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**CEPA : The Threats & Opportunities  
For Hong Kong Lawyers**

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## **CEPA : The Threats & Opportunities For Hong Kong Lawyers**

Economic globalisation is an irresistible tide sweeping over the whole world and affecting every country and territory. A closed economy will not survive. Its economic activities will gradually shrink and ultimately be swept into oblivion.

### **China's accession to the WTO and the changes**

2. In 1947, China was an original contracting party to the General Agreement on Tariffs and Trade (GATT). On the 11 December 2001, after more than 13 years of negotiations, China became a member of the World Trade Organization (WTO).

3. What impact has membership of WTO had on the government of the PRC? I will highlight some of the recent developments, many of which are responses to the requirements under WTO. Some of the changes are gradual, but the trend is clear.

- The government is changing its role from a trader to facilitator of trade; instead of doing business, it now aims to provide a good business environment to facilitate business;
- government operations have become more transparent; the government is obligated to publicise, before they are enforced, all laws, regulations and other measures pertaining to or affecting trade in goods, TRIPS or the control of foreign exchange, and to establish an enquiry point for provision of information relating to such laws, regulations and measures;
- the government shows more respect for the sanctity of contracts and is keen to establish credibility in fulfilling contractual obligations;
- the government is becoming more accountable and responsible, being subject to judicial review and supervision of the public through their representatives to the National People's Congress, and the doctrine of the

three representatives.

- market economy requires the government structure to be streamlined and its efficiency improved;
- the government is keen to observe due process in import purchasing procedures, licensing requirements, judicial proceedings, administrative rulings etc.
- the Central Government must observe fairness and impartiality, and local governments must not get involved in the economic activities of local enterprises;
- the rule of law is developing, as the government adheres to laws, regulations and due process, as well as to proper law enforcement procedures.

4. The impact of China's accession to WTO is therefore tremendous. In the early years of China's accession to WTO, there will be a substantial loss of revenue through reduction of customs, etc. However, in the long run, the benefits of being part of the global economy and of modernisation will vastly outweigh that loss.

5. I would like to move on to the impact of China's accession to WTO with particular reference to legal services.

### **Developing the Mainland Legal Services Market**

6. Since the implementation of the "reform and opening up policy" in 1979, China has fully recognised the importance of international commerce. As the process of modernization continues, foreign investments have grown substantially. It is therefore increasingly important for China to follow international rules, regulations and practices in conducting its business.

7. Mainland legal practitioners have faced immense pressure in this respect. The Mainland legal profession has only a brief history of twenty-odd years. Even though it has developed rapidly over that period, it is still at its developmental stage. In the past decade, China has formulated policies to

progressively open its legal services market to legal practitioners from other jurisdictions.

### **Before China's Accession to the WTO**

8. In May 1992, the Ministry of Justice and the State Administration for Industry and Commerce jointly promulgated the *Interim Provisions on the Establishment of Offices within the Territory of China by Foreign Law Firms* ("Interim Provisions"). These provisions marked the official liberalization of the Mainland legal services market. Upon approval by the Ministry of Justice, a foreign law firm could register with the State Administration for Industry and Commerce and set up its office on the Mainland. However, foreign law firms were not allowed to provide legal services in their capacity as consultant companies. They were also required to comply with certain strict provisions.

9. The representative offices of foreign law firms could engage in the provision of advice on laws of their jurisdictions, international treaties, international commercial laws and practices. But they were not allowed to engage in legal services relating to Mainland law. These law firms could not employ Mainland lawyers, and foreign lawyers were not allowed to obtain Mainland legal qualifications.

10. Under the Interim Provisions, each foreign law firm could only set up one representative office on the Mainland, and was subject to certain restrictions and obligations. For example, the principal representative of the firm must have practised law in the relevant overseas jurisdiction for not less than three years and have had no record of a breach of any legal professional regulations. Representatives of the firm were also required to reside in the Mainland for a period of at least 180 days each year.

