

**For discussion on
25 March 2019**

**Legislative Council Panel on
Administration of Justice and Legal Services**

**Opportunities for Hong Kong's Legal and Dispute Resolution Services in
the Greater Bay Area**

PURPOSE

The HKSAR Government has been striving for more liberalisation measures relating to legal services in the Mainland for the Hong Kong legal sector. This paper seeks to discuss how Hong Kong's legal and dispute resolution professionals may leverage opportunities in the development of the Guangdong-Hong Kong-Macao Greater Bay Area and briefly introduce the capacity building work carried out by the Department of Justice (“**DoJ**”) and the sector. Members are invited to provide comments and suggestions.

BACKGROUND

Current liberalisation measures

2. There are various measures under the “Mainland and Hong Kong Closer Economic Partnership Arrangement” (“**CEPA**”) that facilitate the legal sector in developing the Mainland market, including:

(a) Association in the form of partnership:

Shenzhen city, Guangzhou city and Zhuhai city in the Greater Bay Area have been the pilot cities for setting up associations in the form of partnership between Hong Kong and Mainland law firms. As at January 2019, 11 partnership associations between Hong Kong and Mainland law firms have been set up to provide Mainland and Hong Kong legal services as well as approved foreign legal services. Seven of these partnership associations are set up in Shenzhen, two each in Guangzhou and Zhuhai.

According to the “Agreement on Trade in Services” under CEPA, with effect from 1 March 2019, the geographical scope of setting

up partnership associations by Hong Kong and Mainland law firms has been extended from Guangzhou, Shenzhen and Zhuhai to the entire Mainland.

(b) *National Unified Legal Professional Qualification Examination (formerly known as “National Judicial Examination”):*

The National Judicial Examination commenced in 2001, and Hong Kong residents were allowed to sit the examination since 2004 pursuant to CEPA. Those who passed the examination can obtain the legal professional qualification certificates and acquire Mainland legal professional qualification. In 2018, 108 Hong Kong residents passed the examination which was a historical high and the passing rate (22.4%) ranked among the top in the Mainland. In the same year, 144 Hong Kong residents obtained Mainland lawyer’s practice certificates in Guangdong Province.

(c) *Legal consultants:*

Apart from Hong Kong solicitors, Hong Kong barristers have also been retained as legal consultants by Mainland law firms since 2015, including Guangzhou and Shenzhen law firms in the Greater Bay Area.

3. DoJ will continue to liaise with the sector and to discuss with the relevant Mainland authorities to implement and further enhance the CEPA liberalisation measures.

Record of Meeting signed with the Ministry of Justice

4. Further, DoJ and the Ministry of Justice (“**MoJ**”) signed the Record of Meeting on 7 January this year. MoJ agreed, in principle, to the following:

- (a) extension of measures in the State Council’s Notice on Issuing the Plan for Further Deepening the Reform and Opening-up of the China (Guangdong) Pilot Free Trade Zone (Guo Fa [2018] No. 13)) issued on 24 May 2018 relating to partnership associations set up between Mainland and Hong Kong law firms in the China (Guangdong) Pilot Free Trade Zone to the whole of

Guangdong Province¹;

- (b) removal of the minimum capital injection ratio of 30% by Hong Kong partner firms in the partnership associations set up between Mainland and Hong Kong law firms, thereby providing more flexibility for Hong Kong partner firms when setting up partnership associations; and
- (c) relaxing the current restriction of retention of Hong Kong solicitors and barristers as legal consultant by only one Mainland law firm, and allowing them to be retained as legal consultant by one to three Mainland law firms at the same time.

5. DoJ understands that MoJ together with relevant departments will endeavor to implement the above measures within 2019. DoJ will continue to maintain close liaison with MoJ.

Outline Development Plan of the Guangdong-Hong Kong-Macao Greater Bay Area

6. The “Outline Development Plan of the Guangdong-Hong Kong-Macao Greater Bay Area” (the “**Outline Development Plan**”) was promulgated on 18 February this year. It explicitly supports Hong Kong to establish itself as the centre for international legal and dispute resolution services in the Asia-Pacific region². It also encourages the strengthening of judicial and legal exchanges and cooperation among Guangdong, Hong Kong and Macao, promoting the development of a multi-faceted dispute resolution mechanism that is based on wide consultation, joint contribution and shared benefits, and providing quality, effective and convenient judicial and legal services and safeguards for the development of the Greater Bay Area³.

