

LN294-E

L.N. 294 of 2001

Mutual Legal Assistance in Criminal
Matters (Portugal) Order

(Made by the Chief Executive in Council under section 4
of the Mutual Legal Assistance in Criminal Matters
Ordinance (Cap. 525) subject to the approval
of the Legislative Council)

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Ordinance to apply between Hong Kong
and Portugal

In relation to the arrangements for mutual legal assistance---

(a) which are applicable to the Government and the Government of the Portuguese Republic; and

(b) a copy of which is annexed at Schedule 1,

it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and the Portuguese Republic.

SCHEDULE 1 [s. 2]

AGREEMENT BETWEEN

THE GOVERNMENT OF THE HONG KONG

SPECIAL ADMINISTRATIVE REGION OF THE

PEOPLE'S REPUBLIC OF CHINA

AND

THE GOVERNMENT OF THE PORTUGUESE REPUBLIC

CONCERNING

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China and the Government of the Portuguese Republic,

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds;

Have agreed as follows:

ARTICLE 1

SCOPE OF ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) the obtaining of information, statements, evidence, articles or documents, including the execution of letters rogatory;
- (d) executing requests for search and seizure;
- (e) facilitating the personal appearance of persons to provide assistance;
- (f) effecting the temporary transfer of persons in custody to provide assistance;
- (g) obtaining production of judicial or official records;
- (h) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities;
- (i) providing information, documents and records; and
- (j) delivery of property, including lending of exhibits.

(3) Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings related thereto.

(4) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

ARTICLE 2

CENTRAL AUTHORITIES

(1) The Central Authorities of the Parties shall process requests for assistance in accordance with the provisions of this Agreement.

(2) The Central Authority for the Portuguese Republic is the Procuradoria-Geral da República. The Central Authority for the Hong Kong Special Administrative Region is the Secretary for Justice or an officer authorized by the Secretary for Justice. Either Party may change its Central Authority in which case it shall notify the other of the change.

(3) The Central Authorities may communicate directly with each other for the purposes of this Agreement.

ARTICLE 3

OTHER ASSISTANCE

The Parties may provide assistance pursuant to other agreements, arrangements

or practices.

ARTICLE 4

LIMITATIONS ON COMPLIANCE

(1) The Requested Party shall refuse assistance if:

(a) the request for assistance impairs the sovereignty, security or public order of the Portuguese Republic or, in the case of the Government of the Hong Kong Special Administrative Region, the People's Republic of China;

(b) the request for assistance relates to an offence of a political character;

(c) the request for assistance relates to an offence only under military law;

(d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, religion, nationality or political opinions;

(e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requested Party or for which the person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;

(f) if it is of the opinion that the granting of the request would seriously impair its essential interests;

(g) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided; and

(h) if the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(2) For the purpose of paragraph (1)(f) the Requested Party may include in its consideration of essential interests whether the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

(3) The Requested Party shall refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party or if the request relates to an offence which is punishable, according to the law of the Requesting Party, with life imprisonment or a prison sentence of undetermined duration, unless the Requesting Party gives such assurances as the Requested Party considers sufficient that these penalties will not be imposed, or if imposed, will not be carried out.

(4) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority---

(a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and

(b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(6) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (5)(b), it shall comply with those terms and conditions.

ARTICLE 5

REQUESTS

(1) Requests shall be made in writing.

(2) Requests for assistance shall include:

(a) the name of the authority on behalf of which the request is made;

(b) a description of the purpose of the request and the nature of the assistance requested;

(c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;

(d) where proceedings have been instituted, details of the proceedings;

(e) a summary of the relevant fact and laws;

(f) any requirements for confidentiality;

(g) details of any particular procedure the Requesting Party wishes to be followed; and

(h) details of the period within which the request should be complied with.

(3) The Requested Party shall use its best efforts to keep confidential a request and its contents except when otherwise authorized by the Requesting Party.

(4) Requests shall be in, or translated into, an official language of the Requested Party. All documents submitted in support of a request shall be accompanied, if so required by the Requested Party, by a translation into an official language of the Requested Party.

ARTICLE 6

EXECUTION OF REQUESTS

(1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.

(2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

(3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.

(4) The Requested Party shall promptly inform the Requesting Party of a decision not

to comply in whole or in part with a request for assistance and the reason for that decision.

