

Legal Services (32) - General FAQs and FAQs in relation to CEPA and its Supplements (up to 2006 Liberalization Measures)

I. Employment by Mainland law firms

1. What are the procedural requirements relevant to the employment of Hong Kong legal practitioners by Mainland law firms?

Under the *Measures for the Management of Hong Kong Legal Practitioners and Macao Practising Lawyers Employed by Mainland Law Firms as Legal Consultants*, which has been in force since 1 January 2004 when CEPA I came into operation, a Hong Kong legal practitioner who wishes to take up employment in a Mainland law firm as legal consultant must obtain a Hong Kong legal consultant permit in accordance with the provisions of the *Measures*. The further liberalization measures concerning trade in services under CEPA II which took effect on 1 January 2005 has removed this procedural requirement so that Hong Kong legal practitioners providing professional assistance on an individual case basis at the request of Mainland law firms will not be required to apply for the Hong Kong legal consultant permit.

2. What are the prescribed criteria for Hong Kong legal practitioners to be employed by Mainland law firms?

Before being employed by a Mainland law firm, a Hong Kong legal practitioner must have practised for two years in Hong Kong. He should not have been punished for any criminal offence, professional misconduct or any violation of the code of practice.

II. Association of law firms

3. What are the requirements relevant to Mainland law firms intending to apply for association with Hong Kong law firms?

Under the *Measures for the Management of the Associations*

Formed by Law Firms of the Hong Kong Special Administrative Region and Macao Special Administrative Region with Mainland Law Firms issued by the Ministry of Justice which took effect on 1 January 2004, a Hong Kong law firm which has set up a representative office in the Mainland may apply to form association with a Mainland law firm which (i) has been established for 3 full years; (ii) has not less than 20 full-time lawyers; and (iii) has not been subject to any administrative penalty or disciplinary measure for professional misconduct.

The second requirement, namely, the Mainland law firm shall have not less than 20 full-time lawyers, has been removed under CEPA IV which took effect on 1 January 2007.

However, no branch office of any Mainland law firm may apply for association as a party to the association.

4. Whether the forming of association between a Hong Kong law firm and a Mainland law firm is subject to any geographical restriction?

According to the revised liberalization measures under CEPA III which took effect on 1 July 2006, Hong Kong law firms which have set up representative offices in the Mainland are allowed to form association with one Mainland law firm situated in the Province, Autonomous Region or Municipality directly under the Central Government where their representative office is located. The amendment took effect on 1 January 2006.

The above restriction will be removed by virtue of the Supplement and Amendment Document IV on commitments regarding liberalization trade in services promulgated by the Central Government on [29 June 2007]. Upon the implementation of the new liberalization measure on 1 January 2008, a Hong Kong law firm that has set up a representative office in the Mainland may operate in association with one Mainland law firm anywhere in the Mainland.

5. What benefits will be brought to the Hong Kong legal practitioners by the latest amendments to the liberalization measures concerning association of law firms?

Pursuant to the liberalization measures under CEPA V, Hong Kong law firms will enjoy much greater flexibility in choosing their Mainland partners when forming an association. They will no longer be confined to the Mainland law firms situate in the same Province, Autonomous Region or Municipality directly under the Central Government where their representative offices are located, and could pick a partner from anywhere in the Mainland which can best suit their business purposes. Hong Kong law firms could therefore team up with Mainland law firms to form strategic partnership, thus allowing better deployment of their resources and utilization of the business connections of Mainland law firms in the association to promote their service network and further develop their legal services market in the Mainland.

6. What are the main advantages of forming an association between a Hong Kong law firm's representative office in the Mainland and a Mainland law firm?

There are obvious advantages in terms of costs savings and sharing of resources. Law firms of both jurisdictions forming an association could provide legal services similar to a one-stop shop for clients engaging in cross-boundary business operations who may require legal expertise in both jurisdictions. This should enhance the competitive edge of the law firms concerned, since the co-operation of two firms from two jurisdictions would allow them to offer better and more effective legal services.

With the benefit of sharing better business connections of its associated firm in the Mainland, the Hong Kong law firm is likely to enjoy greater business opportunities there. The management of such association will be subject to the *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* promulgated by the Ministry of Justice.

