

## LEGISLATIVE COUNCIL BRIEF

### Fugitive Offenders Ordinance (Chapter 503)

### Mutual Legal Assistance in Criminal Matters Ordinance (Chapter 525)

### FUGITIVE OFFENDERS (MALAYSIA) (AMENDMENT) ORDER 2007

### MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (MALAYSIA) ORDER

#### INTRODUCTION

At the meeting of the Executive Council on 8 May 2007, the Council ADVISED and the Chief Executive ORDERED that –

- \_\_\_\_\_ (a) the Fugitive Offenders (Malaysia) (Amendment) Order 2007, at **Annex A**, should be made under section 3 of the Fugitive Offenders Ordinance to implement the 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; and
  
- \_\_\_\_\_ (b) the Mutual Legal Assistance in Criminal Matters (Malaysia) Order, at **Annex B**, should be made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance, subject to the approval of the Legislative Council, to implement the 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.

## JUSTIFICATIONS

2. Hong Kong is fully committed to international cooperation in combating serious crimes. We have been expanding our network of bilateral agreements with other jurisdictions on surrender of fugitive offenders (SFO) and mutual legal assistance in criminal matters (MLA). These agreements enhance international cooperation in the fight against transnational crimes and ensure reciprocal assistance between the contracting parties.

3. The Fugitive Offenders Ordinance (Cap. 503) and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) respectively provide for the statutory framework for SFO and MLA arrangements. Specifically, Cap. 503 provides for the surrender to certain places outside Hong Kong of persons wanted for prosecution, or for the imposition or enforcement of a sentence, and for the treatment of persons surrendered to Hong Kong. Cap. 525 regulates the provision and obtaining of assistance in the investigation and prosecution of criminal offences, which includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of the proceeds of crime.

### **The Fugitive Offenders (Malaysia) (Amendment) Order 2007**

4. Section 3(1) of Cap. 503 provides that the Chief Executive in Council may, in relation to any arrangements for SFO, by order direct that the procedures in Cap. 503 shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications contained in the order. Hong Kong signed a bilateral SFO agreement with Malaysia on 11 January 1995. It has been given effect in Hong Kong by the Fugitive Offenders (Malaysia) Order (Cap. 503D) made under section 3(1) of Cap. 503, at **Annex C**. The Order provides that the procedures in Cap. 503 shall apply as between Hong Kong and Malaysia, subject to the terms of the agreement. To further improve the agreement, Hong Kong and Malaysia signed a protocol to supplement the agreement on 17 October 2006. The protocol essentially expands the list of extraditable offences without exceeding the scope provided for under Cap. 503, obliges both parties to give reasons for not taking action in response to a request for provisional arrest and improves other operational aspects of the agreement. The Fugitive Offenders (Malaysia) (Amendment) Order 2007 made under section 3(1) of the Cap. 503 includes the protocol under the Fugitive Offenders (Malaysia) Order and enables the protocol to be brought into force. The Fugitive Offenders (Malaysia) Order as amended

will continue to provide that the procedures in Cap. 503 shall apply as between Hong Kong and Malaysia, subject to the terms of the existing SFO agreement and the protocol.

### **The Mutual Legal Assistance in Criminal Matters (Malaysia) Order**

5. Section 4(1) of Cap. 525 provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for MLA, by order direct that Cap. 525 shall, subject to such modifications as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate. The MLA agreement with Malaysia was signed on 17 October 2006. The Mutual Legal Assistance in Criminal Matters (Malaysia) Order made under section 4(1) of Cap. 525 will enable the agreement to be brought into force and enable Cap. 525 to be applicable as between Hong Kong and Malaysia. Schedule 1 to the Order contains a copy of the agreement.

6. There are certain variations between the agreement and Cap. 525, and we need to modify Cap. 525. Such modifications are summarized in Schedule 2 to the Order in accordance with section 4(3) of Cap. 525. An explanatory statement in relation to the modifications to Cap. 525 is at **Annex D**.

### **Conformity and Commencement**

7. Section 3(9) of Cap. 503 and section 4(2) of Cap. 525 provide that the Chief Executive in Council shall not make an order under the respective Ordinances unless the arrangements for SFO or MLA to which the order relates are substantially in conformity with the provisions of the respective Ordinances. The protocol and MLA agreement with Malaysia do so conform.

8. The commencement dates of both Orders will be appointed by the Secretary for Security by notice in the Gazette. These dates will coincide with the dates on which the protocol and the MLA agreement enter into force respectively. The respective commencement date will be settled after consultation with Malaysia and will depend upon when the necessary domestic procedures of Hong Kong and Malaysia are completed.

## **LEGISLATIVE TIMETABLE**

9. The legislative timetable for the two Orders will be -

### **Fugitive Offenders (Malaysia) (Amendment) Order 2007**

Publication in the Gazette 18 May 2007

Tabling in the Legislative Council 23 May 2007

### **Mutual Legal Assistance in Criminal Matters (Malaysia) Order**

Introduction into the Legislative Council 6 June 2007

## **IMPLICATIONS OF THE ORDERS**

10. The two Orders are in conformity with the Basic Law, including the provisions concerning human rights. They will not affect the current binding effect of Cap. 503 and Cap. 525. They have no sustainability, financial or civil service implications.

## **PUBLIC CONSULTATION**

11. The two Orders will permit the protocol and the MLA agreement to be brought into force in accordance with the existing legal framework. Public consultation is, therefore, considered not necessary.

## **PUBLICITY**

12. We have issued this Legislative Council brief. A spokesman will be available to answer enquiries.

## **BACKGROUND**

13. Sixteen Orders in relation to bilateral SFO arrangements signed with foreign jurisdictions have been made under section 3(1) of Cap. 503. These jurisdictions are the Netherlands, Canada, Australia, Malaysia, the Philippines, the USA, Indonesia, India, the UK, Singapore, New Zealand, Sri Lanka, Portugal, Finland, Germany and Republic of Korea.

14. Twenty Orders in relation to bilateral MLA arrangements signed with foreign jurisdictions have been made under section 4(1) of Cap. 525. These jurisdictions are Australia, the USA, France, the UK, New Zealand, Italy, Republic of Korea, Switzerland, Canada, the Philippines, Portugal, Ireland, the Netherlands, Ukraine, Singapore, Belgium, Denmark, Israel, Poland and Germany.

