

政府總部
運輸及房屋局
運輸科

香港添馬添美道 2 號
政府總部東翼



Transport and
Housing Bureau
Government Secretariat
Transport Branch

East Wing, Central Government Offices,
2 Tim Mei Avenue,
Tamar, Hong Kong

電話 Tel: 3509 8177

傳真 Fax: 2136 8016

22 February 2018

Secretary General
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
(Attn: Mr Timothy TSO)

Dear Mr Tso,

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

We refer to your letter dated 9 February 2018. Our reply to the issues raised in relation to the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Bill (“Bill”) is as follows.

- (1) Legal status and effect of 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 (“XRL”) for Implementing Co-location Arrangement (“Co-operation Arrangement”) and the Decision of the Standing Committee of the National People’s Congress (“NPCSC”)**

The Co-operation Arrangement is in the nature of an agreement entered into by the Hong Kong Special Administrative Region (“HKSAR”) and the Mainland. Its conclusion is an act of the executive. The Co-operation Arrangement could only be implemented in Hong Kong after the passing and coming into effect of the Bill.

The NPCSC’s Decision adopted on 27 December 2017 was a decision made by the NPCSC in accordance with the laws of the People’s Republic of China (including the Constitution of the People’s Republic of China). The Decision is a law under the Mainland legal system.

(2) Jurisdiction of the courts of the HKSAR in adjudicating whether a matter falls within the definition of reserved matter or non-reserved matter, and the applicable laws for construing Articles 3, 4 and 7 of the Co-operation Arrangement

The Bill, if enacted, would form part of the laws of Hong Kong. If a person commences proceedings in the courts of the HKSAR on issues relating to the provisions of the Bill, our courts would have the power to decide if they have jurisdiction on that matter. It means that the courts should have jurisdiction to adjudicate on any provisions of the Bill, including Clause 3 on reserved matters or non-reserved matters and Articles 3, 4 and 7 of the Co-operation Arrangement which have been reproduced in Schedule 1 to the Bill.

(3) Legal and constitutional basis for regarding the Mainland Port Area (except for reserved matters) as lying within the Mainland for the purposes of the application of the laws of the Mainland, and of the laws of Hong Kong, in the Mainland Port Area and the delineation of jurisdiction (including jurisdiction of the courts) over the Mainland Port Area

Under the principle of “one country, two systems”, the HKSAR enjoys a high degree of autonomy. Pursuant to the Basic Law, the

HKSAR has its own immigration controls system. The Government of the HKSAR can also formulate appropriate policies and environment for encouraging investments as well as promoting the economy and people's livelihood etc. To implement the co-location arrangement, the HKSAR must negotiate and co-ordinate with relevant Mainland authorities, and sign the Co-operation Arrangement with the People's Government of Guangdong Province.

According to Clause 6 of the Bill and Article 4 of the Co-operation Arrangement, except for reserved matters, the Mainland Port Area is to be regarded as an area lying outside Hong Kong but lying within the Mainland for the purposes of the application of the laws of the Mainland, and of the laws of Hong Kong, in the Mainland Port Area; and the delineation of jurisdiction (including jurisdiction of the courts) over the Mainland Port Area.

The deeming provision in Article 4 of the Co-operation Arrangement is an agreement entered into by the two parties, i.e. the HKSAR and the Mainland, to cater for the operational needs arising from the implementation of the co-location arrangement.

In fact, the Legislative Council ("LegCo") enacted a similar deeming provision in the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591)¹.

(4) Whether Clauses 3(1)(b), 4, 6(1) and 6(2) of the Bill would violate the provisions of the Basic Law (such as Articles 18, 19 and 22 of the Basic Law)

Under the principle of "one country, two systems", the HKSAR enjoys a high degree of autonomy. Pursuant to the Basic Law, the

¹ Section 5(2) of the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591) provides that "For the purpose of applying the laws of Hong Kong in the Hong Kong Port Area, the Hong Kong Port Area is regarded as an area lying within Hong Kong."

HKSAR has its own immigration controls system. The Government of the HKSAR can also formulate appropriate policies and environment for encouraging investments as well as promoting the economy and people's livelihood etc. To implement the co-location arrangement, the HKSAR must negotiate and co-ordinate with relevant Mainland authorities, and sign the Co-operation Arrangement with the People's Government of Guangdong Province. After the approval and coming into force of the Co-operation Arrangement, the HKSAR still needs to enact local legislation to ensure smooth implementation of the Co-operation Arrangement under our law.

