

Drug Trafficking and Organized Crimes (Amendment) Bill 2000
Restraint orders, charging orders and confiscation orders

At the Bills Committee meeting on the Drug Trafficking and Organized Crimes (Amendment) Bill 2000 (the Bill) held on 15 January 2002, Members requested further information on cases in which restraint orders and charging orders may be made, and elaboration on the difficulties in notifying absconded defendants regarding the proceedings of confiscation order, etc. The requisite information is given below.

Restraint power under the Prevention of Bribery Ordinance (Cap 201)

2. Members requested information on how the property of a suspect can be restrained under section 14C of the Prevention of Bribery Ordinance (Cap 201) and the mechanism, if any, to seek compensation if the person under investigation is subsequently acquitted or not charged. Since this information is related to the Administration's proposal to apply a restraint order against a person who has been arrested and released on bail (sections 2 and 7 of Schedule 1 and sections 2 and 6 of Schedule 2 of the Bill), the Administration gives at **Annex A** a comparison table setting out the operation of a restraint order under Cap 201 and the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405). Section 14C of Cap 201, the relevant sections of Cap 405 and Orders 119 and 115 of the Rules of the High Court are relevant are at **Annex B**.

Holding Charge

3. Members requested illustrations with real cases as to why it was not desirable to restrain the property of a person under investigation by means of a holding charge. Three case examples are given below.

Case A

4. This is a pyramid selling scheme case commonly known as "gold planting". The suspects were directors of a company which was promoting the scheme. The company operated in Hong Kong for about 6 months as well as in other South East Asian countries before being raided by the Police. The turnover of the scheme during those 6 months was about HK\$300 million.

5. An ex parte restraint order and a charging order under section 15 and section 16 of the Organized and Serious Crimes Ordinance (Cap 455) were obtained on 19 December 2000 to restrain and charge the properties of the suspects and the company before the raid, pursuant to section 14(2) of Cap 455 which sets out the criteria for making the orders. The court made the orders and more than HK\$65 million worth of properties were restrained.

6. The raid was conducted the day after the orders were made with several people arrested. Altogether 5,556 items of exhibits were seized, which occupied half a floor of a police station. The computer exhibits consisted of 87GB of data. The company had more than 14,000 members/potential victims. Given the large quantity of exhibits, the cross-jurisdictional element and the number of potential victims, it was estimated by all concerned at the time that it would require a long time to examine and analyze the exhibits, and to locate and interview potential victims.

7. Shortly after their arrests, the suspects sought to set aside the restraint and charging orders on the ground that no charge was laid and no estimation could be made as to when proceedings would be instituted after the arrest. In order to prevent the property from being dissipated, the Administration had no choice but to lay a holding charge against the suspects. The purpose of a holding charge is not to prevent property from disappearing, but it was made in this instance for that purpose. In this case, it took two months before a holding charge could be laid during which the properties seized were free to be dissipated by the suspects. In other cases, the time gap between the seizure of the property and the issuance of a holding charge is much longer, hence greatly increasing the chance of seized property being dissipated through manoeuvring by the suspects. To make our restraint regime more effective, the preferred course would be to apply for a restraint order on the basis that a suspect had been arrested and released on bail if that had been sufficient in law to trigger the restraint proceedings.

Case B

8. In late 2001 a bookmaker was arrested at his home with soccer betting slips showing bets of HK\$8 million having been laid that day. The slips also showed bets with off course bookmakers on credit. Consequently, although the Police could have charged bookmaking after the raid, they did not do so as they were unable to

show any proceeds of crime in connection with that charge and were unable to seek any restraint order. The bookmaker was then put on bail and a detailed financial investigation ensued. During the course of the investigation, production orders were obtained on bank accounts in the names of the bookmaker and his wife. It then took one and a half months for the banks to supply the necessary bank statements and a further two months to obtain the deposit slips, telegraphic transfer slips and cheque copies, etc.

9. From the financial analysis, the Police have been able to show that over HK\$400 million was deposited into their accounts over the past five years, despite the fact that the suspect only had an income of HK\$3.5 million during that period. On the basis of that and other evidence, the Police were confident that the money passing through the accounts was the proceeds of soccer bookmaking. Legal advice is being sought in regard to charging both bookmaking and money laundering in respect of the money passing through the accounts. The money laundering charge does have proceeds and hence restraint will be possible.

10. It is worth noting that on arrest, the wife had HK\$1.5 million in bank deposits and the suspect had about HK\$200,000, plus an expensive property. At present, the couple has no money in the bank and the property has no doubt been disposed of if it was worth anything (it is a case of negative equity). Basically, this case illustrates that sometimes it takes law enforcement months to secure sufficient evidence to lay a charge and by that time the criminal assets may have already been dissipated. In these cases, it is usually impossible to lay a holding charge which has any proceeds of crime any earlier due to insufficient evidence. In bookmaking cases in general, the time lapse between arrest and charging the offence with proceeds means that to date the Police have been unable to seek restraint and, subsequently, confiscation of proceeds of crime.

Case C

11. In March 1997, quantities of cloth which were stored at a fashion company were sold by a suspect who pretended to be the manager of the company to an innocent buyer at the value of \$600,000.

12. The first defendant was subsequently arrested by Police. He was then charged and convicted of the offence and a confiscation order for the amount of \$200,000 was made against him.

13. The second defendant was arrested at a later stage and the Police applied to obtain a restraint order against him. This was done on 20 February 1998. The court granted an order restraining the second defendant and his wife from disposing of their assets, namely a jointly owned property. On 5 March 1998, however, on considering the affirmations filed at court by the second defendant the court discharged the order as it considered that the proceedings in respect of the specified offence had not been instituted within a reasonable time (The Police had not yet charged the second defendant for the offence as the first defendant at first refused to testify against him and without his evidence there was insufficient evidence to proceed. However, at the end of February, the first defendant agreed to testify. While the Police was obtaining legal advice on the charges, the inter-partes hearing on 5 March was heard).