7. What are the major differences between the operation of a partnership and an association?

Solicitors operating under a partnership will share the profits and expenses of the law firm in accordance with the terms of the partnership agreement. Pursuant to a partnership agreement, each partner will be liable not only for any professional liability incurred by himself or herself, but also for the liabilities of the other partners and the employees.

In an association, the professional liability incurred by an individual partner of one firm will not affect the liability of the partners of the other law firm in the association. To put it simply, the professional liability of the partners of the one law firm in an association is severed from the liabilities of the partners of the other firm.

8. Whether the arrangement of forming association with Mainland firms should be applicable to all Hong Kong law firms?

The measures concerning association of law firms are subject to the existing terms of CEPA and the various Supplements, as well as the *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* promulgated by the Ministry of Justice. So far, association between Hong Kong law firms and Mainland law firms is limited to Hong Kong law firms which have set up representative offices in the Mainland. The DoJ has regularly sought the views of the profession on the relevant liberalization measures and related the proposals of the profession to the Mainland authorities with a view to widening the scope of further liberalization measures on legal services.

III. Hong Kong lawyers practising in both jurisdictions

9. Whether a Hong Kong resident who is allowed to practise in the Mainland may also be employed by a Hong Kong law firm?

Under the *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* (“the said *Measures*”), which also came into effect on 1 January 2004 as CEPA I, a Hong Kong resident who is allowed to practise in the Mainland shall practise in one Mainland law firm only, and shall not simultaneously be employed by a law firm of Hong Kong, Macao, Taiwan Region or a foreign country.

The said restriction has been relaxed pursuant to the amendments to the said *Measures*. Under the amended provision, a Hong Kong resident who is allowed to practise in the Mainland shall practise in one Mainland law firm only, and shall not simultaneously be employed by a resident representative office set up by a foreign law firm, a law firm of Hong Kong and Macao. The amendment took effect on 1 January 2006.

IV. *Representative offices of Hong Kong law firms (representative office)*

10. Whether a representative office in the Mainland is allowed to employ practising Mainland lawyers?

Under the *Measures for the Management of Representative Offices set up by Law Firms of the Hong Kong and Macao Special Administrative Regions in the Mainland*, the resident representative office of a Hong Kong law firm cannot employ practising Mainland lawyers. The office may employ paralegals, but they are not allowed to provide legal services to their clients.

11. Why should representative in the Mainland be restricted from employing Mainland lawyers?

This is a requirement of the Ministry of Justice. This measure seems to echo the restriction that representative offices of Hong Kong law firms in the Mainland should not practise Mainland law. However, the Law Society suggested that such a restriction should be relaxed so that representative offices of Hong Kong law firms be allowed to employ Mainland legal professionals. Such a proposal, if adopted, will allow cross fertilization of the legal practices of

both jurisdictions and provide easier access to legal services of either jurisdiction as may be required by clients. The proposal has been put to the Mainland authorities for consideration but it may take longer time for them to deliberate due to the existing laws in the Mainland.

12. What are the stipulated requirements in relation to the establishment of representative offices by Hong Kong law firms in the Mainland?

According to the *Measures for the Administration of Representative Offices set up by Law Firms of the Hong Kong and Macao Special Administrative Regions in the Mainland* (“*Administration Measures*”) promulgated by the Ministry of Justice on 13 March 2002, a Hong Kong law firm must satisfy specific conditions and obtain the approval of the Ministry of Justice in order to establish a representative office in the Mainland.

The following conditions must be satisfied for application by a Hong Kong law firm for the establishment of a representative office in the Mainland --

- (1) The law firm is in lawful practice in Hong Kong and has not been punished for any professional misconduct or any violation of the code of practice;
- (2) The representative of the representative office shall be a practising lawyer and a member of a lawyers’ association of Hong Kong and has been in practice for not less than two years outside the Mainland and has never been punished for any criminal offence or any professional misconduct or any violation of the code of practice;
- (3) The chief representative of the representative office shall be in practice for not less than three years outside the Mainland and is a partner in the law firm;
- (4) The law firm has the genuine need to establish a representative office in the Mainland.

13. What kind of legal services may be provided by a resident representative office of a Hong Kong law firm in the Mainland?

