

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
(Poland) Order, made by the Chief Executive in Council
on 7 February 2006, be approved.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(POLAND) 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 Poland

(1) In relation to the scheduled arrangements for mutual legal assistance, it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 1, apply as between Hong Kong and the Republic of Poland.

(2) In subsection (1), "scheduled arrangements for mutual legal assistance" (列明的相互法律協助的安排) means arrangements which are applicable to the Government and the Government of the Republic of Poland, a copy of which is annexed at Schedule 2.

SCHEDULE 1

[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 -*

(i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place^{**} or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;* or

(ii)* 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(1) of the Ordinance shall be modified by deleting paragraph (ii).

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

"(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that his presence is no longer required for any of the following purposes* ~~has had an opportunity of leaving Hong Kong and 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.".

4. Section 23(2)(a) of the Ordinance shall be modified -
- (a) by adding "or" at the end of subparagraph (i);
 - (b) by deleting subparagraph (ii).

* 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).

SCHEDULE 2

[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 REPUBLIC OF POLAND
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 authorized by the Central People's Government of the People's Republic of China and the Government of the Republic of Poland, hereinafter referred to as "the Contracting Parties",

Desiring to improve the effectiveness of law enforcement of both Contracting Parties in the investigation, prosecution and

prevention of crime and the confiscation of the proceeds of crime through cooperation and mutual legal assistance in criminal matters;

Have agreed as follows:

ARTICLE 1

SCOPE OF ASSISTANCE

1. The Contracting Parties shall provide mutual assistance, in accordance with the provisions of this Agreement, in connection with the investigation, prosecution and prevention of offences. The Contracting Parties shall also provide such assistance in connection with the confiscation or forfeiture of the proceeds or instrumentalities of offences and other proceedings directly related to the commission of offences unless such assistance is not permitted by the laws of the Requested Party.

2. Assistance shall include:

(a) taking testimony or statements;

(b) providing items, including documents, records and articles of evidence;

(c) locating or identifying persons or items;

- (d) serving documents;
- (e) facilitating the personal appearance of persons, including persons in custody;
- (f) executing requests for search and seizure;
- (g) assisting in proceedings related to immobilization and confiscation or forfeiture of the proceeds or instrumentalities of offences and restitution of those proceeds or instrumentalities to the victims of crime; and
- (h) any other forms of assistance not prohibited by the laws of the Requested Party.

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

ARTICLE 2

CENTRAL AUTHORITIES

1. Each Contracting Party shall have a Central Authority to make and receive requests pursuant to this Agreement.

2. For the Hong Kong Special Administrative Region, the Central Authority shall be the Secretary for Justice, or a person authorized by the Secretary for Justice. For the Republic of Poland, the Central Authority shall be the Minister of Justice - Prosecutor General, or a person authorized by the Minister of Justice - Prosecutor General. Either Contracting Party may change its Central Authority in which case it shall notify the other of the change.

3. The Central Authorities shall communicate directly with one another for the purposes of this Agreement.

ARTICLE 3

LIMITATIONS ON PROVIDING ASSISTANCE

1. The Central Authority of the Requested Party shall refuse assistance if:

- (a) the execution of the request for assistance would impair the sovereignty, security or public order of the Republic of Poland or, in the case 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 under military law which would not be an offence under ordinary criminal law;
- (d) there are substantial grounds for believing that the request for assistance was made for the purpose of prosecuting, punishing or otherwise proceeding against a person 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 or acquitted in the Requested Party;
- (f) it is of the opinion that the execution of the request for assistance would impair the essential interests of the Requested Party;
- (g) the acts or omissions which constitute the criminal conduct in respect of which assistance is sought do not constitute an offence under the law of the Requested Party, or would not constitute an offence if committed within the Requested Party;
- (h) the primary purpose of the request for assistance is the assessment or collection of tax;

(i) the request for assistance relates to an offence which carries the death penalty under the law of the Requesting Party;

(j) the request for assistance is not made in conformity with this Agreement.

2. Before refusing assistance pursuant to this Article, the Central Authorities shall consult with each other to consider whether assistance can be given subject to conditions. If the Requesting Party accepts assistance subject to these conditions, it shall comply with the conditions.

3. If the Central Authority of the Requested Party refuses assistance, it shall inform the Central Authority of the Requesting Party of the reasons for the refusal.