## **ENQUIRES**

15. Enquires on this brief should be directed to –

	<u>Telephone No.</u>
Ms Manda Chan Principal Assistant Secretary for Security	2810 2329
Miss Jane Lee Assistant Secretary for Security	2810 3523

**Security Bureau**  
**16 May 2007**

**FUGITIVE OFFENDERS (MALAYSIA)  
(AMENDMENT) ORDER 2007**

(Made by the Chief Executive in Council under section 3  
of the Fugitive Offenders Ordinance (Cap. 503))

**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. Section substituted**

Section 2 of the Fugitive Offenders (Malaysia) Order (Cap. 503 sub. leg. D) is repealed and the following substituted –

**“2. Procedures in Ordinance to apply between  
Hong Kong and Malaysia**

In relation to the arrangements for the surrender of fugitive offenders the terms of which are recited in Schedules 1 and 2, it is directed that the procedures in the Ordinance shall apply as between Hong Kong and Malaysia subject to the limitations, restrictions, exceptions and qualifications contained in the terms of the arrangements.”.

**3. Schedule amended**

The Schedule is amended by repealing “SCHEDULE” and substituting “SCHEDULE 1”.

**4. Schedule 2 added**

The following is added –

## “SCHEDULE 2

[s. 2]

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

The Government of the Hong Kong Special Administrative Region of the People’s Republic of China, having been duly authorised to conclude this Protocol by the Central People’s Government of the People’s Republic of China and the Government of Malaysia (hereinafter referred to as “the Parties to this Protocol”),

Recalling 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;

Recognizing that the People’s Republic of China resumed the exercise of sovereignty over Hong Kong with effect from 1 July 1997 and in accordance with its constitution has on that date established the Hong Kong Special Administrative Region of the People’s Republic of China;

Noting that the Government of the People’s Republic of China has confirmed the continued application of the said Agreement to the Hong Kong Special Administrative Region and its recognition as an agreement entered into between the Government of the Hong Kong Special Administrative Region under the authorisation of the Government of the People’s Republic of China and the Government of Malaysia;

Desiring to adopt provisions supplementary to those of the said Agreement to promote more effective implementation of the said Agreement,

Have agreed as follows:

### **Article I**

This Protocol supplements 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 (hereinafter referred to as “the Agreement”) and the Agreement and this Protocol shall be read and interpreted together as one single instrument.

### **Article II**

Article 2(1) of the Agreement shall be amended –

- (a) in the chapeau, by replacing the words “not less than one year” by the words “more than 12 months”;
- (b) in item (viii), by adding after the word “child” the words “, a mental defective or an unconscious person”;
- (c) in item (xi), by inserting after the word “dealing” the words “or trafficking”;
- (d) by inserting after item (xi) the following items:
  - “(xia) taking a hostage;
  - (xib) criminal intimidation;”;
- (e) in item (xii), by adding after the word “substances” the words “, precursors and essential chemicals used in the illegal manufacture of narcotics and psychotropic substances”;
- (f) in item (xxii), by inserting after the word “bankruptcy” the words “or insolvency”;
- (g) in item (xxiii), by replacing the words “and securities” by the words “, securities and futures trading”;
- (h) by inserting after item (xxiii) the following item:



- “(xxiiiia) an offence involving the unlawful use of computers;”;
- (i) by inserting after item (xxv) the following items:
- “(xxva) an offence against the laws relating to the protection of intellectual property, copyrights, patents or trademarks;
- (xxvb) an offence against the laws relating to immigration including offences relating to passports and visas;
- (xxvc) arranging or facilitating for financial gain, the illegal entry of persons into a jurisdiction;
- (xxvd) an offence against the laws relating to gambling, betting or lotteries;”;
- (j) in item (xxviii), by adding after the word “fire” the words “or mischief in relation to computer data”;
- (k) in item (xxxii), by adding after the word “aircraft” the words “or other means of transportation”;
- (l) in item (xxxv), by adding after the word “piracy” the words “involving ships or aircraft or other means of transportation”;
- (m) by replacing item (xxxvi) by the following item:
- “(xxxvi) an attempt or conspiracy or instigation or incitement to commit, aiding or abetting, counselling, causing or procuring the commission of, or participation in or being accessory before or after the fact to, any offence for which surrender may be granted under this Agreement;”;

- (n) by replacing the full stop at the end of item (xxxvii) by a semicolon; and
- (o) by adding after item (xxxvii) the following item:

“(xxxviii) any other offence for which surrender may be granted in accordance with the law of the requested Party.”.

### **Article III**

Article 5 of the Agreement shall be amended in paragraph (1):

- (a) by replacing the full stop at the end of paragraph (1) by a colon; and
- (b) by inserting after paragraph (1) the following proviso:

“Provided that the requested Party may refuse the surrender of such person until such person has served that sentence.”.

### **Article IV**

Article 8 of the Agreement shall be amended by inserting after paragraph (2) the following paragraph:

“(2A) On receipt of the application, the requested Party shall take appropriate steps to secure the arrest of the person sought. The requesting Party shall be notified without delay of the disposition of the application and the reasons for any denial.”.

### **Article V**

Article 16 of the Agreement shall be amended by adding after paragraph (3) the following paragraph:

“(4) The property in question shall, if the requesting Party so requests, be surrendered to that Party even if the surrender cannot be carried out due to the death or escape of the fugitive offender.”.

### **Article VI**

Article 17 of the Agreement shall be amended –

- (a) by renumbering the existing paragraph as paragraph (1); and
- (b) by adding after paragraph (1) the following paragraph:

“(2) For the purpose of paragraph (1)(c) of this Article, a Party whose consent is required may require the submission of any document or statement referred to in Article 7, and any statement made by the surrendered person on the matter for its consideration.”.

### **Article VII**

The Agreement shall be amended by replacing Article 18 by the following Article:

“(1) A fugitive offender who has been surrendered under this Agreement shall not be resurrendered by the requesting Party to a third State or an international tribunal established in accordance with a multilateral international convention that applies to the requesting Party for trial or punishment for any offence that is committed before his surrender to the requesting Party unless –

- (a) the requested Party consents; and
- (b) if under the convention the consent of another State is required, that State consents.

(2) Paragraph (1) of this Article shall not prevent the resurrender of a surrendered fugitive offender to a third State or the relevant

international tribunal established in accordance with a multilateral international convention that applies to the requesting Party if –

- (a) that fugitive offender leaves the territory of the requesting Party after the surrender and voluntarily returns to it; or
  - (b) that fugitive offender does not leave the territory of the requesting Party within forty days of the day on which the person is free to leave.
- (3) For the purpose of paragraph (1)(a) of this Article, a Party whose consent is requested may require the submission of any document or statement referred to in Article 7, and any statement made by the surrendered person on the matter for its consideration.”.

