

**Article by Article comparison of the Agreement between
the Governments of the HKSAR and Germany
for Surrender of Fugitive Offenders (“SFO”)
and the model agreement on SFO (“model agreement”)**

PREAMBLE

The preamble is substantially the same as the model agreement.

ARTICLE 1 – OBLIGATION TO SURRENDER

Article 1(1) is substantially the same as Article 1 of the Agreements with Australian, Canada and Netherlands.

Article 1(2) is added at the request of Germany to expressly state that “sentence” includes “detention order”. Such sentence may be passed in mental disorder cases. Article 1(2) can be implemented by the Fugitive Offenders Ordinance (Cap. 503).

ARTICLE 2 – OFFENCES

Article 2(1) is similar to Article 2(1) of the model agreement, except that :

- (i) the list of offences is presented in the form of an Appendix to the Agreement; and
- (ii) the list of offences covers 46 groups of offences.

The “Appendix” approach is used at the request of Germany.

Article 2(2) is substantially the same as Article 2(2) of the model agreement.

Article 2(3) spells out the conduct test for the “double criminality” requirement and was modelled on Article 2(3) of the Netherlands Agreement. Similar formulation of the conduct test can be found in other signed SFO Agreements.

Article 2(4) is substantially the same as Article 2(3) of the model agreement with omission of the reference to “appropriate authority”.

ARTICLE 3 – SURRENDER OF NATIONALS

Article 3(1) is substantially the same as Article 3 of the model agreement.

Article 3(2) deals with prosecution by the requested party in case of refusal of surrender on the ground of nationality. Similar provision can be found in the Agreements with Australia (Article 3(2)), Malaysia (Article 3(2)), USA (Article 3(5)) and India (Article 4(5)).

ARTICLE 4 – DEATH PENALTY

The Article is identical with Article 4 of the model agreement.

ARTICLE 5 – MANDATORY REFUSAL TO SURRENDER

Article 5(1) is substantially the same as Article 6(1) of the Netherlands Agreement. The term “a political offence” is added at the request of Germany to make the drafting in line with German treaty practice. The substance of the term is covered by “an offence of a political character”. Similar formulation can be found in the Agreement with Indonesia (Article 7(1)(a)).

Article 5(2) is substantially similar to Article 6(2) of the Netherlands Agreement, with the addition of “sex” and “ethnic origin” at sub-paragraphs (1) and (2).

ARTICLE 6 – NON BIS IN IDEM

This Article deals with double jeopardy and is substantially the same as Article 6(2) of the New Zealand Agreement. Similar provision can be found in the Agreements with Canada (Article 5(2)) and Portugal (Article 6(2)).

ARTICLE 7 – DISCRETIONARY REFUSAL TO SURRENDER

Article 7(1) is similar to Article 5(1) of the model agreement, with an additional provision obliging a requested party to take possible measures for prosecution. Similar provision is found in the Agreements with Canada (Article 6(1)) and New Zealand (Article 7(2)).

Article 7(2)1 is substantially the same as Article 7(d) of the Netherlands Agreement and Article 7(e) of the Australia Agreement.

Article 7(2)2 is a new provision. There is no objection as it is only a discretionary ground.

Article 7(2)3 is the same as Article 7(c) of the Netherlands Agreement and Article 7(d) of the Australia Agreement.

Article 7(3) is also a new provision. It requires a requested party to consider surrender subject to conditions as an alternative to refusal. There is no objection.

ARTICLE 8 – THE REQUEST AND SUPPORTING DOCUMENTS

Article 8(1) deals with transmission of requests. It is substantially the same as similar provisions in other signed agreements such as the Philippines Agreement and the Indonesia Agreement, with the transmitting authority also specified. Similar specification can be found in Article 9(1) of the Portugal Agreement.

Article 8(2)1 is substantially the same as Article 7(2)(a) of the model agreement with some drafting changes.

Article 8(2)2 is substantially the same as Article 7(2)(b) of the model agreement, with an additional provision for the facts of an offence to be contained in a warrant or judgment. The provision is added at the request of Germany to reflect Germany's practice in presenting facts in a warrant or judgment.

Article 8(2)3 is substantially the same as Article 7(2)(c) of the model

agreement with some drafting changes.

Article 8(3) is substantially the same as Article 7(3) of the model agreement with the removal of “magistrate” at the request of Germany. The removal is acceptable to us.

Article 8(4) is substantially the same as Article 9(4) of the Australia Agreement and Article 8(4) of the Netherlands Agreement.

Article 8(5) is similar to Article 9(1) of the model agreement.

Article 8(6) deals with the language of a request. Similar provision can be found in the Agreements with Australia (Article 11), Canada (Article 9), Philippines (Article 10) and Indonesia (Article 12).

ARTICLE 9 – AUTHENTICATION

This Article deals with authentication of supporting documents. Precedents for this Article can be found in the Agreements with Portugal (Article 10(1)), Australia (Article 10(2)), Canada (Article 8(5)), India (Article 12(2)), Indonesia (Article 11(1)), Netherlands (Article 11) and Philippines (Article 9(2)).

