

**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 (Japan)
Order, made by the Chief Executive in Council on
11 November 2008, be approved.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (JAPAN) 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 Japan

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 Japan.

SCHEDULE 1

[s. 2]

AGREEMENT BETWEEN THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA AND JAPAN ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as "Hong Kong Special Administrative Region"), having been duly authorized by the Central People's Government of the People's Republic of China, and Japan,

Desiring to establish more effective cooperation between both Parties in the area of mutual legal assistance in criminal matters,

Desiring that such cooperation will contribute to combating crime,

Have agreed as follows:

Article 1

1. Each Party shall, upon request by the other Party, provide mutual legal assistance (hereinafter referred to as “assistance”) in connection with investigations, prosecutions and other proceedings in criminal matters in accordance with the provisions of this Agreement.

2. Assistance shall include the following:

- (1) obtaining testimony, statements or items;
- (2) examining persons, items or places;
- (3) locating or identifying persons, items or places;
- (4) providing items in the possession of the authorities of the requested Party;
- (5) presenting an invitation to a person whose appearance before an appropriate authority in the requesting Party is sought;

(6) transfer of a person in custody for giving testimony or otherwise assisting in investigations, prosecutions or other proceedings;

(7) serving judicial documents;

(8) assisting in proceedings related to confiscation and immobilization of proceeds or instrumentalities of criminal offences; and

(9) any other assistance permitted under the laws of the requested Party and agreed upon between the Central Authorities of the Parties.

3. The term “items” as used in this Agreement means documents, records and articles of evidence.

4. With regard to a request for assistance in connection with an offence against a law related to taxation, the primary purpose of the request shall not be the assessment or collection of tax.

Article 2

1. Each Party shall designate the Central Authority that is to perform the functions provided for in this Agreement. For the Hong Kong Special Administrative Region, the Central Authority shall be the Secretary for Justice or a person designated by the Secretary for Justice. For Japan, the Central Authority shall be the Minister of Justice or the National Public Safety Commission or persons designated by them.

2. Requests for assistance under this Agreement shall be made by the Central Authority of the requesting Party to the Central Authority of the requested Party.

3. The Central Authorities of the Parties shall communicate directly with one another for the purposes of this Agreement.

Article 3

1. The Central Authority of the requested Party may refuse assistance if the requested Party considers that:

(1) the request relates to a political offence;

(2) the execution of the request would impair its essential interests;

(3) the execution of the request would impair the sovereignty, security or public order of Japan or, in the case of the Hong Kong Special Administrative Region, of the People's Republic of China;

(4) the request does not conform to the requirements of this Agreement;

(5) there are well-founded reasons to suppose that the request for assistance has been made with a view to prosecuting or punishing a person by reason of race, religion, nationality, ethnic origin, political opinions or sex, or that such person's position may be prejudiced for any of those reasons;

(6) the conduct that is the subject of the investigation, prosecution or other proceeding in the requesting Party would not constitute a criminal offence under the laws of the requested Party; or

(7) the request for assistance relates to the prosecution of a person for an offence where the person has been convicted or acquitted in the requested Party in respect of that offence or another offence constituted by the same conduct.

2. Before refusing assistance pursuant to paragraph 1, the Central Authority of the requested Party shall consult with the Central Authority of the requesting Party to consider whether assistance can be provided subject to such conditions as the requested Party may deem necessary. If the requesting Party accepts such conditions, the requesting Party shall comply with them.

3. If assistance is refused, the Central Authority of the requested Party shall inform the Central Authority of the requesting Party of the reasons for the refusal.

4. Nothing in this Agreement shall require either Party to execute a request if it is required by its laws to refuse assistance on any of the grounds specified in paragraph 1.

Article 4

1. The Central Authority of the requesting Party shall make a request in writing. However, the Central Authority of the requesting Party may make a request by any other reliable means of communication if the Central Authority of the requested Party considers it appropriate to receive a request by that means.

In such cases, the Central Authority of the requesting Party shall provide supplementary confirmation of the request in writing promptly thereafter, if the Central Authority of the requested Party so requires. A request shall be accompanied by a translation into an official language of the requested Party or, in case of urgency, into the English language unless otherwise agreed between the Central Authorities of the Parties.