14. The court's judgment was immediately conveyed to the investigating officers and interim legal advice was then sought. It was confirmed that the second defendant would be charged for the offence. A fresh restraint order was then obtained against the defendant's property on 6 March 1998. It was followed by an inter-partes order on 16 March 1998. Eventually, the second defendant was convicted of the offence of "conspiracy to defraud" on 20 July 1998 and was sentenced to two years and four months.

15. This case illustrates that, due to the difficulties stated a holding charge cannot always be laid as quickly as the prosecution would like it to be, and the time during which further investigations proceed and before the issuance of a restraint order provides an opportunity for the suspect to hide or dissipate his property which could be the subject of a restraint order. Together the three cases above demonstrate that it is impracticable to rely solely on holding charge to effect restraint of property, especially where there are voluminous amounts of evidence to be analyzed or where admissible evidence is only likely to be forthcoming after further investigation. In addition, the purpose of a holding charge is not to prevent the dissipation of possible proceeds of crime but it is being used for that purpose. Such difficulties can however be overcome by the Administration's proposed amendments in sections 2 and 7 of Schedule 1, and sections 2 and 6 of Schedule 2, to the Bill.

Bringing a charge against a defendant and application of a restraint order

16. Members requested information on the number of cases in the past three years in which :

- (i) Charge was not brought against the arrested person but restraint order would have been applied under the proposed amendment;
- (ii) charge was brought and restraint order was applied but the defendant was eventually acquitted; and
- (iii) the time gap between arrest and institution of charge in (ii).

17. With regard to (i) above, according to the Police, in the past three years there were about three to four cases involving pyramid selling schemes and other frauds, where charges were not brought against the arrested person but a restraint order would have been applied for under the proposed amendment. With regard to (ii), according to the Police, there were about three cases while the Department of Justice does not keep such statistics. As to (iii), the time gap varies from case to case but can range from two days to eight months or even longer in complicated cases.

“Threshold” for making charges

18. Members requested the Administration to illustrate by case examples the different thresholds (in terms of the requirements in law and in operation) to be applied in making arrests and instituting charges, and explain how its current proposal could address the problem.

19. For Police officers, the power to arrest is governed by section 50 of the Police Force Ordinance (Cap 232). An officer may arrest any person whom he reasonably believes would be charged with an offence or whom he reasonably suspects of being guilty of an offence which is punishable by imprisonment or where it is impractical to serve him with a summon.

20. To charge a suspect, there must be sufficient, admissible and reliable evidence which supports all the ingredients of an offence against an identifiable suspect and a reasonable chance of convicting the suspect.

21. The threshold or evidential burden to arrest a suspect is lower than charging a suspect. As can be seen in Cases A, B and C above, the Police had sufficient evidence to arrest the suspect and his associates based on reasonable suspicion and prima facie evidence. However, unless the information is supported by admissible and reliable evidence which supports all ingredients of an offence against the suspect or his associates, a charge cannot be laid.

22. In general, the ground for making an arrest is “there is reasonable suspicion that the person has committed an offence”, while the ground for instituting a charge is “there is prima facie evidence that the offence was committed by the person”. Sometimes, there may be a time gap between effecting an arrest and instituting a charge. The amendments in respect of sections 2 and 7 of Schedule 1 and sections 2 and 6 of Schedule 2 of the Bill are to plug the loophole in taking restraint action, and to prevent the dissipation of criminal proceeds while the suspect is released on bail pending investigation.

Compensation for third party

23. Members requested the Administration to consider as a matter of legal policy whether a third party should be entitled to seek compensation through civil proceedings if he suffered as a result of a restraint order on the property of a person who had been arrested and released on bail.

24. Detailed legal advice is being sought. At present, according to Order 115 rule 5(1) of the Rules of the High Court, a third party who considers that he is aggrieved by a restraint order can apply to discharge or vary the order. Under the existing section 27 of Cap 405 and section 29 of Cap 455, if an investigation is begun against a person and no proceedings are instituted against him, or proceedings are instituted but do not result in his conviction, the court may, on application by a person who held property which was realizable property, order compensation to be paid to the applicant if it deems appropriate. As a matter of policy, the Administration considers that this redress is adequate and it does not see the need to provide an express avenue for redressing third parties under a restraint order in Cap 405 and Cap 455.

Notifying an abscondee of proceedings in respect of a confiscation order

25. Members requested the Administration to illustrate with practical examples the difficulties in fulfilling the requirement of notifying an absconded defendant under section 3(2)(c)(ii)(B) of Cap 405 and section 8(3)(c)(i)(B)(II) of Cap 455, and the need to amend the legislation as proposed in section 3(a) of Schedules 1 and 2 to the Bill.

26. In the case of an application for a confiscation order against an absconded person whose exact whereabouts are not known, the prosecution has to take reasonable steps to give that person notice of those proceedings. However, in reality, it is difficult, if not impossible to give a notice to a person when the whereabouts of that person are not known. In reality, the concerned authority has first to ascertain the whereabouts of the person by all possible means, e.g. by posting notice to or visiting the person's last known address, etc. It is only when such attempts fail that the person's whereabouts will be accepted as unknown. In such cases, the notice will not reach the person concerned as intended. The purpose of the proposed amendment is therefore to clarify the steps need to be taken under the existing provision, to address the apparent contradiction in the terms employed in the existing provision and to bring the provision in line with the actual situation.

27. That said, having considered Members' views, the Administration is ready to consider strengthening the present proposal with a "deemed service" provision, e.g. placing an advertisement in major newspapers regarding the proceedings shall be deemed to be good service where, for example, personal service at the person's last known address cannot be effected because the person no longer resides there. Subject to Members' views, the Administration may propose a detailed Committee Stage Amendments (CSA) on this at the next stage.