7. The Greater Bay Area has the unique strength of one country, two systems and three jurisdictions. The Outline Development Plan recognises the distinctive advantage of Hong Kong’s legal system under the “one country, two systems” principle and our ability to assume a vital role in the development of the Greater Bay Area. The HKSAR Government will follow the guiding directions in the Outline Development Plan, actively take forward the development of the Greater Bay Area and assist the sector to strive for policy

¹ Major measures include expanding the business scope of partnership associations set up in the China (Guangdong) Pilot Free Trade Zone and allow partnership associations to hire Hong Kong lawyers under the name of the partnership association.

² Please refer to Chapter 2 of the Outline Development Plan.

³ Please refer to Section 1 of Chapter 9 of the Outline Development Plan.

innovation and breakthroughs that are needed for exploring the opportunities.

OPPORTUNITIES FOR HONG KONG'S LEGAL AND DISPUTE RESOLUTION SERVICES IN THE GREATER BAY AREA

8. Hong Kong is the only common law jurisdiction in China and our mature legal system is familiar to the international business community. Hong Kong's legal and dispute resolution professionals are highly regarded. They have rich experience in various specialised areas of law such as financing, international trade and investment, infrastructure, maritime matters and intellectual property. Together with 1,622 registered foreign lawyers from 33 different jurisdictions⁴, Hong Kong is well-equipped to provide foreign-related legal services to investors in the Greater Bay Area.

9. Hong Kong has unique strengths in respect of dispute resolution services. For instance, Hong Kong's legislation on arbitration and mediation is at the forefront of the sector and our courts also support the use of arbitration and mediation to resolve disputes. Arbitration in Hong Kong has been widely recognised internationally. According to an international arbitration survey⁵, Hong Kong ranked third in the 2015 survey following London and Paris. In the same survey conducted in 2018, Hong Kong ranked fourth.

10. As mentioned above, there are three different jurisdictions within the Greater Bay Area. Hong Kong should consider our position and advantages therein so as to capitalise on the opportunities and contribute to the development of Hong Kong's legal and dispute resolution profession as well as the Greater Bay Area. In this regard, DoJ meets with the legal and dispute resolution sector regularly⁶ to obtain their views on the development of Hong Kong's legal profession in the Greater Bay Area so that the legal and dispute resolution services professionals can be brought together to jointly contribute to the development of the Greater Bay Area. So far DoJ has received views on the following major areas:

⁴ Information provided by the Law Society of Hong Kong as at the end of February 2019.

⁵ The survey was conducted by Queen Mary University of London and School of International Arbitration, sponsored by White and Case LLP.

⁶ Including the regular meetings between the Secretary for Justice and the industry as well as the meeting with the legal and dispute resolution professionals on the opportunities arising from the Greater Bay Area in February this year.

(i) Wider application of Hong Kong law in the Greater Bay Area

11. Under current Mainland laws, only when a case is foreign-related⁷, the parties may, in accordance with the law, expressly choose laws applicable to foreign-related civil relations, e.g. Hong Kong law. In the absence of any foreign-related elements, Mainland laws do not expressly allow the parties to apply foreign laws. Therefore, two Mainland parties who enter into a contract cannot choose Hong Kong law as the governing law of the contract in the absence of any foreign-related elements. Wholly owned Hong Kong enterprises (“WOKE”) and joint ventures set up by Hong Kong investors in the Mainland are treated as Mainland legal persons under Mainland laws and are subject to the same restriction.

12. Feedback from the sector suggests that if the HKSAR Government can explore with the Mainland to allow parties in the Greater Bay Area to freely choose the law which is familiar to the parties as the governing law of a contract, e.g. allowing WOKE to choose Hong Kong law as the governing law of a contract, it is believed that this will strengthen the confidence of the investors, create more business opportunities for the Hong Kong legal sector and at the same time improve the understanding of the investors as well as the legal practitioners of the two places on each other’s laws, thereby promoting the collaborative development of the Greater Bay Area.

(ii) Wider use of Hong Kong as a place of arbitration outside the Mainland

13. At present, apart from the restriction on the choice of governing law of a contract, one may take the view that Mainland parties (including WOKE) cannot choose to submit a dispute to an arbitral institution outside the Mainland (e.g. arbitral institutions in Hong Kong) for arbitration in the absence of any foreign-related elements. The Supreme People’s Court of the Mainland has issued an explanation letter⁸, stating that in the absence of any foreign-related elements, the contractual term under which the parties choose to submit a

⁷ In general, unless there is the presence of a foreign-related element, e.g. one of the parties is a foreign citizen, the governing law of a contract shall be the Mainland laws and arbitration of the relevant dispute shall only be conducted in the Mainland.