The *Administration Measures* provide that the resident representative office of a Hong Kong law firm cannot engage in providing any Mainland legal services. The business that can be conducted by a representative office includes –

- (1) providing to its client legal advice regarding Hong Kong law or foreign laws as well as advice on international conventions and international practices;
- (2) accepting instructions to handle legal affairs involving Hong Kong law;
- (3) engaging, on behalf of its Hong Kong clients, a Mainland law firm to handle affairs involving Mainland law;
- (4) providing any legal services through a long term entrustment agreement with a Mainland law firm; and
- (5) providing information relating to the impact on Mainland legal environment.

V. *Minimum stay requirements*

14. What is the “minimum stay requirement in the Mainland for representatives of HK law firms”?

Before the implementation of CEPA I, all the representatives working in Hong Kong law firms’ representative offices were required to reside in the Mainland for at least 6 months in a year. Following the implementation of CEPA I on 1 January 2004, this requirement is generally reduced from 6 months to 2 months. For law firms which set up representative offices in Shenzhen and Guangzhou, the residence requirement is completely waived.

In the Supplement and Amendment Document III to CEPA promulgated on 29 June 2006, it is provided that the residence requirement in the Mainland for all Hong Kong representatives stationed in the representative offices of Hong Kong law firms will be lifted. This measure took effect from 1 January 2007.

15. What benefits would be brought to Hong Kong legal practitioners by waiving the residence requirement?

With the new measures in place, representatives of Hong Kong law firms in the Mainland are no longer required to station in the Mainland for a prescribed period of time wherever their representative offices are located. As such, they will be able to allocate their time more freely to attend to their practices in both jurisdictions according to their professional needs.

VI. *Hong Kong residents practising in the Mainland*

16. What are the legal practices that Hong Kong residents who have acquired Mainland legal professional qualification may be engaged in the Mainland?

Under Article 4 of the *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*, Hong Kong residents who have acquired Mainland legal professional qualification shall only handle “non-litigation legal matters”.

However, the Supplement and Amendment Document III to CEPA promulgated on 29 June 2006 has relaxed the above measure. With effect from 1 January 2007, Hong Kong residents who have acquired Mainland lawyer qualifications or legal professional qualification and hold a Mainland lawyer’s practice certificate are allowed to carry out activities as agents in matrimonial or succession cases involving Hong Kong parties in the capacity of Mainland lawyers. This should enhance the opportunities for Hong Kong residents to develop their professional practice in the Mainland.

17. What would amount to “matrimonial or succession cases involving Hong Kong parties”?

The Administration is not aware that any particular regulations or judicial interpretations have been promulgated to elaborate

such terminology. According to the *Answer by the Supreme People's Court relating to several questions concerning the adjudication of the cases of economic disputes involving Hong Kong or Macao*, a case involves Hong Kong if:

- (a) a part is or both parties are compatriots of Hong Kong;
- (b) the subject matter of the economic disputes is in Hong Kong;
- (c) the economic relationship arises, changes or terminates in Hong Kong.

Efforts have been made by the DoJ to clarify with the Mainland authorities as regards the extent of the practice that Hong Kong residents may be involved as Mainland lawyers and discussions with the Mainland side are continuing.

18. How would Hong Kong residents who have acquired Mainland lawyer qualification respond to this liberalization measure?

Hong Kong residents who have acquired Mainland lawyer qualification generally welcome this liberalization measure. Given that Hong Kong residents are allowed to assist Hong Kong parties in handling certain civil litigation matters in the Mainland, this should be beneficial to Hong Kong residents who have commenced to practise as a Mainland. Hong Kong residents who wish to engage Mainland lawyers to assist them in certain areas of civil litigation should also welcome such a measure.

19. What requirements should be fulfilled in order to practise as a Mainland lawyer?

The *Law of the People's Republic of China on Lawyers* (the "*Lawyers Law*") provides that in order to practise law, a person shall acquire the qualification as a lawyer and obtain a practice certificate.

20. What training will be provided to persons seeking to practice as a Mainland lawyer?

Under the *Lawyers Law, Measures for the Administration of the*

Lawyer's Practice Certificate and the 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, in order to apply for a lawyer's practice certificate, a person has to undertake internship at a law firm for a full year. The law firm that provides the training should file the training details at the judicial bureau of its place of domicile. We understand that during the practical training phase, the person will have to assist qualified lawyers in conducting their business but he shall not engage in any sole practice.

