

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

12 April 2018

Secretary General
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
(Attn: Ms Sophie LAU)

Dear Ms Lau,

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

Letter from Hon Fernando CHEUNG Chiu-hung dated 4 April 2018

We refer to your letter dated 9 April 2018, enclosing a letter from Hon Fernando CHEUNG Chiu-hung dated 4 April 2018 (“Letter”) in respect of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Bill (“Bill”). Our reply is as follows.

(1) Article 18 of the Basic Law (“BL 18”) (Parts 1 and 2 of the Letter)

The principles regarding the interpretation of the Basic Law laid down by the Court of Final Appeal (“CFA”) as well as the relevant case law are summarised below¹:

1. Constitutional instruments are generally made using ample and general language. They are living instruments intended to meet changing needs and circumstances.
2. The courts must avoid a literal, technical, narrow or rigid approach. Instead, they must consider the purpose and context of the provision concerned.
3. Overall speaking, the purpose of the Basic Law is to establish the Hong Kong Special Administrative Region (“HKSAR”) being an inalienable part of the People’s Republic of China with a high degree of autonomy in accordance with the principle of “one country, two systems”. Same as other constitutional documents, the Basic Law distributes and delimits powers.
4. When interpreting a particular provision of the Basic Law,

¹ For details, please refer to Part 4 of the reply issued to the LegCo Secretariat by the HKSAR Government dated 22 February 2018 (LC Paper No. CB(4)631/17-18(01)), Part 2 of the reply issued to the LegCo Secretariat by the HKSAR Government dated 9 March 2018 (LC Paper No. CB(4)720/17-18(01)), reply to Hon Tanya CHAN, Hon Alvin YEUNG, Hon Dennis KWOK, Hon KWOK Ka-ki and Hon Jeremy TAM issued by the HKSAR Government dated 22 March 2018 (LC Paper No. CB(4)803/17-18(01)), Part (b) of the reply issued to the LegCo Secretariat by the HKSAR Government dated 4 April 2018 (LC Paper No. CB(4)870/17-18(01)) and Part (c) of the reply issued to the LegCo Secretariat by the HKSAR Government dated 6 April 2018 (LC Paper No. CB(4)882/17-18(01)).

the courts would consider internal aids as well as extrinsic materials which throw light on the context and purpose of that provision.

5. Internal aids include provisions in the Basic Law other than the provision in question and the Preamble.
6. Extrinsic materials include (but are 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, as well as the state of domestic legislation at that time.

BL 18 is stipulated in Chapter II of the Basic Law. Chapter II provides the most immediate context to the meaning of BL 18 and must be taken into account.

Chapter II of the Basic Law explains the relationship between the Central Authorities and the HKSAR, especially the powers which the State confers on the HKSAR and the powers which the State preserves for the Central Authorities.

National laws mentioned in BL 18(2) refer to laws that are applied and implemented in the whole nation. Applying national laws in the HKSAR would necessarily entail application of such laws in the entire HKSAR. Taking into account the nature of the national laws listed in Annex III to the Basic Law pursuant to BL 18(3), including those relating to defence, foreign affairs and other matters falling outside the limits of the autonomy of the HKSAR, such are laws that would

necessarily be applied and implemented in the whole nation including the entire HKSAR.

It can be seen that the intent of BL 18 is to restrict the general application of national laws to all persons within the HKSAR so that the high degree of autonomy and the legal system of the HKSAR would not be undermined.

Given the above, we consider that BL 18 seeks to restrict the following situation:

1. As far as territorial scope is concerned, Mainland laws are applicable in the entire HKSAR.
2. As regards who would be subject to the laws, Mainland laws are imposed on all persons in Hong Kong.
3. Concerning the enforcement agencies, Mainland laws are enforced by Hong Kong authorities in the entire HKSAR.

For the following reasons, establishing the Mainland Port Area (“MPA”) at the West Kowloon Station and applying Mainland laws there in accordance with 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 (“Co-operation Arrangement”) would not give rise to the situation sought to be restricted by BL 18 as mentioned above:

1. The MPA is established for a specific purpose to meet a real policy need (namely, conducting Mainland clearance

procedures on high-speed rail passengers) pursuant to the Co-operation Arrangement and does not extend to the entire HKSAR.

2. Mainland laws are mainly applicable to high-speed rail passengers in the MPA but not all persons in Hong Kong.
3. Mainland laws are enforced by Mainland authorities in the MPA but not Hong Kong authorities.
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 MPA. The arrangement does not force the application of Mainland laws on any person. The situation of passengers entering the MPA 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.

We therefore consider that applying Mainland laws in the MPA pursuant to the Co-operation Arrangement does not engage BL 18. This view is based on the context and purpose of BL 18 in accordance with the principles laid down by the CFA concerning the interpretation of the Basic Law as listed at the outset of this part.

