

For discussion on
21 March 2016

LEGISLATIVE COUNCIL
PANEL ON ADMINISTRATION OF JUSTICE AND LEGAL SERVICES

**Proposed Creation of one Permanent Post of Deputy Principal Government
Counsel in the Legal Policy Division of the Department of Justice**

PURPOSE

This paper invites Members' views on the proposed creation of one permanent post of Deputy Principal Government Counsel (DPGC)(DL2) in the Legal Policy Division (LPD) of the Department of Justice (DoJ) with effect from 30 May 2016 or upon approval by the Finance Committee, whichever is the later, to head a dedicated unit in LPD to take up the arbitration portfolio, including taking forward measures for promoting and developing Hong Kong's arbitration services in the increasingly competitive regional environment.

JUSTIFICATION

Current situation

2. The LPD is headed by the Solicitor General (SG) (DL6) who is supported by three Principal Government Counsel (PGC) (DL3). One of the PGC heads the Legal Policy (General) Section which comprises three units, namely the China Law Unit (ChLU), the General Legal Policy Unit 1 (GLPU1) and the General Legal Policy Unit 2 (GLPU2).

3. GLPU2 is headed by an Assistant Principal Government Counsel (APGC)(DL1). The original portfolio of GLPU2 includes legal work related to various types of petitions and statutory appeals, judicial reviews against determinations made by the Torture Claims Appeal Board (TCAB), *ex gratia* payment applications (made by persons who have spent time in custody following a wrongful conviction or charge), petitions under section 83P of the Criminal Procedures Ordinance (Cap. 221), etc. Relatively recently, due to operational needs, GLPU2 has also been taking up responsibilities of provision of advice to the Chief Executive (CE) on whether the surrender of a fugitive to a requesting jurisdiction should be ordered, preparation and promotion of bills, as well as promotion and development of Hong Kong's arbitration services, in addition to its original portfolio.

4. The promotion and development of Hong Kong's arbitration services is an integral part of the established policy of DoJ in enhancing Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia-Pacific region. In this regard, the 2015 Policy Agenda states as follows:

“[w]e will continue with the development of Hong Kong as an international legal and dispute resolution services centre in the Asia-Pacific region, in seeking to enhance our position in the international legal, dispute resolution and business arenas.” With the recent launch of the Belt and Road Initiative by the Central Government and the corresponding considerable array of opportunities in financing, project risk/quality management, infrastructure and real estate services, related vast opportunities for Hong Kong’s legal and arbitration services will also be generated. Further, as set out in the CE’s latest 2016 Policy Address, there is a strong demand from regions along the Belt and Road for professional and infrastructural services. Hong Kong has a sound legal system and adopts the common law regime, which is very familiar to the international business community. In establishing economic and trade ties with the Belt and Road countries and helping competitive Mainland enterprises “go global”, we may provide professional international legal and dispute resolution services and assist in developing a sound risk management system.

5. To facilitate this, there is a need for us to further promote Hong Kong’s legal and dispute resolution services so that enterprises in the Mainland and in countries along the Belt and Road will make use of Hong Kong’s professional services in their business development pursuant to the Belt and Road Initiative. By promptly and strategically introducing Hong Kong’s legal and arbitration services to, and promoting them in, the some 60 countries along the Belt and Road through promotional activities both in Hong Kong and elsewhere, we can more effectively capitalise on these opportunities.

6. We have carefully considered how best this new initiative should be taken forward, especially having regard to the focus, scope and volume of work that the tasks concerned will entail. While GLPU2 is well placed in terms of knowledge of arbitration-related matters, it does not have the necessary expertise in Mainland-related promotion tasks. On the other hand, although the ChLU has the relevant experience in the development of legal co-operation between Hong Kong and the Mainland, its experience in promotion work in the Mainland is more focused on the provision of legal services generally. Expertise aside, the two Units are already over-stretched for a prolonged period, and they will not be able to absorb any additional workload, especially that arising from the Belt and Road Initiative which is expected to be broad in scope given the geographic area that is covered and thus heavy in volume. To properly take forward DoJ’s activities for promoting and developing Hong Kong’s arbitration services and other related matters in the increasingly competitive regional environment, we find it necessary to create in the LPD a new dedicated team - i.e. the Arbitration Unit - comprising the proposed DPGC, two Senior Government Counsel (SGC) (including one SGC to be redeployed from GLPU2), one Law Clerk, and one Personal Secretary I. The creation of the team will help allow the APGC of GLPU2 to re-focus on the whole range of other substantial and heavy load of legal work under its already packed portfolio prior to its taking up of the arbitration-related work. The existing and proposed organisation chart of the LPD is at **Annex 1**.