21. Whether Hong Kong residents who have acquired Mainland legal professional qualification could undertake internship in a branch office of a Mainland law firm set up in Hong Kong?

Under the Supplement and Amendment Document III to CEPA promulgated on 29 June 2006, Hong Kong residents who have acquired Mainland lawyer qualifications are allowed to undertake internship in a branch office of a Mainland law firm set up in Hong Kong in accordance with the *Outline for Practical Training and the Guidelines on Practical Training*. With this new measure in place, Hong Kong residents who have passed the National Judicial Examination and wish to obtain a Mainland lawyer practice certificate may do so without relocating to the Mainland.

22. What are the prescribed conditions for setting up law firms in partnership in the Mainland? And what are the conditions relevant for becoming a partner of a Mainland law firm?

Under the *Measures for the Management of Partnership Law Firms*, the following conditions have to be met in order to be eligible for setting up a law firm in partnership. The firm must have:

- (1) its own name, premises and its articles of association;
- (2) an asset of RM 100,000 or more;

- (3) three or more partners; and
- (4) a partnership agreement in writing.

In order to be eligible for becoming a partner of a law firm in the Mainland, a person must possess lawyer qualification and have been in practice for five years and be of good character and conduct.

VII. Lawyer's qualification and the National Judicial Examination (NJE)

23. What are the conditions for acquiring a lawyer's qualification in the Mainland?

The *Lawyers Law* stipulates that a person who has completed undergraduate education or above in an institution of higher learning in the Mainland and on passing the National Judicial Examination shall be granted the qualification as a lawyer. The *Lawyers Law* further stipulates that a person who has completed an undergraduate legal education or above in an institute of higher learning, and who is engaged in professional work such as legal research and teaching, and has a senior professional title or has attained a professional level equivalent to that could also be granted the qualification as a lawyer upon approval by the Ministry of Justice after evaluation and verification.

According to the *Rules on Entering for the National Judicial Examination for Residents of the Hong Kong and Macao Special Administrative Regions*, Hong Kong permanent residents who are Chinese nationals, upon passing the NJE, may apply for a certificate of legal profession qualification.

24. Are Hong Kong residents allowed to enter the NJE?

According to the *Rules on Entering for the National Judicial Examination for Residents of the Hong Kong and Macao Special Administrative Regions*, Hong Kong permanent residents who are Chinese nationals are allowed to enter the NJE. The provisions of the *Interim Implementation Measures for National Judicial Examination* concerning conditions for application and

subjects of examination will similarly apply to Hong Kong residents.

The NJE is held once every year and detailed arrangements will be announced three months prior to the annual examination by the Ministry of Justice. The examination will be in the form of written examination (closed book) and the candidates are required to pass all 4 papers. The number of candidates passing the examination and the passing threshold will be announced by the Ministry of Justice, in consultation with the Supreme People's Court and the Supreme People's Procuratorate. Candidates who passed the examination will be awarded a Certificate of Legal Professional Qualification by the Ministry of Justice.

25. What are the conditions relevant for applying to enter the NJE?

According to the provisions of the *Interim Implementation Measures for National Judicial Examination* jointly promulgated by the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Justice, the national judicial examination for the qualification of legal profession shall be arranged and held by the Ministry of Justice under the State Council. Persons to be appointed as judges, procurators for the first time and persons who wish to acquire a lawyer's qualification must first pass the examination. Any person who meets the following requirements may apply to sit for the examination, in that he or she:

- (1) is of the nationality of the People's Republic of China;
- (2) upholds the *Constitution of the People's Republic of China* and has the right to vote and stand for election;
- (3) has the full capacity for civil conduct;
- (4) meets the qualification and professional requirements as stipulated in the Judges Law, the Public Procurators Law and the Lawyers Law; and
- (5) is a person of good character and conduct.

