

**AGREEMENT BETWEEN THE GOVERNMENT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE
PEOPLE'S REPUBLIC OF CHINA AND THE
GOVERNMENT OF MALAYSIA CONCERNING
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS**

**ARTICLE-BY-ARTICLE COMPARISON
WITH THE MODEL AGREEMENT**

TITLE AND PREAMBLE

The title and preamble are substantially the same as the model agreement.

PART I - GENERAL PROVISIONS

ARTICLE 1 - SCOPE OF ASSISTANCE

Paragraph (1) follows Article 1(1) of the UN model treaty on Mutual Assistance in Criminal Matters and is consistent with Article 1(1) of the model agreement.

Paragraph (2)(a), (e) & (f) are substantially the same as Article 1(2)(a), (e) & (f) of the model agreement.

Paragraph (2)(b) is amended to confine service to judicial documents to accord with the Malaysian Mutual Assistance in Criminal Matters Act. The amendment is also consistent with section 31 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

Paragraph (2)(g) is expanded to include bank, financial corporate and business records. It is consistent with our mutual legal assistance in criminal matters (MLA) practice.

Paragraph (2)(h) is expanded to include "identifying, seizing and recovering" in relation to proceeds and instrumentalities of criminal activities. This is consistent with our MLA practice and conforms to section 2(1) of Cap. 525.

Paragraph 2(j) is added following the UN model treaty.

Paragraph 2(k) follows the corresponding article in the MLA Agreements with Germany, Belgium, the Philippines, Canada, Italy, New Zealand, France and Australia.

ARTICLE 2 - NON APPLICATION

This Article is added at the suggestion of Malaysia. It specifies the areas in which the Agreement has no operation. It is consistent with our MLA practice.

ARTICLE 3 - CENTRAL AUTHORITIES

This Article is substantially the same as Article 2 of the model agreement.

ARTICLE 4 - LIMITATIONS ON COMPLIANCE

Paragraph (1)(a) is substantially the same as Article 4(1)(a) of the model agreement.

Paragraph (1)(b) is a more comprehensive version of Article 4(1)(b) of the model agreement, and follows section 5(1)(b) of Cap. 525.

Paragraph (1)(c) is the same as Article 4(1)(c) of the model agreement.

Paragraph (1)(d) is a more comprehensive version of Article 4(1)(d) of the model agreement. It includes as well prejudice on account of a person's sex and ethnic origin, following the UN model treaty.

Paragraph (1)(e) is substantially similar to Article 4(1)(e) of the model agreement with only that the 'lapse of time' provision being omitted. The same omission appears in the HK/US MLA Agreement.

Paragraphs (1)(f) & (g) is substantially the same as Article 4 (1)(f) & (h) of the model agreement.

Paragraphs (1)(h), (i) & (j) are added at the request of Malaysia. Paragraph (1)(h) and (i) relate respectively to the use and return of the items requested, and (j) deals with refusal if giving effect to the request would contravene the Requested Party's law. They are consistent with our MLA practice.

Article 4(1)(g) of the model agreement has become a discretionary ground for refusal under **paragraph (3)** of this Article. The same approach appears in the MLA Agreements with Germany, Denmark, the Philippines, Switzerland and Australia.

Paragraphs (2), (4) to (6) correspond to Article 4 (2), (4), (5), (6) and (7) of the model agreement.

Article 4(3) of the model agreement which refers to death penalty exception was omitted at the request of Malaysia. Malaysia has difficulty in giving assurance that death penalty will not be imposed or carried out as the award of punishment at the end of the trial rests entirely with the judiciary. Upon discussion, both Parties agreed that assistance for death penalty offences could be refused pursuant to "essential interest" provision under Article 4 (1)(f). Hong Kong has made clear to Malaysia that Hong Kong will refuse to provide assistance if the request relates to an offence which carries the death penalty in Malaysia unless Malaysia gives sufficient assurances that the death penalty will not be imposed or carried out. Malaysia has accepted Hong Kong's position. The same approach was agreed with the US, Philippines and Singapore.

ARTICLE 5 - REQUESTS

Paragraph (1) adopts Article 5(1) of the model agreement. The rest of this paragraph is added at the suggestion of Malaysia. Similar formulation can be found in the MLA Agreements with the US and Korea.