7. The key areas of work related to the further development of arbitration services that the proposed team will need to take forward are set out in paragraphs 8 to 24 below.

Key areas of work of the new Arbitration Unit

(i) Promotion and Development of Arbitration Policies

8. The Policy Addresses of the last three years (i.e. 2013, 2014 and 2015) highlighted the policy objective to actively promote Hong Kong's international legal and dispute resolution services to enhance our status as a centre for international legal and dispute resolution services in the Asia-Pacific region. In order to pursue this policy objective, DoJ has been working closely with the legal professional bodies and arbitration-related bodies to make Hong Kong an arbitration-friendly jurisdiction by, *inter alia*, enhancing the statutory framework for arbitration in Hong Kong and facilitating the establishment and growth of world-class arbitration and law-related organisations in Hong Kong.

(ii) Monitoring the Operation of the Arbitration Ordinance

9. Arbitration is complex by nature, as reflected in the Arbitration Ordinance (Cap. 609)¹ which contains about 120 sections with intricate and elaborate provisions, including the interplay between an arbitral tribunal and the courts, enforcement of various types of arbitral awards, emergency relief, interim measures, etc.² The existing GLPU2 needs to, from time to time, advise and assist other counsel in DoJ on Cap. 609, in relation to the history of, and rationale behind, some provisions. The complexity of the work calls for an officer at a more senior level to take the lead in a dedicated and specialised team. Further, arbitration has a pronounced international element in it, in terms of liaising with international arbitral institutions (apart from the local ones)³, overseas promotional events and intense competition from regional competitors. The interaction with international arbitral and other relevant bodies⁴ has to be handled properly and carefully.

10. It is also relevant to note that competition from various regional competitors is so intense that both substantial legal work and various promotional events have to be handled within a tight and competing schedule. For example, to maintain the competitiveness of our legal framework for arbitration, Cap. 609 must be updated and revised from time to time so as to be on par with the latest international arbitration trend and practice. To this end, the officer in charge of the policy carriage of Cap. 609 must be knowledgeable about both Cap. 609 and the latest international

¹ This is in contrast with mediation which, by its nature, is meant to be laymen-friendly.

² By way of comparison, there are about 11 sections in the Mediation Ordinance (Cap. 620).

³ For example, the Permanent Court of Arbitration (in The Hague), International Court of Arbitration of the Paris-based International Chamber of Commerce (ICC).

⁴ For example, the Regional Centre for Asia and the Pacific, United Nations Commission on International Trade Law.

arbitration trend and practice, and must be able to shoulder the heavy responsibility of introducing amendments to Cap. 609 timeously and taking such amendments through every stage of the legislative process. The Arbitration (Amendment) Bill 2015 is a vivid example of giving swift response (and the desirability of so doing) to the request of the arbitration community in Hong Kong, which is reflected in the endorsement of the Bill by the legal sector, arbitral sector and the Legislative Council (LegCo) as well as the deputations to the Bills Committee. In the face of fierce regional competition, Hong Kong cannot afford to allow such important work to be taken up by an existing DPGC in LPD only when he/she has the spare capacity to do so. A dedicated officer should be assigned to handle the work. In any event, all existing DPGC within DoJ are fully engaged with their own portfolios. Besides, expertise on arbitration matters also needs time to build up, and this could not be achieved on an *ad hoc* basis.

(iii) Developing Specialised Areas of Arbitration

11. DoJ is also working alongside the relevant stakeholders in enhancing Hong Kong's capability in specialised areas of arbitration, such as investment arbitration, maritime arbitration and intellectual property (IP) arbitration.