### **Article VIII**

Article 19(2)(a) of the Agreement shall be amended by replacing the words “defence or foreign affairs” by the words “national security or public order”.

### **Article IX**

This Protocol shall enter into force 30 days after the date on which the Parties to this Protocol have notified each other in writing that their respective requirements for the entry into force of the Protocol have been complied with.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments, have signed this Protocol.

Done in duplicate at Hong Kong this 17th day of October Two thousand and six, in the Chinese, English and Malay languages, each text being equally authentic.”.

Clerk to the Executive Council

COUNCIL CHAMBER

2007

### **Explanatory Note**

This Order amends the Fugitive Offenders (Malaysia) Order (Cap. 503 sub. leg. D) (“the principal Order”), in order to implement in Hong Kong the protocol entered into by the Government of Hong Kong and the Government of Malaysia and signed in Hong Kong on 17 October 2006 (“the Protocol”). The Protocol supplements the Agreement entered into by the Government of Hong Kong and the Government of Malaysia and signed in Hong Kong on 11 January 1995, as set out in the existing Schedule to the principal Order. Section 4 of the Order adds a new Schedule to the principal Order in order to set out the terms of the Protocol.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL  
MATTERS (MALAYSIA) 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  
Malaysia**

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 specified in Schedule 2, apply as between Hong Kong and  
Malaysia.

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 MALAYSIA  
CONCERNING MUTUAL  
LEGAL ASSISTANCE IN  
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The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China to conclude this Agreement and the Government of Malaysia (hereinafter referred to singularly as "the Party" and collectively as "the Parties");

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and tracing, restraint and forfeiture of the proceeds and instrumentalities of crime through co-operation and mutual legal assistance in criminal matters;

Have agreed as follows:

## **PART I – GENERAL PROVISIONS**

### **ARTICLE 1**

#### **SCOPE OF ASSISTANCE**

(1) The Parties shall, in accordance with the provisions of this Agreement and in conformity with their respective laws, render to one another the widest measure of mutual legal assistance in connection with investigations, prosecutions and proceedings that pertain to offences over which the Requesting Party has jurisdiction at the time the assistance is requested.

(2) Assistance shall include:

- (a) locating and identifying witnesses and suspects;
- (b) serving of judicial documents;



- (c) obtaining of statements and evidence from persons;
- (d) executing requests for search and seizure;
- (e) facilitating the attendance of persons to give evidence or assistance in relation to criminal matters;
- (f) arranging the temporary transfer of persons in custody to give evidence or assistance in relation to criminal matters;
- (g) providing information, documents, articles and records (including judicial and official records and bank, financial, corporate and business records);
- (h) identifying, tracing, restraining, seizing, recovering, forfeiting and confiscating proceeds and instrumentalities of criminal activities;
- (i) lending of exhibits;
- (j) examining objects and sites; and
- (k) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.

(3) In the case of requests related to the investigation of taxation offences assistance shall be refused if the primary purpose of the investigation is the assessment or collection of tax.

(4) This Agreement is intended solely for mutual legal assistance between the Parties. The provisions of the 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

### NON-APPLICATION

- (1) This Agreement does not apply to -
- (a) the arrest or detention of any person with a view to the surrender of that person;
  - (b) the enforcement in the Requested Party of criminal judgments imposed in the Requesting Party except to the extent permitted by the law of the Requested Party;
  - (c) the transfer of persons in custody to serve sentences; and
  - (d) the transfer of proceedings in criminal matters.
- (2) This Agreement does not authorise either Party to undertake, in the territory of the other, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of the other Party by its law.

## ARTICLE 3

### CENTRAL AUTHORITIES

- (1) Each Party shall designate a Central Authority to make and receive requests pursuant to this Agreement.
- (2) Requests pursuant to this Agreement shall be made and received through the Consulate-General of Malaysia in the Hong Kong Special Administrative Region.
- (3) The Central Authorities of the Parties shall process requests for mutual legal assistance in accordance with the provisions of this Agreement.
- (4) The Central Authority for the Hong Kong Special Administrative Region is the Secretary for Justice or a person authorised by the Secretary for Justice. For Malaysia, the Central Authority shall be the Attorney General or a person designated by the Attorney General. Either Party may change its Central Authority in which case it shall notify the other of the change.
- (5) The Central Authorities may communicate directly with each other for the purposes of this Agreement.

#### ARTICLE 4

##### LIMITATIONS ON COMPLIANCE

- (1) The Requested Party shall refuse assistance if:
  - (a) the granting of the request would, in the case 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 Malaysia, impair the sovereignty, security or public order of Malaysia;

- (b) the request relates to the investigation, prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political nature;
- (c) the request for assistance relates to an offence only under military law;
- (d) there are substantial grounds for believing that the request for assistance was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of his race, religion, sex, ethnic origin, nationality or political opinions;
- (e) the request for assistance relates to the investigation, prosecution or punishment of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requesting Party or has undergone the punishment provided by the law of that Party;
- (f) it is of the opinion that the granting of the request would seriously impair its essential public interests;
- (g) 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 against the law of the Requested Party;
- (h) the Central Authority of the Requesting Party fails to undertake that the item requested will not be used for a matter other than the criminal matter in respect of which the request was made and the

Central Authority of the Requested Party has not consented to waive such undertaking;

- (i) the Central Authority of the Requesting Party fails to undertake to return to the Central Authority of the Requested Party, upon its request, any item that may be obtained pursuant to the request upon completion of the criminal matter in respect of which the request was made;
- (j) the provision of the assistance would require steps to be taken that would be contrary to the law of the Requested Party.

(2) The Requested Party may refuse assistance if the Requested Party is of the opinion that the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

(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 interfere with or prejudice an ongoing investigation or prosecution in the Requested Party.

(5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority –

- (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and

(b) 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 Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (5)(b), it shall comply with those terms and conditions.

#### ARTICLE 5

#### REQUESTS

(1) Requests shall be made in writing or, where possible, by any means capable of producing a written record under conditions allowing the Requested Party to establish authenticity. In urgent situations and where permitted by the law of the Requested Party, requests may be made orally, but in such cases the requests shall be confirmed in writing within ten days.

(2) Central Authorities shall deal with the transmission of all requests and any communication related thereto. In urgent situations and where permitted by the law of the Requested Party, requests and any communication related thereto may be transmitted through the International Criminal Police Organization (INTERPOL).

