

**Article by article comparison of the
agreement between Hong Kong SAR and Spain
on mutual legal assistance in criminal matters (MLA)
and the model text on MLA**

Title

This is an agreement between Hong Kong SAR and Spain instead of an agreement between the two Governments. This arrangement was proposed by Spain as being in accordance with their constitutional requirements. There is no objection. There is a precedent in an earlier agreement between Hong Kong SAR and Ukraine on mutual legal assistance in criminal matters.

Preamble

The first paragraph in the preamble of the model text has been split into two paragraphs at the request of the Spanish side. The purpose is to highlight that the requirement for authorization to conclude the agreement applies to Hong Kong SAR only. This accurately describes Hong Kong's position under Article 96 of the Basic Law and is acceptable.

The third paragraph in the preamble is identical to the second paragraph in the model text.

Article 1: Scope of Assistance

Paragraph (1) is identical to the corresponding paragraph in the model text.

Paragraph (2)

The notable variations from the model text are in respect of :-

- omission of reference to "letters rogatory" in sub-para. (c); (Precedents in many MLA agreements e.g. Canada, France, Ireland, Italy, Korea, Philippines, Ukraine and USA);
- omission of sub-paras. (g) and (i) of the model text; since sub-para. (g) is already subsumed under sub-para. (c) and para. (i) of the model text is now covered by the general provision in new sub-para. (j);
- addition of new sub-para. (i) on exchange of information relating to criminal acts and institution of criminal proceedings in the Requested Party (see discussion of Article 18 below); and
- inclusion of a general provision in sub-para. (j) to comprehend other forms of assistance not inconsistent with the law of the Requested Party. This sub-paragraph was adopted in a

number of earlier agreements (including those with Australia, Canada, France, Italy, New Zealand, Philippines and Singapore) and has proved to be useful.

Paragraph (3)

The substance of paragraph 3 of the model text has been expressed in a positive manner in this paragraph. (Precedent in HK / France MLA agreement).

Paragraph (4) is identical to the model text.

Article 2: Central Authority

Paragraphs (1), (2) and (4) are identical to Article 2 of the model text.

Paragraph (3) has been added to provide for the possibility of changes in the designation of Central Authorities. (Precedents in HK / Ireland MLA; HK / Singapore MLA; HK / Portugal MLA and HK / Ukraine MLA agreements).

Article 3: Grounds for refusal

A different heading has been adopted in this Agreement. (Precedents in HK / Netherlands MLA ; HK / Singapore MLA agreement and HK / Switzerland MLA Agreements).

Paragraph 1(a) to (f) are substantially the same as those in the model text.

Paragraph 1(g) is the equivalent of Article 3(1)(h) of the model text although it has been modified in response to a proposal from the Spanish side so that the requirement only applies to requests the execution of which requires compulsory measures. Similar formulations have been adopted in agreements with other European countries (HK / Italy, HK / Switzerland and HK / France MLA agreements).

Paragraph (2) was added at the request of the Spanish side who wanted to add a reference to “terrorist offences” to highlight the importance placed in the combating of such offences. Hong Kong has no objection. The latter reference (to offences excluded from the category of political offences by international agreements) reflects the international obligations under relevant international instruments e.g. the UN Convention Against Terrorist Bombings. There is a similar formulation in HK’s MLA Agreement with Belgium.

Please note that Article 4(2) of the model text (on the determination of the essential interests) has been omitted as being considered unnecessary by Spain. Hong Kong side also agrees that it is for the Requested Party to determine what its essential interests are. This clause was omitted in many MLA agreements with Hong Kong (e.g. USA, Italy, Switzerland, Singapore, Philippines, Netherlands, Ukraine and France).

Paragraph (3) relates to death penalty offences. At the request of the Spanish side to reflect their legal position, this ground is now a mandatory one. There are similar formulations in Hong Kong's MLA agreements with Portugal, Poland, Ireland, UK and Italy.

Paragraph (4) was added in response to a proposal from the Spanish side to reflect the position under their law. This is a discretionary ground and Hong Kong has no objection. A similar formulation was adopted in Article 4(3) of the HK / Portugal MLA agreement.

Paragraph (5) is the equivalent of paragraph 1(g) in the model text although it has become a discretionary ground for refusal. There are precedents in earlier agreements (e.g. HK / Australia MLA; HK / Canada MLA, HK / Philippines MLA and HK / Switzerland MLA).

Paragraphs (6) to (8) are identical to Article 4(4) to (6) of the model text.

Article 4: Form and language of requests

Article 5 of the model text has been split into separate articles.

Paragraph (1) of Article 4 is the equivalent of Article 5(1) of the model text with some modifications to suit modern means of communication. (See precedent in HK / Netherlands MLA.)

Paragraph (2) of Article 4 is the equivalent of Article 5(4) of the model text.

Article 5: Contents of requests

This article is the equivalent of Article 5(2) of the model text although it has been split in two separate paragraphs for improved presentation. Article 5(2)(d) has been added to include other information not identified in the preceding subparagraphs. (Precedents in HK / Ireland MLA; HK / Korea MLA; HK / Netherlands MLA; HK / Singapore MLA; HK / Ukraine MLA and HK / USA MLA).

