

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ORDINANCE

RESOLUTION

(Under section 4 of the Mutual Legal Assistance in
Criminal Matters Ordinance (Cap. 525))

RESOLVED that the Mutual Legal Assistance in Criminal Matters
(Netherlands) Order, made by the Chief Executive in Council on
7 October 2003, be approved.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(NETHERLANDS) 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 Netherlands

In relation to the arrangements for mutual legal assistance –

- (a) which are applicable to the Government and the Government of the Kingdom of the Netherlands; and
- (b) which are contained in the Agreement between the two Governments done on 26 August 2002 (a copy of which is annexed at Schedule 1) of which the Chinese text of Article 14(5) was corrected by an exchange of notes between the two Governments on 23 July 2003 and 24 July 2003 to read as shown in Schedule 2,

it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 3, apply as between Hong Kong and the Kingdom of the Netherlands (including the Netherlands Antilles and Aruba).

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 KINGDOM OF THE
NETHERLANDS

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 Kingdom of the Netherlands, hereinafter referred to as the Parties;

Desiring to improve the effectiveness of their co-operation in criminal matters and in the confiscation of proceeds of crime;

Have agreed as follows :

ARTICLE 1

SCOPE OF ASSISTANCE

(1) The Parties shall provide each other, in accordance with the provisions of this Agreement, the widest measure of mutual assistance in investigations, prosecutions or proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the Requesting Party.

(2) Assistance shall include, in particular :

- (a) identifying and locating persons;
- (b) taking testimony or other statements in the Requested Party;
- (c) providing information, objects, documents, records and evidence, including exhibits;
- (d) facilitating the personal appearance of persons in the Requesting Party to give testimony or to provide other assistance;
- (e) executing requests for search and seizure;
- (f) identifying, tracing, restraining and confiscating proceeds of crime as defined in Article 16; and
- (g) serving of documents.

(3) Assistance under this Agreement shall include assistance in connection with offences against a law relating to taxation, customs duties or other revenue matters, but not in connection with non criminal investigations or proceedings relating thereto.

ARTICLE 2

CENTRAL AUTHORITY

(1) The Central Authorities of the Parties shall process all requests for assistance made in accordance with the provisions of this Agreement and handle all other communications concerning the application, interpretation and implementation of the Agreement.

(2) For the purposes of this Agreement, “Central Authority” means :

- (a) for the Hong Kong Special Administrative Region: the Secretary for Justice;
- (b) for the Kingdom of the Netherlands: the Minister of Justice of the Netherlands, the Minister of Justice of the Netherlands Antilles, or the Minister of Justice of Aruba, as the case may be.

ARTICLE 3

OTHER ASSISTANCE

This Agreement shall not preclude assistance being provided pursuant to other agreements or arrangements that are applicable to the Parties.

ARTICLE 4

GROUND OF REFUSAL

The Requested Party shall refuse assistance if :

- (a) the request relates to acts or omissions which would not have constituted an offence under the law of the Requested Party, if they had taken place within its jurisdiction;
- (b) the Requested Party being the Government of the Kingdom of the Netherlands, the execution of the request would impair the sovereignty, security, public order, or essential interests of the Kingdom of the Netherlands;
- (c) the Requested Party being the Government of the Hong Kong Special Administrative Region, the execution of the request would impair :
 - (i) the sovereignty, security or public order of the People's Republic of China; or
 - (ii) the essential interests of the Hong Kong Special Administrative Region;

- (d) the request relates to an offence of a political character;
- (e) the request relates to an offence under military law which is not an offence under ordinary criminal law;
- (f) the Requested Party has substantial grounds for believing that the request has been made for the purpose of prosecuting a person on account of his race, religion, nationality or political opinions;
- (g) the request relates to the prosecution of a person who is or who has become, for any reasons provided under the law of the Requested Party, immune from prosecution for the offence that underlies the request;
- (h) the Requesting Party cannot comply with conditions in relation to confidentiality or limitation as to the use of information or evidence to be provided.