#### ARTICLE 6

#### CONTENTS OF REQUESTS

(1) Requests for assistance shall include:

- (a) the name of the requesting office and the competent authority conducting the investigation or criminal proceedings to which the request relates;
- (b) a description of the purpose of the request and the nature of the assistance requested including particulars of the evidence, information or other assistance sought;
- (c) a description of the nature of the investigation, prosecution and offence including the maximum penalty for such offence and whether or not proceedings have been instituted;
- (d) in the event that proceedings have been instituted, details of the proceedings;
- (e) a summary of the relevant facts including a description of the facts alleged to constitute the offence and a statement or text of the relevant laws;
- (f) any requirements for confidentiality and the reasons for it;
- (g) the reasons for and details of any particular procedure or requirement that the Requesting Party wishes to be followed;
- (h) specification of any time limit within which compliance with the request is desired; and
- (i) any other information which is required to facilitate execution of the request.

(2) Requests for assistance may also, to the extent necessary, contain the following information:

- (a) the identity, nationality and location of the person or persons who are the subject of the investigation or criminal proceedings;
- (b) the identity and location of any person from whom evidence is sought;
- (c) the identity and location of a person to be served, that person's relationship to the criminal proceedings, and the manner in which service is to be made;
- (d) information on the identity and whereabouts of a person to be located;
- (e) a description of the manner in which any testimony or statement is to be taken and recorded;
- (f) a list of questions to be asked of a witness;
- (g) a description of the documents, records or items of evidence to be produced as well as a description of the appropriate person to be asked to produce them and, to the extent not otherwise provided for, the form in which they should be reproduced and authenticated;
- (h) a statement as to whether sworn or affirmed evidence or statements are required;



- (i) a description of the property, asset or article to which the request relates, including its identity and location; and
- (j) any court order relating to the assistance requested and a statement relating to the finality of that order.

(3) The request, all documents submitted in support of the request and other communications made pursuant to this Agreement shall, if they are not in English, be accompanied by a translation into English.

(4) If the Central Authority of the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, the Central Authority may request additional information. The Requesting Party shall supply such additional information as the Requested Party considers necessary to enable the request to be fulfilled.

#### ARTICLE 7

#### EXECUTION OF REQUESTS

(1) The Central Authority of 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 not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

(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 to the extent necessary to execute it.

(6) The Central Authority of the Requested Party shall respond within a reasonable period to reasonable inquiries by the Central Authority of the Requesting Party concerning progress toward execution of the request.

(7) The Central Authority of the Requested Party may ask the Central Authority of the Requesting Party to provide information in such form as may be necessary to enable it to execute the request or to undertake any steps which may be necessary under the law and practice of the Requested Party in order to give effect to the request received from the Requesting Party.

#### 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 Central Authority of the Requested Party.

(3) In an investigation, prosecution or proceeding where the charge is altered, the information or evidence provided may continue to be used in that investigation, prosecution or proceeding so far as the offence, as charged, is an offence in respect of which mutual legal assistance could be provided under this Agreement.

#### ARTICLE 9

##### PROTECTION OF CONFIDENTIALITY AND RESTRICTION ON USE OF EVIDENCE AND INFORMATION

(1) The Requested Party shall, upon request and to the extent permitted by its law, use its best endeavours to keep confidential the request for assistance, its contents and its supporting documents, the fact of granting of such assistance and any action taken pursuant to the request. If the request cannot be executed without breaching the confidentiality requirements stated in the request, the Requested Party shall so inform the Requesting Party, which shall then determine whether the request should nevertheless be executed.

(2) The Requesting Party shall, upon request and to the extent permitted by its law, keep confidential evidence and information provided by the Requested Party, except to the extent that the evidence and information is needed for the investigation and criminal proceedings described in the request.

#### **PART II – FORMS OF ASSISTANCE**

#### ARTICLE 10

##### OBTAINING OF EVIDENCE

(1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the

jurisdiction of the Requesting Party, the Requested Party shall arrange to have such evidence taken.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, articles or records.

(3) For the purposes of requests under this Article, the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.

(4) Where evidence is to be taken, pursuant to a request for assistance under this Article, the person to whom the investigation, prosecution or proceeding in the Requesting Party relates, the person who is to give evidence and representatives of the Requesting Party may, subject to the law of the Requested Party, appear or have legal representation or both for the purpose of questioning the person giving the evidence.

(5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to do so where either:

(a) the law of the Requested Party would permit or require that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or

(b) the law of the Requesting Party would permit or require him to decline to give evidence in such proceedings in the Requesting Party.

(6) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect

thereto rely on a certificate of the Central Authority of the Requesting Party.

#### ARTICLE 11

##### TAKING OF TESTIMONY BY VIDEO OR TELEVISION LINK

The Parties may agree on a case by case basis to the use of live video or television links or other appropriate communications and multimedia facilities in accordance with the law and procedure of the Requested Party for the purpose of executing this Agreement if it is expedient in the interest of justice to do so.

#### ARTICLE 12

##### LOCATION OR IDENTIFICATION OF PERSONS

The Requested Party shall, if requested, use its best endeavours to ascertain the location or identity of any person specified in the request.

#### ARTICLE 13

##### SERVICE OF DOCUMENTS

- (1) The Requested Party shall use its best endeavours to effect service of any document transmitted to it for the purpose of service.
- (2) The Requesting Party shall transmit a request for the service of a document that requires a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.
- (3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the

Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

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

(5) 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 Requested Party.

(6) For the purposes of paragraph (4), the expression “proof of service” includes information in the form of an affidavit on when and how the document was served and, where possible, a receipt signed by the person on whom it was served and if the serving officer has not been able to cause the document to be served, that fact and the reason for the failure.

#### ARTICLE 14

##### PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) The Requested Party shall provide the Requesting Party with copies of publicly available documents, including documents or information in any form, in the possession of government departments and agencies in the Requested Party.

(2) The Requested Party may, to the extent permitted by its law, provide the Requesting Party with copies of any records, including documents or information in any form, that are in the possession of a government department or agency in the Requested Party but that are not publicly available. The Requested Party may in its discretion deny, entirely or in part, a request pursuant to this paragraph.

## ARTICLE 15

### ATTENDANCE OF PERSONS IN THE REQUESTING PARTY

- (1) The Requesting Party may request the assistance of the Requested Party in inviting a person to attend in the Requesting Party to provide assistance pursuant to this Agreement.
- (2) Upon receipt of such a request the Requested Party shall invite the person to travel to the Requesting Party and inform the Requesting Party of the person's response.
- (3) Where a person is asked to attend in the Requesting Party, the request shall contain information on the following matters:
  - (a) the fees, allowances and expenses, if any, to which he will be entitled;
  - (b) the arrangements for his security while he is travelling to and from the Requesting Party and while he is in the Requesting Party, if any; and
  - (c) the arrangements for his accommodation while he is in the Requesting Party.