Others

28. Members requested the Administration to update the description of section 25(1) of Cap. 405 and Cap. 455 in paragraphs 15 and 16 of Schedule 1 to Cap. 455. The CSAs in respect of Paragraphs 15 and 16 of Schedule 1 to Cap. 455 are at **Annex C**.

Security Bureau
February 2002

**Comparison between the power of restraint under s.14C of the Prevention of Bribery Ordinance ("POBO"),
Cap. 201 and the Drug Trafficking (Recovery of Proceeds) Ordinance ("DTROP"), Cap. 405**

	POBO	DTROP
Statutory Provisions	s.14C, Order 119 Rules of High Court	s.10, Order 115 Rules of High Court
Purpose of order	No stated purpose	To make available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the defendant's case the value for the time being of realisable property held by any person by the realisation of such property. [s.14(2)]
Procedure	Ex parte application by the Commissioner of ICAC [s. 14C(1)]	May be made by the Secretary for Justice ex parte [Order 115 Rule 3)]
Targeted persons	Suspected person, who is the subject of an investigation under POBO or a defendant, against whom a prosecution has been instituted [s.14C(1)(a)] Or a third party holding any property for or on behalf of the suspected person [s.14C(1)(b)]	Defendant in a drug trafficking offence [s.10(1)] (cf. the part on "criteria" in this table) or person to be charged with a drug trafficking offence [s.10(2)] third party holding property for or on behalf of the defendant or such property was under the effective control of the defendant

Properties that can be restrained	Any property in the possession of or under the control of or is due to a suspected person [s.14C(1)(a)], including income derived from such property [s.14C(2A)]	"realisable property", i.e. (a) any property held by the defendant; (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by DTROP; and (c) any property that is subject to the effective control of the defendant. [s.7]
Criteria	The property belongs to a person who is the subject of an investigation of an offence alleged or suspected to have been committed against him or against whom prosecution for such an offence has been instituted, from another person. [s.14C(1)]	(a) the Defendant has benefited from drug trafficking; (b) proceedings have been instituted against the defendant for a drug trafficking offence and that they have not been concluded; (c) whether by the laying of information or otherwise, a person is to be charged with a drug trafficking offence; and (d) where proceedings have not been instituted, verify that the Secretary for Justice is to have the conduct of the proposed proceedings and indicate when it is intended that they should be instituted. [Order 115 Rule 3(2)]
Service of the Order	Served personally or if the suspected person cannot be found or is not in Hong Kong, be served in such manner as the court may direct on application ex parte by or on behalf of the Commissioner. [s.14C(3)]	Served personally [Order 115 Rule 4(3)]

Duration of the Order	<p>12 months for a suspect from the making thereof and the Court may extend for property [s.14C(4)(a)]</p> <p>6 months for a person holding property for and on behalf of a suspect [s.14C(4)(b)]</p> <p>If prosecution for the offence has been instituted, until the proceedings on such prosecution have been finally determined [s.14C(5)]</p>	For ex parte order, unless otherwise directed by the Court, to a date for inter partes hearing. [Order 115(4)]
Effect of breaching the Order	Criminal offence, punishable to a fine of HK\$50,000 or the value of the property disposed of, whichever is greater, and to imprisonment for 1 year. [s.14C(6)]	Contempt of Court. Punishable at the discretion of the Court.
Compensation	No provision for compensation	<p>If a person was investigated for a drug trafficking offence and was holding realisable property and eventually:-</p> <p>(a) no proceedings are instituted against that person;</p> <p>(b) proceedings are instituted against that person but do not result in his conviction for any drug trafficking;</p> <p>(c) for an absconded offender, after he ceased to be an absconded and proceedings are continued but failed to result in his conviction or proceedings did not resume within a reasonable period; and</p>

		(d) proceedings are instituted and resulted in conviction but conviction quashed or he was pardoned, he may seek compensation from the government. [s.27(1)]
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Section of Enactment

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Chapter:	201	Title:	PREVENTION OF BRIBERY ORDINANCE	Gazette Number:	25 of 1998 s.2
Section	14C	Heading:	*Restraining orders	Version Date:	01/07/1997

Remarks:

Amendments retroactively made - see 25 of 1998 s. 2

- (1) If, on application ex parte by or on behalf of the Commissioner, the court is satisfied that-
- (a) any property is in the possession of or under the control of or is due to a person (hereinafter in this section and in sections 14D and 14E referred to as the "suspected person"), who is the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under this Ordinance or against whom a prosecution for such an offence has been instituted, from another person (hereinafter so referred to as the "third party"); or
- (b) a third party is holding any property for or on behalf of or to the order of a suspected person, the court may make an order under this subsection (hereinafter so referred to as a "restraining order").
- (2) In making a restraining order the court may-
- (a) impose such conditions; or
- (b) exempt such property from the operation thereof (including periodic payments of money), as it thinks fit, but subject as aforesaid, the suspected person and any third party on whom a restraining order is served in accordance with subsection (3) shall not dispose of or otherwise deal with any property specified in the restraining order save in accordance with directions of the court.
- (2A) A restraining order shall, if so provided in the order, apply to the income from any property specified therein as it applies to the property itself. (Added 50 of 1987 s. 8)
- (3) A restraining order shall be served on the suspected person and any third party to whom it is directed and may be served by delivering it to him or them personally or may, where the court is satisfied that such person cannot be found or is not in Hong Kong, be served in such other manner as the court may direct on application ex parte by or on behalf of the Commissioner. (Amended 15 of 1976 s. 3)
- (3A) Where any property specified in a restraining order is immovable property, such order shall be deemed to be an instrument affecting land and shall be registrable as such in the Land Registry under the Land Registration Ordinance (Cap 128) in such manner as the Land Registrar thinks fit. (Added 28 of 1980 s. 10. Amended 8 of 1993 ss. 2 & 3)
- (3B) Where any property specified in a restraining order includes any debt or obligation due by a bank or deposit-taking company to the person to whom the notice is given the Commissioner may serve on such bank or deposit-taking company a copy of that restraining order which copy restraining order shall have the effect of directing the bank or deposit-taking company with respect to the person specified in the copy restraining order not to pay, liquidate, satisfy, settle or discharge that debt or obligation either in whole or in part without the consent of the court. (Added 48 of 1996 s. 7)
- (4) Subject to subsection (5), a restraining order with respect to property-
- (a) of the description mentioned in subsection (1)(a) shall continue in force for a period of 12 months from the making thereof, but on application by or on behalf of the Commissioner the court may extend its operation for periods of 12 months at a time;