⁸ Reply from the Supreme People’s Court of the Mainland on the Application of Beijing Chao Lai Xin Sheng Sport and Leisure Limited Company for Recognition of the Arbitral Awards Nos.12113-0011 and 12112-0012 made by the Korean Commercial Arbitration Board ([2013]Min Si Ta Zi No 64)

dispute to an arbitral institution outside the Mainland for arbitration is invalid⁹.

14. In January 2017, the Supreme People's Court of the Mainland issued the "Opinion of the Supreme People's Court on the Provision of Judicial Safeguards for the Development of the Pilot Free Trade Zones" (Fa Fa [2015] No.34) ("**FTZ Opinion**"). Article 9 of the FTZ Opinion provides that "*where the wholly foreign owned enterprises registered in the pilot free trade zones agree to submit a commercial dispute to arbitration outside the Mainland, the relevant arbitral agreement shall not be considered invalid solely because the dispute lacks any foreign-related elements.....*". The FTZ Opinion suitably relaxes the arbitral agreement between wholly foreign owned enterprises to submit a dispute to arbitration outside the Mainland in the absence of any foreign-related elements.

15. In August 2018, the Supreme People's Court of the Mainland issued the "Opinion of the Supreme People's Court on the Provision of Judicial Service and Safeguards for Comprehensively Deepening Reform and Opening Up of Hainan" (Fa Fa [2018] No.16) ("**Hainan Opinion**"), which further relaxes the restriction on the parties who agree to submit a dispute to arbitration outside the Mainland, i.e. where the parties of civil and commercial cases in Hainan Pilot Free Trade Zone or Free Trade Port agree to submit a dispute to arbitration outside the Mainland, it would not be advisable to consider the agreement invalid due to the absence of any foreign-related elements.

16. Feedback from the sector suggests that if we can explore with the Mainland to implement the extra-territorial arbitration measure in the Greater Bay Area similar to or more relaxed than that in the Hainan Opinion, it is believed that it would help promote the development of a multi-faceted dispute resolution mechanism that is based on wide consultation, joint contribution and shared benefits in the Greater Bay Area as stated in the Outline Development Plan, and further promote Hong Kong's quality arbitration services in the Greater Bay Area and facilitate the development of the arbitration sector of Hong Kong.

(iii) Expanding the scope of practice of Hong Kong legal practitioners in the Greater Bay Area

17. In light of growing economic and trading activities between Hong

⁹ In the case "Application of Siemens International Trading (Shanghai) Co. Ltd. for Recognition and Enforcement of a Foreign Arbitral Award" ([2013]Hu Yi Zhong Min Ren (Wai Zhong) Zi No.2), Shanghai No.1 Intermediate People's Court adopted a more relaxed approach on recognising the "foreign-related element" between wholly foreign owned enterprises incorporated in the free trade zone.

Kong and the Mainland, especially in the course of developing the Greater Bay Area, cases concerning Hong Kong will increase. Taking Qianhai Court as an example, from February 2015 to April 2018, it received 3,100 cases concerning Hong Kong and ranked the top nationwide. In order to better resolve disputes concerning Hong Kong, Qianhai Court also established the systems of Hong Kong assessors and Hong Kong mediators. According to the relevant statistics, from July 2016 to December 2018, Hong Kong assessors participated in 172 cases. From its establishment in May 2016 to January 2018, the Court-Connected Mediation Center of the Qianhai Court successfully resolved 420 cases by mediation, among which 120 cases were resolved by Hong Kong mediators, representing 28.6%.

18. Feedback from the sector suggests that if we can further explore with the Mainland to allow Hong Kong solicitors and barristers to participate in appropriate cases concerning Hong Kong (e.g. cases where Hong Kong law is applicable) as advocates in the courts of the Greater Bay Area (e.g. Qianhai Court), this may help to accurately grasp the legal issues of the cases concerning Hong Kong, enhance the efficiency of resolution of cases and the credibility of judgments and further leveraging the role of the Hong Kong legal sector in establishing Hong Kong as the centre of international legal and dispute resolution services in the Greater Bay Area.

(iv) Study on the setting up of the Greater Bay Area Mediation Centre

19. With the development of the Greater Bay Area, we anticipate that there will be a sharp increase in the demand of dispute resolution. The sector expressed the wish for the HKSAR Government to study the feasibility of establishing the Greater Bay Area Mediation Centre together with the relevant Mainland government authorities. The Greater Bay Area Mediation Centre could be co-founded by leading mediation institutions of Hong Kong and those within the Greater Bay Area. The Greater Bay Area Mediation Centre shall discharge the role of a governing and standard-setting body.