ARTICLE 4

FORM AND CONTENTS OF REQUESTS

1. A request for assistance shall be made in writing except that the Central Authority of the Requested Party may accept a request in another form in emergency situations. In any such case, the request shall be confirmed in writing within ten days thereafter unless the Central Authority of the Requested Party indicates otherwise. The request shall be in the language of the Requesting

Party, with an attached translation into the language of the Requested Party, unless otherwise agreed.

2. The request shall include the following:

- (a) the name of the authority conducting the investigation, prosecution or proceeding to which the request relates;
- (b) a description of the nature of the criminal matter and a summary of the relevant facts and laws;
- (c) a description of the evidence, information or other assistance sought; and
- (d) a statement of the purpose for which the evidence, information, or other assistance is sought.

3. To the extent necessary and possible, a request shall also include:

- (a) information on the identity and location of any person from whom evidence or information is sought;
- (b) information on the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;

- (c) information on the identity and whereabouts of a person or an item to be located;
- (d) a precise description of the place or person to be searched and of the items to be seized;
- (e) a description of the manner in which any testimony, evidence or statement is to be taken and recorded;
- (f) a list of questions to be asked of a person or a description of the subject matter about which a person is to be examined or both;
- (g) a description of any particular procedure to be followed in executing the request;
- (h) any requirement for persons designated in the request to be present during the execution of the request;
- (i) information as to the allowances and expenses to which a person asked to appear in the Requesting Party will be entitled;
- (j) any time limits relevant to the request;
- (k) any requirements for confidentiality; and

- (1) any other information which may be brought to the attention of the Requested Party to facilitate its execution of the request.

ARTICLE 5

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. The competent authorities of the Requested Party shall use their best efforts to execute the request. The judicial authorities or other competent authorities of the Requested Party shall issue subpoenas, search warrants, or other orders necessary to execute the request.

2. The Central Authority of the Requested Party shall make all necessary arrangements for representation of the Requesting Party in any proceedings in the Requested Party arising out of a request for assistance.

3. Requests shall be executed in accordance with this Agreement. As regards matters not governed by this Agreement, requests shall be dealt with in accordance with the laws of the Requested Party. The method of execution specified in the request shall be followed except insofar as it is prohibited by the laws of the Requested Party.

4. If the Central Authority of the Requested Party determines that the execution of a request would interfere with an ongoing criminal investigation, prosecution or other proceeding in that Party, it may postpone execution, or make execution subject to conditions determined necessary, after consultation with the Central Authority of the Requesting Party. If the Requesting Party accepts assistance subject to conditions, it shall comply with the conditions.

5. The Requested Party shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the Central Authority of the Requesting Party. If the request cannot be executed without breaching such confidentiality, the Central Authority of the Requested Party shall so inform the Central Authority of the Requesting Party, which shall then determine whether the request should nevertheless be executed.

6. The Central Authority of the Requested Party shall respond to reasonable enquiries by the Central Authority of the Requesting Party about progress toward execution of the request.

7. The Central Authority of the Requested Party shall promptly inform the Central Authority of the Requesting Party of the outcome of the execution of the request. If the execution of the request is delayed or postponed or cannot be executed in whole or

in part, the Central Authority of the Requested Party shall inform the Central Authority of the Requesting Party of the reasons therefor.

ARTICLE 6

COSTS

1. The Requested Party shall pay all costs relating to the execution of the request, except for:

- (a) the fees of counsel retained at the request of the Requesting Party;
- (b) the fees for experts;
- (c) the cost of oral and written translations;
- (d) the cost incurred for transcription by private persons of testimony or statements, or the cost incurred for the preparation by private persons of written records or video records of testimony or statements;
- (e) the allowances and expenses related to travel of persons to a place in the Requested Party upon the request of the Requesting Party, or pursuant to Articles 10 or 11.

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

ARTICLE 7

LIMITATIONS ON USE

1. The Central Authority of 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 cases, the Requesting Party shall comply with the requirement.

2. The Central Authority of the Requested Party may require that information or evidence furnished under this Agreement be kept confidential or be used in accordance with any conditions which the Central Authority shall specify. If the Requesting Party accepts the information or evidence subject to such conditions, the Requesting Party shall use its best efforts to comply with the conditions.

3. Nothing in this Article shall preclude the use or disclosure of information to the extent that such information is exculpatory

to the defendant in a criminal prosecution. The Requesting Party shall notify the Requested Party in advance of any such proposed disclosure.

4. Information or evidence which has been made public in the Requesting Party in accordance with paragraph 1 or 2 may thereafter be used for any purpose.

