

**PROTOCOL SUPPLEMENTARY TO THE AGREEMENT
BETWEEN THE GOVERNMENT OF HONG KONG AND THE
GOVERNMENT OF MALAYSIA FOR
THE SURRENDER OF FUGITIVE OFFENDERS,
DONE AT HONG KONG ON 11 JANUARY 1995**

EXPLANATORY MEMORANDUM

Article I

Article I allows the Protocol to make direct amendments to the Agreement between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders (the SFO Agreement) when it comes into force. The amendments will become an integral part of the SFO Agreement.

Article II

Para. (a)

The amendment was proposed by Hong Kong in order to align with the legal requirement in Hong Kong under s.2(2)(a) of the Fugitive Offenders Ordinance (Cap. 503) and reflected in the model text for agreements for the surrender of fugitive offenders.

Paras. (b) to (m)

General

The SFO Agreement was signed in 1995, before the enactment of Cap. 503. The Malaysian side proposed to expand the list of categories of offences in Article 2. The newly added categories of offences are within Schedule 1 to Cap. 503.

Para. (b)

The wording was taken from item 5 of the Description of Offences in Schedule 1 to Cap. 503.

Para. (c)

The wording is consistent with item 6 of Schedule 1 to Cap. 503.

Para. (d)

The added offences of “taking a hostage” and “criminal intimidation” appear in items 6 and 7 respectively of Schedule 1 to Cap. 503.

Para. (e)

The wording follows the formulation in item 8 of Schedule 1 to Cap. 503.

Para. (f)

The adding of offences against insolvency law follows item 10 in Schedule 1 to Cap. 503.

Para. (g)

The added words of “futures trading” follow item 12 of Schedule 1 to Cap. 503.

Para. (h)

Offences involving the unlawful use of computers are added. The wording follows item 35 in Schedule 1 of Cap. 503.

Para. (i)

The offences relating to the protection of intellectual property in new item (xxva) follow item 14 of Schedule 1 to Cap. 503.

Items (xxvb) and (xxvc) were taken from items 29 and 30 respectively of Schedule 1 to Cap. 503. The former relates to immigration offences and the latter to facilitating illegal entry of persons into a jurisdiction for gain.

The addition of gambling offences in item (xxvd) follows item 31 of Schedule 1 to Cap. 503.

Para. (j)

An express reference to “mischief in relation to computer data” is added to item (xxviii) which follows item 18 of Schedule 1 to Cap. 503.

Para. (k)

The additional reference to “other means of transportation” is consistent with item 24 in Schedule 1 to Cap.503.

Para. (l)

Item (xxxv) has been revised to comprehend offences under item 23 of Schedule 1 to Cap.503.

Para. (m)

Item (xxxvi) has been expanded to comprehend the offences identified in item 46 in Schedule 1 to Cap. 503.

Paras. (n) and (o)

The new item (o) will enable surrender to be effected in respect of offences which are not listed in Article 2(1)(i) to (xxxvii) of the SFO Agreement but which are permitted under the law of the requested Party. Both sides considered this to be a useful provision. Similar provision can be found in item 46 of the Annex of the Hong Kong / Republic of Korea agreement concerning surrender of fugitive offenders.

Article III

The Malaysian side proposed to add a proviso to Article 5(1) to address their concerns that the discretionary power currently provided in this article does not make it absolutely clear that the requested Party may refuse temporary surrender of a fugitive offender who has yet to complete serving his sentence. Hong Kong has no objection to the proviso which merely re-iterates that the requested Party may refuse to temporarily surrender a fugitive offender in specified circumstances.

Article IV

Article 8(2A) has been added by agreement of the two sides to state a requirement to inform the requesting Party of the result of its

application for provisional arrest and to give reasons for denial. Similar formulations can be found in the Hong Kong / US agreement on surrender of fugitives, Article 10(3).

Article V

This amendment was proposed by Hong Kong and agreed by Malaysia. Hong Kong considers it useful to include a provision to cater for the disposal of property found on a surrendered person in the event of his subsequent death or abscondment. Similar provisions can be found in Hong Kong's agreements with Australia, Canada, Indonesia, New Zealand, Portugal, The Philippines and Sri Lanka.

Article VI

This was added at the suggestion of the Hong Kong side. It empowers the requested Party to require more information for its consideration of whether consent should be given for the surrendered fugitive to be dealt with in the requesting Party for offences other than the offence or offences in respect of which surrender is ordered. Similar formulations can be found in agreements with Australia, Canada, India, Indonesia, The Netherlands, New Zealand, The Philippines, Portugal and Sri Lanka.

Article VII

This new article which replaces Article 18 of the surrender agreement was proposed by the Malaysian side to enable it to handle a situation which may require it to resurrender a fugitive in accordance with the Rome Statute establishing the International Criminal Court (ICC) which Malaysia intends to accede to in the near future.

The first limb of this article which relates to resurrender to a third jurisdiction is the same as the provisions in "old" Article 18 of the surrender agreement. The second limb refers to resurrender to ICC.

Paragraph (3) of Article 18 is similar to new Article 17(2) of the SFO Agreement (amended by Article VI in this Protocol). The provision enables a requested Party to seek more information for its consideration of whether to agree to resurrender to another jurisdiction. Similar provisions can be found in Hong Kong's agreements with Australia, Canada, India, Indonesia, The Netherlands, New Zealand, The Philippines, Portugal, Sri Lanka and UK.

Article VIII

The amendment to Article 19(2)(a) was requested by the Malaysian side to reflect the legal position in Malaysia.

Article IX

This article concerns the entry into force of the Protocol and follows the mode in Article 21(1) of the SFO Agreement.

International Law Division
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