

ARTICLE-BY-ARTICLE COMPARISON OF THE HONG KONG/ JAPAN MLA AGREEMENT WITH THE MODEL AGREEMENT

TITLE AND PREAMBLE

This is an agreement between the two places and not between the Governments of the two places. This arrangement was made at the request of Japan due to its constitutional requirements. Precedent can be found in MLA Agreement with Ukraine. The preamble is substantially the same as the model agreement.

ARTICLE 1

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

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

Paragraph 3 provides for the definition on “items”, which is consistent with the description in Article I(2)(i) of the model agreement.

Paragraph 4 reflects section 5(2) of the MLA Ordinance.

Article I(4) of the model agreement is not included at the suggestion of Japan as being self-evident.

ARTICLE 2

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

Paragraph 2 is the same as Article II(3) of the model agreement.

Paragraph 3 provides for direct communication between the Central Authorities.

ARTICLE 3

Paragraph 1 uses in its chapeau the word “may”, as opposed to “shall” in Article IV(1) of the model agreement. Nonetheless, Hong Kong’s legal position under section 5(1) of the MLA Ordinance is preserved in

paragraph 4, which provides that the domestic law of the requested Party shall prevail. The grounds of refusal in paragraph 1 are substantially the same as those under Article IV(1) of the model agreement.

Paragraph 1(4) refers to the refusal of a request if it does not conform to the requirements of the Agreement. Similar provision is found in MLA Agreements with Israel, the USA and Poland.

Paragraph 1(7) does not include the time-bar to prosecutions in the requested Party as a ground for refusal (the second part of Article IV(1)(e) of the model agreement). This is not a mandatory ground for refusal under the MLA Ordinance. Precedents can be found in MLA Agreements with Denmark, Germany, Malaysia and Poland.

Paragraphs 2 and 3 are substantially the same as Article IV(5) and (6) of the model agreement.

Article IV(1)(c) of the model agreement (military offences) is not included in the Agreement as neither Hong Kong nor Japan has military law. Precedents can be found in MLA Agreements with Denmark, France and Switzerland.

Article IV(1)(g) of the model agreement (confidentiality) is not included in the Agreement as this ground is subsumed in paragraph 1(4), as read together with Article 5(4) of the Agreement.

Article IV(2) of the model agreement is not included in the Agreement as matters for consideration of essential interests are primarily for the Requested Party and there is no need to set them out in the Agreement. Precedents can be found in MLA Agreements with Belgium, Denmark, France, Germany, Poland, Switzerland, Ukraine and the USA.

Article IV(3) of the model agreement is not included in the Agreement on the understanding that death penalty cases could be dealt with under the category of “essential interests” of the Requested Party in accordance with paragraph 1(2). Precedents can be found in MLA Agreements with Malaysia, the Netherlands, the Philippines, Singapore and the USA.

ARTICLE 4

Paragraph 1 is substantially the same as Article V(1) and (4) of the model agreement, but has been expanded to permit transmission of requests by other reliable means to enhance flexibility. Similar provision is found in MLA Agreements with Malaysia, the Netherlands and Poland.

Paragraphs 2(1) to 2(4) are the same as items (a), (e), (c) and (b) of Article V(2) of the model agreement respectively.

Paragraph 3 sets out the more elaborate information to be provided for requests concerning specific types of assistance. Similar provision is found in MLA Agreements with Germany, Ireland, Korea, Malaysia, Philippines, Poland, Singapore and Switzerland.

Paragraph 4 expressly provides for the requested Party to ask for additional information. Similar provision is found in MLA Agreements with Canada, Korea, the Netherlands and New Zealand.

ARTICLE 5

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

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

Paragraph 3 builds on Article IV(4) of the model agreement and further provides for a mechanism for rendering assistance subject to conditions notwithstanding on-going investigation or prosecution in the requested Party. Similar provision is found in MLA Agreements with Poland and the USA.

Paragraph 4 corresponds to Article V(3) of the model agreement. Similar provision is found in MLA Agreements with Poland, Singapore and the USA.

Provisions similar to **paragraph 5** is found in MLA Agreements with Israel, Malaysia, Poland and the USA.

Paragraph 6 corresponds to Article VI(3) and (4) of the model agreement.

ARTICLE 6

This Article is substantially the same as Article VII(2) and (3) of the model agreement.

Article VII(1) of the model agreement (arranging for legal representation) is not included in the Agreement. In practice, the requested Party will execute a request under Article 5 of the Agreement. Precedents can be

found in MLA Agreements with Belgium, France, Poland and the Netherlands.

ARTICLE 7

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

ARTICLE 8

This Article is added to provide for the requested Party to specify the manner in which items furnished under the Agreement should be maintained. It is envisaged that this provision may be invoked where exhibits are borrowed from the requested Party. The imposition of condition can be given effect to by section 6 of the MLA Ordinance.

