

**Article by Article comparison of the Agreement between
the Governments of the HKSAR and Germany
on Mutual Legal Assistance in Criminal Matters (“MLA”)
and the model agreement on MLA (“model agreement”)**

PREAMBLE

Substantially the same as the model agreement.

ARTICLE 1 - SCOPE OF LEGAL ASSISTANCE

Paragraph (1) is substantially the same as the model agreement [Article 1(1)].

Paragraph (2) is added at the suggestion of the German side who wished to emphasise that assistance could be granted to and sought by authorities other than the judicial authorities.

Paragraph (3) is substantially the same as the model agreement [Article 1(2)].

Paragraph (4) is derived from Article 1(3) of the model agreement, but provides positively that assistance shall be granted in relation to taxation offences. The requirements of section 5(2) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) are reflected in paragraph (1) number 7 of Article 4 which sets out grounds for refusal of requests.

Paragraph (5) is the same as the model Agreement [Article 1(4)].

ARTICLE 2 – CHANNELS OF COMMUNICATION

Title is amended to “Channels of Communication” to reflect the fact that Central Authorities will not be established by the Parties. Corresponding amendments are made throughout the Agreement.

ARTICLE 3 – OTHER LEGAL ASSISTANCE

This Article is substantially the same as Article 3 of the model agreement.

ARTICLE 4 – REFUSAL OR POSTPONEMENT OF ASSISTANCE

Paragraph (1) is substantially the same as Article 4(1) of the model agreement with the following modification :-

- *The chapeau* adopts the wording of Article 5(2) of the HKSAR/Canada Agreement so that mandatory refusal is confined to cases where refusal is required by the law of the Requested Party.
- *Sub-paragraph number 5* is revised by adding “sex, ethnic origin”. This addition can be found in HKSAR’s agreements with New Zealand and Singapore.
- *Sub-paragraph number 6* is an amended version of Article 4(1)(e) of the model agreement, deleting the last part of Article 4(1)(e) of the model agreement (i.e. the person could no longer be prosecuted by reason of lapse of time) at the suggestion of the German side. This is acceptable since it is not a mandatory ground of refusal under Cap. 525.
- *Sub-paragraph (g) of the model agreement* becomes a discretionary ground at paragraph (3).
- *Sub-paragraph number 7* reflects section 5(2) of Cap. 525.

Paragraph (2) is to the same effect as Article 4(3) of the model agreement.

Paragraph (3) is moved from paragraph 1(g) of Article 4 of the model agreement (see above).

Paragraph (4) is substantially the same as Article 4(4) of the model agreement.

Paragraph (5) is the same as Article 4(5) of the model agreement except that the reference to “Central Authority” is deleted.

Paragraph (6) is the same as Article 4(6) of the model agreement.

ARTICLE 5 - REQUESTS FOR ASSISTANCE

Paragraph (1) does not permit the making of oral requests. This is acceptable.

Paragraph (2) is substantially the same as Article 5(2) of the model agreement, with the following modifications-

- ***Sub-paragraph number 7*** is adopted from Article 14(1)(c) of the European Convention at the suggestion of the German side. Similar provision is found in the HK/Canada Agreement and the HK/Philippines Agreement.
- ***Sub-paragraph number 8*** is added to cover any other information that would facilitate the execution of the request. This was included in many MLA agreements entered into by HK.

Paragraph (3) is included at the suggestion of the German side to reflect Germany’s legal requirements.

Paragraph (4) corresponds to Article 5(4) of the model agreement.

Article 5(3) of the model agreement becomes Article 6(5).

ARTICLE 6 - EXECUTION OF REQUESTS

Substantially the same as Article 6 of the model agreement.

ARTICLE 7 – EXPENSES

Paragraph (1) of Article 7 of the model agreement which concerns representation is deleted. As with some other civil law countries Germany does not provide representation. Requests are executed by judicial authorities. Corresponding amendment is made to the **Title**.

Paragraph (1) is substantially the same as Article 7(2) of the model agreement.

Paragraph (2) is substantially the same as Article 7(3) of the model agreement but has been expanded to cover fees of receivers.

ARTICLE 8 - LIMITATIONS ON USE

Article 8 is substantially the same as Article 8 of the model agreement.

ARTICLE 9 – PERSONAL DATA

This Article is added at the request of the German side to reflect their legal requirements concerning the use and transmission of personal data. The provisions are based upon Article 14 of the Germany/Canada MLA Agreement. There is no objection to the Article which is consistent with Article 8 of the model Agreement and Hong Kong law.