(a) Investment arbitration

12. In January 2015, a Host Country Agreement between the Central Government and the Permanent Court of Arbitration (PCA) on the conduct of dispute settlement proceedings in Hong Kong and a related Memorandum of Administrative Arrangements concerning such proceedings between the HKSAR Government and the PCA were signed. The PCA, which has a history of over 100 years, has an excellent reputation in handling international investment arbitration, and is a leading international institution with its headquarters in The Hague. The signing of these two documents will facilitate the conduct of PCA-administered arbitration in Hong Kong, including state-investor arbitration. Closer co-operation between DoJ and the PCA would provide opportunities for Hong Kong-based practitioners to develop their skills in investment arbitration and diversify their arbitration practices. To this end, GLPU2 has already organised two seminars in March and November 2015 on PCA arbitration in Hong Kong with speakers from the PCA (including its Secretary General in the November seminar) since the signing of the above two documents. GLPU2 is also working alongside the relevant stakeholders on finalising the implementation arrangements for the Memorandum of Administrative Arrangements signed with PCA. Both DoJ and PCA are keen on fostering closer ties and co-operation on developing PCA-administered arbitrations in Hong Kong. The proposed Arbitration Unit would have very substantial work to do in continuing to develop international investment arbitration in Hong Kong.

(b) Maritime arbitration

13. Hong Kong has a long tradition as a regional maritime hub. The 2015 Policy Address (paragraph 52) states as follows: "With increasing maritime activities in Asia, maritime arbitration services have immense potential for growth. ... We will actively further advance development in this area." In order to respond to

stiff competition from other jurisdictions in the region, Hong Kong should take every opportunity to showcase our ability to provide first-class arbitration services in maritime disputes and maintain our edge.

14. For example, DoJ supported the holding of the 19th International Congress of Maritime Arbitrators in Hong Kong in May 2015. DoJ is also working closely with the Transport and Housing Bureau in promoting Hong Kong's maritime arbitration services through hosting and proactively participating in breakout sessions in the annual Hong Kong Asian Logistics and Maritime Conference in 2014 and 2015 and in the Hong Kong-Qingdao Maritime Services Seminar held in Qingdao (in September 2015)⁵ to promote Hong Kong's maritime arbitration services. The promotion and development of maritime arbitration will be another substantial area of work which the proposed Arbitration Unit will be required to continue to take forward.

(c) IP arbitration

15. Another important issue in the context of arbitration which is progressing speedily is the handling of cases relating to IP rights. As set out in the 2016 Policy Address, with increasing IP transactions, there is growing demand for dispute resolution services, and DoJ will help strengthen Hong Kong's status as an international IP arbitration and mediation centre and consider amendments to relevant legislation.

16. In this regard, the Working Group on Intellectual Property Trading set up by the Government in 2013 has formulated its support strategies, and corresponding initiatives are being implemented. It also published its report in March 2015, recommending, inter alia, the "study [of] the need for legislative amendments to clarify the arbitrability of IP disputes". To implement this recommendation, the Working Group on Arbitrability of IP Rights chaired by the SG published a consultation paper in December 2015 with a view to, in the light of the responses, introducing a bill into the LegCo as soon as possible in view of the intense competition in the region. In fact, the secretarial support to the latter Working Group has been provided and work arising from the promotion of the intended bill is currently absorbed by GLPU2.

17. We hope the bill can be passed as soon as possible. If the bill is passed by LegCo, the proposed Arbitration Unit would need to follow up on the publicity work (both locally and outside Hong Kong) by way of publications and seminars etc. (for example the drafting of articles featuring the new law for publication in international arbitration, IP and business journals, in addition to local journals; organisation of seminars to brief local arbitration, IP and business sectors on the new law; and participation in and/or organisation of regional or international conferences to introduce the new law to potential users of our IP arbitration services). This would,

⁵ Another example is that the Legal Services Forum (held in Qingdao in September 2014) organised by DoJ included a maritime arbitration session in which experienced Hong Kong maritime arbitrators shared their expertise and knowledge with Mainland audience.

hopefully, further lift Hong Kong's profile as a pioneer in arbitration generally and IP arbitration in particular.

(iv) *Cooperation with the United Nations Commission on International Trade Law (UNCITRAL)*

18. UNCITRAL is one of the subsidiary organs of the General Assembly of the United Nations (UN) and it is the core legal body of the UN system in the field of international trade law. UNCITRAL has an excellent reputation for formulating high-quality texts not only within the UN, but also among its Member States. The presence of UNCITRAL's representatives in Hong Kong (albeit just for particular events) may also provide synergy between Hong Kong and this organisation and further enhance the status of Hong Kong as a centre for international legal and dispute resolution services in the Asia-Pacific region. The events to be organised will be a convenient platform for the exchange of experience between Hong Kong and overseas professionals, and the latter learning more about the quality of services (including legal services) that Hong Kong may offer. It is an indirect way to promote Hong Kong's service industries. This increasing co-operation with UNCITRAL (in particular its Regional Centre for Asia and the Pacific (RCAP)) in the organisation of arbitration-related conferences and events is no doubt conducive to the development of Hong Kong's position as an international centre for legal and dispute resolution services.