Article 6: Execution of Requests

Paragraphs (1) to (4) of this Article are identical to the corresponding article of the model text.

Paragraph 5 is the equivalent of Article 5(3) of the model text.

Article 7: Expenses

The reference to “representation” has been omitted from the heading to reflect the text of this article as agreed by the Parties.

Paragraphs (1) and (2) are identical to paragraphs (2) and (3) of the corresponding article of the model text.

Paragraph (1) of Article 7 of the model text (on legal representation) has been omitted at the request of the Spanish side as under the civil law system they will always represent the Requesting Party. There is no objection. This clause was also omitted from Hong Kong’s MLA agreement with France.

Article 8: Confidentiality

This is the same as the corresponding article (entitled “limitation of use”) in the model text. Similar headings were used in MLA Agreements with Australia and Singapore.

Article 9: Obtaining evidence, documents, articles and records

This is the same as the corresponding article in the model text.

Article 10: Obtaining voluntary statements of persons

This is substantially the same as the model text. The word “voluntary” was inserted both in the heading and in the text of this article to emphasize the nature of the rendering of this type of assistance.

Article 11: Testimony by video conference

This was suggested by the Spanish side and agreed by Hong Kong. A similar clause was found in Article 11 of the Hong Kong / Netherlands MLA agreement.

Article 12: Service of documents

This article is the same as paragraphs (1), (2), (4) and (5) of the corresponding article in the model text. Paragraph (3) of the model text has been omitted at the request of the Spanish side on the basis that they have no capacity to discharge such obligation. This clause was omitted in earlier agreements with e.g. France, USA, Canada, Italy, Korea, Netherlands, UK, Switzerland and Singapore.

Article 13: Publicly available and official documents

This is substantially the same as the corresponding article in the model text. The last sentence in subparagraph (b) was added at the request of the Spanish side to which Hong Kong has no objection.

Article 14: Assistance in the Requesting Party

This article corresponds to the article on “transfer of other persons” in the model text.

Paragraph (1) has been varied slightly because the Requested Party can only invite a person who is not in custody to appear in the Requesting Party.

Paragraph (2) was also varied so as to limit the obligation of the Requested Party to informing the Requesting Party of the person’s response.

Similar formulations have been adopted in earlier MLA agreements with France, Ireland, Switzerland, The Netherlands and UK.

Article 15: Temporary transfer of persons in custody to provide assistance

This is identical to the article on “transfer of persons in custody” in the model text.

Article 16: Immunity

The heading has been changed from safe conduct (Article 17 of the model text) to immunity. There is no objection as it also describes the substance of the article accurately. (Precedent in HK / Italy MLA agreement).

Paragraph (1) is substantially the same as the model text with some drafting changes.

Paragraphs (2) to (5) are identical to the corresponding paragraphs in Article 17 of the model text.

Article 17: Search and seizure

This Article is identical to the model text.

Article 18: Exchange of information and institution of proceedings in the Requested Party

This was included at the request of the Spanish side which considered spontaneous submission of information from one Party to other Party useful. Hong Kong has no objection. There are precedents in Hong Kong's agreements with France, Switzerland and The Netherlands.

Article 19: Proceeds and instrumentalities of crime

This is the equivalent of Article 19 of the model text. The heading was slightly expanded to clarify its application to instrumentalities of crime.

Paragraph (1) is substantially the same as the corresponding paragraph in the model text.

Paragraphs (2) and (3) are identical to the corresponding paragraphs in the model text.

Paragraph (4) is an elaborated version of the corresponding provision in the model text to clarify that confiscated proceeds may be transferred from one Party to the other. There are precedents in the HK / US, HK / The Netherlands, HK / Korea and HK / Ireland MLA agreements.

Paragraph (5) is a definition provision intended to assist in the interpretation of the expressions "proceeds" and "instrumentalities of crime". There are several precedents in MLA agreement with Australia, The Netherlands, Philippines, Singapore, UK New Zealand, and Ukraine.

Article 20: Return of documents, records and items of evidence -

This was added at the request of the Spanish side. This is a useful article and Hong Kong has no objection. Similar articles were found in Hong Kong's agreements with Singapore, Korea and USA.

Article 21: Exemption from authentication

This is the equivalent of Article 14 of the model text.

Article 22: Compatibility with other international agreements

This is the equivalent of Article 3 of the model text.

Article 23: Consultation

This was added at the request of the Spanish side. It is a useful article and similar clauses can be found in earlier agreements with Switzerland, New Zealand, and Singapore.

Article 24: Settlement of disputes

This is identical to the model text.

Article 25: Application

This is a clause on temporal application of the Agreement and was included at the suggestion of the Spanish side. There are precedents in earlier agreements with Singapore, Australia, Canada, Korea, The Netherlands, New Zealand, Philippines and the USA.

Article 26: Entry into force and termination

This is identical to the model text.

Other comments

Article 11 of the model text (location or identity of persons) has been omitted at the request of the Spanish side. In their view, it seems superfluous to devote a separate article on this aspect of assistance when it is already stipulated in Article 1(2)(a) of the Agreement. Hong Kong has no objection. The same was omitted in earlier agreements with France, Korea, The Netherlands and Switzerland.