ARTICLE 8

EVIDENCE IN THE REQUESTED PARTY

1. A person in the Requested Party from whom evidence is requested pursuant to this Agreement shall be compelled, if necessary, to appear and testify or produce items, including documents, records and articles of evidence. A person who gives false testimony, either orally or in writing, in execution of a request shall be subject to prosecution and punishment in the Requested Party in accordance with the criminal law of that Party.

2. Upon the request of the Requesting Party, the Central Authority of the Requested Party shall furnish information in advance about the date and place of the taking of the evidence pursuant to this Article.

3. The Requested Party shall permit the presence of persons specified in the request during the execution of the request, and

to the extent permitted by its law shall allow such persons to question the person giving the evidence.

4. The person referred to in paragraph 1 may refuse to give evidence if such person is entitled to do so according to the laws of the Requesting Party or the Requested Party.

5. If the person from whom evidence is sought asserts the right to decline to give evidence under the law of the Requested Party, the Requested Party shall resolve the matter in accordance with its own law. If the person from whom evidence is sought asserts the right to decline to give evidence under the law of the Requesting Party, the Requested Party shall resolve the matter on the basis of a certificate of the Central Authority of the Requesting Party.

6. The Requesting Party may request that items, including documents, records and articles produced in the Requested Party pursuant to this Article be certified in accordance with forms attached to the request. The absence or non-existence of items, including documents, records and articles may also be certified by forms attached to the request.

ARTICLE 9

DOCUMENTS AND OFFICIAL RECORDS

1. The Requested Party shall provide the Requesting Party with copies of documents or records in any form publicly available in the Requested Party, in the possession of the authorities of the Requested Party.

2. The Requested Party may provide copies of any documents or records in the possession of the authorities of that Party, but which are not publicly available, to the same extent and under the same conditions as such copies would be available to its own law enforcement or judicial authorities.

3. The Requesting Party may request that documents or records provided pursuant to this Article be certified in accordance with forms attached to the request. The absence or non-existence of documents or records may also be certified by forms specified in the request.

ARTICLE 10

APPEARANCE IN THE REQUESTING PARTY

When the Requesting Party requests the appearance of a person not in custody in that Party, the Requested Party shall invite the person to appear before the appropriate authority in the Requesting Party. The Requesting Party shall indicate the extent to which the expenses of that person will be paid. The Central Authority of Requested Party shall promptly inform the Central Authority of the Requesting Party of the person's response.

ARTICLE 11

TRANSFER OF PERSONS IN CUSTODY

1. A person in the custody of the Requested Party whose presence in the Requesting Party is sought for purposes of assistance under this Agreement shall be temporarily transferred from the Requested Party to the Requesting Party for that purpose if the person consents and if the Central Authorities of both Parties agree.

2. A person in the custody of the Requesting Party whose presence in the Requested Party is sought for the purposes of assistance under this Agreement shall be temporarily transferred from the Requesting Party to the Requested Party if the person consents and if the Central Authorities of both Parties agree.

3. For the purposes of this Article:

(a) the receiving Party shall have the authority and the obligation to keep the person transferred in custody unless otherwise authorised by the sending Party;

(b) the receiving Party shall return the person transferred to the custody of the sending Party as soon as circumstances permit or as otherwise agreed by both Central Authorities;

- (c) the receiving Party shall not require the sending Party to initiate extradition proceedings or any other proceedings for the return of the person transferred; and
- (d) the person transferred shall receive credit for service of the sentence imposed in the sending Party for the time served in the custody of the receiving Party.

ARTICLE 12

SAFE CONDUCT

1. A person referred to in Article 10 or 11 who upon request appears in the Requesting Party shall not, subject to Article 11.3(a), be prosecuted, detained or restricted in his personal liberty in that Party for any acts committed before his departure from the Requested Party. That person shall not be required to give testimony in any proceedings other than the proceedings to which the request relates.

2. A person referred to in Article 10 or 11 who upon request appears in the Requesting Party shall not be prosecuted, detained or restricted in his personal liberty in that Party by reason of the content of testimony provided by him, unless he gives false testimony as a witness.

3. The provisions of paragraph 1 shall not apply if the person who appears, being free to leave the Requesting Party, has not left it within fifteen consecutive days after being notified by a competent authority that his presence is no longer required, or having left, has voluntarily returned.

4. A person who has not appeared in the Requesting Party when invited to do so under Article 10 or 11 shall not be liable to any penalty or coercive measure in the Requested Party.

