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9 March 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 28 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.

It should be noted that the issues raised in your letter are not based on any actual situations. Hence, we can only provide general analysis on the issues raised. The applicability of our analysis to actual situations would require case-by-case consideration depending on the factual circumstances of the case in question.

**(1) The law interpreting Articles 3, 4 and 7 of the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region (“HKSAR”) 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”)**

As explained in Part 2 of the letter dated 22 February 2018 issued by the Government of the HKSAR to the Legislative Council (“LegCo”) Secretariat (LC Paper No. CB(4)631/17-18(01)), the courts of Hong Kong should have jurisdiction to adjudicate on any provisions of the Bill, and Articles 3, 4 and 7 of the Co-operation Arrangement which have been reproduced in Schedule 1 to the Bill. The courts should make its adjudication in accordance with the laws applicable in Hong Kong.

**(2) Article 18 of the Basic Law (hereinafter denoted in the format of “BL 18”)**

The Court of Final Appeal (“CFA”) held in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 that the purpose and context are the corner stones of constitutional interpretation. The CFA recognized that the purpose of the Basic Law is to implement the unique principle of “one country, two systems”. Like other constitutional documents, the Basic Law distributes and delimits powers<sup>1</sup>. Li CJ (as he then was) explained the purpose of the Basic Law and the approach of interpretation as follows:

*“75. As to purpose, the purpose of the Basic Law is to establish the Hong Kong Special Administrative Region being an inalienable part of the People’s Republic of China under the principle of “one country, two systems” with a high degree of autonomy in accordance with China’s basic policies regarding*

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<sup>1</sup> *Ng Ka Ling*, para 64.

*Hong Kong as set out and elaborated in the Joint Declaration. The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.*

76. *As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used.”*

The CFA explained clearly in *The Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 that:

*“To assist in the task of interpretation of the provision in question, the courts consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question and the Preamble. These are internal aids to interpretation.*

*Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law. Extrinsic materials which can be considered include the Joint Declaration and the Explanations on the Basic Law (draft) given at the NPC on 28 March 1990 shortly before its adoption on 4 April 1990. The state of domestic legislation at that time and the time of the Joint Declaration will often also serve as an aid to the interpretation of the Basic Law. Because the context and purpose of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials,*

*that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997.”<sup>2</sup>*

The decisions of the CFA in *Ng Ka Ling* and *Chong Fung Yuen* facilitate the understanding of extrinsic materials of the Basic Law. Such materials include (but not limited to) the Joint Declaration, the Explanations on the Basic Law (draft) given to the National People’s Congress for deliberation before the adoption of the Basic Law, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law. The state of domestic legislation at the time of enactment can also facilitate the interpretation of the Basic Law. What is within the Basic Law can be an internal aid to the interpretation of a Basic Law provision.

Regarding BL 18, an important aid to interpretation is Chapter II of the Basic Law. BL 18 is stipulated in Chapter II of the Basic Law which explains the relationship between the Central Authorities and the HKSAR. Chapter II is the most immediate context of BL 18 and must be taken into account. Chapter II concerns the powers which the State confers on the HKSAR and the powers which the State preserves for the Central Authorities.

Therefore, 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 Decision of the Standing Committee of the National People’s

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<sup>2</sup> *Chong Fung Yuen*, para 6.3.

Congress (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.

### **(3) BL 19**

BL 19 is stipulated in Chapter II of the Basic Law. The main purpose of BL 19 is to make provision for the judicial powers and jurisdiction for the HKSAR in the light of the relationship of the Central Authorities and the HKSAR. The structure, powers and functions of the Judiciary are the subject matter of Section 4 in Chapter IV of the Basic Law, not BL 19.

BL 19(2) provides 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 the court’s jurisdiction by legislation.

Prior to 1 July 1997, the jurisdiction of the courts of Hong Kong could be restricted by legislation. For instance, prior to the establishment of the HKSAR, in accordance with the International Organizations and Diplomatic Privileges Ordinance (Cap. 190), diplomatic immunities and the immunities for international organizations restricted the jurisdiction of the courts. The above immunities continue to be recognized under Hong Kong law after 1 July 1997.

#### **(4) Restrictions consistent with the proportionality test**

We consider it reasonably arguable that the Bill would satisfy the proportionality test.

First, the implementation of co-location arrangement at the West Kowloon Station would allow Hong Kong to fully enjoy the high-speed rail’s advantages of high speed and great efficiency, and ensure the transport, economic and social benefits of the Hong Kong Section of the XRL. The implementation of co-location arrangement at the West Kowloon Station and the establishment of the Mainland Port Area thereat are of great importance for maintaining the long-term economic development of the HKSAR. Meanwhile, in order to allow a large number of people to pass the immigration controls of the two places efficiently and expeditiously at the West Kowloon Station, the jurisdictions of the HKSAR and the Mainland must be clearly delineated. Therefore, we consider that the restriction on the jurisdiction of the courts of Hong Kong imposed by the Bill should be able to satisfy the first two steps of the proportionality test, that is, it pursues a legitimate aim and it is rationally connected with the accomplishment of that aim.

