

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 (Germany)
Order, made by the Chief Executive in Council on
14 November 2006, be approved.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (GERMANY) 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 Germany

In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and the Federal Republic of Germany.

SCHEDULE 1

[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 FEDERAL REPUBLIC OF GERMANY CONCERNING MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of
the People's Republic of China,
having been duly authorised by the Central People's Government of
the People's Republic of China
and
the Government of the Federal Republic of Germany;

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds;

Have agreed as follows:

Article 1

Scope of Legal Assistance

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual legal assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.

(2) Mutual legal assistance, for the purpose of paragraph (1), shall be any assistance in a criminal matter, irrespective of whether the assistance is sought or to be provided by a court or some other authority.

(3) Assistance shall include:

1. taking of evidence and obtaining of statements of persons;
2. provision of information, documents and other records, including extracts from judicial and official records;
3. location of persons and objects, including their identification;
4. search and seizure;

5. tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities;
6. delivery of property, including lending of exhibits;
7. making detained persons and others available to give evidence or assist investigations;
8. service of documents, including documents seeking the attendance of persons; and
9. other assistance consistent with the objects of this Agreement, which is not inconsistent with the law of the Requested Party.

(4) Assistance under this Agreement shall include assistance in relation to taxation offences.

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

Article 2

Channels of Communication

Requests under this Agreement and responses thereto shall be transmitted through the Department of Justice of the Hong Kong Special Administrative Region of the People's Republic of China and the Federal Ministry of Justice of the Federal Republic of Germany. Such requests may be made by or on behalf

of courts, prosecutors and authorities responsible for investigations or proceedings related to criminal matters.

Article 3

Other Legal Assistance

The Parties may provide legal assistance pursuant to other agreements, arrangements or practices.

Article 4

Refusal or Postponement of Assistance

- (1) The Requested Party shall, if required by its law, refuse assistance if:
1. the execution of the request for assistance would, in the case of the Government of the Hong Kong Special Administrative Region, impair the sovereignty, security or public order of the People's Republic of China or, in the case of the Government of the Federal Republic of Germany, impair the sovereignty, security or public order of the Federal Republic of Germany;
 2. it is of the opinion that the granting of the request would seriously impair its essential interests;
 3. the request for assistance relates to an offence of a political character;
 4. the request for assistance relates to an offence only under military law;

5. there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, religion, nationality, sex, ethnic origin or political opinions;
6. the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the jurisdiction of the Requested Party;
7. the main purpose of the request is the assessment or collection of tax;
8. the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(2) The Requested Party shall refuse assistance if the request relates to an offence which carries the death penalty in the jurisdiction of the Requesting Party and the Requesting Party shall not use evidence or information provided to it in proceedings for any such offence.

(3) The Requested Party may refuse assistance if the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided.

(4) The Requested Party may postpone assistance if execution of the request would impair ongoing investigations or proceedings in the jurisdiction of the Requested Party.

(5) Before denying or postponing assistance pursuant to this Article, the Requested Party

1. shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
2. shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(6) If the Requested Party provides assistance subject to certain terms and conditions referred to in paragraph (5) number 2, the Requesting Party shall comply with those terms and conditions.

Article 5

Requests for Assistance

- (1) Requests for assistance shall be made in writing.
- (2) Requests for assistance shall include:
 1. the name of the authority concerned with the criminal matter to which the request relates;
 2. a description of the purpose of the request and the nature of the assistance requested;
 3. a description of the nature of the criminal matter and a summary of the relevant facts and laws;

4. any requirements for confidentiality;
5. details of any particular procedure the Requesting Party wishes to be followed;
6. details of any period within which the Requesting Party wishes the request to be complied with;
7. where possible, the identity and location of the person who is the subject of the investigation or criminal proceedings; and
8. any other information which is required to facilitate execution of the request.

(3) In addition, requests for assistance shall include:

1. in the case of requests for service of documents, the name and address of the person to be served;
2. in the case of requests for delivery of property obtained, or to be obtained, by search and seizure:
 - a) a declaration by a competent authority of the Requesting Party that seizure of the property could be obtained by compulsory measures if it were situated in the jurisdiction of the Requesting Party; or
 - b) an order by a court in the Requesting Party authorising seizure of the property;

3. in the case of requests to take evidence from a person, the subject matter on which the person is to be examined, including, where possible, a list of questions and details of any right of that person to decline to give evidence under the law of the Requesting Party.
- (4) The request and, if so required by the Requested Party, all documents submitted in support of the request shall be translated into an official language of the Requested Party.