26. How could a Hong Kong resident apply for a lawyer's practice certificate in the Mainland?

Under the *Lawyers Law*, a person possessing the qualification as a lawyer, having completed practical training at a Mainland law firm for a full year and being a person of good character and conduct may apply for a lawyer's practice certificate. According to the *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*, Hong Kong residents who have obtained a certificate of legal profession qualification and completed internship of one year may apply to practise as lawyers in the Mainland.

A Hong Kong resident who applies to practise as a lawyer in the Mainland shall apply for a lawyer's practice certificate from the judicial administrative authority at provincial level of the place where the Mainland law firm which intends to employ him is located.

27. Whether an expatriate with a "HK Permanent Resident" status would be allowed to enter the NJE as if the case of a "Chinese National"?

Only if the expatriate concerned has acquired Chinese nationality under the *Nationality Law* of the PRC would be allowed to do so.

28. What arrangements have been made to facilitate Hong Kong residents entering the NJE?

To facilitate candidates of Hong Kong to enter the NJE, the DoJ and the Ministry of Justice signed the *Memorandum of Discussion on matters regarding the organization of Hong Kong residents sitting the National Judicial Examination* on 13 May 2005. Under the Memorandum, the DoJ was entrusted by the Ministry of Justice to assist in organizing the arrangements for Hong Kong residents to sit for the examination to be held in Hong Kong, whereas the actual arrangements relating to the conduct of the Examination would be undertaken by the Hong

Kong Examination and Assessment Authority (HKEAA). The NJE was first held in Hong Kong in September 2005.

For the 2007 NJE to be held on 15 & 16 September 2007, the Ministry of Justice issued a notice to announce the arrangements for holding the NJE on 25 May 2007. An announcement specifying the details of application relevant to Hong Kong residents seeking to enter the examination has been promulgated on 29 May 2007. Examination centres will be set up in Hong Kong for holding the NJE 2007.

VIII. Appointment as agents in the Mainland

29. Apart from practising in the Mainland in the capacity as Mainland lawyers, whether Hong Kong lawyers are allowed to engage in any other legal work in the Mainland?

Under the Supplement and Amendment Document III to CEPA promulgated on 29 June 2006, Hong Kong barristers are allowed to act as agents in civil litigation cases in the Mainland in the capacity of citizens effective from 1 January 2007.

30. How should “agents in civil litigation cases in the capacity of citizens” be understood under Mainland laws?

Pursuant to Section 2 of Chapter V of the *Civil Procedure Law*, a lawyer, a near relative of the party, a person recommended by a relevant social organization or a unit to which the party belongs or any other citizen approved by the People’s Court may be appointed as the party’s “*agent ad litem*”. The person appointing the *agent* must submit a written appointment to the People’s Court specifying the matter entrusted and the powers conferred. The *Civil Procedure Law* also provides that “*agent ad litem*” shall have the right to investigate and collect evidence and may have access to materials pertaining to the case. It should be noted that the *Lawyers Law* however provides that if a person has not obtained a lawyer’s practice certificate but engages in the business of acting as agent in litigation or defending clients for the purpose of seeking economic benefit,

he shall be ordered to cease the illegal practice of law.

As the new measure only permits the appointment of an agent in the capacity of citizen, it is our understanding that only those Hong Kong barristers who are Chinese citizens may be appointed to act as such.

31. What are the appointment criteria and procedures for the appointment of Hong Kong barristers as “agents” in civil litigation cases in the capacity of citizens in the Mainland?

The details of the appointment criteria and procedures for appointing Hong Kong barristers to act as “agents” in civil litigation cases in the capacity of citizens will need to be further clarified with the Mainland authorities which will then be referred to the practitioners for their information. The Administration has already approached the Ministry of Justice for assistance in this respect.

32. Why should only Hong Kong barristers be allowed to act as “agents in civil litigation cases in the capacity of citizens”?

The stipulation is a new measure allowing Hong Kong lawyers to engage in legal work in the Mainland other than in the capacity of Mainland lawyers. The DoJ will closely follow-up the implementation of this new measure and discuss with the Mainland authorities for further liberalization including extending this measure to other Hong Kong legal practitioners so that the Mainland clients may have a wider choice in the appointment of agents in the capacity of citizens to represent their interests.

In this respect, the DoJ has sought the views of the Law Society and has duly reflected the same to the Mainland authorities for further discussions.