Paragraph 2 provides for the return of items to the requested Party furnished under the Agreement. Similar provision is found in MLA Agreements with Korea, Malaysia, Poland, Singapore and the USA.

ARTICLE 9

Paragraph 1 corresponds to Articles IX(1), IX(2) and XVIII of the model agreement.

Paragraph 2 is substantially the same as Article IX(4) of the model agreement.

Paragraph 3 reflects a practice which is permitted by section 10(9) of the MLA Ordinance. Similar provision is found in MLA Agreements with Belgium, France, Ireland, Israel, Italy and the USA.

The substance of Article IX(3) of the model agreement is set out in paragraph 3 (3) of Article 4 of the Agreement. Articles IX(5) and (6) of the model agreement are not included at the request of Japan as being unnecessary in view of the arrangement set out in Article 9(3) of the Agreement.

ARTICLE 10

Paragraph 1 was added to cater for, inter alia, physical examination or taking of photographs of a person's peculiar visual features such as tattoos or scars (see also Article 1(2)(2) of the Agreement). In the case of Hong Kong, the conduct of physical examination of a person will be

subject to that person's consent.

Provisions similar to **paragraph 2** are found in MLA Agreements with Denmark, Italy and the Netherlands.

ARTICLE 11

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

ARTICLE 12

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

ARTICLE 13

This Article is substantially the same as Article XVI (1) of the model agreement.

ARTICLE 14

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

Paragraphs 2(1) and (2) set out the practical arrangements regarding the custody of the prisoner during the period he is transferred to the requesting Party and his return to the requested Party. It has the same effect as Article XV(2) of the model agreement. **Paragraph 2(3)** reflects the provisions of section 24 of the MLA Ordinance.

ARTICLE 15

Paragraph 1 is basically the same as Article XVII(1) and XVII(4) of the model agreement except for the absence of the immunity in respect of civil matters, as Japanese law does not permit such kind of immunity. Precedents can be found in MLA Agreements with Canada, Israel, Poland, Germany, the UK and the USA.

Paragraphs 2(1)(a) and (b) are basically the same as Article XVII(2) of the model agreement. **Paragraphs 2(1)(c)** was added at the request of the Japan to emphasize that the reasons for failing to appear on the scheduled date must be overriding.

Paragraph 3 states that the immunity ceases after the person in custody returns to the requested Party.

Paragraph 4 is substantially the same as Article XVII(5) of the model agreement.

Article XVII(3) of the model agreement is not included in the Agreement as the legal position of a witness will be governed by the domestic law of the requesting Party¹. Precedent can be found in MLA Agreement with the UK.

ARTICLE 16

Paragraph 1 is substantially the same as Article XII(1) of the model agreement. Service is limited to judicial documents under Japanese law. Similar provision is found in MLA Agreement with the UK.

Paragraph 2 is substantially the same as Article XII(2) of the model agreement. Similar provision is found in MLA Agreements with Belgium, France, Italy, Korea, Germany and the Netherlands.

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

Paragraph 4 is substantially the same as Article XII(5) of the model agreement. Similar provision is found in MLA Agreements with Australia, France, Philippines and the USA.

Article XII(3) of the model agreement is not included in the Agreement as Japan is unable to give effect to such provision under its law. Precedents can be found in MLA Agreements with Canada, Belgium, Denmark, France, Italy, Korea, Poland, Germany, the Netherlands, Singapore, Switzerland, the UK and the USA.

ARTICLE 17

This Article corresponds to Article XIX of the model agreement. Similar provision is found in MLA Agreements with Poland and Singapore.

ARTICLE 18

This Article corresponds to Article III of the model agreement.

¹ See s.17(1)(iv) and (v) and s.19 and s.23(2)(b) of the MLA Ordinance.

ARTICLE 19

Paragraphs 1 and 2 provide for consultation between the Parties. Similar provision is found in MLA Agreements with Malaysia, Poland, Singapore, Switzerland and the USA.

Paragraph 3 is substantially the same as Article XX of the model agreement.

ARTICLE 20

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

Paragraph 2 defines the temporal application of the Agreement.

Paragraph 3 is substantially the same as Article XXI(2) of the model agreement.

OTHERS

Article X of the model agreement (obtaining statements of persons) is not included in the Agreement as assistance can be rendered without compulsory means. Precedents can be found in MLA Agreements with Belgium, Denmark, France, Germany, Italy, Korea, Malaysia, the Netherlands and Switzerland.

Article XIV of the model agreement (certification and authentication) is also not included in view of the absence of such requirement in Japan. In any case, pursuant to Article 5(2) of the Agreement, the requesting Party may specify its requirements as to certification and authentication in the request.

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