ARTICLE 13

LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

If the Requesting Party seeks the location or identity of persons or items in the Requested Party, the Requested Party shall use its best efforts to establish the location or identity.

ARTICLE 14

SERVICE OF DOCUMENTS

1. The Requested Party shall use its best efforts to effect service of any document transmitted to it by the Requesting Party for the purposes of service.

2. The Requesting Party shall transmit any request for the service of a document requiring the appearance of a person before an authority in the Requesting Party a reasonable time before the

scheduled appearance. This principle shall apply equally to a request for the service of a document requiring the recipient to take any other specific steps or giving the recipient the opportunity to do so.

3. The Requested Party shall return a proof of service in the manner specified in the request.

4. A person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure in the Requested Party.

ARTICLE 15

SEARCH AND SEIZURE

1. The Requested Party shall execute a request for the search, seizure, and delivery of any item to the Requesting Party if the request includes information justifying such action under the law of the Requested Party.

2. The Requested Party shall provide such information as may be required by the Requesting Party concerning the circumstances of any search, seizure and custody of the item seized. In particular the Requesting Party may request that each official who has had custody of a seized item certify the identity of the item, the continuity of custody and the integrity of its condition in accordance with forms attached to the request. Such certificates

shall be admissible as evidence in the Requesting Party as proof of the matters set forth therein.

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

ARTICLE 16

RETURN OF ITEMS

If required by the Central Authority of the Requested Party the Central Authority of Requesting Party shall return as soon as possible any item furnished to it in execution of a request under this Agreement.

ARTICLE 17

ASSISTANCE IN CONFISCATION AND FORFEITURE PROCEEDINGS

1. If the Central Authority of one Contracting Party becomes aware that proceeds or instrumentalities of offences are located in the other Contracting Party, it may so inform the Central Authority of the other Contracting Party. If that other Party has jurisdiction to forfeit or temporarily immobilize those proceeds or instrumentalities, it may present this information to its authorities for a determination whether any action is appropriate. These authorities shall issue their decision in accordance with

law, and shall, through their Central Authority, inform the Party which has made the initial notification of the action taken.

2. The Contracting Parties shall assist each other to the extent permitted by their respective laws in proceedings relating to the confiscation or forfeiture of the proceeds or instrumentalities of offences and restitution to the victims of crime. The assistance may include action to temporarily immobilize the proceeds or instrumentalities pending further proceedings.

3. The Contracting Party that has custody of the proceeds or instrumentalities of offences shall dispose of them in accordance with its law. Either Party may transfer all or part of such assets or the proceeds of their sale to the other Party, to the extent permitted by the transferring Party's laws and upon such terms as may be agreed.

ARTICLE 18

AUTHENTICATION

Evidence or documents transmitted pursuant to this Agreement shall not require any form of authentication, unless expressly requested by either of the Contracting Parties in accordance with its law.

ARTICLE 19

COMPATIBILITY WITH OTHER AGREEMENTS

The provisions of this Agreement shall not prevent either of the Contracting Parties from granting assistance to the other Party through the provisions of other applicable international agreements or practices.

ARTICLE 20

CONSULTATION

1. The Central Authorities of the Contracting Parties shall consult, whenever necessary, to promote the most effective use of this Agreement. The Central Authorities may also agree on such practical measures as may be necessary to facilitate the implementation of this Agreement.

2. Any differences arising out of the interpretation or application of this Agreement shall be resolved through diplomatic channels if the Central Authorities of the Contracting Parties are themselves unable to reach agreement.

ARTICLE 21

ENTRY INTO FORCE, DURATION AND TERMINATION

1. This Agreement shall be adopted by each Contracting Party in accordance with its laws.

2. This Agreement shall enter into force thirty days after the date of receipt of the later of the notifications by which the Contracting Parties notify each other that their respective legal requirements for entry into force of the Agreement have been complied with.

3. This Agreement has not been concluded for a predetermined period of time. It may be terminated by means of notification of either of the Contracting Parties; in such case it shall cease to be in force after the expiry of three months from the date of receipt of the notification.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Hong Kong this twenty-sixth day of April 2005 in duplicate, in the Chinese, English and Polish languages, all texts being equally authentic; in case of a dispute as to their interpretation, the English text shall prevail.

Clerk to the Executive Council

COUNCIL CHAMBER

7 February 2006

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the Republic of Poland. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Republic of Poland and signed in Hong Kong on 26 April 2005. A copy of those arrangements is annexed at Schedule 2 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 1 to the Order.