Paragraph (2) reflects the existing cooperation through INTERPOL.

ARTICLE 6 - CONTENTS OF REQUESTS

Paragraph (1) corresponds to Article 5(2) of the model agreement.

Paragraph (2) follows the formulation in Article 4(4) of the HK/US MLA Agreement.

Paragraph (3) adopts the same formulation of Article 5(6) of the HK/Netherlands MLA Agreement.

Paragraph (4) follows the MLA Agreements with Canada [Article 4(3)], and the Netherlands [Article 5(5)].

ARTICLE 7 - EXECUTION OF REQUESTS

Paragraphs (1) to (4) correspond to Article 6 paragraphs (1) to (4) of the model agreement.

Paragraph (5) corresponds to Article 5(3) of the model agreement.

Paragraph (6) follows Article 5(7) of the HK/US MLA Agreement.

Paragraph (7) is consistent with our MLA practice.

ARTICLE 8 - LIMITATIONS ON USE

Paragraphs (1) & (2) are equivalent to Article 8(1) & (2) of the model agreement.

Paragraph (3) is modified from Article 8 of the UN model treaty.

ARTICLE 9 - PROTECTION OF CONFIDENTIALITY AND RESTRICTION ON USE OF EVIDENCE AND INFORMATION

Paragraph (1) follows the MLA agreements with the US [Article 5(6)], Philippines [Article VII (2)] and Ireland [Article 8(1)].

Paragraph (2) follows the MLA agreements with the Philippines [Article VII (1)] and Ireland [Article 8(2)].

PART II - FORMS OF ASSISTANCE

ARTICLE 10 - OBTAINING OF EVIDENCE

This Article is substantially the same as Article 9 of the model agreement.

ARTICLE 11 - TAKING OF TESTIMONY BY VIDEO OR TELEVISION LINK

This Article is added at the request of Malaysia. Section 10 of Cap. 525 as amended by the Evidence (Miscellaneous Amendments) Ordinance 2003 (Ord. No. 23 of 2003) empowers the Secretary for Justice to authorise the taking of evidence by way of video or live television link upon a foreign request. Similar provision can be found in the MLA Agreements with Canada and the Netherlands.

ARTICLE 12 - LOCATION OR IDENTIFICATION OF PERSONS

This Article is substantially similar to Article 11 of the model agreement.

ARTICLE 13 - SERVICE OF DOCUMENTS

Paragraph (1) is equivalent to Article 12(1) of the model agreement in substance.

Paragraphs (2), (3), (4) & (5) are substantially the same as Article 12 paragraphs (2), (3), (4) and (5) of the model agreement.

Paragraph (6) is added to specify the mode of service. Similar provision is found in the MLA Agreements with France, Australia, USA and Switzerland.

ARTICLE 14 - PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

Paragraph (1)'s reference to "documents or information in any form in the possession of government departments and agencies" is included to clarify what is comprehended by "publicly available documents".

Paragraph (2) includes a discretion by the Requested Party to deny a request for assistance pursuant to this provision.

ARTICLE 15 - ATTENDANCE OF PERSONS IN THE REQUESTING PARTY

Paragraphs (1) & (2) correspond to Article 16(1) and (2) of the model agreement.

Paragraph (3) is suggested by Malaysia. It deals with the additional information required from the Requesting Party and accords with our MLA practice.

ARTICLE 16 - ATTENDANCE OF PERSONS IN CUSTODY IN THE REQUESTING PARTY

Paragraphs (1) & (2) is substantially similar to Article 15(1) and (2) of the model agreement.

Paragraphs (3) is added at the suggestion of Malaysia. It echoes Article 2(1)(a) and accords with our MLA practice.

Paragraphs (4) & (5) are added at the suggestion of Malaysia. They are consistent with sections 23 and 24 of Cap. 525.

ARTICLE 17 - SAFE CONDUCT

Paragraph (1) is basically the same as Article 17(1) of the model agreement, but is more a detailed formulation with separate provisions for immunities from criminal liability and civil suits. The more detailed formulation is consistent with section 17(1)(i) and (ii) and section 23(2)(a)(i) and (ii) of Cap. 525.