(b) of the description mentioned in subsection (1)(b) shall continue in force for a period of 6 months from the making thereof, but on application by or on behalf of the Commissioner the court may extend its operation for periods of 3 months at a time. (Replaced 48 of 1996 s. 7)

(5) Where-

(a) a restraining order is made with respect to a third party or a suspected person against whom a prosecution for an offence under this Ordinance has been instituted; or

(b) a restraining order is in force with respect to a third party or a suspected person against whom a prosecution for such an offence is instituted, the restraining order shall, except in the case of a prosecution against a third party, continue in force until the proceedings on such prosecution have been finally determined and, if an order is made against that person under section 12(3) or 12AA, until that order has been set aside, complied with or enforced, as the case may be. (Amended 50 of 1987 s. 8)

(5A) Nothing in subsection (4) or (5) shall prevent the court from making a further restraining order in respect of the same property on application ex parte by or on behalf of the Commissioner. (Added 50 of 1987 s. 8)

(6) A suspected person or third party on whom a copy of a restraining order has been served in accordance with subsection (3) or (3B) of this section or section 14D(5) shall be guilty of an offence and shall be liable on conviction to a fine of \$50000 or to the value of the property disposed of or otherwise dealt with, whichever is greater, and to imprisonment for 1 year if, during the continuance in force of the order, he knowingly disposes of or otherwise deals with any property specified in the restraining order otherwise than in accordance with directions of the court.

(7) In this section and in sections 14D and 14E, "court" (法庭) means the Court of First Instance. (Added 48 of 1996 s. 7. Amended 25 of 1998 s. 2)

(Added 9 of 1974 s. 7. Amended 48 of 1996 s. 7)

* Please see the saving provisions contained in s. 18 of 48 of 1996, which section is reproduced immediately after the Schedule.

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Chapter:	405	Title:	DRUG TRAFFICKING (RECOVERY OF PROCEEDS) ORDINANCE	Gazette Number:	25 of 1998 s.2
Section	10	Heading:	Restraining orders	Version Date:	01/07/1997

Remarks:

Amendments retroactively made-see 25 of 1998 s. 2

(1) The Court of First Instance may by order (in this Ordinance referred to as a "restraint order " (限制令)) prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order. (Amended 25 of 1998 s. 2)

(2) A restraint order may apply-

(a) to all realisable property held by a specified person, whether the property is described in the order or not; and

(b) to realisable property held by a specified person, being property transferred to him after the making of the order.

(3) This section shall not have effect in relation to any property for the time being subject to a charge under section 11.

(4) A restraint order-

(a) may be made only on an application by the prosecutor;

(b) may be made on an ex parte application to a judge in chambers; and

(c) shall provide for notice to be given to persons affected by the order.

(5) A restraint order-

(a) may be discharged or varied in relation to any property; and

(b) shall be discharged on the conclusion of the proceedings or application concerned. (Replaced 89 of 1995 s. 11)

(6) An application for the discharge or variation of a restraint order may be made by any person affected by it.

(7) Where the Court of First Instance has made a restraint order, the Court of First Instance may at any time appoint a receiver-

(a) to take possession of any realisable property; and

(b) in accordance with the directions of the Court of First Instance, to manage or otherwise deal with any property in respect of which he is appointed, subject to such exceptions and conditions as may be specified by the Court of First Instance; and may require any person having possession of property in respect of which a receiver is appointed under this section to give possession of it to the receiver. (Amended 25 of 1998 s. 2)

(8) (Repealed 89 of 1995 s. 11)

(9) Where the Court of First Instance has made a restraint order, an authorized officer may, for the purpose of preventing any realisable property being removed from Hong Kong, seize the property. (Amended 25 of 1998 s. 2)

(10) Property seized under subsection (9) shall be dealt with in accordance with the directions of the Court of First Instance. (Amended 25 of 1998 s. 2)

(11) Where any property specified in a restraint order is immovable property the order shall, for the purposes of the Land

Registration Ordinance (Cap 128)-

(a) be deemed to be an instrument affecting land; and

(b) be registrable as such in the Land Registry under that Ordinance in such manner as the Land Registrar thinks fit. (Amended 8 of 1993 ss. 2 & 3)

[cf. 1986 c. 32 s. 8 U.K.]

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Chapter:	4A	Title:	THE RULES OF THE HIGH COURT	Gazette Number:	25 of 1998
Section	119	Heading:	(HK) PREVENTION OF BRIBERY ORDINANCE (CAP 201)	Version Date:	01/07/1997

Remarks:

Adaptation amendments retroactively made - see 25 of 1998 s. 2

PART III-POWERS OF INVESTIGATION

1. Interpretation (O.119, r. 1)

(1) In this Order "the Ordinance" (條例) means the Prevention of Bribery Ordinance (Cap 201), and a section referred to by number means the section so numbered in the Ordinance.

(2) Expressions used in this Order which are used in the Ordinance have the same meanings in this Order as in the Ordinance.