20. The Greater Bay Area comprises three different legal systems, the Mainland, Hong Kong and Macao. For the proposed Greater Bay Area Mediation Centre, one of the measures that may be considered is for different mediation bodies within the Greater Bay Area to participate as member organisations of the Greater Bay Area Mediation Centre (“**member organisations**”). Member organisations have to subscribe to the unified mediators’ accreditation system and mediation rules established by the Greater Bay Area Mediation Centre. The proposed Greater Bay Area Mediation Centre could establish a panel of mediators. A mediator could be enrolled to this panel of mediators after satisfying the unified mediators’ accreditation

system. Under these unified standards, mediations of each jurisdiction will still be conducted in accordance with their local laws and regulations, thereby enhancing the confidence of mediation users within the Greater Bay Area, facilitating the use of mediation within the Greater Bay Area and supporting the development of dispute resolution in the Greater Bay Area. The Greater Bay Area Mediation Centre could also be developed as a platform for learning and exchanges for the mediation sector within the Greater Bay Area, thus fostering mutual understanding and development.

(v) *Exploring a unified dispute resolution neutral third party accreditation standard*

21. The sector suggested that consideration can be given for the proposed Greater Bay Area Mediation Centre to adopt, on a pilot basis, a unified mediators' accreditation system to be established jointly by the Hong Kong Mediation Accreditation Association Limited (HKMAAL) and relevant Mainland mediation bodies (e.g. China Council for the Promotion of International Trade / China Chamber of International Commerce (CCPIT/CCOIC) and China International Economic and Trade Arbitration Commission (CIETAC) etc.)

22. Reference might be made to the mediators' accreditation system adopted by HKMAAL with suitable adjustment(s) in establishing the unified mediators' accreditation system of the Greater Bay Area Mediation Centre. For instance, in order to be an accredited mediator of the Greater Bay Area Mediation Centre, a person has to receive relevant training on, for example, (i) mediation skills; (ii) legal systems, laws and regulations of the Mainland, Hong Kong and Macao and (iii) the business environment of the three jurisdictions, and pass requisite assessments. We believe that this could foster exchanges between mediation professionals of the Mainland, Hong Kong and Macao, and improve mutual understanding of their respective legal systems and cultures. In respect of assisting the Mainland to establish an arbitrators' accreditation system, the experience of Hong Kong arbitral institutions and professional bodies may be relevant.

(vi) *Developing a Capacity Building and Exchange Platform*

23. Under the "one country, two systems" principle, Guangdong, Hong Kong and Macao constitute three different jurisdictions, which is a potential and unique feature in the Greater Bay Area. The legal sectors in the three jurisdictions should acquire a better understanding of their counterparts in order to complement each other and provide necessary support to the development of the Greater Bay Area. There are views that the three jurisdictions in the

Greater Bay Area can jointly develop an exchange platform covering different scopes to enable exchanges between legal professionals and students in Guangdong, Hong Kong and Macao on a regular basis so as to deepen their understanding of different legal systems and business environments in the Greater Bay Area.

DEVELOPMENT OF HONG KONG AS THE CAPACITY BUILDING CENTRE OF THE GREATER BAY AREA

24. The relevant sectors in Hong Kong can make contributions to the development of legal framework in the Greater Bay Area which align with international standard and uphold the rule of law. With its rich experience in training, the legal and dispute resolution services sector contributes to the development of Hong Kong as the capacity building centre of the Greater Bay Area.

25. Since its establishment in January 2019, the Inclusive Dispute Avoidance and Resolution (IDAR) Office under DoJ has been actively liaising with various local and international law-related organisations and has organised a series of events. In the first quarter of this year, DoJ co-organised the Public-Private Partnerships Conference with the United Nations Commission on International Trade Law (“**UNCITRAL**”) and Asia Academy of International Law (“**AAIL**”) and co-organised the Investor-State Dispute Settlement Reform Conference with AAIL. Legal and dispute resolution professionals, reputable local and overseas academics, senior government officials and representatives from the business sector were invited to speak at the conferences.

26. DoJ also organises or participates in training courses on a regular basis, for example:

- (a) co-organising the biennial UNCITRAL Asia-Pacific Judicial Summit with UNCITRAL and the Hong Kong International Arbitration Centre with the objective of enhancing international trade development through capacity-building with a focus on international law for judiciaries in the Asia-Pacific region; the next Asia-Pacific Judicial Summit will be held in the 3rd quarter of 2019;
- (b) supporting AAIL to undertake part of the “China-Asian-African Legal Consultative Organization (“**AALCO**”) Exchange and Research Program on International Law” jointly established by the Ministry of Foreign Affairs and the AALCO; the 5th training

session will be held in the 3rd quarter in 2019 with a one-week session forming part of it being held in Hong Kong; and

- (c) co-organising the first investment law and investment mediation skills training course in Asia with the International Centre for Settlement of Investment Disputes (ICSID) under the World Bank Group and the AAIL in mid-October 2018; participants included four lawyers and diplomats from the Mainland; DoJ plans to conduct further rounds of such training with the goals of building up a team of investment mediators in Asia and developing Hong Kong into an international investment law and international investment dispute resolution skills training base.