Article 22(2) of the Basic Law (hereinafter denoted in the format of "BL 22(2)") stipulates that "if there is a need for departments of the Central Government, or for provinces, autonomous regions, or municipalities directly under the Central Government to set up offices in the Hong Kong Special Administrative Region, they must obtain the consent of the government of the Region and the approval of the Central People's Government." The establishment of the Mainland Port Area and the implementation of Mainland port management thereat are conducted with the consent of the Government of the HKSAR and the approval of the Central People's Government, thus BL 22(2) would not be violated.

The intent of BL 18 is to restrict the general application of national laws to all persons within the HKSAR, in order not to undermine the high degree of autonomy and the legal system of the HKSAR. This is totally different from the application of Mainland laws in the Mainland Port Area.

1. The Mainland Port Area is established for a specific purpose (of conducting Mainland clearance procedures on high-speed rail passengers) pursuant to the Co-operation Arrangement and the NPCSC's Decision (the area of application is not the entire HKSAR).

2. Mainland laws are mainly applicable to high-speed rail passengers in the Mainland Port Area (not all persons in Hong Kong).
3. They are implemented by Mainland authorities (they are not implemented by Hong Kong authorities in the entire Hong Kong).
4. The entire arrangement does not undermine the immigration system of Hong Kong.
5. The main point is that citizens could make their own choices whether or not to use the high-speed rail and enter the Mainland Port Area. The arrangement does not force the application of Mainland laws on any person.
6. The situation of passengers entering the Mainland Port Area is as if they have chosen to enter another jurisdiction (e.g. Luohu and Futian Ports etc.) and subject themselves to the applicable laws therein.

Pursuant to the deeming provision in Article 4 of the Co-operation Arrangement, for the purposes of the application of laws and the delineation of the jurisdiction of the courts in the Mainland Port Area, the Mainland Port Area is to be regarded as lying within the Mainland. In these circumstances, the Mainland courts would exercise jurisdiction over the Mainland Port Area.

BL 19(2) stipulates that “the courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.” The legal system and principles previously in force in

Hong Kong include the restrictions imposed on court's jurisdiction by legislations. Further, even though BL 82 confers the power of final adjudication on the Court of Final Appeal ("CFA"), the CFA has agreed in various cases that their power of final adjudication could also be subject to reasonable restrictions.

(5) Matters in relation to the right to use the Mainland Port Area

The HKSAR Government will discuss with the Mainland for acquiring the right to use the Mainland Port Area as well as the duration and fee involved (including the arrangement of the signatories), and make an announcement at a suitable juncture. As for whether the People's Government of Guangdong Province is considered as "legal persons or organizations" under BL 7, it should be noted that BL 7 does not only cover "legal persons or organizations" but also "individuals".

The Basic Law does not contain any interpretation provision on the meaning of the term "individuals, legal persons or organizations". In such case, extrinsic materials such as the drafting materials of the Basic Law as well as the established usage of similar term under Hong Kong laws may throw light on the interpretation of the term.

Section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) defines the term "person" as follows –

"person (人、人士、個人、人物、人選) includes any public body and any body of persons, corporate or unincorporate ..."

In view of the above discussion, it would be appropriate to apply a broader interpretation to the term "individuals, legal persons or organizations" in BL 7. The term would be able to cover the People's Government of Guangdong Province.

In any case, the details relating to the Mainland's acquisition of the right to use the Mainland Port Area have no direct relationship to the application of the laws in, and the delineation of jurisdiction over, the Mainland Port Area, and thus will not affect the local legislative process of the Bill.

(6) Laws of the Mainland applicable in the Mainland Port Area, and why Mainland laws other than those relating to customs, immigration and quarantine procedures would need to be applied to the Mainland Port Area

Pursuant to Article 4 of the Co-operation Arrangement, with effect from the date of commissioning of the Mainland Port Area, except for the matters provided for in Article 3 and Article 7 of the Co-operation Arrangement, the Mainland will exercise jurisdiction (including jurisdiction of the courts) over the Mainland Port Area in accordance with the Co-operation Arrangement and the laws of the Mainland. The relevant arrangement has been reflected in the interpretation of reserved matter and non-reserved matter in Clause 3 of the Bill.

As stated in the reply from the HKSAR Government to the LegCo Panel on Transport, Panel on Security, and Panel on Administration of Justice and Legal Services dated 21 September 2017, the co-location arrangement involves complicated constitutional, legal and operational issues. The HKSAR Government and the relevant Mainland authorities have thus conducted thorough studies and discussions in great depth. During the process, the HKSAR Government had once explored the idea of allowing Mainland officials to enforce only those laws relevant to clearance procedures in the Mainland Port Area in the West Kowloon Station ("WKS"). However, studies revealed that such idea is infeasible and cannot be adopted for the implementation of the co-location arrangement in the WKS.