## ARTICLE 16

### ATTENDANCE OF PERSONS IN CUSTODY IN THE REQUESTING PARTY

(1) A person in custody in the Requested Party whose attendance is requested in the Requesting Party for the purposes of providing assistance pursuant to this Agreement shall, if the Requested Party consents and to the extent permitted by its law, be temporarily transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody and the person shall be treated as a person referred to in Article 15 of this Agreement.

(3) The Requesting Party shall not require the Requested Party to initiate proceedings for the surrender of the person transferred.

(4) The period during which such person was under the custody of the Requesting Party shall count towards the period of his imprisonment or detention in the Requested Party.

(5) No transfer under this Article shall be effected unless the Central Authority of the Requesting Party gives an undertaking –

- (a) to bear and be responsible for all the expenses of the transfer of custody;
- (b) to keep the person under lawful custody throughout the transfer of his custody; and



- (c) to return him into the custody of the Requested Party immediately upon his attendance before the competent authority or court in the Requesting Party is dispensed with.

#### ARTICLE 17

#### SAFE CONDUCT

(1) Where a person is present in the Requesting Party pursuant to a request made under Article 15 or 16 of this Agreement –

- (a) that person shall not be detained, prosecuted, punished or subjected to any other restriction of personal liberty in the Requesting Party in respect of any acts or omissions or convictions for any offence against the law of the Requesting Party that is alleged to have been committed, or that was committed, before the person's departure from the Requested Party;
- (b) that person shall not be subjected to any civil suit (being a civil suit to which the person could not be subject if he were not in the Requesting Party) in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person's departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 16, and being free to leave, has not left the Requesting Party within a period of 15 consecutive days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Article 15 or 16 shall not be subjected to prosecution based on his testimony, except for perjury or contempt of court.

(4) A person who consents to provide assistance pursuant to Article 15 or 16 shall not be required to provide assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Article 15 or 16 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

#### ARTICLE 18

#### SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to an investigation, prosecution or proceeding in relation to a criminal matter and provided that the rights of *bona fide* third parties are protected.

(2) 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 and the subsequent custody of the property seized.

(3) 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.

#### ARTICLE 19

#### PROCEEDS AND INSTRUMENTALITIES OF CRIME

(1) The Requested Party shall, upon request, use its best endeavours to identify or locate any proceeds or instrumentalities of crime located within its jurisdiction or to ascertain whether any such proceeds or instrumentalities 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 or instrumentalities may be located in its jurisdiction.

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

(3) Where a request is made for assistance in securing the forfeiture or confiscation of proceeds or instrumentalities of crime, 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 Requesting Party.

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

(5) In the application of this Article, the rights of *bona fide* third parties shall be respected to the extent permitted by the law of the Requested Party.

(6) For the purposes of this Agreement –

“proceeds of crime” includes –

- (a) property derived or realized directly or indirectly from the commission of an offence; and
- (b) property which represents the equivalent value of the property and other benefits derived from the commission of an offence;

“instrumentalities of crime” means property used or intended to be used in connection with the commission of an offence or the equivalent value of such property.

#### ARTICLE 20

#### RETURN OF EVIDENCE

(1) The Requesting Party shall, upon request, at the conclusion of the criminal matter in respect of which the request for assistance was made return to the Requested Party any evidence, including documents, records or items, provided to the Requesting Party pursuant to a request under this Agreement.

(2) Notwithstanding paragraph (1), the Requesting Party shall at any time, upon request, temporarily return to the Requested Party any evidence, including documents, records or items, provided to the Requesting Party pursuant to a request under this Agreement if it is needed for an investigation or criminal proceedings in the Requested Party.

### PART III – FINAL PROVISIONS

#### ARTICLE 21

#### CERTIFICATION AND AUTHENTICATION

(1) Documents or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Documents or other material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

(2) A document or other material is duly authenticated for the purposes of this Agreement if -

(a) it purports to be signed or certified by a judge, magistrate, or officer of the Requested Party duly authorised by the law of the Requested Party; and

(b) either –

(i) it is verified by the oath or affirmation of a witness, or of an officer of the government of the Requested Party; or

(ii) it purports to be sealed with an official or public seal of the Requested Party or of a Minister of State, or of a department or officer of the government, of the Requested Party.

(3) Nothing in this Article shall prevent the proof of any matter or the admission in evidence of any document or other material in accordance with the law of the Requesting Party.

(4) To the extent permitted by the law of each Party -

- (a) a document signed with a digital or electronic signature in accordance with the law of the Party concerned shall be as legally binding as a document signed with a handwritten signature, an affixed thumb-print or any other mark; and
- (b) a digital or electronic signature created in accordance with the law of the Party concerned shall be deemed to be a legally binding signature.

## ARTICLE 22

### REPRESENTATION AND EXPENSES

- (1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceeding arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.
- (2) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:
  - (a) fees of counsel retained at the request of the Requesting Party;
  - (b) the fees and expenses of expert witnesses;
  - (c) the costs of translation, interpretation and transcription; and
  - (d) travel expenses and allowances of persons who travel between the Requesting and Requested Parties.
- (3) If during the execution of the request it becomes apparent that expenses of an extraordinary or substantial nature 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.

(4) The cost of establishing live video or television links or other appropriate communications and multimedia facilities, the costs related to the servicing of live video or television links or other appropriate communications and multimedia facilities, the remuneration of interpreters provided by the Requested Party and allowances to witnesses and their travelling expenses in the Requested Party shall be refunded by the Requesting Party to the Requested Party, unless the Parties mutually agree otherwise.

### ARTICLE 23

#### COMPATIBILITY WITH OTHER ARRANGEMENTS

(1) The Parties may provide assistance pursuant to other agreements, arrangements or practices.

(2) Unless the Parties mutually agree otherwise, this Agreement shall not be interpreted as affecting or restricting obligations in effect between the Parties under any other international, bilateral or multilateral treaty or arrangement that contains or might contain clauses governing specific aspects of international criminal judicial assistance, wholly or in part, or more favourable practices which those Parties might observe in this matter.

### ARTICLE 24

#### CONSULTATION

(1) The Central Authorities of the Parties shall consult, at times mutually agreed upon by them, to promote the most effective use of this Agreement.