Paragraph (2) is substantially the same as Article 17(2) of the model agreement except that 15 consecutive days (instead of 15 days) is adopted at the request of Malaysia. Such formulation avoids any ambiguity of whether intervening Sundays and/or public holidays are to be counted.

Paragraph (3) is substantially the same as Article 17(3) of the model agreement except that "*contempt*" is added to align with section 23(2)(b)(ii) of Cap. 525.

Paragraph (4) & (5) are the same as Article 17(4) and (5) of the model agreement.

ARTICLE 18 - SEARCH AND SEIZURE

Paragraph (1) is substantially the same as Article 18(1) of the model agreement but has included provision to protect the rights of third parties, which is adopted from the UN model treaty, at the request of Malaysia.

Paragraph (2) is substantially the same as Article 18(2) of the model agreement with the deletion, at the request of Malaysia, of “*the circumstances of seizure*”. The deletion is acceptable as the reference is covered by “*the results of the search*” in the same paragraph.

Paragraph (3) is the same as Article 18(3) of the model agreement.

ARTICLE 19 - PROCEEDS AND INSTRUMENTALITIES OF CRIME

Paragraphs (1) to (6) follow the provisions in Article 19 of the model agreement.

Paragraph (5) is derived from Article 6 of the Optional Protocol of the UN model treaty and is adopted at the request of Malaysia. Similar provision is found in the MLA Agreements with New Zealand and Australia.

Paragraph (6) provides for the definitions of “*proceeds of crime*” and “*instrumentalities of crime*”. The definitions are derived from the definition of “external confiscation order” in Cap. 525. Similar definition is also found in the MLA agreements with the United Kingdom and the Philippines.

ARTICLE 20 - RETURN OF EVIDENCE

This Article is adopted at the request of Malaysia to expressly provide for the return of evidence to the Requested Party upon request either temporarily or at the conclusion of the criminal matter. Provisions for return of evidence are also found in the MLA Agreements with Switzerland and USA.

PART III - FINAL PROVISIONS

ARTICLE 21 - CERTIFICATION AND AUTHENTICATION

Paragraph (1) is substantially the same as Article 14(1) of the model agreement.

Paragraph (2) & (3) are included at the request of Malaysia. The provisions are consistent with section 32(2) and (3) of Cap. 525.

Paragraph (4) is included at the request of Malaysia. The provision is consistent with Hong Kong's legislation regarding digital signatures (i.e. Electronic Transactions Ordinance, Cap. 553).

ARTICLE 22 - REPRESENTATION AND EXPENSES

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

Paragraph (2) & (3) are substantially the same as Article 7(2) and (3) of the model agreement.

Paragraph (4) is adopted at the request of Malaysia. The provision reiterates that the expenses of establishing live video or television links or other facilities shall be borne by the Requesting Party.

ARTICLE 23 - COMPATIBILITY WITH OTHER ARRANGEMENTS

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

Paragraph (2) is included at the request of Malaysia. The provision is consistent with section 3 of Cap. 525 and our MLA practice.

ARTICLE 24 - CONSULTATION

The Article is included at the request of Malaysia. Provision for consultation is found in the MLA Agreements with New Zealand, the USA, Switzerland, Canada and Singapore.

ARTICLE 25 - AMENDMENT

The Article is included at the request of Malaysia.

ARTICLE 26 - SETTLEMENT OF DISPUTES

The Article is the same as Article 20 of the model agreement.

ARTICLE 27 - ENTRY INTO FORCE AND TERMINATION

Paragraph (1) is the same as Article 21(1) of the model agreement.

Paragraph (2) is adopted at the request of Malaysia and is a useful provision in clarifying that the Agreement applies to requests presented after the date of operation of the Agreement irrespective of the time when the acts or omissions constituting the relevant offence occurred.

Paragraph (3) is the same as the first sentence of Article 21(2) of the model agreement except that there is a 6 months' lead period from the date of notification before the Agreement ceases to have effect.

The first sentence of **Paragraph (4)** is the same as the second sentence of Article 21(2) of the model agreement. The second sentence is added at the suggestion of Malaysia to expressly provide that the rights and obligations arising from the Agreement are not prejudiced by the termination of the Agreement.

**International Law Division
Department of Justice
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