First of all, as stated in the discussion paper submitted by the

HKSAR Government to the LegCo on 25 July 2017, it is impossible to define in practice what Mainland laws are essential for enforcing the Mainland clearance procedures. This is because clearance procedures concern various matters, and numerous Mainland laws and regulations may be involved.

Secondly, under this idea, Hong Kong laws will not be excluded from the Mainland Port Area and will therefore still be applicable. As a result, there will be problems of overlapping in laws and jurisdictions, giving rise to legal disputes and proceedings, especially legal challenges against immigration and repatriation matters with cases involving offenders of serious offences or terrorists in particular. This will thereby increase the security risks in Hong Kong. Based on the above reasons, the HKSAR Government considers that allowing Mainland officials to enforce only the laws allegedly essential for enforcing the Mainland clearance procedures in the Mainland Port Area in the WKS will result in confusion in jurisdiction and is practically infeasible.

(7) Nature and effect of the Hong Kong Clearance Area and Passenger Corridor being coloured in blue on Plan No. 1 in Schedule 2 to the Bill

The Hong Kong Clearance Area and Passenger Corridor is coloured in blue on Plan No. 1 in Schedule 2 to the Bill in order to demonstrate that the position of the Hong Kong Port Area (including the Hong Kong Clearance Area and Passenger Corridor) of the WKS is adjacent to the Mainland Port Area. This is meant for illustration purpose, and will not affect the effect of any provision of or Schedule to the Bill.

Departing passengers will immediately enter the Mainland Port Area upon leaving the Hong Kong Port Area on B3 level of the WKS, whereas arriving passengers will immediately enter the Hong Kong Port Area upon leaving the Mainland Port Area on B2 level of the WKS. In

other words, there will be no “grey area” with overlapping jurisdictions of Hong Kong and the Mainland between the Hong Kong Port Area and the Mainland Port Area of the WKS.

(8) Escalators and staircases in the WKS

Upon commissioning of the Hong Kong Section of the XRL, there will be a series of escalators within the Mainland Port Area. These include –

- (a) escalators for departing passengers’ use, which connect B3 level and B4 level. A part of such an escalator is shown in Section B-B of Annex 1 to Plan No. 1 in Schedule 2 to the Bill;
- (b) escalators for arriving passengers’ use, which connect B4 level and B2 level, as well as escalators connecting B4 level and B2 level with intermediate landings at B3 level. Such landings are fully enclosed under normal circumstances, and form part of the escape route during emergencies; and
- (c) escalators for staff use, which connect B2 level and B3 level, to which passengers have no access.

There will also be staircases within the Mainland Port Area. These include –

- (a) a staircase for staff use, which connects B2 level and B3 level, to which passengers have no access;
- (b) a staircase for departing passengers’ use, which connects the waiting hall for departing passenger on B3 level and the business lounge on B2 level. As the business lounge is fully enclosed, passengers therein cannot access other areas of B2 level under normal circumstances; and

- (c) staircases for departing passengers' use, which connect B3 level and B4 level at the short-haul platforms.

Whilst there are also staircases designated as Means of Access and Means of Escape connecting B2, B3 and B4 levels within the Mainland Port Area, they can only be accessed during emergencies. As such, there are no staircases connecting B2, B3 and B4 levels for passengers' daily use.

(9) WKS and administration as a closed area

According to Article 1(2) of the Co-operation Arrangement, the WKS Port comprises the Hong Kong Port Area and the Mainland Port Area. The Hong Kong Port Area is to be established by the HKSAR and be subject to its jurisdiction in accordance with the laws of the HKSAR and managed as a “cross-boundary restricted area”.

Different from the Shenzhen Bay Port, the WKS is not purely a control point, but also a station to be managed by the operator of the Hong Kong Section of the XRL – a situation akin to that of the Intercity Through Train service in Hung Hom Station. The Hong Kong Port Area will be declared and managed as a “cross-boundary restricted area” under the Mass Transit Railway By-laws (Cap. 556B). This arrangement is the same as that adopted for the Intercity Through Train service in Hung Hom Station.