(2) The Parties may develop such practical measures as may be necessary to facilitate the implementation of this Agreement.

#### ARTICLE 25

#### AMENDMENT

(1) This Agreement may be modified or amended at any time by mutual written consent of the Parties. Such modification or amendment will enter into force on such date as may be mutually agreed upon by the Parties and will form part of the Agreement.

(2) Any modification or amendment will be without prejudice to the rights and obligations arising from or based on this Agreement before or up to the date such modification or amendment enters into force.

#### ARTICLE 26

#### SETTLEMENT OF DISPUTES

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

#### ARTICLE 27

#### ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force 30 days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.



(2) This Agreement shall apply to requests presented after the date of its entry into force whether the relevant acts or omissions constituting the offence occurred before or after that date.

(3) Either Party may terminate this Agreement at any time by giving written notification to the other. In that event, the Agreement shall cease to have effect six months following the date of notification.

(4) Requests for assistance which have been received prior to termination of this Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement were still in force. Termination of the Agreement shall be without prejudice to the rights and obligations arising from or based on the Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments have signed this Agreement.

Done in duplicate at Hong Kong, this 17<sup>th</sup> day of October Two thousand and six, in the Chinese, English and Malay languages, each text being equally authentic. In the event of any divergence in interpretation between any of the texts, the English text shall prevail.

## SCHEDULE 2

[s. 2]

### MODIFICATIONS TO THE ORDINANCE

Section 17(3)(b) of the Ordinance shall be modified to read as follows –

“(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 consecutive days after being notified that his presence is no longer required for any of the following purposes\* ~~has had an opportunity of leaving Hong Kong and has remained in Hong Kong 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.”.

\* 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

2007

### **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 Malaysia. 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 Malaysia and signed in Hong Kong on 17 October 2006. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications specified in Schedule 2 to the Order.

Chapter:	503D	FUGITIVE OFFENDERS (MALAYSIA) ORDER	Gazette Number	Version Date
Section:	2	Procedures in Ordinance to apply between Hong Kong and Malaysia	L.N. 136 of 2001	16/06/2001

In relation to the arrangements for the surrender of fugitive offenders which are—  
(a) applicable to the Government of Hong Kong and the Government of Malaysia; and  
(b) recited in the Schedule,  
it is hereby directed that the procedures in the Ordinance shall apply as between Hong Kong and Malaysia subject to the limitations, restrictions, exceptions and qualifications contained in those arrangements as so recited.

Schedule:		SCHEDULE	L.N. 136 of 2001	16/06/2001
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[section 2]

AGREEMENT BETWEEN THE GOVERNMENT OF HONG KONG  
AND THE GOVERNMENT OF MALAYSIA  
FOR THE SURRENDER OF FUGITIVE OFFENDERS

The Government Hong Kong, having been duly authorised to conclude this agreement by the sovereign government which is responsible for its foreign affairs, and the Government of Malaysia;

Desiring to make provision for the reciprocal surrender of fugitive offenders;

Have agreed as follows:

ARTICLE 1

OBLIGATION TO SURRENDER

The Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who, being accused or convicted of an offence under Article 2 committed within the jurisdiction of the one Party, is found within the jurisdiction of the other Party.

ARTICLE 2

NATURE OF OFFENCES

(1) Surrender of fugitive offenders shall be granted for an offence coming within any of the following descriptions of offences in so far as it is according to the laws of both Parties punishable by imprisonment for not less than one year or by a more severe penalty;

- (i) murder;
- (ii) manslaughter or culpable homicide not amounting to murder;
- (iii) aiding, abetting, counselling or procuring suicide;
- (iv) wounding, inflicting grievous bodily harm; assault occasioning actual bodily harm;
- (v) rape;
- (vi) indecent assault or use of criminal force with intent to outrage modesty;
- (vii) an offence punishable under the laws relating to women and girls;

- (viii) gross indecency with a child;
- (ix) abduction and kidnapping;
- (x) false imprisonment;
- (xi) dealing in slaves or other persons;
- (xii) an offence against the law relating to dangerous drugs including narcotics and psycho-tropic substances;
- (xiii) an offence relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted;
- (xiv) cheating, criminal breach of trust or obtaining property or pecuniary advantage by deception;
- (xv) housebreaking or burglary, theft and handling or receiving stolen property;
- (xvi) robbery;
- (xvii) extortion or blackmail;
- (xviii) embezzlement or criminal misappropriation;
- (xix) criminal breach of trust;
- (xx) fraud, conspiracy to commit fraud or to defraud;
- (xxi) an offence of criminal conspiracy;
- (xxii) an offence against bankruptcy laws;
- (xxiii) an offence against the laws relating to companies and securities;
- (xxiv) an offence relating to fiscal matter, taxes or duties, notwithstanding that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty or customs regulation of the same kind as the law of the requesting Party;
- (xxv) counterfeiting, forgery and related offences;
- (xxvi) an offence against the laws relating to bribery and corruption;
- (xxvii) perjury; attempting to pervert the course of justice;
- (xxviii) criminal damage, including arson or mischief by fire;
- (xxix) an offence against the law relating to firearms or ammunition;
- (xxx) an offence against the law relating to explosives;
- (xxxi) sinking or destroying a vessel at sea; assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm; revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master;
- (xxxii) unlawful seizure or exercise of control of an aircraft;
- (xxxiii) impeding the arrest or prosecution of a person who has or is believed to have committed an offence for which surrender may be granted under this Agreement and which is punishable according to the laws of both Parties by imprisonment for a period of five years or more;
- (xxxiv) smuggling;
- (xxxv) piracy;
- (xxxvi) an attempt or conspiracy or instigation or incitement to commit, or participation in, any offence for which surrender may be granted under this Agreement;
- (xxxvii) an offence for which fugitive offenders may be surrendered under any International Convention binding on both Parties.

(2) Where surrender of a fugitive offender is requested for the purpose of carrying out a sentence, a further requirement shall be that in the case of a period of imprisonment at least six months remains to be served.

(3) For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account without reference to the elements of the offence prescribed by the law of the requesting Party.

(4) For the purpose of paragraph (1) of this Article, an offence shall be an offence according to the laws of both Parties if the conduct constituting the offence was an offence against the law of

the requesting Party at the time it was committed and an offence against the law of the requested Party at the time the request for surrender is received.

### ARTICLE 3

#### SURRENDER OF NATIONALS

(1) The Government of Malaysia reserves the right to refuse the surrender of its nationals. The Government of Hong Kong reserves the right to refuse the surrender of nationals of the state whose Government is responsible for its foreign affairs.

