

The Relationships between China and Its Special Administrative Regions and Their Regulation (an outline)

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Three relationships exist between China and its autonomous provinces, Hongkong and Macao Special Administrative Regions, under the current legal framework, which are the fundamental constitutional relationship regulated by the Basic Laws; the macro-relationship in the investment and trade regulated by the Closer Economic Partnership Arrangement (abbreviated as CEPA); as well as the micro-relationship in the civil and commercial transactions regulated by the specific Arrangements on such particular issues such as the mutual service of judicial documents, and the recognition and enforcement of the judgments and arbitral awards from the other side. The Basic Laws, as the constitutional documents, guarantees the principles of “one country, two systems”, “Hongkong people ruling Hongkong”, “Macao people ruling Macao”, and “a high degree of autonomy”; the CEPA made between both sides secure the realization of the closer economic partnership in the region; and the other specific Arrangements ensure and protect the free mobility of the people and business between both sides. These measures in whole provide a favorable environment for the economic development and the regional integration. Some omissions and deficiencies in the current legal framework, however, impede the process of the regional integration, to which more attention should be put and more practical measures should be adopted in future. Though the regional integration between China and its autonomous provinces is different from those in other regions in the world in some aspects, it can still learn some beneficial experiences from the regional integrations in Europe, America and Africa, and it can also provide references for them.

I . The Fundamental Constitutional Relationship under the Basic Laws

The Basic Laws of the Hong Kong Special Administrative Region (HKSAR) and the

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Macao Special Administrative Region (MSAR) of the People's Republic of China, were adopted on April 4, 1990 and on 31 March, 1993 by the Seventh and the Eighth National People's Congress (NPC) of the People's Republic of China, respectively, and they went into effect on July 1, 1997 and 20 December, 2000, when China resumed the sovereignty over the two regions. The Basic Laws are the constitutional documents for the HKSAR and MSAR which enshrines the important concepts of "One Country, Two Systems", "a high degree of autonomy", and "Hong Kong/Macao People ruling Hong Kong/Macao". They also prescribe the various systems to be practiced in the HKSAR and MSAR.

Both Basic Laws have a special chapter (Articles 12-23) on the relationships between the China Central Authority and the special administrative regions, the provisions in each chapter are essentially the same. According to the provisions, the relationships between China Central Authority and the Special Administrative Regions are as follows:

- The Special Administrative Regions shall be local administrative regions of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.¹
- The Central People's Government shall be responsible for the foreign affairs relating to the Special Administrative Regions, and it authorizes the Special Administrative Regions to conduct relevant external affairs on their own in accordance with the Basic Laws.²
- The Central People's Government shall be responsible for the defence of the Special Administrative Regions. The Governments of the Special Administrative Regions shall be responsible for the maintenance of public order in the Regions.³
- The Central People's Government shall appoint the Chief Executives and the principal officials of the executive authorities of the Special Administrative Region in accordance with the relevant provisions of the Basic Laws.⁴

¹ Art. 12 of the Basic Laws of HKSAR and MSAR.

² Art. 13 of the Basic Laws of HKSAR and MSAR.

³ Art. 14 of the Basic Laws of HKSAR and MSAR.

⁴ Art. 15 of the Basic Laws of HKSAR and MSAR.

- The Special Administrative Regions shall be vested with executive power and legislative power.⁵
- The laws in force in the Special Administrative Regions shall be the Basic Laws, the laws previously in force in Hong Kong and Macao as provided for in the Basic Laws, and the laws enacted by the legislatures of the Regions. National laws shall not be applied in the Special Administrative Regions except for those listed in Annex III to the Basic Laws. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.⁶
- The Special Administrative Regions shall be vested with independent judicial power, including that of final adjudication.⁷
- The Special Administrative Regions may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government.⁸
- Chinese citizens who are residents of the Special Administrative Regions shall be entitled to participate in the management of state affairs according to law. In accordance with the assigned number of seats and the selection method specified by the National People's Congress, the Chinese citizens among the residents of the Special Administrative Regions shall locally elect deputies of the Regions to the National People's Congress to participate in the work of the highest organ of state power.⁹
- No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Special Administrative Regions administers on their own in accordance with the Basic Laws.¹⁰
- The Special Administrative Regions shall enact laws on their own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Regions, and to prohibit political

⁵ Arts. 16 and 17 of the Basic Laws of HKSAR and MSAR.

⁶ Art. 18 of the Basic Laws of HKSAR and MSAR.

⁷ Art. 19 of the Basic Laws of HKSAR and MSAR.

⁸ Art. 20 of the Basic Laws of HKSAR and MSAR.

⁹ Art. 21 of the Basic Laws of HKSAR and MSAR.