ARTICLE 10 – PROVISIONAL ARREST

It is substantially the same as Article 8 of the model agreement, except that “45 days” in Article 8(3) is revised to “60 days”. Precedent for this Article can be found in Article 9 of the Netherlands agreement.

ARTICLE 11 – CONFLICTING REQUESTS

This Article is similar to Article 10 of the Netherlands Agreement and Article 11 of the US Agreement with some drafting changes. The phrases “or, in the case of the Government of the Federal Republic of Germany, extradition” and “or, in the case of the Government of the Federal Republic of Germany, re-extradition” are added at the request of Germany to deal with situations where Germany receives a surrender request from the HKSAR and an extradition request from a third

jurisdiction.

ARTICLE 12 – REPRESENTATION AND COSTS

Article 12(1) is substantially similar to Article 12(1) of the Netherlands Agreement with some drafting changes to simplify the wording of the paragraph.

Article 12(2) and Article 12(3) are modelled on Article 12(2) and Article 12(3) of the Netherlands Agreement.

ARTICLE 13 – ARRANGEMENTS FOR HANDOVER

Articles 13(1) to (4) are modelled on and substantially the same as Articles 14(1), (2), (4) and (5) of the Netherlands Agreement with “surrendering” and “surrender” revised to “Handing over” and “Handover” at Article 13(4) and the Heading. “Handover” is used at the request of Germany to distinguish the “physical act” of “handing over” a fugitive from the “procedures” for “surrendering” a person. In our view, there is no substantial difference between the two words. Hence, we have agreed to the use of “Handover”.

ARTICLE 14 – DEFERRAL OR TEMPORARY SURRENDER

Article 14(1) is modelled on Article 14(3) of the Netherlands Agreement except that deferral is discretionary in Article 14(1).

Article 14(2) deals with temporary surrender for prosecution. Similar provision can be found in the Agreements with the US (Article 17) and Malaysia (Article 5).

ARTICLE 15 – HANDING OVER OF PROPERTY

For the reason set out at Article 13, “Surrender” is changed to “Handing Over” at the Heading. This Article is substantially the same as Article 13 of the model agreement, except that Article 15(2) is narrowed to “pending criminal proceedings” at the request of Germany because German law provides for seizure and confiscation in respect of criminal

proceedings only.

ARTICLE 16 – RULE OF SPECIALTY

This Article is substantially the same as Article 16(1) and Article 16(3) of the Netherlands Agreement.

ARTICLE 17 – RE-SURRENDER OR RE-EXTRADITION

The words “or Re-Extradition” are added to the Heading at the request of Germany.

The Article is substantially the same as Article 16(2) and Article 16(3) of the Netherlands Agreement. The phrases “or, in the case of the Government of the Federal Republic of Germany, re-extradited” and “or re-extradition” are added at the request of Germany to cover situations where Germany receives an extradition request from a third jurisdiction in respect of a person surrendered to Germany by the HKSAR.

ARTICLE 18 – TRANSIT

It is modelled on Article 19 of the Canada Agreement with an additional provision on expenses borne by the requesting party.

ARTICLE 19 – RESULT OF CRIMINAL PROCEEDINGS

This is a new article to enable a requested party to be informed of the outcome of the criminal proceedings instituted against a surrendered person. There is no objection to this Article.

ARTICLE 20 – SURRENDER BY CONSENT

This is a useful provision to expedite surrender proceedings. It was included by agreement of both sides. There are precedents of the Article in the Agreements with Singapore (Article 18), US (Article 18) and Malaysia (Article 15).

ARTICEL 21 – PERSONAL DATA

This is a new article added at the request of Germany to reflect their legal requirements concerning the use and transmission of personal data. There is no objection to the article.

ARTICLE 22 – SETTLEMENT OF DISPUTES

This is a new article dealing with settlement of disputes added at the request of Germany. The Article is found in the Model Mutual Legal Assistance in Criminal Matters Agreement. There is no objection.

ARTICEL 23 – ENTRY INTO FORCE, SUSPENSION AND TERINATION

Articles 23(1) and (2) are substantially similar to Articles 21(1) and (2) of the Australia Agreement.

Article 23(3) is similar to Article 20(3) of the Canada Agreement with “This Agreement shall be of unlimited duration.” added at the request of Germany. There is no material difference between Article 23(3) and Article 20(3).

APPENDIX

The list of 26 descriptions of offences in Article 2(1) of the model agreement has been expanded to 46 descriptions of offences presented in the form of an Appendix to the Agreement. Paragraphs 1 to 45 are adopted from Schedule 1 of the Fugitive Offenders Ordinance, Cap.503, with some drafting changes made to paragraphs 35, 40-42, 44-45. Paragraph 46 is similar to Article 2(1)(xxxi) of the Australia Agreement.

Of the 26 descriptions of offences listed in Article 2(1) of the model agreement, except for the offences of Aiding, Abetting, Counselling or Procuring Suicide at paragraph (ii), they have been included in the Appendix with some drafting changes made to some of the descriptions.