Article 6

Execution of Requests

- (1) The Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) A request shall be executed in accordance with the law of the Requested Party and, to the extent possible under the law of the Requested Party, in accordance with the directions stated in the request.
- (3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.
- (4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

(5) The Requested Party shall use its best efforts to keep confidential a request and its contents except when authorised otherwise by the Requesting Party.

Article 7

Expenses

(1) The Requested Party shall meet the cost of executing the request for assistance, except that the Requesting Party shall bear:

1. the expenses associated with conveying any person to or from the area of the Requested Party at the request of the Requesting Party, and any allowances or expenses payable to that person in connection with the execution of the request;
2. the expenses and fees of experts in the area of either the Requested Party or the Requesting Party;
3. fees of counsel retained at the request of the Requesting Party; and
4. expenses of translation carried out at the request of the Requesting Party.

(2) If during the execution of the request it becomes apparent that exceptional expenses, including the costs of managing property, are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

Article 8

Limitations on Use

- (1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished, including documents, articles or records, be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.
- (2) The Requesting Party shall not disclose or use information or evidence furnished, including documents, articles or records, for purposes other than those stated in the request without the prior consent of the Requested Party.

Article 9

Personal Data

- (1) In this Article “personal data” means any information about an identified or identifiable natural person.
- (2) Personal data transmitted on the basis of this Agreement shall be used for the purposes for which the data were transmitted and subject to such conditions as the transmitting Party determines. In addition such data may be used by the Party which has received it for the purpose of warding off substantial dangers to its security. Use of the data for other purposes requires the prior consent of the Party transmitting the data.
- (3) Subject to the respective law of each Party, the following provisions shall apply to the transmission and use of personal data transmitted for the purpose of a request for assistance under this Agreement –

1. only data that relates to the request shall be transmitted;
2. upon request, the Party which has received the data shall identify the data received, and inform the transmitting Party of the use made of the data and the results achieved therefrom;
3. if it appears to the transmitting Party that incorrect data have been transmitted or that data have been transmitted that should not have been, the transmitting Party shall notify without delay the Party that has received the data; the Party that has received the data shall without delay rectify any errors or destroy the data;
4. the Parties shall keep records in a readily retrievable form concerning the transmission and receipt of data;
5. the Parties shall protect personal data against unauthorised access, unauthorised alteration and unauthorised publication.

Article 10

Obtaining of Evidence, Documents, Articles or Records

- (1) The Requested Party shall, upon request, arrange for evidence to be taken from a witness and, following the taking of the evidence, shall make available to the Requesting Party a written record including any documents, articles or records produced by the witness in accordance with the law of the Requested Party.
- (2) The Requested Party shall, upon request, inform the Requesting Party of the time and place of execution of the request for assistance.

(3) Subject to the law of the Requested Party, judges or officials of the Requesting Party and other persons concerned in the investigation or proceedings may be permitted to be present at the execution of the request, to appear or be legally represented in the proceedings in the jurisdiction of the Requested Party and to question the person giving evidence at such proceedings.

(4) A person who is required to give evidence in the jurisdiction of the Requested Party pursuant to a request for assistance may decline to do so where the law of either of the Parties permits the witness to decline to give evidence.

(5) If any person claims that he has a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto obtain a certificate from the Requesting Party.

Article 11

Service of Documents

(1) The Requested Party shall effect the service of documents transmitted to it by the Requesting Party for this purpose.

(2) A request for service of a summons on an accused person shall, unless there are exceptional circumstances, be executed only if it is received by the Requested Party at least one month before the date fixed for the person's appearance. Where the person to be served is not an accused person, the request for service shall be sent to the Requested Party within a reasonable time.

(3) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(4) A person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or the Requested Party.

Article 12

Official Documents

In response to a request the Requested Party may, subject to its law, provide the Requesting Party with copies of official documents which are not publicly available.

Article 13

Certification and Authentication

Unless otherwise requested, evidence or documents transmitted pursuant to this Agreement shall not require any form of authentication. Material shall be certified or authenticated by consular posts or diplomatic missions only if the law of the Requesting Party specifically so requires.