**(2) Articles 118 and 119 of the Basic Law (“BL 118” and “BL 119”)
(Part 3 of the Letter)**

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

provisions concerning the high degree of autonomy enjoyed by the HKSAR, including BL 118 and BL 119. According to BL 118, the HKSAR can formulate appropriate policies to provide an economic and legal environment for encouraging investments, technological progress and the development of new industries. Pursuant to BL 119, the HKSAR can formulate appropriate policies to promote and co-ordinate the development of various trades. Implementation of the co-location arrangement through the signing of the Co-operation Arrangement by the HKSAR Government and the relevant Mainland authorities is a clear demonstration of the exercise of the high degree of autonomy by the HKSAR in accordance with law.

As we have repeatedly emphasised, the co-location arrangement and the Bill do not contravene the Basic Law². The Decision made by the Standing Committee of the National People's Congress ("NPCSC") on 27 December 2017 also approves the Co-operation Arrangement and confirms that it is consistent with the Constitution of the People's Republic of China and the Basic Law.

(3) Article 19 of the Basic Law ("BL 19") (Part 4 of the Letter)

Clause 6(1) of the Bill provides: "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 – (a) the application of the laws of the Mainland, and of the laws of Hong Kong, in

² For the detailed reasons why the co-location arrangement and the Bill do not contravene the Basic Law, please refer to Parts 3 and 4 of the reply issued to the LegCo Secretariat by the HKSAR Government dated 22 February 2018 (LC Paper No. CB(4)631/17-18(01)), Parts 2 to 4 and Part 6 of the reply issued to the LegCo Secretariat by the HKSAR Government dated 9 March 2018 (LC Paper No. CB(4)720/17-18(01)) and Part (b) of the reply issued to the LegCo Secretariat by the HKSAR Government dated 4 April 2018 (LC Paper No. CB(4)870/17-18(01)).

the Mainland Port Area; and (b) the delineation of jurisdiction (including jurisdiction of the courts) over the Mainland Port Area.”

In our view, even though the Bill has restricted the jurisdiction of Hong Kong courts, such restriction does not contravene BL 19(2) given that it is imposed by an ordinance enacted by the LegCo and meets the “proportionality test”³.

(4) Article 22(3) of the Basic Law (“BL 22(3)”) (Part 5 of the Letter)

Regarding BL 22(3), as stated in Part 6 of the reply issued to the LegCo Secretariat by the HKSAR Government dated 9 March 2018 (LC Paper No. CB(4)720/17-18(01)) and Part (b) of the reply issued to the LegCo Secretariat by the HKSAR Government dated 4 April 2018 (LC Paper No. CB(4)870/17-18(01)), one of the objectives of the Bill is to allow Mainland personnel to perform their duties in the MPA at the West Kowloon Station in accordance with the relevant provisions of the Co-operation Arrangement. In other words, only after the Bill is enacted as an ordinance and forms part of the laws of Hong Kong can Mainland personnel perform their duties in the MPA. Accordingly, the Bill is consistent with BL 22(3).

(5) Clause 6(1) of the Bill (Part 6 of the Letter)

As stated in Part 3 above, Clause 6(1) of the Bill provides for the delineation of the laws and jurisdiction applicable in the MPA. The objective of the Bill is to establish the MPA and implement the co-location arrangement. The Bill would apply to the MPA after it has

³ For the detailed reasons why the restriction imposed by the Bill on the jurisdiction of Hong Kong courts would meet the “proportionality test”, please refer to Part 4 of the reply issued to the LegCo Secretariat by the HKSAR Government dated 9 March 2018 (LC Paper No. CB(4)720/17-18(01)).

been passed by the LegCo and forms part of the laws of Hong Kong.

(6) Article 20 of the Basic Law (“BL 20”) (Part 7 of the Letter)

As stated in Part 2 above, under the principle of “one country, two systems”, the HKSAR enjoys a high degree of autonomy. At the same time, as stated in Part (b) of the reply issued to the LegCo Secretariat by the HKSAR Government dated 6 April 2018 (LC Paper No. CB(4)882/17-18(01)), implementation of immigration controls falls within the scope of the HKSAR’s high degree of autonomy. As such, the HKSAR Government considers that it would be appropriate to follow the “Three-step Process” for the purpose of implementing the co-location arrangement (namely, negotiation and signing of the Co-operation Arrangement with the Mainland by the HKSAR pursuant to its high degree of autonomy conferred by the Basic Law, endorsement of the Co-operation Arrangement by the NPCSC, and passing of the Bill by the LegCo of the HKSAR).

Yours sincerely,



(Ronald CHENG)

for Secretary for Transport and Housing

c.c. Secretary for Justice
Secretary for Security