11. These regulations also applied to Hong Kong law firms intending to set up an office on the Mainland.

### **Situation following China's Accession to the WTO**

12. When China joined the WTO in December 2001, in order to fulfill its

obligations as a member state, the State Council endorsed *the Regulations on the Management of Representative Offices set up by Foreign Law Firms in China*.

13. Since the implementation of *the Regulations* on 1 January 2002, representative offices of foreign law firms are no longer required to register with the State Administration for Industry and Commerce. They are only required to complete registration formalities with the provincial judicial administrations.

14. The *Regulations* set out clearly the criteria for issuing or revoking practice licences of the representative offices, as well as the circumstances under which such licences are issued or revoked. They expressly allow representative offices to maintain long-term entrustment relations with Mainland law firms. These relations are similar to a referral or agency relationship. The *Regulations* provide that representative offices and the representatives may directly instruct lawyers in the entrusted Mainland law firms when they act under the entrustment agreement.

15. It is evident that the *Regulations* have introduced a substantial relaxation of the *1992 Interim Provisions*. However, the provisions prohibiting representative offices from providing Mainland legal services and employing Mainland lawyers still remain.

16. Another point worth noting is that, under the terms of China's accession to the WTO, two former restrictions had to be removed one year after China's accession to the WTO. They were the geographical restriction for foreign law firms' representative offices, and the rule that each foreign law firm could only set up one representative office on the Mainland. Both restrictions no longer apply.

17. Provisions regulating the law firms of Hong Kong and Macao were enacted, and were implemented in February 2002. Those provisions are similar to the Regulations concerning Foreign Law Firms. The result is that registration is better regulated, the procedures are clearer, and registration can be achieved more quickly and with more certainty. As a result, entry into the Mainland market by the legal profession has become easier.

## **Arrangements Permitted under the WTO Agreement**

18. China made no commitment to open its legal services market to other WTO members. This is clearly stated in Section II item Aa in Schedule CLII, Part II in Annex 9 to the Agreement. (CPC 861 excluding Chinese Law practice). However, further liberalization towards Hong Kong under CEPA is possible under GATS.

19. Article V of the *GATS* sets out provisions for further economic integration and liberalization of trade in services. It allows any WTO member to enter into an agreement for further co-operation with other countries or regions which are parties to *GATS*, provided that such an agreement shall -

- (a) have substantial sectoral coverage;
- (b) eliminate discriminatory measures against service suppliers in other countries which are parties to *GATS*;
- (c) prohibit new or more discriminatory measures; and
- (d) aim at facilitating trade between or among members and shall not raise the overall level of barriers to trade in services for non-members when dealing within the respective sectors.

20. Such an agreement is generally known as a “free trade agreement”.

## **Free Trade Agreement**

21. Under a Free Trade Agreement (FTA) two or more countries or customs territories may agree to reduce or eliminate trade barriers that exist between them, but each country or territory may maintain its own external trade policy for non-member countries. The North American Free Trade Agreement (NAFTA) is an example. Further integration may take the form of a customs union, which is similar to an FTA, but its members adopt the same external trade policy for non-member countries.

22. The WTO agreements recognise that regional arrangements and closer economic integration can benefit the participating countries or regions. The

guiding principle is that regional integration should complement the multilateral trade system and not threaten it.

## **CEPA**

23. Since the Mainland and the HKSAR are two independent tariff zones, they can enter into an FTA with each other. The *Mainland and Hong Kong Closer Economic Partnership Arrangement* (CEPA) is, in effect, a type of free trade agreement. This was signed on 29 June 2003, under a framework permitted by the WTO, followed by the signing of six Annexes on the 29 September 2003.

24. The legal basis for CEPA is found in Article 24 of the *General Agreement on Tariffs and Trade* and Article V of the *General Agreement on Trade in Services*. Operating within the scope of commitments of China and under the principle that the interest of other WTO members would not be prejudiced, China and Hong Kong could make arrangements for eliminating various trade barriers and tariffs and fostering economic development and trade ties between the two sides.