19. In this regard, the UNCITRAL Asia Pacific Judicial Summit & Roundtable (the Conference) was held in Hong Kong in October 2015 relating to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention). It was in the form of roughly a two-and-a-half-day conference, targeting judges and judicial training officers from about 50 countries for attendance. About 260 participants from 37 jurisdictions (including Hong Kong) attended the Judicial Summit. Out of these 260 participants, about 157 came from elsewhere.

20. The Conference was organised by DoJ in collaboration with the UNCITRAL RCAP and the Hong Kong International Arbitration Centre (HKIAC). Although the HKIAC was primarily assisting on the logistical arrangements, substantial work also rested with DoJ counsel, including working out the form of cooperation with parties concerned, chairing and participating in the Organising Committee meetings, and working on the conference programme (including the choice of topics and speakers).

21. Taking into account the satisfactory outcome of the Conference, it is intended that similar conference would be held in Hong Kong roughly every two to three years to enhance international trade and development in the Asia-Pacific and to also raise capacity on the interpretation and application of the New York Convention in the judiciaries. Moreover, we will continue to explore other forms of cooperation with the UNICTIRAL. Apart from being responsible for the work involved in the organisation of such joint events, the new Unit will also be required to maintain close contact with UNCITRAL, monitor its deliberations in relation to arbitration and, where appropriate, to attend international conferences and meetings, so as to keep the

department abreast of developments on the international front and further enhance our cooperation with the organisation.

(v) *The Belt and Road Initiative*

22. The opportunities relating to the provision of international legal and dispute resolution services for enterprises in the Mainland, countries along the Belt and Road, as well as other overseas business arising from the Belt and Road Initiative (as mentioned in paragraphs 4 and 5 above) aside, Hong Kong has also actively participated in the preparatory work for the establishment of the Asian Infrastructure Investment Bank (AIIB), which is an essential part of the Belt and Road Initiative. In this regard, we intend to promote Hong Kong as a dispute resolution centre for AIIB development projects.

23. It is planned that regular promotional activities in the form of roadshows, conferences, seminars and forums will be conducted to promote Hong Kong's legal and arbitration services in some 60 overseas countries along the Belt and Road (a list of these countries at **Annex 2**). It is envisaged that there will be a sizable number of participants on each occasion and the Arbitration Unit will be heavily involved in meticulous planning, extensive liaison work with government officials and arbitral and professional bodies which are complex and time-consuming duties.

24. An important and useful way by which our status as a hub for international legal and dispute resolution services can be reinforced is for Hong Kong to enhance its role in the provision of legal and dispute resolution-related training/capacity building opportunities for professionals and government officials from the Belt and Road countries. This would have the dual advantage of enhancing their awareness of different means of dispute resolution and increasing Hong Kong's presence (and hopefully influence) in these countries as an international legal and dispute resolution centre, thereby bringing more business opportunities for the legal and dispute resolution sectors in Hong Kong. In the slightly longer run, if well-received and proven effective, DoJ may further consider to institutionalise the provision of such training/capacity building services through the establishment of a legal and dispute resolution training centre in Hong Kong.

The need for a permanent DPGC post

25. The new Arbitration Unit will take up the tasks specified in paragraphs 8 to 24 above that require legal knowledge and delicate networking and liaison work with the legal and arbitral professions, as well as other relevant bodies (such as UNCITRAL) and Government officials in various countries. In view of the complexity and sensitivity of its work, it is necessary for the Unit to be headed by a DPGC who will be responsible for developing a policy agenda for the implementation of the long term commitment to promote and develop arbitration services, supervising the overall work of the Unit and attending to management duties. When compared to the existing APGC in GLPU2 handling the arbitration portfolio, the DPGC will take up a higher level of duties in terms of complexity and volume, including monitoring the operation

of the Arbitration Ordinance and the international development in the arbitration field, providing secretarial and research support to the Advisory Committee on Promotion of Arbitration, liaising with relevant UN bodies and stakeholders, helping formulate appropriate policies on the arbitration law and devise effective strategies on promoting and developing Hong Kong's arbitration services and liaising closely, at a senior level, with the legal professional and arbitral bodies as well as other stakeholders in promoting Hong Kong as a leading centre for international arbitration services.