¹⁰ Art. 22 of the Basic Laws of HKSAR and MSAR.

organizations or bodies of the Regions from establishing ties with foreign political organizations or bodies.¹¹

The power of interpretation and amendment of the Basic Laws shall be vested in the Standing Committee of the National People's Congress. The Standing Committee of the National People's Congress shall authorize the courts of the Special Administrative Regions to interpret on their own, in adjudicating cases, the provisions of the Basic Laws which are within the limits of the autonomy of the Regions. The courts of the Special Administrative Regions may also interpret other provisions of the Basic Laws in adjudicating cases. However, if the courts of the Regions, in adjudicating cases, need to interpret the provisions of the Basic Laws concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Regions, and if such interpretation will affect the judgments on the cases, the courts of the Regions shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Courts of Final Appeal of the Regions. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Regions, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.¹²

The power to propose bills for amendments to the Basic Laws shall be vested in the Standing Committee of the National People's Congress, the State Council and the Special Administrative Regions. Amendment bills from the Special Administrative Regions shall be submitted to the National People's Congress by the delegation of the Regions to the National People's Congress after obtaining the consent of two-thirds of the deputies of the Regions to the National People's Congress, two-thirds of all the members of the Legislative Council of the Regions, and the Chief Executive of the Regions. Before a bill for amendment to the Basic Laws is put on the agenda of the National People's Congress, the Committee for the Basic Laws of the Special Administrative Regions shall study it and submit its views. No amendment to the

¹¹ Art. 23 of the Basic Laws of HKSAR and MSAR.

¹² Art. 158 of the Basic Law of HKSAR, Art. 143 of the Basic Law of MSAR.

Basic Laws shall contravene the established basic policies of the People's Republic of China regarding Hong Kong and Macao.¹³

II . The Macro-relationship in Trade and Investment under the CEPA

The central government of the People's Republic of China and the government of Hong Kong Special Administrative Region signed the Closer Economic Partnership Arrangement (CEPA) on 29 June, 2003. Just several months later, on 17 October, 2003, the Chinese central government and the Macao Special Administrative Region signed another CEPA, which is in fact a virtually identical copy of the former. The article will make a brief introduction about the trade and investment relationship by reference to the CEPA between Mainland China and HKSAR.

The objectives of the CEPA are to strengthen trade and investment cooperation between the Mainland and the Special Administrative Regions and promote joint development of the two sides, through the implementation of the following measures:¹⁴

- progressively reducing or eliminating tariff and non-tariff barriers on substantially all the trade in goods between the two sides;
- progressively achieving liberalization of trade in services through reduction or elimination of substantially all discriminatory measures;
- promoting trade and investment facilitation.

According to Article 2 of the CEPA Between Mainland China and HKSAR, the implementation and amendment of the "CEPA" shall adhere to the following principles :

- to abide by the "one country, two systems" principle;
- to be consistent with the rules of the World Trade Organisation (hereinafter referred to as the "WTO");
- to accord with the needs of both sides to adjust and upgrade their industries and

¹³ Art. 159 of the Basic Law of HKSAR, Art. 144 of the Basic Law of MSAR.

¹⁴ Art. 2 of the CEPA between Mainland China and Hong Kong.

- enterprises and to promote steady and sustained development;
- to achieve reciprocity and mutual benefits, complementarity with each other's advantages and joint prosperity;
 - to take progressive action, dealing with the easier subjects before the more difficult ones.

CEPA is a win-win agreement, bringing new business opportunities to the Mainland, Hong Kong and all foreign investors. For Hong Kong, CEPA provides a window of opportunity for Hong Kong businesses to gain greater access to the Mainland market. CEPA also benefits the Mainland as Hong Kong serves as a perfect "springboard" for Mainland enterprises to reach out to the global market and accelerating the Mainland's full integration with the world economy. Foreign investors are also welcome to establish businesses in Hong Kong to leverage on the CEPA benefits and join hands in tapping the vast opportunities of the Mainland market.

CEPA covers the following three broad areas:

1. trade in goods¹⁵

Under CEPA, the Mainland agreed to fully implement zero tariff on imported goods of Hong Kong origin from 1 January 2006, upon applications by local manufacturers and upon the CEPA origin rules (ROOs) being agreed and met. Imported goods do not include goods prohibited by the Mainland's rules and regulations and those prohibited as a result of the implementation of international treaties by the Mainland. So far, both sides have reached agreements on the CEPA ROOs for over one thousand four hundred items of goods. For goods that have no agreed ROOs for the time being, their relevant ROOs will be jointly worked out twice a year on applications by the trade from 2006.