Article 14

Making Detained Persons Available to Assist in Investigations or Criminal Proceedings

(1) A person in custody in the jurisdiction of the Requested Party shall, at the request of the Requesting Party, be temporarily transferred to the jurisdiction of the Requesting Party to assist in investigations or criminal proceedings provided that the person consents to that transfer and there are no overriding grounds against transferring the person.

(2) While the person transferred is required to be kept in custody under the law of the Requested Party, the Requesting Party shall hold that person in custody and shall return the person in custody either at the conclusion of the investigations or criminal proceedings, or at such earlier time stipulated by the Requested Party.

(3) Where the sentence imposed expires, or where the Requested Party advises the Requesting Party that the transferred person is no longer required to be held in custody, that person shall be set at liberty and be treated as a person present in the jurisdiction of the Requesting Party pursuant to a request under Article 15.

Article 15

Appearance of Other Persons

(1) The Requesting Party may request the assistance of the Requested Party in inviting a person to appear in the jurisdiction of the Requesting Party to assist in investigations or criminal proceedings.

(2) The Requested Party shall inform the Requesting Party of that person's response.

Article 16

Safe Conduct

(1) A person present in the jurisdiction of the Requesting Party in response to a request seeking that person's attendance shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the jurisdiction of that

Party in respect of acts, omissions or convictions prior to his departure from the jurisdiction of the Requested Party.

(2) A person summoned before the judicial authorities of the Requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts, omissions or convictions prior to his departure from the jurisdiction of the Requested Party and not specified in the summons.

(3) The immunities provided for in paragraphs (1) and (2) shall cease when the person, having been notified by the Requesting Party that his presence is no longer required and having had, for a period of 15 consecutive days from the date of notification, an opportunity to leave has nevertheless remained in the jurisdiction of the Requesting Party or having left the jurisdiction of the Requesting Party has returned.

(4) A person who consents to give evidence under Articles 14 or 15 shall not be subject to prosecution based on his testimony.

(5) A person present in the jurisdiction of the Requesting Party in response to a request seeking that person's attendance shall not be obliged to provide assistance in any investigations or criminal proceedings other than those to which the request relates.

(6) A person who does not respond to a request seeking that person's attendance shall not, even if the request contains a notice of penalty, be subjected to any punishment or measure of constraint.

Article 17

Search and Seizure

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of property and documents to the Requesting Party which are relevant to an investigation, prosecution or criminal proceeding as evidence.

(2) The delivery of property and documents requested under paragraph (1) shall be made upon such terms and conditions as the Requested Party sees fit. In addition, property may be returned to the person who was deprived of it.

(3) The delivery of property requested under paragraph (1) shall not affect the rights of third parties. The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

(4) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

Article 18

Proceeds of Crime

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime against the law of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested

Party of the basis of its belief that such proceeds may be located in its jurisdiction.

(2) Where, pursuant to paragraph (1), suspected proceeds of crime are found, the Requested Party shall take such measures as are permitted under its law to prevent any dealing in, transfer or disposal of those suspected proceeds of crime, pending a final determination in respect of those proceeds by a Court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds such request shall be executed pursuant to the law of the Requested Party. This may include enforcing an order made by a court in the jurisdiction of the Requesting Party.

(4) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

Article 19

Settlement of Disputes

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Parties are themselves unable to reach agreement.

Article 20

Entry into Force, Suspension and Termination

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other that their respective requirements for the

entry into force of the Agreement have been complied with. The date of receipt of the second notification shall be decisive. Both Parties shall apply the Agreement provisionally from the date of signing of the agreement in accordance with their respective law.

(2) This Agreement shall be of unlimited duration. Each of the Parties may suspend or terminate this Agreement at any time by giving notification to the other. Suspension shall take effect on receipt of the relevant notification. In the event of termination the Agreement shall cease to have effect six months after receipt of the relevant notification.

Done at Hong Kong, this 26th day of May 2006 in two originals in the Chinese, English and German languages, each text being equally authentic.

SCHEDULE 2

[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 has had an opportunity of leaving Hong Kong and has remained in Hong Kong for a period of 15 consecutive days from the date of being notified that his presence is no longer required for any of the following purposes* ~~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).

Clerk to the Executive Council

COUNCIL CHAMBER

14 November 2006

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (“the Ordinance”) shall apply as between Hong Kong and

the Federal Republic of Germany. 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 Federal Republic of Germany and signed in Hong Kong on 26 May 2006. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications summarized in Schedule 2 to the Order.