

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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來函檔號 Your Ref.:LS/R/3/13-14

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8 November 2013

Miss Carrie Wong
Assistant Legal Advisor
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road,
Central, Hong Kong
Dear Miss Wong,

Mutual Legal Assistance in Criminal Matters (Spain) Order
Mutual Legal Assistance in Criminal Matters (Czech Republic) Order

I refer to your letter on the captioned subject dated 4 November 2013.
The Administration's replies to the questions in your letter are set out below.

Background

The Agreements with Spain and Czech Republic on Mutual Legal Assistance in Criminal Matters (MLA) were negotiated based on a model agreement drafted in compliance with the Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525) and approved by the Central People's Government of the People's Republic of China.

Both the Spain and Czech Republic MLA Agreements contain deviations from the model agreement to reflect the unique requirements and requests of these countries.

Refusal on ground of death penalty

Although the ground of death penalty is discretionary under Hong Kong law (section 5(3)(c)), it is mandatory under Spanish law. Therefore, at the request of Spain, Article 3(3) of the Spain Agreement has been formulated in mandatory form. It is consistent with section 5(3)(c) and does not go beyond the scope of this section.

In practice, when a request is made from Spain to Hong Kong, the Secretary for Justice will take into account all factors including the mandatory requirement under the Agreement with Spain and exercise the discretion under section 5(3)(c) accordingly. Article 3(3) has no real effect when Hong Kong makes a request to Spain, as Hong Kong has no death penalty. Similar formulation is also found in the Agreements with Portugal, Poland, Ireland, the UK and Italy.

Refusal on ground of torture, etc

Article 4(1)(e) of the Czech Agreement is an additional ground included at the request of Czech Republic. This is not provided in the model agreement.

Refusal on ground of political offence

Article 3(2) of the Spain Agreement was added at the request of Spain to highlight the importance placed in combating terrorist offences. This ground is not provided in the model agreement.

Refusal on the ground of double jeopardy

In processing a request for MLA from Spain or Czech Republic, Hong Kong will observe all the safeguards as specified under section 5 of Cap.525, subject to the modifications as set out in the respective Schedule 2 of the two Orders. All the statutory safeguards under section 5(1)(e) of Cap.525 and Schedule 2 of the two Orders will be preserved. Accordingly, a request by Spain or Czech Republic for assistance shall be refused if, in the opinion of the Secretary for Justice, the request relates to the prosecution of a person for an external offence in a case where the person –

- (a) has been convicted, acquitted or pardoned by a competent court or other authority in Spain or Czech Republic (as the case may be) or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence; or
- (b) has undergone the punishment provided by the law of Spain or Czech Republic (as the case may be) or Hong Kong, in respect of that offence or of another external offence constituted by the same act or omission as that offence.

It should be noted that similar formulation is found in the Agreements with France, the UK, Korea, Switzerland, Canada, Philippines, Portugal, etc. In any case, Hong Kong will not make or execute an MLA request which relates to the prosecution or a person for an offence in a case where the person has been convicted, acquitted, pardoned or has undergone punishment in respect of the offence or another offence constituted by the same act or omission as that offence.

Safe conduct – civil suit

Article 6(2) of both Agreements provides that a request shall be executed in accordance with the law of the Requested Party. The safeguards to protect the legal rights of a person to provide assistance to or from Hong Kong are contained in sections 17 and 23 of Cap.525.

In practice, the transfer of the person to provide assistance is a consensual arrangement. The transfer must be agreed by both parties to the Agreement as well as the person sought to be transferred. Hong Kong provides and obtains undertakings in accordance with the provisions of sections 17 and 23 of Cap.525 for the consideration of the person sought to be transferred prior to seeking the person's consent. The person, if not satisfied with the proposed arrangements and the undertakings provided, has the option of not giving consent and no transfer will be effected.

Application

Article 25 was added at the request of Spain. This is the usual practice (whether there is any specific provision or not) for the agreement to apply to any

request submitted after the commencement of the agreement even if the relevant act or omission occurs prior to that date.

After Termination

The second sentence of Model Agreement Article XXI (also adopted in Article 26(2) of the Spain Agreement) provides for the continuous execution of requests made prior to the service of the termination notice. This sentence has been excluded at the request of Czech Republic. Similar exclusion is found in the Agreement with the Philippines.

Section 4(2) of Cap.525 provides that the Chief Executive in Council shall not make an order unless the arrangements for mutual legal assistance to which the order relates are substantially in conformity with the provisions of Cap.525. The two Orders do so conform. The model agreement and an article-by-article comparison of the two Orders with the model agreement are enclosed at Annex A to C respectively for your reference.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Huggin Tang', with a small superscript '2' above the final part of the signature.