Goods exported from Hong Kong to the Mainland must fulfill the CEPA origin rules in order to claim zero tariff under CEPA. To claim the tariff preference, each consignment of goods exported to the Mainland must be accompanied by a Certificate of Hong Kong Origin - CEPA ("CO(CEPA)") issued by the Trade and Industry

¹⁵ Arts. 5, 6, 7, 8, 9 of the CEPA between Mainland China and Hong Kong.

Department or one of the five Government Approved Certification Organizations (i.e. the Hong Kong General Chamber of Commerce; Federation of Hong Kong Industries; the Chinese Manufacturers' Association of Hong Kong, the Chinese General Chamber of Commerce and the Indian Chamber of Commerce, Hong Kong). Before applying for CO(CEPA), the Hong Kong manufacturer concerned is required to apply for Factory Registration (FR) with the Trade and Industry Department to demonstrate that its factory possesses sufficient capacity to produce the goods for export.

2. trade in services¹⁶

Hong Kong service suppliers enjoy preferential treatment in entering into the Mainland market in various service areas. Professional bodies of Hong Kong and the regulatory authorities in the Mainland have also signed a number of agreements or arrangements on mutual recognition of professional qualification and other issues relating to professional services under CEPA such as construction and related engineering services, securities and futures services, insurance services, patent agent services, and professional accountants services.

Generally speaking, "juridical persons" (including companies, partnerships and sole proprietorships) as well as "natural persons" of Hong Kong will be able to enjoy preferential treatment granted by the Mainland under CEPA, provided that they fulfil the definition and related requirements of Hong Kong service suppliers. Unless otherwise specified in CEPA, a "natural person" means a Hong Kong permanent resident, whereas a "juridical person" means any legal entity duly constituted or otherwise organized under the applicable laws of Hong Kong and which has engaged in substantive business operations in Hong Kong for three to five years.

3. trade and investment facilitation¹⁷

The two sides shall promote trade and investment facilitation through greater transparency, standard conformity and enhanced information exchange.

¹⁶ Chapter 4 of the CEPA between Mainland China and Hong Kong.

¹⁷ Chapter 5 of the CEPA between Mainland China and Hong Kong.

The two sides will promote cooperation in the following areas :

- trade and investment promotion;
- customs clearance facilitation;
- commodity inspection and quarantine, food safety and quality and standardization;
- electronic business;
- transparency in laws and regulations;
- cooperation of small and medium enterprises;
- cooperation in Chinese traditional medicine and medical products sector.

III . The Micro-relationship in Civil and Commercial Transactions under the Other Specific Arrangements

Since China's resumption of sovereignty over Hong Kong and Macao, and especially since the ratification of the CEPAs with HKSAR and MSAR, the civil and commercial transactions between Mainland China and the Special Administrative Regions rose sharply. Consequently, more and more cases involving the persons, the transactions, or the properties in Mainland China, HKSAR or MSAR appeared in the courts of Mainland China and the Special Administrative Regions. Because under the Basic Laws of the Special Administrative Regions, the laws in HKSAR and MSAR existed before the Basic Laws are still in force, and the courts in the Special Administrative Regions have independent and final jurisdiction over cases arising in their respective region, this will result in the interregional conflict of laws under the context of "one country, two systems and three jurisdictions"¹⁸.

The interregional conflict of laws concern the following three questions: first, which court has jurisdiction to hear a case with an element (elements) with Mainland China and the Special Administrative Regions, for example, the party to the dispute is a domiciliary of Mainland China or the Special Administrative Regions, or the dispute is about the transaction happened in Mainland China or the Special Administrative Regions, Second, once the court's jurisdiction has been decided, which law, the law of

¹⁸ The Mainland China has the Chinese law system, the HKSAR has the common law system and the MSAR has the Portuguese law system.

Mainland China, or the law of HKSAR or MSAR, the court will choose to adjudicate the case; the third and the last question deals with the recognition and enforcement of the judgment of the arbitral award, as well as other matters such as the service of judicial document and the taking of evidence.

There are no arrangements about the jurisdiction and choice of law issues between Mainland China and the Special Administrative Regions up to now. According to the Judicial Interpretation of the People's Supreme Court of Mainland China, the cases with the element (elements) with the Special Administrative Regions are treated as the foreign related cases, which should be dealt with in accordance with the Chinese private international law rules. On the other hand, the cases with the element (elements) of Mainland China are dealt with under the conflict rules in British and Portuguese private international law in the courts of HKSAR and MSAR, respectively.

While in the areas of service of judicial documents, the investigation and the taking of evidence, and the recognition and enforcement of judgments and arbitral awards, many specific Arrangements have been signed between both sides which will be dealt with briefly below. Pursuant to the Article 19 of the HKSAR Basic Law and Article 93 of the MSAR Basic Law, The Special Administrative Regions may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other. Mutual judicial assistance in the above areas is an important part of the implementation of the "one country, two systems" principle of the Basic Laws.