2. Application of this Order (O. 119, r. 2)

This Order applies to an application made to the Court under Part III of the Ordinance.

3. Assignment of proceedings (O. 119, r. 3)

An application to which this Order applies shall be heard by a judge in chambers.

4. Form of application (O. 119, r. 4)

Subject to rule 6, an application to which this Order applies shall be made by ex parte notice of motion in Form 109 and, except for an application made under section 14D of the Ordinance, be supported by affidavit.

5. Restrictions on access to documents, etc.
(O. 119, r. 5)

(1) The notice of motion, affidavit, if any, information and all other documents relating to the application shall be treated as confidential and shall, immediately on the determination of the application, be placed in a packet and sealed by order of the judge by whom the application was heard.

(2) The packet shall be kept in the custody of the Court in a place to which the public has no access or in such other place as the judge may authorize and shall not-

(a) be opened;

(b) have its contents removed;

(c) be copied; or
(d) be destroyed,
except by order of a judge.

6. Variation or revocation of orders (O. 119, r. 6)

(1) An application made under section 14D of the Ordinance shall be made by summons issued in the proceedings in which the order which it is sought to vary or revoke was made and shall state, so far as the applicant is able, the grounds on which the application is made.

(2) The summons and any affidavit in support shall be served on the Commissioner not less than 3 clear days before the hearing of the application.

(L.N. 222 of 1997)

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Section of Enactment

Chapter:	4A	Title:	THE RULES OF THE HIGH COURT	Gazette Number:	L.N. 362 of 1997; 25 of 1998
Section	115	Heading:	DRUG TRAFFICKING (RECOVERY OF PROCEEDS) ORDINANCE (CAP 405)	Version Date:	01/07/1997

Remarks:

Adaptation amendments retroactively made - see 25 of 1998 s. 2

1. Interpretation (O. 115, r. 1)

(1) In this Order "the Ordinance" (條例) means the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), and a section referred to by number means the section so numbered in the Ordinance.

(2) Expressions used in this Order which are used in the Ordinance have the same meanings in this Order as in the Ordinance.

2. Assignment of proceedings (O. 115, r. 2)

Subject to Order 32, rule 18, and to rule 12, the jurisdiction of the Court under the Ordinance shall be exercised by a judge of the Court in chambers notwithstanding that the originating process is a motion.
(L.N. 296 of 1996)

2A. Application for confiscation order where person has died or absconded (O. 115, r. 2A)

An application for a confiscation order under section 3 where the defendant has died or absconded shall be made by the Secretary for Justice by originating summons.
(89 of 1995 s. 30; L.N. 296 of 1996; L.N. 362 of 1997)

3. Application for restraint order or charging order (O. 115, r. 3)

(1) An application for a restraint order under section 10 or for a charging order under section 11 (to either of which may be joined an application for the appointment of a receiver) shall be made by the Secretary for Justice ex parte by originating motion. (L.N. 296 of 1996; L.N. 362 of 1997)

(2) An application under paragraph (1) shall be supported by an affidavit, which shall-

(a) state, as the case may be, the grounds for believing that-

(i) the defendant has benefited from drug trafficking; or

(ii) the Court of First Instance will be satisfied as specified in section 15(1A); (89 of 1995 s. 30; 25 of 1998 s. 2)

(b) state, as the case may be-

(i) that proceedings have been instituted against the defendant for a drug trafficking offence (giving

- particulars of the offence) and that they have not been concluded;
- (ii) that, whether by the laying of an information or otherwise, a person is to be charged with a drug trafficking offence;
 - (iii) that an application for a confiscation order has been made in respect of the defendant where section 3(1)(a)(ii) or (7) is applicable; or
 - (iv) that an application has been made under section 15(1A) in respect of a confiscation order made against the defendant; (89 of 1995 s. 30)
- (c) to the best of the deponent's ability, give full particulars of the realisable property in respect of which the order is sought and specify the person or persons holding such property;
- (d) where proceedings have not been instituted, verify that the Secretary for Justice is to have the conduct of the proposed proceedings; (L.N. 362 of 1997)
- (e) where proceedings have not been instituted, indicate when it is intended that they should be instituted.
- (3) An originating motion under paragraph (1) shall be entitled in the matter of the defendant, naming him, and in the matter of the Ordinance, and all subsequent documents in the matter shall be so entitled.
- (4) Unless the Court otherwise directs, an affidavit under paragraph (2) may contain statements of information or belief with the sources and grounds thereof.

4. Restraint order and charging order (O. 115, r. 4)

- (1) A restraint order may be made subject to conditions and exceptions, including but not limited to conditions relating to the indemnifying of third parties against expenses incurred in complying with the order, and exceptions relating to reasonable living expenses and reasonable legal expenses of the defendant, but the Secretary for Justice shall not be required to give an undertaking to abide by any order as to damages sustained by the defendant as a result of the restraint order. (89 of 1995 s. 30)
- (2) Unless the Court otherwise directs, a restraint order made ex parte shall have effect until a day which shall be fixed for the hearing inter partes of the application and a charging order shall be an order to show cause, imposing the charge until such day.
- (3) Where a restraint order is made the Secretary for Justice shall serve copies of the order and of the affidavit in support on the defendant and on all other named persons restrained by the order and shall notify all other persons or bodies affected by the order of its terms.
- (4) Where a charging order is made the Secretary for Justice shall, unless the Court otherwise directs, serve copies of the order and of the affidavit in support on the defendant and, where the property to which the order relates is held by another person, on that person and shall serve a copy of the order on such of the persons or bodies specified in Order 50, rule 2(1)(b) to (d) as shall be appropriate.