ARTICLE 5

REQUESTS

- (1) Requests shall be made in writing or, where appropriate, through electronic means that are capable of leaving a written record.
- (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 nature of the investigation, prosecution or proceeding and of the acts or omissions which constitute the offence underlying the request, as well as a summary of the relevant laws or the text of the applicable provisions, including the maximum penalty prescribed for the offence;
 - (c) the purpose of the request, the nature of the assistance being sought and its relevance to the investigation, prosecution or proceeding;
 - (d) where appropriate, a description of the formalities or procedures to be followed by the Requested Party in executing the request and the reasons therefor;

- (e) any requirements for confidentiality and the reasons therefor; and
 - (f) a specification of any time limit within which compliance with the request is required and the reasons therefor.
- (3) The Requesting Party may provide any other information it deems helpful for the execution of the request, including a description of the evidence or the information sought.
- (4) The Requesting Party may require that the Requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the Requested Party cannot comply with the required confidentiality, it shall promptly consult with the Requesting Party.
- (5) The Requested Party may request additional information considered necessary to execute the request.
- (6) A request and documents submitted in support of the request shall, if they are not in English, be accompanied by translation into English.

ARTICLE 6

EXECUTION OF REQUESTS

- (1) A request shall be promptly executed and in accordance with time limits set out in the request. However, if there are circumstances which prevent compliance within the time limits or which are likely to cause a significant delay in executing the request, the Requested Party shall promptly inform the Requesting Party.
- (2) A request shall be executed in accordance with the provisions of this Agreement, the law of the Requested Party and, provided that they are not contrary to that Party's law, with any formalities and procedures expressly set out in the request.
- (3) If the Requesting Party expressly requests, the Central Authority of the Requested Party shall inform it of the date and place of the execution of the request.
- (4) Without prejudice to Article 10, paragraph (3), the Requested Party shall give favourable consideration to a request by the Requesting Party that the

authorities involved and interested persons, and their legal representatives be present at the execution of a request.

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

(6) Before refusing or postponing assistance, the Requested Party shall promptly inform the Requesting Party of the reasons for considering refusal or postponement and consult with that Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(7) The Requested Party shall inform the Requesting Party in writing of a decision to refuse assistance and the reasons therefor.

ARTICLE 7

REPRESENTATION AND EXPENSES

(1) The Requested Party shall represent the interests of the Requesting Party in any proceedings arising out of a request for assistance.

(2) The Requested Party shall meet the costs of executing the request except that the Requesting Party shall bear :

- (a) the expenses associated with conveying any person to or from the Requested Party, and any fees, allowances or expenses payable to that person whilst in the Requesting Party pursuant to a request; and
- (b) the expenses associated with conveying custodial or escorting officers.

(3) If before or during the execution of the request it becomes apparent that execution of the request would impose an excessive burden on the Requested Party's resources or involve expenses of an extraordinary nature, the Parties shall consult to determine the terms and conditions under which the execution of the request may proceed or continue.

ARTICLE 8

LIMITATIONS ON USE

(1) The Requested Party may require that the Requesting Party not use any information or evidence obtained under this Agreement in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested Party. In such a situation, the Requesting Party shall comply with the requirement.

(2) The Requested Party may require that information or evidence furnished under this Agreement be kept confidential or be used only subject to terms and conditions it may specify. If the Central Authority of the Requesting Party accepts the information or evidence subject to such conditions, the Requesting Party shall comply with the conditions.

ARTICLE 9

TAKING OF EVIDENCE

Where a request is made that evidence be taken, the Requested Party shall arrange to have such evidence taken. The taking of evidence shall include the production of objects, documents, records and exhibits.

ARTICLE 10

TAKING OF TESTIMONY IN THE REQUESTED PARTY

(1) Where a request is made that testimony be taken in the Requested Party, that Party shall arrange to have such testimony taken.

(2) In addition to the information referred to in Article 5, paragraph (2), the Requesting Party shall specify in its request the questions to be put to the person who is required to give testimony or the subject matter about which he or she is to be examined.

(3) The authorities involved in the Requesting Party and interested persons, and their legal representatives, may, subject to the law of the Requested Party, be present and question the person giving the testimony.

(4) A person who is required to give testimony may decline to do so where either :

- (a) the law of the Requested Party would permit him or her to decline to give testimony in similar circumstances in proceedings which originated in the Requested Party; or
- (b) the law of the Requesting Party would permit him or her to decline to give testimony in such proceedings in the Requesting Party.

(5) If a person claims that there is a right to decline to give testimony under the law of the Requesting Party, the Central Authority of the Requested Party shall, where appropriate, consult with the Central Authority of the Requesting Party and rely on a declaration provided by that Authority.

ARTICLE 11

VIDEO CONFERENCE

Where possible and consistent with their laws, the Parties may agree on a case by case basis that the taking of testimony takes place by means of video conference under specified conditions.