26. The detailed job description of the proposed DPGC post is at **Annex 3**. Given the heavy and extensive duties to be taken forward, the nature of work, as well as the long term commitment for the promotion and development of arbitration (especially in relation to the additional workload in the light of Belt and Road Initiative) services, it is appropriate for this permanent post to be pitched at DPGC level.

Non-directorate support

27. Apart from the proposed DPGC post, we will also create one SGC, one Law Clerk and one Personal Secretary I posts to provide the necessary support to the DPGC. Moreover, the SGC post previously created in the GLPU2 (since 2014) to provide various support to the Advisory Committee on Promotion of Arbitration and the promotional initiatives of arbitration services will also be redeployed to the proposed Arbitration Unit to continue handling the work concerned (which will be taken up by the new Unit).

ALTERNATIVE

28. There is no viable alternative. Other than the creation of the DPGC post, the alternative of staff redeployment has been considered but found to be not feasible. GLPU2 is already over-stretched for a prolonged period with demanding and competing duties. The team is already fully engaged in a whole range of other substantial legal work prior to its taking up of tasks relating to arbitration and preparation and promotion of bills. It is not sustainable for the team to continue to be responsible for arbitration matters, let alone absorbing any additional work arising from the Belt and Road Initiative. It is also not possible for LPD to take up the considerable workload with the existing directorate establishment, as all existing directorate officers are fully engaged with their own portfolios.

29. With the creation of the proposed Arbitration Unit, the existing GLPU2 will be able to re-focus on the handling of a whole range of other substantial and heavy load of legal work (as outlined in paragraph 3 above) prior to its taking up of tasks relating to arbitration. Many of these tasks are increasingly time-consuming and require focused attention. The proposed creation of the Arbitration Unit, including the DPGC post, will help ensure that due supervisory attention at the appropriate directorate level can be provided to all these important non-arbitration tasks.

30. If the proposed DPGC is not created, the capability of the Government in implementing the policy initiative to pursue Hong Kong's legitimate interests mentioned above will be adversely affected to a significant extent. Besides, the level of the Government's efforts in promoting and developing Hong Kong's arbitration services will fall short of the expectations of the legal and dispute resolution professional bodies (in particular on rendering its support in helping them ride on the valuable opportunities arising from the Belt and Road Initiative). DoJ may then encounter real difficulties in implementing the firm and long-term commitment of promoting and developing Hong Kong's arbitration services. Moreover, other dispute resolution centres in the region, which have at all times been vying eagerly for both the Asia-Pacific and the Mainland dispute resolution markets, would likely take advantage of any slight relaxation in Hong Kong's promotional work in this respect.

FINANCIAL IMPLICATIONS

31. The proposed creation of the DPGC post in DoJ will bring about an additional notional annual salary cost at mid-point of \$1,973,400. The full annual average staff cost, including salaries and staff on-cost, is \$2,785,212.

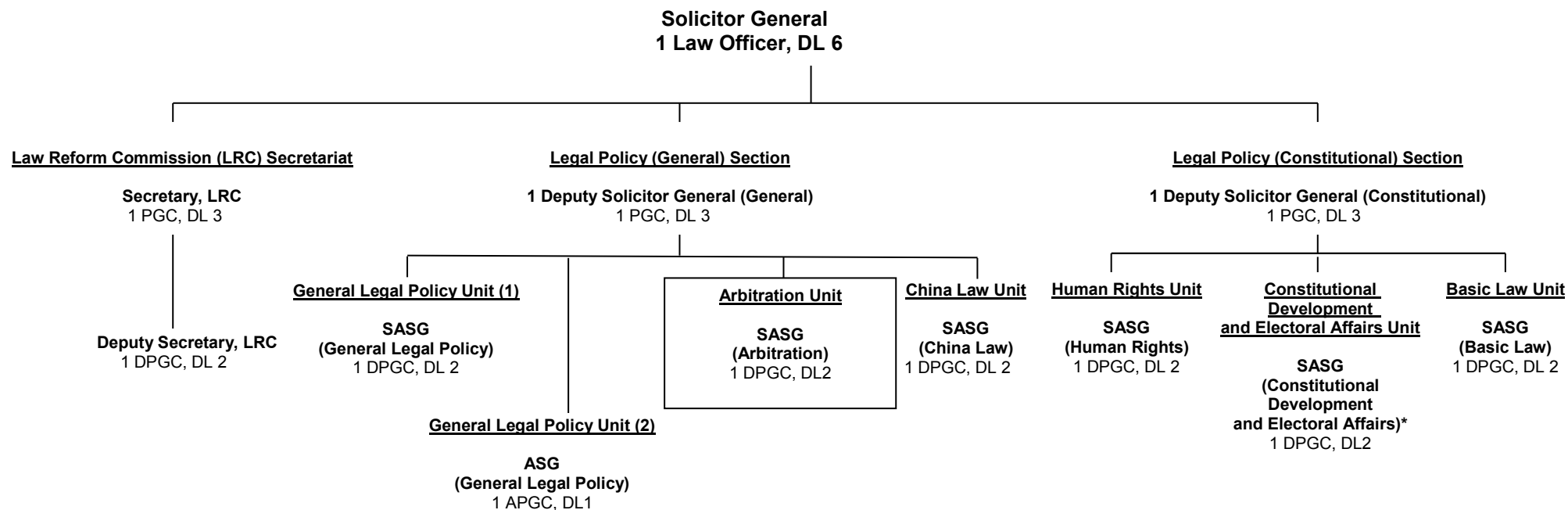
32. The proposed DPGC will be supported by four non-directorate staff as mentioned in paragraph 27 above, at a notional annual salary cost at mid-point of \$3,381,120 and the full annual average staff cost, including salaries and staff on-cost, is \$4,949,712. We have included sufficient provision in the draft Estimates of 2016-17 to meet the cost of this proposal.