## **Objective of CEPA**

25. The objective of CEPA is to promote economic prosperity and development of the Mainland and the HKSAR, and to facilitate further development of economic links between the two sides and other countries and regions.

26. Under CEPA, both the Mainland and HKSAR will –

- (a) progressively reduce or eliminate tariff and non-tariff barriers on substantially all the trade in goods between the two sides, currently 273 items of goods enjoy 0 customs treatment;
- (b) progressively achieve liberalization of trade in services through reduction or elimination of substantially all discriminatory measures; and

- (c) promote trade and investment facilitation.

### **Implementation principles**

27. The implementation of CEPA will adhere to the following principles –

- (a) to abide by the “one country, two systems” principle;
- (b) to be consistent with the rules of the WTO;
- (c) to accord with the needs of both sides to adjust and upgrade their economic regime;
- (d) to achieve mutual-benefits, complementarity and joint prosperity;
- (e) to take progressive action, dealing with the easier issues first.

28. The Mainland and the HKSAR will progressively reduce or eliminate restrictive measures against specified services and service suppliers of the other side. The Administration has specified different areas and implementation timetables for different sectors and sub-sectors of trade in services.

### **Efforts of the Legal Services Sector**

29. Since the Reunification, the legal services sector has been one of the pioneers in expanding into the Mainland market. The Department of Justice undertook negotiations with its Mainland counterpart in accordance with the wishes of the legal profession. We have also, in conjunction with the Law Society and the Bar Association, adopted various measures to introduce Hong Kong’s legal services and profession to Mainland officials, practitioners and potential clients.

30. As a result of these efforts, the legal service sector has been listed in the first group of service sectors covered by CEPA.



## **Legal Services under CEPA**

31. Under CEPA, the Mainland and HKSAR will adopt reciprocal arrangements to ensure market access. Specific commitments made in the Annexes to CEPA have come into effect since 1 January, 2004. Details of the commitments are as follows: -

- (a) Hong Kong law firms are allowed to set up representative offices in the Mainland to operate in association with Mainland law firms, but not in the form of partnership;
- (b) Mainland law firms are allowed to employ Hong Kong lawyers and barristers as consultants on Hong Kong law;
- (c) the 15 Hong Kong lawyers who have already acquired Mainland lawyer qualifications are allowed to intern and practise in non-litigation legal work on the Mainland;
- (d) Hong Kong permanent residents with Chinese citizenship are allowed to sit the legal qualifying examination on the Mainland;
- (e) those who have acquired Mainland legal professional qualification are allowed to engage in non-litigation legal work in Mainland law firms; and
- (f) the minimum residency requirement for Hong Kong representatives stationed in the Mainland representative offices of Hong Kong law firms located in Shenzhen and Guangzhou is waived, while the minimum residency requirement for such representatives stationing in cities and places other than Shenzhen and Guangzhou is shortened to two months each year.

## **Commitments of the HKSAR**

32. As from 1 January 2004, the HKSAR will not impose any new discriminatory measures on Mainland's services and service providers. In fact, the HKSAR has all along adopted a very open policy towards foreign lawyers and Mainland lawyers.

33. Lawyers from other jurisdictions, including Mainland lawyers, can be admitted as Hong Kong solicitors upon passing the Overseas Lawyers Qualification Examination conducted in the HKSAR. Similar examinations are also conducted for barristers to enable lawyers from other jurisdictions to be admitted as barristers in Hong Kong.

34. Lawyers and law firms from other jurisdictions (including the Mainland) may become foreign lawyers or foreign law firms respectively by registration. They may cooperate with local lawyers and operate as associations, share remuneration and profits, share offices and staff or manage them jointly. Lawyers from other jurisdictions may also be employed in Hong Kong law firms.

### **Steering Committee**

35. Under the provisions of CEPA, the Mainland and the HKSAR will set up a Joint Steering Committee. This will comprise senior representatives or officials designated by the two sides. It will meet at least once a year.

