 4613)  
Mr Henry CHAN, Sr Govt Counsel (By Fax: 2536 8758))  
Legal Adviser  
Assistant Legal Adviser 1  
Clerk to the Bills Committee