ARTICLE 12

TAKING OF TESTIMONY AND PROVIDING ASSISTANCE IN THE REQUESTING PARTY

(1) If the Requesting Party considers the appearance of a person in the Requesting Party necessary for the purpose of giving testimony or providing other assistance, it may ask the Requested Party to invite that person to appear.

(2) In addition to the information referred to in Article 5, paragraph (2), a request pursuant to this Article shall contain information as to :

- (a) the reason why the person's appearance in the Requesting Party is considered necessary;
- (b) the approximate dates on which the person is required to appear;

- (c) the person's rights, protections and obligations under the law of the Requesting Party;
- (d) where appropriate, arrangements for the person's security;
- (e) arrangements for the person's travel to and stay in the Requesting Party as well as his return; and
- (f) the amount of allowances payable to the person, including travel and accommodation expenses.

(3) The Requested Party shall, if satisfied that appropriate arrangements for that person's safety will be made by the Requesting Party, invite the person to appear in the Requesting Party and seek that person's concurrence thereto.

(4) A person who declines to appear shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

ARTICLE 13

TRANSFER OF PERSONS IN CUSTODY TO THE REQUESTING PARTY

(1) A person in custody in the Requested Party whose appearance is requested in the Requesting Party for the purpose of giving testimony or providing other assistance shall, if the Requested Party consents, be transferred to the Requesting Party for that purpose, provided that the Requesting Party has guaranteed maintaining the person in custody and his or her subsequent return as soon as the person's presence is no longer required, but no later than the time specified by the Requested Party.

(2) Transfer may be refused if :

- (a) the person concerned does not consent to appear;
- (b) his or her presence is required for an investigation or proceeding pending in the Requested Party; or
- (c) there are other overriding grounds against transfer.

(3) Where a person in custody who is transferred, becomes entitled under the law of the Requested Party to be released from custody whilst he or she is in the Requesting Party, the Requested Party shall inform the Requesting Party which

shall ensure the person's release and thereafter treat the person as a person referred to in Article 12.

(4) A person who does not consent to be transferred shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

ARTICLE 14

SAFE CONDUCT

(1) A person who consents to appear in the Requesting Party pursuant to Articles 12 or 13 shall not be prosecuted, detained, or restricted in his or her personal liberty in the Requesting Party for any criminal offence or be subject to any civil suit or any proceeding to which the person could not be subjected if he or she were not in the Requesting Party, in respect of any act or omission which preceded the person's departure from the Requested Party.

(2) Paragraph (1) shall cease to apply if the person, being free to leave, has not left the Requesting Party within a period of 15 days after having been officially notified that his or her presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give testimony in the Requesting Party pursuant to Articles 12 or 13 shall not be subject to prosecution based on the testimony given, except in relation to perjury.

(4) A person who consents to give testimony in the Requesting Party pursuant to Articles 12 or 13 may decline to give testimony where either :

- (a) the law of the Requested Party would permit him or her to decline to give testimony in similar circumstances in proceedings which originated in the Requested Party; or
- (b) the law of the Requesting Party would permit him or her to decline to give testimony.

(5) If a person claims that there is a right to decline to give testimony under the law of the Requested Party, the Central Authority of the Requesting Party shall, where appropriate, consult with the Central Authority of the Requested Party and rely on a declaration provided by that Authority.

(6) A person who consents to appear in the Requesting Party pursuant to Articles 12 or 13 shall not be required to give testimony or to provide assistance in any proceedings other than those mentioned in the request.

ARTICLE 15

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure or the production of documents, records or articles and transfer any material thus obtained, or copies thereof, to the Requesting Party.

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

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

ARTICLE 16

CONFISCATION

(1) For the purpose of this Agreement, “proceeds of crime” shall mean :

- (a) assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets derived from or obtained, directly or indirectly, through the commission of an offence or the value which corresponds to such assets; and
- (b) property, equipment or other instrumentalities used in or destined for use in the commission of an offence.