36. The functions of the Steering Committee include supervising the implementation of CEPA, interpreting the provisions of CEPA and resolving disputes that may arise during the implementation of CEPA.

37. Liaison Offices will be set up under the Steering Committee. Working groups may be set up as needed. In addition, the Department of Justice has entered into co-operation agreements with various provincial and municipal Justice Bureaux and Departments for exchange of personnel and information, for resolution of problems arising from the implementation of CEPA without referral to the central authority.

### **Qualifying Criteria for “Hong Kong Law Firms”**

38. Only Hong Kong service providers can benefit from the treatment under CEPA. In respect of legal services, only a law firm that engages in substantive business operations in the HKSAR can so benefit. The relevant criteria include-

- (a) the sole proprietor and all the partners of the law firm should be registered practising lawyers of Hong Kong;
- (b) the principal scope of business of the law firm should be to provide Hong Kong legal services in the HKSAR;
- (c) the law firm or its sole proprietor or all partners should pay Hong Kong profits tax in accordance with the law of the HKSAR;
- (d) the law firm should have engaged in substantive business operations in the HKSAR for at least three years; and
- (e) the law firm should own or rent premises in the HKSAR to engage in substantive business operations.

### **Hong Kong lawyers**

39. Hong Kong permanent residents can apply to the relevant Mainland departments for the provision of legal services as natural persons in accordance with CEPA.

### **Existing Situation following the Implementation of CEPA**

40. At present, 35 law firms have set up 39 representative offices in 10 Mainland cities. I have not yet been able to obtain the number of association of firms approved, or the number of Hong Kong interns registered with the authorities.

### **Merits of CEPA**

41. CEPA offers an enormous market for Hong Kong legal practitioners if they wish to enter into the Mainland market. Globalization has affected not only China, but also Hong Kong. If we do not look across the border now, when China opens up its markets completely, including its China law practice, lawyers from other jurisdictions will join with Mainland firms and we shall not

be able to resist the competition resulting from such alliances. Closer co-operation between Mainland lawyers and Hong Kong lawyers will enable us to compete when China opens up its market under the WTO agreement. The benefit of CEPA to China is therefore macro and long term. We must take advantage of this window period and secure for ourselves a place in the economic development of China. Hong Kong lawyers have a lot to offer.

42. The Hong Kong legal profession, which is renowned internationally, operates on the basis of well-established common law principles. After opening its market in the 1980s to foreign law firms, it has accumulated a wealth of experience on international commerce. It can therefore help introduce international standards and values to the Mainland law practice. Moreover, the Hong Kong legal profession will be able to serve as a bridge between lawyers in the Mainland and in other jurisdictions (especially those English speaking regions) and help enhance their communication.

43. The benefits of such a development to Hong Kong legal practitioners themselves are self-evident. It will enable them to participate in the enormous market of one of the fastest growing economies in the world.

44. It should be emphasized that the benefits that CEPA will bring, are only possible because of the principle of “one country, two systems”. It is only under one country, two systems that you can have two customs territories within one country. There is no point in having a CEPA between Guangzhou and Shanghai where the practice is governed by national regulations. It is only under one country, two systems that benefit could be viewed in a macro and long term manner.

### **Transparency and Implementation of Regulations**

45. Under CEPA, both the Mainland and the HKSAR agree to increase the transparency of the relevant regulations and rules and to enhance information exchange. The Mainland has already taken action to implement the commitments set out in CEPA. To this end, the Ministry of Justice implemented a number of regulations and measures in November 2003. Those regulations and measures provide a mechanism for Hong Kong residents to sit the National Judicial Examination and for the regularization of the practice of Hong Kong lawyers and law firms on the Mainland.

## **Entering into Associations**

46. Under CEPA, a Hong Kong law firm which has set up a representative office in the Mainland is allowed to enter into an association with a Mainland law firm. Such associations will provide one-stop legal services to clients who require advice on both Mainland and Hong Kong laws as they engage in cross-boundary business. The co-operation between two law firms from different jurisdictions will enable them to provide better and more effective legal services to clients. Associations will therefore enhance the competitiveness of the law firms.