In turn, the establishment of such a framework and its smooth function would provide an incarnation of the successful implementation since the arrangement will protect the independence of the judicial systems of Hong Kong and Macao and respect the equality of Hong Kong and Macao on one hand, and the Mainland on the other hand, as two separate jurisdictions. The judicial assistance will play a crucial role in safeguarding the smooth transition of Hong Kong and Macao, and in promoting the economic integration of the Mainland and the Special Administrative Regions.

1. the service of judicial document and the taking of evidence

An international convention existed in this area and has served as the legal basis for judicial assistance between the two sides before the handover. It is the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 had been applied by virtue of the accession to them by Chinese, British and Portuguese Governments.¹⁹ Also, China ratified on 3 July 1997 the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 1970, which had become the law of Hong Kong and Macao through the British and Portuguese accession. After the handover, the Chinese Government has notified the secretary-general of the United Nations that with certain reservations and declarations, the international conventions would continue to be applied in the HKSAR and MSAR. However, these conventions can no longer be applied between the Mainland and the Special Administrative Regions simply because under international law, an international convention may only be applied among states as independent subjects of the international community, but not directly to any part of a country without transplantation.

In order that the cases between both sides can be dealt with timely and efficiently, the Mainland and the HKSAR and MSAR concluded an Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts and an Arrangement for Mutual Entrustment with Service of Judicial Documents and Taking of Evidence in Civil and Commercial Cases by Courts in the Mainland and the Macao Special Administrative Region in 1999 and in 2001, and went into force from 30 March, 1999 and 15 September, 2001, respectively. The two Arrangements have detailed provisions about the mutual service of judicial documents between the Mainland and the Special Administrative Regions.

2. the recognition and enforcement of the judgment and the arbitral award

There are no agreements on the recognition and enforcement of the judgment and the arbitral awards except the 1958 New York Convention on the Recognition and Enforcement of the Foreign Arbitral Award, to which the Mainland China, the UK and

¹⁹ Mainland China, the UK and the Portugal acceded to the Convention in 1991, 1965 and 1971 respectively.

the Portugal are member states,²⁰ between the Mainland and Hong Kong and Macao. There are no co-operation between both sides on the mutual recognition and enforcement of civil and commercial judgment, either. On the other hand, the arbitral awards and civil and commercial judgments to be recognized and enforced in both sides are increasing year by year, which lead to the urgent call for the mechanism for the recognition and enforcement of the arbitral awards and judgments. Therefore, the Mainland China and HKSAR entered into the Arrangement for the Mutual Recognition and Enforcement of the Arbitral Awards based on the 1958 New York Convention and the Arrangement between the Mainland and HKSAR concerning Mutual Recognition and Enforcement of Judgments of Civil and Commercial Cases under the Jurisdiction as Agreed to by the Parties Concerned in 1999 and in 2006 respectively; and the Mainland and MSAR reached the Arrangement for the Recognition and Enforcement of Civil and Commercial Judgments and the Arrangement for the Mutual Recognition and Enforcement of the Arbitral Awards in 2006 and 2007 respectively. These Arrangements constitute the solid base for the mutual recognition and enforcement of the arbitral awards and judgments between the Mainland and the Special Administrative Regions.

IV. Conclusion

The above legal framework provides the guarantee for the successful economic integration between the Mainland and its Special Administrative Regions. However, the inadequacies and omissions in the above legal instruments, for example, the ambiguities in the words of the HKSAR Basic Law have arose some heated debate about the interpretation of it,²¹ there is some inadequacies,²² in particular, there is no dispute settlement mechanism in the CEPA, and the judicial assistance areas are still to be broadened, which will impede the progress of the integration, and which need to be further developed in the future.

²⁰ Mainland China acceded to the Convention in 1986, the UK acceded the Convention in 1975 and extended it to Hong Kong in 1977, though Portugal acceded the Convention in 1995, it did not extend it to Macao.

²¹ Yongping Xiao, "Comments on the Judgment on the Right of Abode by Hong Kong CFA", 48 *Am. J. Comp. L.* 471, summer, 2000; Mark R. Conrad, "Interpretation of Hong Kong Basic Law: A Case for Cases", 23 *UCLAPAC. BASIN L. J.* 1, Fall, 2005; Albert H. Y. Chen, "Constitutional Adjudication in Post-1997 Hong Kong", 15 *Pac. Rim L. Pol'y* 627, September, 2006.

²² Jiaxiang Hu, "Closer Integration, Controversial Rules: Issues Arising from the CEPA between Mainland China, Hong Kong, and Macao", 18 *Pace Int'l L. Rev.* 389, Fall, 2006.