(2) Where the requested Party exercises this right, the requesting Party may request that the case be submitted to the competent authorities of the requested Party in order that proceedings for prosecution of the person may be considered.

### ARTICLE 4

#### JURISDICTION

(1) Surrender may be refused for an offence which is regarded as one over which the requested Party has jurisdiction.

(2) If surrender is refused pursuant to paragraph (1), the requested Party shall submit the case to its competent authorities with a view to causing the fugitive offender to be proceeded against under its laws.

### ARTICLE 5

#### TEMPORARY AND DEFERRED SURRENDER

(1) If the request for surrender is made in respect of a person who is serving a sentence in accordance with the laws of the requested Party, that Party may temporarily surrender such person to the requesting Party for the purpose of prosecution.

(2) If the request for surrender is made in respect of a person who is being proceeded against by the requested Party, the requested Party-

(a) shall proceed with the proceedings for surrender after the prosecution against such person has been concluded and he is acquitted; or

(b) may, if such person is convicted and sentenced to imprisonment proceed with the proceedings for surrender and upon his committal, temporarily surrender that person to the requesting Party for the purpose of prosecution.

(3) Where a person is temporarily surrendered, he shall be kept in custody by the requesting Party and be returned to the requested Party after the conclusion of the proceedings against him, in accordance with conditions to be determined by agreement of the Parties.

### ARTICLE 6

#### RESTRICTIONS ON SURRENDER

(1) A fugitive offender shall not be surrendered if the requested Party has substantial grounds for believing:

(a) that the offence of which that person is accused or was convicted is an offence of a political character;

(b) that the request for his return (though purporting to be made on account of an offence

- for which surrender may be granted) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or
- (c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.
- (2) For the purposes of this Agreement, the following offences shall not be considered to be of a political character:
- (a) murder or other wilful crime against the person of the Head of State of Malaysia, or, in the case of Hong Kong, the Head of State whose government is responsible for its foreign affairs, or in either case of a member of the Head of States's immediate family;
  - (b) any offence which is not to be regarded as an offence of a political character by virtue of an international agreement binding on both Parties;
  - (c) an attempt or conspiracy to commit or participate in, any such offences.
- (3) Surrender for an offence shall also be refused if the person whose surrender is sought cannot under the laws of either Party be prosecuted or punished for that offence.

## ARTICLE 7

### PROCEDURES AND DOCUMENTATION FOR SURRENDER

- (1) The request for surrender of a fugitive offender shall be made to the appropriate authority, as may be notified from time to time by one Party to the other.
- (2) The request shall be accompanied by:
- (a) as accurate a description as possible of the person sought, together with any other information which would help to establish his identity and nationality including, if known, his location;
  - (b) a statement and particulars of the offence for which surrender is requested;
  - (c) the text of the legal provisions, if any, creating the offence, and a statement of the punishment which can be imposed therefor and a specification of any time limit that is imposed on the institution of proceedings, or on the execution of any punishment imposed, for that offence.
- (3) If the request relates to an accused person, it shall also be accompanied by a warrant of arrest issued by a judge, magistrate or other competent authority of the requesting Party and by such evidence as, according to the law of the requested Party, would justify his committal for trial if the offence had been committed within the jurisdiction of the requested Party.
- (4) If the request relates to a person already convicted and sentenced, or convicted but not yet sentenced, it shall also be accompanied by:
- (a) in respect of a person convicted and sentenced, a certificate of the conviction and sentence and a statement showing how much of the sentence has not been carried out; and
  - (b) in respect of a person convicted but not yet sentenced, a statement to that effect by the appropriate court and the warrant of arrest.

## ARTICLE 8

### PROVISIONAL ARREST

- (1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on the application of the competent authorities of the requesting Party. The application for provisional arrest shall contain an indication of intention to request the surrender of the person sought and a statement of the existence of a warrant of arrest or a judgment of

conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offence been committed, or the person sought been convicted, within the jurisdiction of the requested Party.

(2) An application for provisional arrest may be forwarded through the same channels as a request for surrender or through the International Criminal Police Organisation (INTERPOL).

(3) The provisional arrest of the person sought shall be terminated upon the expiration of forty-five days from the date of his arrest if the request for his surrender shall not have been received. This provision shall not prevent the re-arrest or surrender of the person sought if the request for his surrender is received subsequently.

## ARTICLE 9

### ADDITIONAL DOCUMENTATION

(1) If the requested Party considers that the documents furnished in support of the request for the surrender of a person sought are not sufficient to fulfill the requirements of this Agreement, that Party shall request the submission of necessary additional documents. The requested Party may set a time limit for the submission of such documents, and may grant a reasonable extension of the time limit upon application of the requesting Party setting forth reasons therefor.

(2) If the person sought is in custody and the additional documents submitted are not sufficient, or if such documents are not received within the period specified by the requested Party, that person may be discharged from custody. Such discharge shall not prejudice the rearrest and the surrender of the person if the additional documents are subsequently received.

## ARTICLE 10

### CONCURRENT REQUESTS

If the surrender of a fugitive offender is requested concurrently by one of the Parties and a State or States with which Malaysia or Hong Kong, whichever is being requested, has arrangements for the surrender of fugitive offenders, the requested Party shall make its decision in so far as its law allows having regard to all the circumstances including the provisions in this regard in any agreements in force between the requested Party and the requesting Parties, the order of the receipt of the requests, the relative seriousness and place of commission of the offences, the nationality of the person sought and the possibility of subsequent surrender to another State, and shall furnish the other Party with information justifying its decision in the event of surrender of the fugitive to another jurisdiction.

## ARTICLE 11

### ADMISSIBILITY AND AUTHENTICATION

The authorities of the requested Party shall admit as evidence, in any proceedings for the surrender of a fugitive offender, a sworn deposition or affirmation taken in the jurisdiction of the requesting Party, any warrant, any copy of any such deposition, affirmation or warrant, and any certificate of a conviction or sentence if it is authenticated:

- (a) in the case of a warrant by being signed, or in the case of any other original document by being certified, by a judge, magistrate or other competent authority of the requesting Party, or in the case of a copy by being so certified to be a true copy of the original; and
- (b) either by the oath of some witness or by being sealed with the official seal of the competent authority of the requesting Party;

or in any such other manner as may be permitted by the law of the requested Party.



## ARTICLE 12

### TRANSLATION

The requesting Party shall on request provide an authenticated translation of all documents relating to the request into a language acceptable to the requested Party. This provision shall not affect the admissibility of an untranslated document furnished by the requesting Party.