47. The business connections of an association formed between a Hong Kong law firm and a Mainland law firm should also bring more business opportunities to the former. There will be obvious advantages in terms of cost reduction and sharing of resources.

48. The Ministry of Justice has promulgated a set of measures to regulate the activities and management of such associations. The measures came into effect on 1 January 2004.

49. In accordance with *the Measures*, only Hong Kong law firms that have representative offices on the Mainland are allowed to form an association with Mainland law firms. These law firms are in fact the first batch of professional bodies to attempt this new mode of operation on the Mainland.

50. The HKSAR Government will discuss with the Mainland authorities the possibilities of broadening the present scope of cooperation in the light of experience gained from this mode of operation. We are eager to seek and listen to the views of different professional bodies and will try our best to reflect their views in the next round of negotiation.

51. However, it should be noted that representative offices of Hong Kong law firms on the Mainland are still not allowed to engage in the provision of Mainland legal services. They are allowed only to:

- (a) advise clients on Hong Kong or foreign laws, as well as international conventions and practices;

- (b) accept instructions from clients to handle affairs involving Hong Kong laws;
- (c) engage, on behalf of their clients in Hong Kong, Mainland law firms to handle affairs involving Mainland laws;
- (d) provide legal services through long-term entrustment agreements with Mainland law firms; and
- (e) provide information relating to the impacts on Mainland law environment.

### **The Employment of Hong Kong Legal Practitioners**

52. Under CEPA and the express provisions of the *Measures for the Management of Hong Kong Legal Practitioners and Macao Practising Lawyers Employed by Mainland Law Firms as Legal Consultants* promulgated by the Ministry of Justice in November 2003, Mainland law firms may now employ Hong Kong lawyers.

53. Any Hong Kong legal practitioner who wishes to be employed by a Mainland law firm must have been in practice in the HKSAR for two full years. He should have never been punished for any criminal offence or disciplined for any professional misconduct or any violation of the code of professional ethics.

### **The Employment of Practising Mainland Lawyers**

54. Under the provisions of the *Measures on the Management of Representative Offices set up by Law Firms of the Hong Kong and Macao Special Administrative Regions in the Mainland*, representative offices of Hong Kong law firms must not employ practising Mainland lawyers. Representative offices may employ supporting staff who must not provide Mainland legal services to their clients.

55. The above provisions are apparently consistent with the provision that Hong Kong law firms on the Mainland shall not engage in the provision of

Mainland legal services. On the other hand, the existing provisions do allow Mainland law firms to employ Hong Kong lawyers. This implies that Hong Kong lawyers may broaden their professional scope through gaining access to a new market.

56. It is worth mentioning that such liberalization is only restricted to “non-litigation legal matters”. “Non-litigation legal matters” should mean matters other than conducting litigation in Mainland courts on behalf of clients.

### **Acquiring Professional Qualification by Hong Kong Residents**

57. A Hong Kong resident must obtain a Mainland lawyer’s qualification and acquire a Certificate of Legal Profession Qualification before he can engage in legal services on the Mainland.

58. In accordance with CEPA, the Ministry of Justice has promulgated specific regulations to make provision for the residents of the two Special Administrative Regions to sit the National Judicial Examination. Hong Kong permanent residents who are Chinese nationals are allowed to sit the examination. Those who have passed the examination may apply to be awarded a Certificate of Legal Profession Qualification.

### **Hong Kong Resident Obtaining a Lawyer’s Practice Certificate**

59. According to the *Law of the People’s Republic of China on Lawyers* (Lawyers Law), anyone possessing the qualification as a lawyer, having completed practical training in a Mainland law firm for a full year and being of good character and conduct, may apply to obtain a lawyer’s practice certificate. The Ministry of Justice has stipulated provisions in this regard. A Hong Kong resident may apply to practise law on the Mainland after obtaining a Certificate of Legal Profession Qualification and having undergone practical training for a full year.