(L.N. 362 of 1997)

5. Discharge or variation of order (O. 115, r. 5)

- (1) Any person or body on whom a restraint order or a charging order is served or who is notified of such an order may apply by summons to discharge or vary the order.
- (2) The summons and any affidavit in support shall be served on the Secretary for Justice and, where he is not the applicant, on the defendant, not less than 2 clear days before the date fixed for the hearing of the summons. (L.N. 296 of 1996; L.N. 362 of 1997)
- (3) Upon the Court being notified that proceedings for the offences have been concluded or that the amount payment of which is secured by a charging order has been paid into court, any restraint order or charging order, as the case may be, shall be discharged.

6. Further application by Secretary for Justice (O. 115, r. 6)

- (1) Where a restraint order or a charging order has been made the Secretary for Justice may apply (and, if so, by summons) or, where the case is one of urgency, ex parte- (L.N. 296 of 1996; L.N. 362 of 1997)
- (a) to discharge or vary such order; or
 - (b) for a restraint order or a charging order in respect of other realisable property; or
 - (c) for the appointment of a receiver.

(2) An application under paragraph (1) shall be supported by an affidavit which, where the application is for a restraint order or a charging order, shall to the best of the deponent's ability give full particulars of the realisable property in respect of which the order is sought and specify the person or persons holding such property.

(3) The summons and affidavit in support shall be served on the defendant and, where one has been appointed in the matter, on the receiver, not less than 2 clear days before the date fixed for the hearing of the summons. (L.N. 296 of 1996)

(4) Rule 4(3) and (4) shall apply to the service of restraint orders and charging orders respectively made under this rule on persons other than the defendant.

7. Realisation of property (O. 115, r. 7)

(1) An application under section 12 shall, where there have been proceedings against the defendant in the Court of First Instance, be made by the Secretary for Justice by summons and shall otherwise be made by originating motion. (L.N. 362 of 1997; 25 of 1998 s. 2)

(2) The summons or originating motion, as the case may be, shall be served with the evidence in support not less than 7 days before the date fixed for the hearing of the summons on-

(a) the defendant;

(b) any person holding any interest in the realisable property to which the application relates; and

(c) the receiver, where one has been appointed in the matter.

(3) The application shall be supported by an affidavit, which shall, to the best of the deponent's ability, give full particulars of the realisable property to which it relates and specify the person or persons holding such property, and a copy of the confiscation order, of any certificate issued by the Court under section 6(2) and of any charging order made in the matter shall be exhibited to such affidavit.

(4) The Court may, on an application under section 12, exercise the power conferred by section 13(1) to direct the making of payments by the receiver.

8. Receivers (O. 115, r. 8)

(1) Subject to this rule, the provisions of Order 30, rules 2 to 8 shall apply where a receiver is appointed in pursuance of a charging order or under section 10 or 12.

(2) Where the receiver proposed to be appointed has been appointed receiver in other proceedings under the Ordinance, it shall not be necessary for an affidavit of fitness to be sworn or for the receiver to give security, unless the Court otherwise orders.

(3) Where a receiver has fully paid the amount payable under the confiscation order and any sums remain in his hands, he shall apply by summons for directions as to the distribution of such sums.

(4) A summons under paragraph (3) shall be served with any evidence in support not less than 7 days before the date fixed for the hearing of the summons on-

(a) the defendant; and

(b) any other person who held property realised by the receiver.

9. Variation of confiscation order (O. 115, r. 9)

(1) The Secretary for Justice or defendant may apply by summons for an order under section 15(1).

(2) A summons under paragraph (1) shall be served, with any supporting evidence, not less than 7 days before the date fixed for the hearing of the summons on-

(a) where the Secretary for Justice is making the application, the defendant;

(b) where the defendant is making the application, the Secretary for Justice,

and, in either case, on the receiver, where one has been appointed in the matter.

(3) The Secretary for Justice may apply by summons for an order under section 15(1A). (89 of 1995 s.

30)

(89 of 1995 s. 30; L.N. 362 of 1997)

10. Compensation (O. 115, r. 10)

An application for an order under section 27 shall be made by summons, which shall be served, with any supporting evidence, on the person alleged to be in default and on the Secretary for Justice not less than 7 days before the date fixed for the hearing of the summons.

(L.N. 362 of 1997)

11. Disclosure of information (O. 115, r. 11)

(1) An application under section 23 shall be made by the Secretary for Justice by summons, which shall state the nature of the order sought and whether material sought to be disclosed is to be disclosed to a receiver appointed under section 10 or 12 or in pursuance of a charging order or to an authorized officer. (L.N. 362 of 1997)

(2) The summons and affidavit in support shall be served on the public body-

(a) not less than 7 days before the date fixed for the hearing of the summons; and

(b) where the public body is a Government Department, in accordance with Order 77, rule 4.

(3) The affidavit in support of an application under paragraph (1) shall state the grounds for believing that the conditions in section 23(4) and, if appropriate, section 23(7) are fulfilled.

12. Exercise of powers under section 29 (O. 115, r. 12)

The powers conferred on the Court by section 29 may be exercised by a judge in chambers and a Master.

13. Application for registration (O. 115, r. 13)

An application for registration of an external confiscation order under section 29(1) may be ex parte.

15. Evidence in support of application under section 29(1) (O. 115, r. 15)

An application for registration of an external confiscation order must be supported by an affidavit-

(a) exhibiting the order or a verified or certified or otherwise duly authenticated copy thereof and, where the order is not in the English language, a translation thereof into English certified by a notary public or authenticated by affidavit; and

(b) stating-

(i) that the order is in force and is not subject to appeal;

(ii) where the person against whom, or in relation to whose property, the order was made did not appear in the proceedings, that he received notice of the proceedings, in accordance with the law of the designated country concerned, in sufficient time to enable him to defend them; (89 of 1995 s. 30)

(iii) in the case of money, either that at the date of the application the sum payable under the order has not been paid or the amount which remains unpaid, as may be appropriate, or, in the case of other property, the property which has not been recovered; and

(iv) to the best of the deponent's knowledge, particulars of what property the person against whom, or in relation to whose property, the order was made holds in Hong Kong, giving the source of the deponent's knowledge. (89 of 1995 s. 30)

16. Register of orders (O. 115, r. 16)

(1) The Registrar shall keep a register of the orders registered under the Ordinance.