ARTICLE 7

REPRESENTATION AND EXPENSES

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceeding arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Requested Party shall assume all ordinary expenses of executing a request, except:

(a) fees of counsel retained at the request of the Requesting Party;

(b) fees of experts;

(c) expenses of translation; and

(d) travel expenses and allowances of persons travelling at the request of the Requesting Party.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

ARTICLE 8

LIMITATIONS OF USE

(1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished by the Requested Party including documents, articles or records be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(2) The Requesting Party shall not disclose or use information or evidence furnished by the Requested Party including documents, articles or records for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

ARTICLE 9

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

(1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter the Requested Party shall, subject to its laws, arrange to have such evidence taken.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.

(3) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.

(4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the Parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, subject to the laws of the Requested Party, appear and question the person giving that evidence.

(5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to give evidence where either:

(a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or

(b) where the law of the Requesting Party would permit him to decline to give evidence in such proceedings in the Requesting Party.

(6) If any person claims that there is right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate of the Central Authority of the Requesting Party.

ARTICLE 10

OBTAINING STATEMENTS OF PERSONS

Where a request is made to obtain the statement of a person for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

ARTICLE 11

LOCATION OR IDENTITY OF PERSONS

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person specified in the request.

ARTICLE 12

SERVICE OF DOCUMENTS

(1) The Requested Party shall serve any process relating to a criminal matter which has been transmitted to it for the purposes of service.

(2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.

(3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(4) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(5) A person who fails to comply with any process served on him shall not thereby

be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party.

ARTICLE 13

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law the Requested Party shall provide copies of publicly available documents.

(2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

ARTICLE 14

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

ARTICLE 15

TRANSFER OF PERSONS IN CUSTODY

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purpose of providing assistance pursuant to this Agreement shall be transferred from the Requested Party to the Requesting Party, provided the Requested Party and the person consent and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody.

ARTICLE 16

TRANSFER OF OTHER PERSONS

(1) The Requesting Party may request the assistance of the Requested Party in making a person available for the purpose of providing assistance pursuant to this Agreement.

(2) The Requested Party shall, if satisfied that satisfactory arrangements for that person's security will be made by the Requesting Party, request the person to travel to the Requesting Party to provide assistance and shall inform the Requesting Party of the response of that person.

ARTICLE 17

SAFE CONDUCT

(1) A person who consents to provide assistance pursuant to Articles 15 or 16 shall

not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or civil matter which preceded his departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 15, and being free to leave, has not left the Requesting Party within a period of 45 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles 15 or 16 shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Articles 15 or 16 shall not be required to provide assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Articles 15 or 16 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 18

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to a proceeding or investigation in relation to a criminal matter.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

ARTICLE 19

PROCEEDS OF CRIME

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime against the law of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

(2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a Court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds such assistance shall be given by whatever means are appropriate. This may include

enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds to which the request relates.

(4) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(5) Proceeds of crime include instruments used in connection with the commission of an offence.

ARTICLE 20

SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

ARTICLE 21

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.

(2) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

In witness whereof the undersigned, being duly authorised by their respective governments, have signed this Agreement.

Done at the Hong Kong Special Administrative Region, this twenty-fourth day of May Two Thousand and One in duplicate in the Chinese, Portuguese and English languages, each text being equally authentic.

SCHEDULE 2 [s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows---

"(e) the request relates to the prosecution of a person---*

(i)* for an external offence in a case where the person---*

(A)* has been convicted, acquitted or pardoned by a competent court or other authority in the place, ** or Hong Kong;* or

(B)* has undergone the punishment provided by the law of that place or Hong Kong*, in respect of that offence or of another external offence constituted by the same act or omission as that offence;

(ii) in respect of an act or omission that, if it had occurred in Hong

Kong, could no

longer be prosecuted in Hong Kong by reason of lapse of time;*

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows---

"(b) the person has had an opportunity of leaving Hong Kong, 45 days have expired since that opportunity* and the person* has remained in Hong Kong otherwise than for---

(i) the purpose to which the request relates; or

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance."

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

CHENG Mei-sze, Maisie

Clerk to the Executive Council

Council Chamber

18 September 2001

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the Portuguese Republic. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of the Portuguese Republic and signed in Hong Kong on 24 May 2001. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.