## **Relaxation of the Residency Requirement**

60. Before the implementation of CEPA, China's commitments to the WTO applied to the representatives of Hong Kong law firms' representative offices on the Mainland. This means that they had to stay on the Mainland for at least six months each year.

61. After the implementation of CEPA, since 1 January 2004, the minimum residency requirement for those representatives has been shortened to two months each year, while the residency requirement for the representatives of the representative offices in Shenzhen and Guangzhou is waived.

## **Further Liberalization of the Professional Services Sector**

62. In accordance with the principle of progression and dealing with the easier issues first as set out in Article 2 of CEPA, there is always room for further liberalization and closer co-operation. By Article 3, it is agreed that the two sides will broaden and enrich the content of CEPA through continuous and further liberalization between them. The Steering Committee set up under Article 19 of CEPA is also an operational mechanism for reviewing, reinforcing and further implementing the arrangements.

63. Under Article 15 of CEPA, the Mainland and the HKSAR will encourage mutual recognition of professional qualifications and promote the exchange of professional talents between each other. Views are being sought from the Law Society and the Bar Association in this respect.

64. Moreover, competent authorities and professional bodies of both sides will, after seeking the advice of the other side, consider and design specific methodologies for mutual recognition of academic achievement by giving credits for certain subjects which are common under both systems.

## **Other Related Schemes**

65. In relation to the legal services sector, apart from CEPA, there are other schemes which play a significant part in bringing about closer



co-operation and mutual benefits. They include –

- (a) the HKSAR serving as an arbitration centre;
- (b) various practical training courses;
- (c) various roving exhibitions and seminars;
- (d) the concept of “one firm, two laws”; and
- (e) various kinds of co-operation agreements signed between the Mainland and Government departments and professional bodies of the HKSAR. Provisions facilitating and implementing the CEPA at the local level are incorporated into such agreements. A recent example is a co-operation agreement signed between the Justice Bureau, Beijing and the HKSAR.

## **Conclusion**

66. In conclusion, I hope that this review of legal developments before and after the CEPA has highlighted the tremendous opportunities that exist for Hong Kong lawyers at this time. The Mainland’s rapid development and participation in the global economy needs to be supported by sophisticated legal services. Hong Kong lawyers have, or can develop, the necessary expertise and can take advantage of CEPA to provide their services in respect of Mainland business. Opportunities are there to be grasped. Thank you.

- Annex 1 *Mainland and Hong Kong Closer Economic Partnership Arrangement*
- Annex 2 *Specific Commitments on Liberalization of Trade in Services*
- Annex 3 *Rules on Entering for the State Judicial Examination for Residents of the Hong Kong Special Administrative Region and the Macao Special Administrative Region*
- Annex 4 *Measures for the Management of Residents of the Hong Kong Special Administrative Region and the Macao Special Administrative Region Having Acquired the Mainland Legal Professional Qualification to Work as Lawyers in the Mainland*
- Annex 5 *Measures for the Management of Hong Kong Legal Practitioners and Macao Practising Lawyers Employed by Mainland Law Firms as Legal Consultants*
- Annex 6 *Measures for the Management of Associations Formed by Law Firms of the Hong Kong Special Administrative Region or the Macao Special Administrative Region with Mainland Law Firms*
- Annex 7 *Decision of the Ministry of Justice on Amending the Measures for Administration of Representative Offices set up by Law Firms of the Hong Kong and Macao Special Administrative Regions in the Mainland*
- Annex 8 *Regulations on the Management of Representative Offices set up by Foreign Law Firms in China*
- Annex 9 *Measures on the Management of Representative Offices set up by Law Firms of the Hong Kong and Macao Special Administrative Regions in the Mainland*
- Annex 10 *Provisional Regulations on the Setting Up of Offices by Foreign Law Firms within the Territory of China*