ADVICE SOUGHT

33. Members are invited to comment on the proposal. Subject to Members' views, we will seek the recommendation of the Establishment Subcommittee and approval from the Finance Committee.

Department of Justice
March 2016

Existing and Proposed Organisation Chart of the Legal Policy Division



Legend :

- * — Time-limited post
- DL — Directorate Legal Pay Scale
- PGC — Principal Government Counsel
- DPGC — Deputy Principal Government Counsel
- APGC — Assistant Principal Government Counsel
- SASG — Senior Assistant Solicitor General
- ASG — Assistant Solicitor General
- Proposed DPGC post

List of 63 countries under the Belt and Road Initiative

1. South East Asia (11 in total)

Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Vietnam, Laos, Myanmar, Cambodia, East Timor

2. South Asia (7 in total)

Nepal, Bhutan, India, Pakistan, Bangladesh, Sri Lanka, Maldives

3. Central Asia (6 in total)

Kazakhstan, Turkmenistan, Kyrgyzstan, Uzbekistan, Tajikistan, Afghanistan

4. West Asia (17 in total)

Iran, Iraq, Georgia, Armenia, Azerbaijan, Turkey, Syria, Jordan, Israel, Saudi Arabia, Bahrain, Qatar, Yemen, Oman, United Arab Emirates, Kuwait, Lebanon

5. Europe (16 in total)

Albania, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Romania, Poland, Serbia, Slovakia, Slovenia

6. Commonwealth of Independent States (4 in total)

Russia, Belarus, Ukraine, Moldova

7. Others (2 in total)

Mongolia, Egypt

Job Description
Deputy Principal Government Counsel (Arbitration)

Rank : Deputy Principal Government Counsel (DL2)

Responsible to : Deputy Solicitor General (General)

Main Duties and Responsibilities

1. To keep abreast of the latest developments in arbitration internationally and locally, and to monitor the operation of the Arbitration Ordinance (Cap. 609) and consider the need to introduce amendments in the light of feedback from the arbitration community;
2. To act as the Secretary, providing secretarial and research (and writing) support to the Advisory Committee on Promotion of Arbitration chaired by the Secretary of Justice;
3. To liaise or at times to work closely with, often at a senior level, the relevant United Nations bodies, professional and arbitral bodies, academics, local and overseas judiciaries and government departments and stakeholders in formulating and implementing various initiatives (including promotional events such as roadshows, conferences, seminars and forums);⁶
4. To monitor the international developments in the arbitration field including the deliberations of United Nations Commission on International Trade Law in relation to arbitration and, where appropriate, to attend international conferences and meetings;
5. To undertake such other duties as may be assigned from time to time, in particular relating to arbitration and other forms of dispute resolution;
6. To provide inputs in relation to arbitration on setting up the Hong Kong Legal Hub; and
7. To supervise the overall work of the unit and attend to management duties.

⁶ Interaction with local and international arbitral and other relevant bodies is delicate and sensitive, and has to be handled with prowess.