(2) There shall be included in such register particulars of any variation or setting aside of a registration, of any variation, satisfaction or discharge of a registered order, and of any execution issued on such an order.

17. Notice of registration (O. 115, r. 17)

(1) Notice of the registration of an order must be served on the person against whom, or in relation to whose property, it was obtained by delivering it to him personally or by sending it to him at his usual or last known address or place of business or in such other manner as the Court may direct. (89 of 1995 s. 30)

(2) Service of such a notice out of the jurisdiction is permissible without leave, and Order 11, rules 5, 6 and 8 shall apply in relation to such a notice as they apply in relation to a writ.

(3) The notice shall state the period within which an application may be made to vary or set aside the registration and that the order will not be enforced until after the expiration of that period.

18. Application to vary or set aside registration (O. 115, r. 18)

An application by the person against whom, or in relation to whose property, an order was made to vary or set aside the registration of an order must be made to a judge by summons supported by affidavit. (89 of 1995 s. 30)

19. Enforcement of order (O. 115, r. 19)

(1) An order registered under the Ordinance shall not be enforced until after the expiration of the period specified in accordance with rule 17(3) or, if that period has been extended by the Court, until after the expiration of the period so extended.

(2) If an application is made under rule 18, an order shall not be enforced until after such application is determined.

20. Variation, satisfaction and discharge of registered order (O. 115, r. 20)

Upon the Court being notified by the applicant for registration that an order which has been registered has been varied, satisfied or discharged, particulars of the variation, satisfaction or discharge, as the case may be, shall be entered in the register.

21. Rules to have effect subject to orders (O. 115, r. 21)

Rules 12 to 20 shall have effect subject to the provisions of any order made under section 28.

22. Statement relating to drug trafficking (O. 115, r. 22)

(HK)(1) Where the Secretary for Justice or the defendant proposes to tender to the Court any statement or other document under section 5 he shall give a copy thereof as soon as practicable to the defendant or the Secretary for Justice, as the case may be, and to the appropriate officer of the Court. (89 of 1995 s. 30)

(2) Any statement tendered to the Court by the Secretary for Justice under section 5(1) shall include the following particulars, namely- (L.N. 362 of 1997)

(a) the name of the defendant;

(b) the name of the person who made the statement;

(c) such information known to the person who made the statement as is relevant to-

(i) where section 3(1)(a)(ii) is applicable, the determination whether the defendant could have been convicted in respect of the drug trafficking offence or offences concerned;

(ii) the determination whether the defendant has benefited from drug trafficking;

(iii) the assessment of the value of the defendant's proceeds of drug trafficking. (89 of 1995 s. 30)

(L.N. 362 of 1997)

23. Investigation into drug trafficking-discharge and variation of orders (O. 115, r. 23)

(1A) An authorized officer shall make an application for an order under section 20 or a warrant under section 21 ex parte to a judge by laying an information on oath. (L.N. 142 of 1990)

(HK)(1) Where an order under section 20 has been made, the person required to comply with it may apply in writing to the appropriate officer of the Court for the order to be discharged or varied, and on hearing such an application the Court may discharge the order or make such variations to it as it thinks fit.

(2) Subject to paragraph (3), where a person proposes to make an application under paragraph (1) for the discharge or variation of an order, he shall give a copy of the application, not later than 48 hours before the making of the application, to the authorized officer by whom the application for an order was made, or if such officer is not known or cannot be found, to another authorized officer, together with a notice indicating the time and place at which the application for discharge or variation is to be made.

(3) The Court may direct that paragraph (2) need not be complied with if it is satisfied that the person making the application has good reason to seek a discharge or variation of the order as soon as possible and it is not practicable to comply with that paragraph.

24. Application for continued detention of seized property (O. 115, r. 24)

(1) An application under section 24C(2) for an order to authorize the continued detention of seized property shall be made by ex parte originating motion in Form No. 107 in Appendix A.

(2) An application under paragraph (1) shall be supported by an affidavit, which shall-

(a) state what the seized property consists of (including, in the case of money, the amount and currency thereof) and the date on which and the place at which it was seized;

(b) state the grounds for suspecting that the seized property is specified property; and

(c) give particulars, in terms of the matters referred to in section 24C(2)(b), as to why the continued detention of the seized property is justified.

(L.N. 296 of 1996)

25. Order for continued detention of seized property (O. 115, r. 25)

(1) Where an order is made under section 24C(2), the applicant shall, as soon as is practicable, serve a copy of the order on each person affected by the order.

(2) An order under section 24C(2) shall be in Form No. 108 in Appendix A.

(3) In rules 26(3) and (4), 27, 28(2) and 29(3) and (4), "affected person" (受影響的人), in relation to any summons or order referred to in those rules, means a person-

(a) on whom a copy of an order made under section 24C(2) has been served pursuant to paragraph (1) where the seized property (or any part thereof) the subject of the summons or first-mentioned order is or was the subject of the second-mentioned order; or

(b) in respect of whom the Court has made an order under rule 31 in connection with the summons or first-mentioned order.

(L.N. 296 of 1996)

26. Application for further detention of seized property (O. 115, r. 26)

(1) An application under section 24C(3) for an order to authorize the further detention of seized property shall be made by summons in the proceedings commenced under rule 24.