2. A request shall include the following:

(1) the name of the authority conducting the investigation, prosecution or other proceeding;

(2) the facts pertaining to the subject of the investigation, prosecution or other proceeding; the nature and the stage of the investigation, prosecution or other proceeding; and the text of the relevant laws of the requesting Party;

(3) a description of the assistance requested; and

(4) a description of the purpose of the assistance requested.

3. To the extent necessary and possible, a request shall also include the following:

(1) information on the identity and whereabouts of any person from whom testimony, statements or items are sought;

(2) a description of the manner in which testimony, statements or items are to be obtained or recorded;

(3) a list of questions to be asked of the person from whom testimony, statements or items are sought;

(4) a precise description of persons or places to be searched and of items to be sought;

(5) information regarding persons, items or places to be examined;

(6) a description of the manner in which an examination of persons, items or places is to be conducted and recorded, including the format of any written record to be made concerning the examination;

(7) information regarding persons, items or places to be located or identified;

(8) information on the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;

(9) a description of any particular procedure to be followed in executing the request;

(10) information on the allowances and expenses to which a person whose appearance is sought before the appropriate authority in the requesting Party will be entitled;

(11) a description of the reason for confidentiality concerning the request; and

(12) any other information that should be brought to the attention of the requested Party to facilitate the execution of the request.

4. If the requested Party considers that the information contained in a request for assistance is not sufficient to meet the requirements under this Agreement to enable the execution of the request, the Central Authority of the requested Party may request that additional information be provided.

Article 5

1. The requested Party shall promptly execute a request in accordance with the relevant provisions of this Agreement. The competent authorities of the requested Party shall take every possible measure in their power to ensure the execution of a request.

2. A request shall be executed in the manner or procedure provided for by the laws of the requested Party. The manner or particular procedure described in a request referred to in paragraph 3(2), 3(6) or 3(9) of Article 4 shall be followed, if appropriate, to the extent it is not prohibited by the laws of the requested Party.

3. If the execution of a request is deemed to interfere with an ongoing investigation, prosecution or other proceeding in the requested Party, the Central Authority of the requested Party may postpone the execution or make the execution subject to conditions deemed necessary after consultations between the Central Authorities of the Parties. If the requesting Party accepts such conditions, the requesting Party shall comply with them.

4. The requested Party shall make its best efforts to keep confidential the fact that a request has been made, the contents of a request, the outcome of the execution of a request and other relevant information concerning the execution of a request if such confidentiality is requested by the Central Authority of the requesting Party. If a request cannot be executed without disclosure of such information, the Central Authority of the requested Party shall so inform the Central Authority of the requesting Party, which shall then determine whether the request should nevertheless be executed.

5. The Central Authority of the requested Party shall respond to reasonable inquiries by the Central Authority of the requesting Party concerning the status of the execution of a request.

6. The Central Authority of the requested Party shall promptly inform the Central Authority of the requesting Party of the result of the execution of a request, and shall provide the Central Authority of the requesting Party with the testimony, statements or items obtained as a result. If a request cannot be executed in whole or in part, the Central Authority of the requested Party shall inform the Central Authority of the requesting Party of the reasons therefor.

Article 6

1. Unless otherwise agreed between the Central Authorities of the Parties, the requested Party shall pay all costs related to the execution of a request, except for the fees of an expert witness, the costs of translation, interpretation and transcription, and the allowances and expenses related to travel of persons pursuant to Articles 13 and 14. Such fees, costs, allowances and expenses shall be paid by the requesting Party.

2. If it becomes apparent that expenses of an extraordinary nature are required to execute a request, the Central Authorities of the Parties shall consult to determine the conditions under which the request will be executed.

Article 7

1. The requesting Party shall not use any testimony, statements or items provided under this Agreement other than in the investigation, prosecution or other proceeding described in a request without prior consent of the Central Authority of the requested Party.

2. The Central Authority of the requested Party may request that testimony, statements or items provided under this Agreement be kept confidential or be used only subject to other conditions it may specify. If the requesting Party agrees to such confidentiality or accepts such conditions, it shall comply with them.