(2) The Requested Party shall, upon request, endeavour to :

- (a) identify and trace any proceeds of crime located within its jurisdiction; and

- (b) restrain with a view to preventing any dealing in, transfer or disposal of such proceeds of crime.
- (3) The Requested Party shall execute requests referred to in paragraph (2) in accordance with its law, pending a final determination in respect of those proceeds by a court of the Requesting Party. The Requested Party shall notify the Requesting Party immediately of the result of the execution of the request.
- (4) The Requested Party shall, upon request, confiscate proceeds of crime in accordance with its law.
- (5) In addition to the information referred to in Article 5, paragraph (2), requests made under this Article shall :
- (a) indicate, as precisely as possible, the description and the location of the proceeds of crime and their connection with the person suspected of, charged with or convicted of the offence; and
 - (b) where the request is made under paragraph (4), be accompanied by a copy of any order of confiscation made by a judicial authority of the Requesting Party and a declaration by the Central Authority of the Requesting Party that the order is final and enforceable.
- (6) Proceeds of crime confiscated pursuant to this Article shall be retained by the Requested Party. However, a Party may, to the extent permitted by its law, offer to transfer the proceeds of crime, or part thereof, to the other Party upon such terms as may be agreed.
- (7) In the application of this Article, the rights of bona fide third parties shall be respected.

ARTICLE 17

SERVICE OF DOCUMENTS

- (1) The Requested Party shall serve any document relating to a criminal matter transmitted to it for the purpose of service, provided that the document is accompanied by a translation into an official language of the Requested Party or at the minimum, a translation of the essential passages thereof.
- (2) The Requesting Party shall transmit a request for the service of a document pertaining to a response within a reasonable time before the scheduled response.

(3) The Requesting Party shall transmit a request for the service of a document pertaining to an appearance in the Requesting Party at least thirty days before the scheduled appearance.

(4) The Requested Party shall give proof of service :

(a) by means of a receipt dated and signed by the person served; or

(b) by means of a declaration made by the Requested Party consistent with its domestic law that service has been effected and stating the form and date of such service.

(5) A person who fails to comply with a document served on him or her pursuant to this Article shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

ARTICLE 18

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law the Requested Party shall, upon request, 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 19

CERTIFICATION

Evidence, documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified if the Requesting Party so requests. For that purpose certification by the Central Authority of the Requested Party shall be sufficient.

ARTICLE 20

PROVISION OF INFORMATION IN CONNECTION WITH PROCEEDINGS

Where an offence has been committed in one of the Parties and that offence may also be prosecuted by the other Party, the Party where the offence was committed may, if it decides not to prosecute the offence, inform the other Party. Upon request, the Party where the offence was committed, may assist the other Party, in particular by providing information and evidence in relation to that offence, with a view to prosecution of the offence in the latter Party.

ARTICLE 21

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 themselves are unable to reach agreement.

ARTICLE 22

TERRITORIAL APPLICATION

As regards the Kingdom of the Netherlands this Agreement shall apply to the part of the Kingdom in Europe only and may be extended to the Netherlands Antilles and/or to Aruba at the request of the Kingdom of the Netherlands.

ARTICLE 23

ENTRY INTO FORCE

- (1) This Agreement shall enter into force on the first day of the second month following the date on which the Parties have notified each other in writing that their respective legal requirements have been complied with.
- (2) This Agreement shall apply to any requests presented after its entry into force even if the relevant acts and omissions occurred before that date.

ARTICLE 24

TERMINATION

Either Party may terminate this Agreement at any time by written notification. Termination shall become effective six months after the date of the receipt of such notification. In case of extension of the applicability of this Agreement to the Netherlands Antilles and/or Aruba, the Kingdom of the Netherlands shall be entitled to terminate the application of this Agreement in respect of any of the constituent parts of the Kingdom of the Netherlands.

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-sixth day of August Two Thousand and Two in duplicate in the Chinese, English and Dutch languages, each version being equally authentic.

SCHEDULE 2

[s. 2]

THE CORRECTED CHINESE TEXT OF ARTICLE 14(5) OF THE AGREEMENT

“(5) 如任何人宣稱有權根據被請求方的法律拒絕作證，請求方的中心機關須在適當時諮詢被請求方的中心機關，並以該機關所發的聲明為憑證。”

SCHEDULE 3

[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 for an external offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in the place or Hong Kong*, or 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;”.

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, 15 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).

Clerk to the Executive Council

COUNCIL CHAMBER

7 October 2003

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the Kingdom of the Netherlands (including the Netherlands Antilles and Aruba). The Order is made in consequence of the Agreement concerning the arrangements for mutual legal assistance entered into by the two Governments on 26 August 2002 and corrected in relation to the Chinese text of Article 14(5) on 24 July 2003. A copy of the Agreement and the corrected Chinese text of Article 14(5) are annexed at Schedules 1 and 2 to the Order respectively. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 3 to the Order.