Under the Mass Transit Railway By-laws, no person shall enter or remain in a “cross-boundary restricted area” except for specified train passengers and persons with valid permits etc. Hence, management as a “cross-boundary restricted area” by demarcation of “cross-boundary restricted area” under the Mass Transit Railway By-laws is no different from administration as a closed area by demarcation of closed area under the Public Order Ordinance, in that both can achieve the purpose of

effectively prohibiting entry by non-cross-boundary passengers and unauthorised persons, and are conducive to maintaining the law and order in the restricted area. A merit for management in a railway station as a “cross-boundary restricted area” under the Mass Transit Railway By-laws is its convenience to the daily operation management of the railway operator. For example, it is more convenient for the railway operator to issue permits direct to eligible persons (including railway crew and personnel at the railway stations) for entry into the “cross-boundary restricted area” for work, obviating the need to apply to the Hong Kong Police Force for such permits each and every time.

(10) Intended effect of Clause 7(1)(a) of the Bill

Clause 7(1)(a) provides that Clause 6(1) does not affect a right acquired or accrued, or an obligation incurred, because of an act that was done, or an omission that was made, before the commencement date in the area to be declared as the West Kowloon Station Mainland Port Area under Clause 4 (“designated area”). Clause 6(1) does not apply to a reserved matter.

The intended effect is that, on and after the commencement date, even if a right or an obligation falling within Clause 7(1)(a) is in relation to a non-reserved matter, the Mainland Port Area continues to be an area lying within Hong Kong for the purposes of the application of laws in that Area and the delineation of jurisdiction over that Area. If the laws of Hong Kong apply to, and Hong Kong exercises jurisdiction over, the right or obligation before the commencement date, these will continue on and after the commencement date.

On the other hand, since Clause 6(1) does not apply to a reserved matter, a right or obligation in relation to a reserved matter is not affected by Clause 6(1) in any event, whether or not it falls within Clause 7(1)(a).

(11) Construction of “investigation”, “legal proceedings” and “remedy” in Clause 7(1)(b) of the Bill

Clause 7(1)(a) preserves the rights and obligations which arose from acts or omissions before the commencement date in the designated area. On this basis, such rights and obligations may still be enforced after the commencement date. Clauses 7(1)(b) and (c) refer to some specific instances of enforcement of such rights and obligations for avoidance of arguments. However, even if a particular manner of enforcement of a right or obligation is not specifically mentioned in Clauses 7(1)(b) and (c), this in itself should not affect the enforceability of such right or obligation which is already preserved by Clause 7(1)(a).

The term “investigation” refers only to investigation which may be lawfully conducted under the laws of Hong Kong. Lawful investigation by the Police and ICAC are already covered. Whether or not investigation by any other person or organisation may be conducted depends on whether it may be lawfully conducted under the laws of Hong Kong.

The term “legal proceedings” is wide enough to cover both criminal and civil proceedings. There is no policy intention to cover legal proceedings outside the HKSAR. For the reasons stated above, a right or obligation preserved by Clause 7(1)(a) is still enforceable even if the proceedings for enforcement do not fall within the term “legal proceedings”.

The term “remedy” refers to the means available at law or equity by which a right is enforced or the infringement of a right is prevented, redressed, or compensated. It covers remedies whether granted by a court or any other body with such power.

(12) Rationale for the proposed arrangement in Clauses 7(3)(a) and (c) of the Bill, and whether Schedules 4 and 5 adequately cover the types of orders

First of all, Clause 7(3)(a) covers a pre-existing right or pre-existing obligation that has arisen because of an order specified in Schedule 4 and Clause 7(3)(c) covers a right conferred, or an obligation imposed, by a pre-existing Court order specified in Schedule 5, regardless of whether the right or obligation relates to a matter falling within Clause 7(1).

The orders specified in Schedule 4, and the Court orders specified in Schedule 5, involve persons or things crossing the boundary. These orders relate to immigration, import and export controls, and quarantine of Hong Kong. Before the commencement of the Bill, such orders would have been issued on the basis that the Mainland Port Area was lying within Hong Kong. However, after the commencement of the Bill, the Mainland Port Area would be regarded as lying outside Hong Kong for the purposes of immigration, import and export controls and quarantine. It is therefore necessary to state clearly in the Bill the change in effect of such orders which existed before the commencement date of the Bill.

As for whether Schedules 4 and 5 adequately cover the types of orders, the Transport and Housing Bureau has consulted relevant bureaux/departments in drafting the Bill to ensure that it may meet the actual operational needs. The current Schedules are largely drafted with reference to the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591), and the Shenzhen Bay Port has been operating smoothly since its commissioning in 2007.

(13) Whether Clauses 7(3)(b) and (d) are subject to Clause 6(1) of the Bill

Clause 6(1) does not apply to a reserved matter. Hence, quite apart from Clauses 7(3)(b) and (d), a right or obligation is not affected by Clause 6(1) to the extent that it may be exercised or discharged in relation to a reserved matter.