Article 8

1. The Central Authority of the requested Party may request that the requesting Party transport and maintain items provided under this Agreement in accordance with the conditions specified by the Central Authority of the requested Party, including the conditions deemed necessary to protect third-party interests in the items to be transferred.

2. The Central Authority of the requested Party may request that the requesting Party return any items provided under this Agreement in accordance

with the conditions specified by the Central Authority of the requested Party, after such items have been used for the purpose described in a request.

3. The requesting Party shall comply with a request made pursuant to paragraph 1 or 2. When such a request has been made, the requesting Party shall not examine the items without the prior consent of the Central Authority of the requested Party if the examination impairs or could impair the item.

Article 9

1. The requested Party shall obtain testimony, statements or items. In obtaining testimony or items, the requested Party shall employ compulsory measures, including search and seizure, if such measures are necessary and the request includes information justifying those measures under the laws of the requested Party.

2. The requested Party shall make its best efforts to facilitate the presence of such persons as specified in a request for obtaining testimony, statements or items during the execution of the request, and to allow such persons to question the person from whom testimony, statements or items are sought. In the event that such direct questioning is not permitted, such persons shall be allowed to submit questions to be posed to the person from whom testimony, statements or items are sought.

3. (1) If a person, from whom testimony, statements or items are sought pursuant to this Article, asserts a claim of immunity, incapacity or privilege under the laws of the requesting Party, testimony, statements or items shall nevertheless be obtained.

(2) In cases where testimony, statements or items are obtained in accordance with sub-paragraph (1), they shall be provided, together with the claim referred to in that sub-paragraph, to the Central Authority of the requesting Party for resolution of the claim by the competent authorities of the requesting Party.

Article 10

1. The requested Party shall examine persons, items or places. The requested Party shall, subject to its laws, employ compulsory measures in order to do so, if such measures are necessary and the request includes information justifying those measures.

2. The requested Party shall make its best efforts to facilitate the presence of such persons as specified in a request for examining persons, items or places during the execution of a request.

Article 11

The requested Party shall make its best efforts to locate or identify persons, items or places.

Article 12

1. The requested Party shall provide the requesting Party with items that are in the possession of the authorities of the requested Party and are available to the general public.

2. The requested Party shall endeavour to provide the requesting Party with items that are in the possession of the authorities of the requested Party and are not available to the general public, to the same extent and under the same conditions as such items would be available to its investigative and prosecuting authorities.

Article 13

The requested Party shall present an invitation to a person in the requested Party whose appearance before the appropriate authority in the requesting Party is sought. The Central Authority of the requesting Party shall inform the Central Authority of the requested Party of the extent to which the allowances and expenses for such appearance will be paid by the requesting Party. The Central Authority of the requested Party shall promptly inform the Central Authority of the requesting Party of the response of the person.

Article 14

1. A person in the custody of the requested Party whose presence within the jurisdiction of the requesting Party is necessary for giving testimony or otherwise assisting in investigations, prosecutions or other proceedings shall be transferred for those purposes to the requesting Party, if the person consents and if the Central Authorities of the Parties agree, where permitted under the laws of the requested Party.

2. (1) The requesting Party shall keep the person transferred pursuant to paragraph 1 in the custody of the requesting Party, unless permitted by the requested Party to do otherwise.

(2) The requesting Party shall immediately return the person transferred to the requested Party, as agreed beforehand, or as otherwise agreed between the Central Authorities of the Parties.

(3) The person transferred shall receive credit for service of the sentence imposed in the requested Party for the time served in the custody of the requesting Party.

Article 15

1. A person who consents to appear before the appropriate authority in the requesting Party under Article 13 or a person who consents to be transferred to the requesting Party under Article 14 shall not be subject to prosecution, detention or any restriction of personal liberty within its jurisdiction by reason of any conduct or conviction that precedes the departure from the requested Party of that person, nor shall that person be obliged to give evidence in any proceeding or to assist in any investigation other than the proceeding or investigation which is specified in the request.

2. (1) The safe conduct provided in accordance with paragraph 1 to the person who consents to appear before the appropriate authority in the requesting Party under Article 13 shall cease when:

- (a) the person, having had an opportunity to leave, has nevertheless remained in the requesting Party for a period of fifteen (15)

consecutive days after the date of notification by the appropriate authority that the appearance of that person is no longer necessary;

- (b) the person, having left the requesting Party, voluntarily returns to it; or
- (c) the person fails to appear before the appropriate authority on the scheduled appearance date unless there are compelling reasons.