(2) An application under paragraph (1) shall be supported by an affidavit, which shall-

(a) state the grounds for suspecting that the seized property is specified property; and

(b) give particulars, in terms of the matters referred to in section 24C(2)(b), as to why the continued detention of the seized property is justified.

(3) The summons and the affidavit in support shall be served on each affected person not less than 5 clear days before the date fixed for the hearing of the summons.

(4) Affidavit evidence in response to the summons shall be served by an affected person on-
(a) the Secretary for Justice on behalf of the applicant; and (L.N. 362 of 1997)
(b) each other affected person,
not less than 2 clear days before the date fixed for the hearing of the summons.

(L.N. 296 of 1996)

27. Order for further detention of
seized property (O. 115, r. 27)

Where an order is made under section 24C(3), the applicant shall, as soon as is practicable, serve a copy
of the order on each affected person.

(L.N. 296 of 1996)

28. Application for release of seized
property (O. 115, r. 28)

(1) An application under section 24C(4)(a) for the release of seized property detained by an order under
section 24C(2) or

(3) shall be made by summons which shall state the grounds on which the application is made.

(2) The summons and any affidavit in support shall be served on-

(a) the Secretary for Justice on behalf of the authorized officer who obtained the order by virtue of which
the seized property is detained; and (L.N. 362 of 1997)

(b) each other affected person,

not less than 5 clear days before the date fixed for the hearing of the summons.

(3) Any affidavit in opposition to the summons shall be served on-

(a) the person who made the application under paragraph (1); and

(b) each of the other persons referred to in paragraph (2)(a) and (b),

not less than 2 clear days before the date fixed for the hearing of the summons.

(L.N. 296 of 1996)

29. Application for forfeiture of seized
property (O. 115, r. 29)

(1) An application under section 24D(1) for the forfeiture of seized property shall be made by summons
in the proceedings under which any order under rule 24 has been obtained.

(2) An application under paragraph (1) shall be supported by an affidavit, which shall state the grounds
for believing that the seized property-

(a) in whole or in part directly or indirectly represents any person's proceeds of drug trafficking;

(b) has been used in drug trafficking; or

(c) is intended for use in drug trafficking.

(3) The summons and the affidavit in support referred to in paragraphs (1) and (2) shall be served on each
affected person not less than 14 clear days before the date fixed for the hearing of the summons.

(4) Any affidavit in opposition to the summons shall be served by an affected person on-

(a) the Secretary for Justice on behalf of the applicant; and (L.N. 362 of 1997)

(b) each other affected person,

not less than 5 clear days before the date fixed for the hearing of the summons.

(L.N. 296 of 1996)

30. Release of seized property (O. 115, r. 30)

Where in relation to any seized property-

(a) an order under section 24C(2) expires without an order being made under section 24C(3);

(b) an order under section 24C(3) expires without a further order being made thereunder; or

(c) a direction is obtained under section 24C(4), then, unless the Court has directed that an issue be stated

and tried as between affected persons, the property shall be forthwith released on such terms, if any, as the Court thinks fit to the person from whom the property was seized or to such other person as appears to be entitled to it.

(L.N. 296 of 1996)

31. Joinder and payment into Court (O. 115, r. 31)

(1) Without prejudice to its powers under Order 15, rule 6, the Court may either of its own motion or on application order that any person who may be affected by any order made by it be joined as a party to the proceedings.

(2) The Court may order that the property which is the subject of an application or order shall be paid into or lodged in Court on such terms as it thinks fit.

(L.N. 296 of 1996)

32. Service of documents (O. 115, r. 32)

(1) Without prejudice to Order 65, any documents required to be served on a party under rules 25 to 29 may be served in accordance with the provisions of this rule.

(2) Where documents are required to be served on a party from whom property has been seized and that party has provided an authorized officer with an address or facsimile number at which any such document may be served, the documents may be served by leaving them at or sending them by registered mail to that address or by sending it by facsimile to the number provided.

(3) If that party has refused to provide an authorized officer with any such address or facsimile number and there is no other method of serving him or if it is otherwise not possible to serve a party, the documents may be served on that party by exhibiting them on a notice board at a place to which the public have access on the ground floor of the High Court Building but where any application made under rule 25, 26, 27, 28 or 29 is so served, the applicant shall state in his affidavit of service why this method of service has been adopted and the Court shall consider whether to give directions for some other form of service (including substituted service) by the applicant. (25 of 1998 s. 2)

(4) A body corporate which is not incorporated in Hong Kong and which is not registered under Part XI of the Companies Ordinance (Cap 32) may be served by leaving the document to be served at or by sending it by registered mail to the registered office or principal place of business of that body corporate.

(L.N. 296 of 1996)

33. Power to extend or abridge time (O. 115, r. 33)

Rules 26(3) and (4), 28(2) and (3), and 29(3) and (4) shall not operate to prejudice the power of the Court under Order 3, rule 5, to extend or abridge the period within which a person is required or authorized by any of those rules to do any act in any proceedings.

(L.N. 296 of 1996)

DRUG TRAFFICKING AND ORGANISED CRIMES (AMENDMENT) BILL 2000

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
Schedule 2	<p>By deleting section 11(b) and substituting -</p> <p>"(b) by repealing paragraphs 15 and 16 and substituting -</p> <p>"15. Drug Trafficking</p> <p>(Recovery of Proceeds)</p> <p>Ordinance (Cap. 405)</p> <p>section 25(1) <u>or</u> dealing with</p> <p><u>1(A)</u> property</p> <p>known,</p> <p>believed or</p> <p>suspected to</p> <p>represent</p> <p>proceeds of</p> <p>drug</p> <p>trafficking</p> <p>16. Organized and</p> <p>Serious Crimes</p> <p>Ordinance (Cap. 455)</p> <p>Section 25(1) <u>or</u> dealing with</p>

1(A)

property
known,
believed or
suspected to
represent
proceeds of
indictable
offence".".