(14) Jurisdiction of the courts of the HKSAR in handling disputes in relation to Clauses 7(3)(b) and (d) of the Bill

After the Bill is enacted as an Ordinance, it will become part of the laws of Hong Kong. The courts would have to apply the provisions of the Ordinance to cases where such provisions are relevant, including the provisions which differentiate between reserved matter and non-reserved matter.

(15) Whether parties would be at liberty to come to their own agreement as to the geographical scope for the rights and obligations arising from existing documents

Parties to a pre-existing contract or other document of a private nature may come to their own agreement as to the geographical scope for the rights and obligations arising from such contract or other document.

(16) 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, and whether a provision similar to section 11 of the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591) will be added

Clause 6(1) has the effect that on and after the commencement date, except for reserved matters, the Mainland Port Area is to be

regarded as an area lying outside Hong Kong but lying within the Mainland for the purposes of the application of the laws in that Area and the delineation of jurisdiction over that Area. From the perspective of the laws of Hong Kong, the geographical scope for a right or obligation is to be interpreted in accordance with Clause 6(1).

Section 11 of the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591) deals with the issue of extension of the territorial limit of a future right or obligation to include the Hong Kong Port Area in the Shenzhen Bay Port from the perspective of the laws of Hong Kong. The same issue does not arise in the present case.

On the other hand, the question as to whether the geographical scope for a future right that permits a person to do an act in the Mainland should include the Mainland Port Area is not a matter to be dealt with by the HKSAR.

(17) Rationale for Clause 8 of the Bill not applying to an enactment, a statutory authority or a Court order, and whether reference to Hong Kong or part of Hong Kong in a future enactment, statutory authority or Court order would include the Mainland Port Area

Clause 8 provides for an interpretation aid for documents of private nature. If such documents contain a reference to Hong Kong or part of Hong Kong to describe the geographical scope for a right or obligation in relation to a non-reserved matter, the Mainland Port Area is to be regarded as an area lying outside Hong Kong but lying within the Mainland. This is a default interpretation subject to a contrary intention. Clause 8 respects the rights of the private parties to decide among themselves the geographical scope for their rights and obligations arising from contract etc.

In documents to which Clause 8 does not apply, a reference to

Hong Kong or part of Hong Kong to describe the geographical scope for a right or obligation is to be interpreted in accordance with Clause 6(1). To the extent that a non-reserved matter is involved, the Mainland Port Area is to be regarded as lying outside Hong Kong but lying within the Mainland for the purpose of determining the geographical scope for rights and obligations. Unlike documents of private nature, enactments, statutory authorities and Court orders are matters of public law rather than matters of intention of private parties. Thus, Clause 8 would have no application to them.

On the other hand, since Clause 6(1) does not apply to a reserved matter, a right or obligation in relation to a reserved matter is not affected by Clause 6(1) in any event.

(18) Jurisdiction of the courts of the HKSAR in handling disputes in relation to Clause 8(2) of the Bill

After the Bill is enacted as an Ordinance, it will become part of the laws of Hong Kong. The courts would have to apply the provisions of the Ordinance to cases where such provisions are relevant, including the provisions which differentiate between reserved matter and non-reserved matter.

(19) Whether parties would be at liberty under Clause 8(3) of the Bill 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

Clause 8 deals with the interpretation of future documents of private nature if the documents contain a reference to Hong Kong or part of Hong Kong to describe the geographical scope for the right or obligation. Clause 8(2) sets out the default position in interpreting any such reference in the document, i.e. the Mainland Port Area is regarded as an area lying outside Hong Kong in relation to a non-reserved matter.

Clause 8(3) only provides that the private parties are free to displace this default rule, but does not authorise them to change the delineation of the respective jurisdictions of the HKSAR and the Mainland under Articles 3, 4 and 7 of the Co-operation Arrangement.

(20) Status of the note in Schedule 1 to the Bill, and whether it has legislative effect

The term “Mainland Authorities Stationed at the Mainland Port Area”, as defined in Article 6 of the Co-operation Arrangement, is used in Article 7 of the Co-operation Arrangement. Since Article 7 is set out in Schedule 1, the note is added to provide a piece of factual information on how the term is defined in Article 6 for the benefit of the readers. The note has legislative effect as it is part of the Bill. However, since it is only to provide factual information, its inclusion will not change the substantive effect of the Bill.

Yours sincerely,



(Ronald CHENG)

for Secretary for Transport and Housing

c.c. Secretary for Justice
 Secretary for Security