(2) When the notification is made pursuant to sub-paragraph (1)(a), or when the safe conduct ceases pursuant to sub-paragraph (1)(b) or (1)(c), the Central Authority of the requesting Party shall so inform the Central Authority of the requested Party without delay.

3. The safe conduct provided in accordance with paragraph 1 to the person who consents to be transferred to the requesting Party under Article 14 shall cease when that person returns to the requested Party.

4. A person who does not consent to appear before the appropriate authority in the requesting Party under Article 13 or a person who does not consent to be transferred to the requesting Party under Article 14 shall not, by reason thereof, be liable to any penalty or be subjected to any compulsory measure in the requesting Party, notwithstanding any contrary statement in the request.

Article 16

1. The requested Party shall effect service of judicial documents that are transmitted to it for this purpose by the requesting Party.
2. A request for service of a judicial document requiring the appearance of a person before an appropriate authority in the requesting Party shall be received by the requested Party not less than forty-five (45) days before the date on which the appearance is required. In urgent cases, the requested Party may waive this requirement.
3. In informing the result of the execution of a request for service of a judicial document in accordance with the provisions of paragraph 6 of Article 5, the Central Authority of the requested Party shall inform the Central Authority of the requesting Party in writing of the fact that the service was effected, as well as the date, place and manner of the service.
4. A person who does not comply with a judicial document requiring the appearance of the person before an appropriate authority in the requesting Party served pursuant to this Article shall not, by reason thereof, be liable to any penalty or be subjected to any compulsory measure in the requesting Party, notwithstanding any contrary statement in that document.

Article 17

1. The requested Party shall assist, to the extent permitted by its laws, in proceedings related to the confiscation of the proceeds or instrumentalities of criminal offences. Such assistance may include action to identify, trace and

temporarily immobilize the proceeds or instrumentalities pending further proceedings.

2. The requested Party that has custody over proceeds or instrumentalities of criminal offences may transfer such proceeds or instrumentalities, in whole or in part, to the requesting Party, to the extent permitted by the laws of the requested Party and upon such conditions as it deems appropriate. Such transfer may take place irrespective of whether taking custody over the proceeds or instrumentalities of criminal offences took place before, on or after the entry into force of this Agreement.

Article 18

Nothing in this Agreement shall prevent either Party from requesting assistance from or providing assistance to the other Party in accordance with other applicable international agreements, or pursuant to its laws that may be applicable.

Article 19

1. The Central Authorities of the Parties shall hold consultations for the purpose of facilitating speedy and effective assistance under this Agreement, and may decide on such measures as may be necessary for this purpose.

2. The Parties shall, if necessary, hold consultations on any matter that may arise in the interpretation or implementation of this Agreement and shall make every effort to reach agreement.

3. Any dispute arising out of the interpretation or implementation of this Agreement shall be resolved through diplomatic channels.

Article 20

1. This Agreement shall enter into force on the thirtieth day after the date on which the Parties exchange notes informing each other that their respective internal legal procedures necessary for entry into force of this Agreement have been completed.

2. This Agreement shall apply to any request for assistance presented on or after the date upon which this Agreement enters into force, whether the acts relevant to the request were committed before, on or after that date.

3. Either Party may terminate this Agreement at any time by giving six months' written notice to the other Party.

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

DONE at Hong Kong, in duplicate, in the Chinese, English and Japanese languages, all texts being equally authentic, this 23rd day of May, 2008. In case of any divergence of interpretation, the English text shall prevail.

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)(a) of the Ordinance shall be modified by deleting “or”.

4. 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 after the date of being notified that the appearance of the person 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.**; or**”.

5. Section 17(3) of the Ordinance shall be modified by adding –

“(c) in the absence of compelling reasons, the person fails to appear on the scheduled appearance date before the authority before which the person consents to appear.”*

6. 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

11 November 2008

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 Japan. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region and Japan and signed in Hong Kong on 23 May 2008. 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.