27. The legal and dispute resolution services sector of Guangdong, Hong Kong and Macao has in turn launched different forms of exchanges in order to leverage on their strengths. For example:

- (a) The Guangdong, Hong Kong and Macao Arbitration Alliance has been established in September 2019 as a joint initiative of arbitral institutions in Guangdong, Hong Kong and Macao, with its first working meeting held in Guangzhou on 23 February 2019. In the working meeting, representatives of various arbitral institutions signed the *Memorandum of Cooperation of the Guangdong, Hong Kong and Macao Arbitration Alliance* to facilitate cooperation concerning international commercial arbitration in the Greater Bay Area.
- (b) The Guangdong Lawyers Association, the Law Society of Hong Kong and other lawyers' associations established the "Guangdong-Hong Kong-Macao Greater Bay Area Lawyer's Associations Joint Conference System" in December 2018 to foster the developments of the legal professions in Guangdong, Hong Kong and Macao.
- (c) In December 2018, DoJ organised a Seminar on Ascertainment of Foreign Law together with the Hong Kong Bar Association and the Law Society of Hong Kong, inviting representatives from the Benchmark Chambers International in Qianhai, Shenzhen to brief the officers of DoJ and practitioners about the system for ascertainment of foreign law and its latest developments, as well as the ways to apply for admission to the foreign legal experts' list.

DoJ will continue to proactively liaise and consult with a view to establishing an exchange platform for the legal and business sectors in Hong Kong and the Mainland, which will facilitate commercial, trade, financial, etc. exchanges between Guangdong, Hong Kong and Macao.

28. On the mediation front, DoJ will continue to host, participate in and support forums, trainings, visits, exchanges of the mediation sector in the Greater Bay Area. In the past, DoJ and the Hong Kong mediation sector had participated in various activities including:

- (a) Forum on Commercial Mediation Involving Hong Kong, Macao and Taiwan;
- (b) visit to Hong Kong by the Arbitration and Mediation Working Group of the Department of Justice, Guangdong;
- (c) International Mediation Summit; and
- (d) Shanghai-Hong Kong Commercial Mediation Forum.

29. DoJ has spared no efforts to promote Hong Kong's legal and dispute resolution services in the Mainland, including the Greater Bay Area. For instance, the 5th Hong Kong Legal Services Forum under the theme "From Bay Area to International Arena" held in Guangzhou in September last year attracted a record high of 1,200 participants. It demonstrates that business sector in the Greater Bay Area has a keen interest and demand in Hong Kong's legal and dispute resolution services. Going forward, DoJ strives to further introduce the "Hong Kong brand" to the legal services market in the Greater Bay Area and explore new opportunities for the Hong Kong legal and dispute resolution services professionals.

WAY FORWARD

30. Being one of the major policy initiatives of the Central People's Government, the Greater Bay Area initiative will be implemented under the principle of "complementary strengths and mutual benefits". It requires the coordination and cooperation of talents from different professional disciplines. In this connection, the legal and dispute resolution services sector in Hong Kong can capitalise on the opportunities. Some of the recommendations above require the support of the relevant authorities of the Central People's Government in order to be implemented. DoJ will continue to utilise Hong

Kong's edge under the "one country, two systems" principle, formulate its work plans with more Greater Bay Area elements and proactively liaise with the relevant authorities in the Mainland to strive for more pilot schemes of liberalisation measures in the Greater Bay Area, and facilitate the legal and dispute resolution services sector in Hong Kong to capitalise on the opportunities. Apart from the Greater Bay Area, DoJ would also continue to actively take forward new measures applicable nationwide, and conducive to enhancing Hong Kong's position as a dispute resolution hub, so as to strengthen the edge and competitiveness of Hong Kong's arbitration in the multi-faceted dispute resolution mechanism of the Greater Bay Area.

ADVICE SOUGHT

31. We invite Members' comments and suggestions on how to seize opportunities in the Greater Bay Area. To actively strive for further opening up of the Mainland market for the Hong Kong's legal and dispute resolution sector and enhance Hong Kong's advantage as a leading centre for international legal and dispute resolution services in the Asia Pacific region, DoJ will suitably convey the relevant comments and suggestions obtained through different channels to the relevant Mainland authorities.

The Department of Justice
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