Regarding the third step, the Government of the HKSAR and the relevant departments of the Mainland agreed, after discussion and

deliberation, that the co-location arrangement must be implemented in a smooth and safe manner in order to avoid creating any security issues. Hence, both sides agreed that the laws of the Mainland would apply in the Mainland Port Area. On this basis, it was agreed that the laws of the HKSAR would continue to apply to the reserved matters and the courts of Hong Kong would continue to exercise jurisdiction in respect of those matters. The reserved matters concern the management of land, the operation of the XRL and its safety, the repair and maintenance of buildings and structures and their subsequent structural alterations, the protection of the rights and benefits of those Hong Kong staff members working in the Mainland Port Area.

Further, the Mainland Port Area is a limited and specific area, which does not include any surrounding area of the Mainland Port Area or other places at the West Kowloon Station. Except for this limited area of around 109 000 m<sup>2</sup> (which is around one-fourth of the total construction floor area of the West Kowloon Station), the jurisdiction of the courts of Hong Kong at the West Kowloon Station would not be affected in any way. We therefore consider that the restriction imposed by the Bill on the jurisdiction of the courts of Hong Kong should be able to comply with the third step of the proportionality test.

The fourth step of the proportionality test aims at striking a reasonable balance between the societal benefits of the restriction and the inroads made into the constitutionally protected rights of the individuals. Since all passengers would be informed about the arrangement of jurisdiction in the Mainland Port Area, they can freely choose whether or not to travel between Hong Kong and the Mainland by the XRL. In the circumstances, the restriction on the jurisdiction of the courts of Hong Kong in the Mainland Port Area for the implementation of co-location arrangement imposed by the Bill should be able to achieve the overall societal interest. It respects the choice of those who wish to travel to and from the Mainland by the XRL and would not undermine the rights and freedoms enjoyed by the residents of the HKSAR in accordance with law. The restriction also would not affect anyone who does not want to travel by the XRL. It should be able to comply with the fourth step of

the proportionality test.

**(5) The CFA agrees that its power of final adjudication could be subject to reasonable restrictions**

BL 82 provides that “the power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region.” For the relevant CFA decisions, see *Solicitor v Law Society of Hong Kong & Secretary for Justice*<sup>3</sup>, *Mok Charles v Tam Wai Ho*<sup>4</sup> and *Sam Woo Marine Works Ltd v The Incorporated Owners of Po Hang Building*.<sup>5</sup>

In the above cases, in deciding whether restrictions imposed by the legislature on the CFA’s power of final adjudication are consistent with BL 82, the CFA considered whether the restrictions pursue a legitimate aim and are rationally connected with the accomplishment of that aim, whether they are more than necessary to achieve that aim (or whether they are manifestly without reasonable foundation), and whether they have already achieved a fair balance between the general interest and the individuals’ rights (collectively referred to as the “proportionality test”).

If the courts adopt the proportionality test to review the constitutionality of the Bill, we consider that the Bill would satisfy that test. The relevant reasons have been explained in detail in Part 4 above.

**(6) Clauses 3(1)(b) and 6(1) of the Bill are consistent with BL 22(3)**

The implementation of the Co-operation Arrangement in a smooth manner and in accordance with law could only be ensured by way of local legislation. One of the objectives of the Bill is to allow Mainland personnel to perform their duties at the West Kowloon Station

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<sup>3</sup> FACV No.7 of 2003 (19 December 2003), (2003) 6 HKCFAR 570.

<sup>4</sup> FACV No. 8 of 2010 (13 December 2010), (2010) 13 HKCFAR 762.

<sup>5</sup> FACV No.10 of 2016 (29 May 2017), (2017) 20 HKCFAR 240.



Mainland Port Area in accordance with the relevant provisions of the Co-operation Arrangement.

In other words, only after the Bill is enacted and forms part of the laws of Hong Kong can Mainland personnel perform their duties in the Mainland Port Area. As such, we consider that the Bill is not inconsistent with BL 22(3).

**(7) Interpretation of BL 7**

The CFA stated clearly in the case of *Chong Fung Yuen* that the aids to the interpretation of the Basic Law include the state of domestic legislation at the time the Explanations on the Basic Law (draft) were deliberated and at the time when the Joint Declaration was signed (see Part 2 above).

As pointed out in our reply of 22 February 2018, when considering the meaning of “individuals, legal persons or organizations” in BL 7, we made reference to the definition of “person” in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1). That provision was already in existence before the enactment of the Basic Law. It could thus serve as an extrinsic material throwing light on the context and purpose of BL 7.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Ronald Cheng', with a stylized flourish at the end.

( Ronald CHENG )

for Secretary for Transport and Housing

c.c.      Secretary for Justice  
            Secretary for Security