ARTICLE 10 - OBTAINING OF EVIDENCE, DOCUMENTS, ARTICLES OR RECORDS

Paragraph (1) is an amalgamation of Article 9(1) and (2) of the model agreement.

Paragraph (2) is added at the request of the German side and is consistent with paragraph (3) of this Article.

Paragraph (3) is a modified version of Article 9(4) of the model agreement and is consistent with section 10(4) of Cap. 525.

Paragraph (4) is substantially the same as Article 9(5) of the model agreement with sub-paragraphs (a) and (b) consolidated.

Paragraph (5) is substantially the same as Article 9(6) of the model agreement.

ARTICLE 11 – SERVICE OF DOCUMENTS

Paragraph (1) is substantially the same as Article 12(1) of the model agreement.

Paragraph (2) is similar to Article 12(2) of the model agreement, with the modifications to reflect German law. The modifications do not affect the substance of Article 12(2) and are therefore acceptable.

Paragraphs (3) and (4) are the same as paragraphs (4) and (5) of Article 12 of the model agreement.

ARTICLE 12 - OFFICIAL DOCUMENTS

Article 12 corresponds to Article 13(2) of the model agreement. The Article is now confined to official documents at the suggestion of the German side. The omission of *paragraph (1) of the model agreement* concerning public records is acceptable as the assistance is covered in Article 1(3)2.

ARTICLE 13 – CERTIFICATION AND AUTHENTICATION

Article 13 is substantially the same as Article 14 of the model agreement.

ARTICLE 14 – MAKING DETAINED PERSONS AVAILABLE TO ASSIST IN INVESTIGATIONS OR CRIMINAL PROCEEDINGS

This Article corresponds to Article 15 of the model agreement.

Title is amended at the suggestion of the German side.

Paragraph (1) is substantially the same as Article 15(1) of the model agreement.

Paragraph (2) is an expanded version of the last part of Article 15(1) of the model Agreement and has incorporated Article 11(3) of the European Convention which provides for early release by the Requesting Party at the request of the Requested Party.

Paragraph (3) is to the same effect as Article 15(2) of the model agreement.

ARTICLE 15 - APPEARANCE OF OTHER PERSONS

This Article corresponds to Article 16 of the model agreement. Consistent with other signed Agreements the Article reflects the obligations on the Requested Party to invite the person to appear and advise the person's response.

ARTICLE 16 - SAFE CONDUCT

Paragraph (1) is substantially the same as Article 17(1) of the model agreement. Protection from civil suit is not included at the request of the German side. Similar deletion is found in the HK/UK Agreement and the HK/Canada Agreement.

Paragraph (2) is added at the suggestion of the German side and is modelled upon Article 12(2) of the European Convention. Similar provision is found in the HK/Switzerland Agreement and the HK/France Agreement.

Paragraph (3) is substantially the same as Article 17(2) of the model agreement with slightly amended formulation.

Paragraph (4) is substantially the same as Article 17(3) of the model agreement

Paragraph (5) is substantially similar to Article 17(4) of the model agreement.

Paragraph (6) is substantially similar to Article 17(5) of the model agreement.

ARTICLE 17 - SEARCH AND SEIZURE

Paragraph (1) is substantially similar to Article 18(1) of the model agreement with slightly amended formulation and wording.

Paragraphs (2) and (3) are an expanded version of Article 18(3) of the model agreement and are consistent with HK MLA practice.

Paragraph (4) is the identical to Article 18(2) of the model agreement.

ARTICLE 18 - PROCEEDS OF CRIME

Paragraphs (1) and (2) are identical to paragraphs (1) and (2) of Article 19 of the model agreement.

Paragraph (3) is to the same effect as Article 19(3) of the model agreement.

Paragraph (4) is the same as Article 19(4) of the model agreement.

ARTICLE 19 - SETTLEMENT OF DISPUTES

Article 19 is identical to Article 20 of the model agreement except with the substitution of “Central Authorities” by “Parties”.

ARTICLE 20 - ENTRY INTO FORCE, SUSPENSION AND TERMINATION

Paragraph (1) is substantially the same as Article 21(1) of the model agreement except that provisional application of the Agreement is added at the

suggestion of the German side. This allows assistance to be provided on the basis of reciprocity pending entry into force of the Agreement. Cap. 525 permits assistance to be granted in the absence of an agreement if there is reciprocity (see section 5(3) and (4) of Cap. 525).

Paragraph (2) has been amended at the request of the German side to expressly provide that the Agreement shall be of unlimited duration and to provide for the suspension of the Agreement. This paragraph is the same as Article 23(3) of the HK/Germany SFO Agreement.