## ARTICLE 13

### REPRESENTATION AND COSTS

- (1) (a) The requested Party shall, if asked by the requesting Party, make the necessary arrangements for that Party's legal representation and assistance in any proceedings arising out of a request for the surrender of a fugitive offender.
  - (b) In the event that the requesting Party arranges its own legal representation and assistance, it shall bear any costs incurred.
  - (c) Where expenses are of a substantial or extraordinary nature, the Parties shall consult to determine the manner in which the costs shall be borne.
- (2) Subject to the provisions of paragraphs (1)(b) and (1)(c) of this Article, expenses incurred in the jurisdiction of the requested Party by reason of surrender shall be borne by that Party.
- (3) The cost of sending a fugitive offender to the jurisdiction of the requesting Party shall be borne by that Party.

## ARTICLE 14

### PRIMA FACIE RULE AND TERMS OF SURRENDER

- (1) A fugitive offender shall be surrendered only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offence of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.
- (2) If a fugitive offender is to be surrendered, the person sought shall be sent by the authorities of the requested Party to such convenient place of departure within that Party's jurisdiction as the requesting Party shall indicate.
- (3) Subject to the provisions of paragraph (4) of this Article, if the requesting Party does not take custody of the person sought on the date agreed by the two Parties, he shall be released on the expiry of such period as is specified under the law of the requested Party, and the requested party may subsequently refuse to surrender him for the same offence.
- (4) If circumstances beyond its control prevent a Party from surrendering or taking over the person to be surrendered, it shall notify the other Party. In that case, the two Parties shall agree to a new date for surrendered and the provisions of paragraph (3) of this Article shall apply.

## ARTICLE 15

### SURRENDER BY CONSENT

- (1) If the person sought consents to return to the jurisdiction of the requesting Party after personally being advised by a competent judicial authority of the effect of such consent under the

law of the requested Party, the requested Party may surrender him without formal surrender proceedings.

(2) The surrender of a person pursuant to this Article shall be subject to Article 17.

#### ARTICLE 16

##### SURRENDER OF PROPERTY

(1) To the extent permitted under its law, the requested Party may seize and surrender to the requesting Party all property (including sums of money) found in the possession of the fugitive offender at the time of his arrest which may serve as proof of the offence in respect of which surrender is granted.

(2) If the property in question is liable to seizure or confiscation within the jurisdiction of the requested Party the latter may, in connection with pending proceedings, temporarily retain it or hand it over on condition it is returned.

(3) These provisions shall not prejudice the rights of the requested Party or of any person other than the person sought. When such rights exist the property shall on request be returned to the requested Party without charge as soon as possible after the end of the proceedings.

#### ARTICLE 17

##### RULE OF SPECIALITY

A fugitive offender who has been surrendered shall not be proceeded against, sentenced or kept in custody with a view to the carrying out of a sentence for any offence committed prior to his surrender other than:

- (a) the offence in respect of which his return is ordered;
- (b) any lesser offence, however described, disclosed by the facts in respect of which his return was ordered provided such an offence is an offence for which he can be returned under this Agreement;
- (c) any other offence being an offence for which surrender may be granted under this Agreement in respect of which the requested Party may consent to his being dealt with; unless he has first had an opportunity to leave the jurisdiction of the Party to which he has been surrendered and he had not done so within forty days of his having been free to leave the jurisdiction or has returned to that jurisdiction having left it.

#### ARTICLE 18

##### RESURRENDER

A fugitive offender who has been surrendered shall not be resurrendered to another jurisdiction for trial or punishment for any offence that is committed before his return to Hong Kong or Malaysia as the case may be, unless

- (a) the consent of the appropriate authority of the requested Party has been obtained; or
- (b) he has first had an opportunity to leave the jurisdiction of the Party to which he has been surrendered and he had not done so within twenty one days of his having been free to leave the jurisdiction or has returned to that jurisdiction having left it.

#### ARTICLE 19

##### ADDITIONAL GROUNDS OF REFUSAL

- (1) The surrender of any person sought under the terms of this Agreement may be refused if it appears to the appropriate authority of the requested Party that:
- (a) by reason of the trivial nature of the offence of which he is accused or was convicted; or
  - (b) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large as the case may be; or
  - (c) because the accusation against him is not made in good faith in the interests of justice; or
  - (d) because there exist valid humanitarian grounds
- it would, having regard to all the circumstances, be unjust or oppressive to return him.
- (2) The requested Party may also refuse to surrender a fugitive offender:
- (a) where the Government of Malaysia is the requested Party, where the surrender would significantly affect the interests of the Government of Malaysia in matters of defence or foreign affairs;
  - (b) where the Government of Hong Kong is the requested Party, where the surrender would significantly affect the interests of Government responsible for Hong Kong's foreign affairs in matters of defence or foreign affairs.

## ARTICLE 20

### TRANSIT

- (1) Either Party may authorise transit through its area of a person surrendered to the other Party by a State not party to this Agreement. A request for transit shall be made through an authority to be notified from time to time by one Party to the other. The facilities of the International Criminal Police Organisation (INTERPOL) may be used to transmit such a request. It shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit may be kept in custody during the period transit.
- (2) No authorisation is required where air transportation is used and no landing is scheduled in the area of a Party. If an unscheduled landing occurs in the area of a Party, that Party may require the other Party to make a request for transit as provided in paragraph (1). That Party shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

## ARTICLE 21

### ENTRY INTO FORCE AND TERMINATION

- (1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.
- (2) Each of the Parties may terminate the Agreement at any time by giving notice to the other through the same channels as a request for the surrender of a fugitive offender. In that event the Agreement shall cease to have effect six months after the receipt of notice.

In witness whereof the undersigned, being duly authorized by their respective governments, have signed this Agreement.

Done at Hong Kong this eleventh day of January One thousand nine hundred and ninety five in Bahasa Malaysia, in the Chinese and English languages, each text being equally authentic.

**Explanatory Statement on the Modifications to the  
Mutual Legal Assistance in Criminal Matters Ordinance**

***Mutual Legal Assistance in  
Criminal Matters (Malaysia) Order***

Immunities

Section 17 of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to render assistance. These immunities cease to apply if the person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article 17(2) of the Hong Kong / Malaysia Agreement provides that the immunities will continue to be applicable for a period of 15 consecutive days after the person, having had an opportunity to leave, has been notified that his presence is no longer required. The modification reflects the additional protection in the Agreement by providing for a period of 15 consecutive days in section 17.