(Huggin Tang)
for Secretary for Security

c.c.: Department of Justice (attn.: Ms. Elizabeth LIU, SGC/ILD)

Annex A to LC Paper No. CB(2)339/13-14(05)

AGREEMENT BETWEEN

THE GOVERNMENT OF HONG KONG

AND

THE GOVERNMENT OF _____

CONCERNING

MUTUAL LEGAL ASSISTANCE IN

CRIMINAL MATTERS

The Government of Hong Kong, having been duly authorised by the sovereign government responsible for its foreign affairs, and the Government of _____

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

ARTICLE I

SCOPE OF ASSISTANCE

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

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) the obtaining of evidence, articles or documents, including the execution of letters rogatory;
- (d) executing requests for search and seizure;

(e) facilitating the personal appearance of witnesses;

(f) effecting the temporary transfer of persons in custody to appear as witnesses;

(g) obtaining production of judicial or official records;

(h) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities;

(i) providing information, documents and records; and

(j) delivery of property, including lending of exhibits.

(3) Proceedings relating to criminal matters do not include proceedings related to the regulations involving the imposition, calculation or collection of taxes.

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

ARTICLE II

CENTRAL AUTHORITY

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority of Hong Kong shall be the Attorney General or his duly authorised officer. The Central Authority for _____ shall be _____
- (3) Requests under this Agreement shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.

ARTICLE III

OTHER ASSISTANCE

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

ARTICLE IV

LIMITATIONS ON COMPLIANCE

- (1) The Requested Party shall refuse assistance if:

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- (a) the request for assistance impairs the sovereignty, security or public order of _____ or, in the case of the Government of Hong Kong, the State which is responsible for its foreign affairs;
- (b) the request for assistance relates to an offence of a political character;
- (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 will result in a person being prejudiced on account of his race, religion, nationality or political opinions;
- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requested Party, or for which the person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the requested Party;

(f) if it is of the opinion that the granting of the request would seriously impair its essential interests;

(g) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided; and

(h) if the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(2) For the purpose of paragraph (1)(f) the Requested Party may include in its consideration of essential interests whether 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 request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

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(4) The Requested Party may postpone assistance if execution of the request would interfere with 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.

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ARTICLE V

REQUESTS

(1) Requests shall be made in writing except in urgent cases. In urgent cases, requests may be made orally, but shall be confirmed in writing within 10 days thereafter.

(2) Requests for assistance shall include:

(a) the name of the authority on behalf of which the request is made;

(b) a description of the purpose of the request and the nature of the assistance requested;

(c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;

(d) where proceedings have been instituted, details of the proceedings;

(e) a summary of the relevant fact and laws;

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- (f) any requirements for confidentiality;
- (g) details of any particular procedure the Requesting Party wishes to be followed;
and
- (h) details of the period within which the request should be complied with.

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

(4) All documents submitted in support of a request shall be accompanied by a translation in the language of the Requested Party.

ARTICLE VI

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.

ARTICLE VII

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:

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- (a) fees of counsel retained at the request of the Requesting Party;
 - (b) fees of experts;
 - (c) expenses of translation; and
 - (d) travel expenses and allowances of persons.
- (3) If during the execution of the request it becomes apparent that expenses of an extraordinary 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.

ARTICLE VIII

LIMITATIONS OF USE

- (1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished 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 for purposes other than

those stated in the request without the prior consent of the Central Authority of the Requested Party.

ARTICLE IX

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

(1) Where a request is made that evidence be taken for the purpose of a 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, records or other material.

(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, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party

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may, subject to the laws of the Requested Party, appear and question the person giving that evidence.

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

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

(b) where the law of the Requesting Party would permit 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 X

OBTAINING STATEMENTS OF PERSONS

Where a request is made to obtain the statement of a person for the purpose of an investigation or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

ARTICLE XI

LOCATION OR IDENTITY OF PERSONS

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

ARTICLE XII

SERVICE OF DOCUMENTS

(1) The Requested Party shall serve any document transmitted to it for the purpose of service.

(2) The Requesting Party shall transmit a request for the service of a document pertaining to 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.

ARTICLE XIII

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law the Requested Party shall provide copies of publicly available documents.

(2) The Requested Party may provide copies of any document, record or information in the possession of a

government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

ARTICLE XIV
CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

ARTICLE XV
TRANSFER OF PERSONS IN CUSTODY

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purposes of providing assistance pursuant to this Agreement shall if the Requesting Party consents be 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.

ARTICLE XVI

TRANSFER OF OTHER PERSONS

(1) The Requesting Party may request the assistance of the Requested Party in making a person available for the purpose of providing assistance pursuant to this Agreement.

(2) The Requested Party shall, if satisfied that satisfactory arrangements for that person's security will be made by the Requesting Party, request the person to travel to the Requesting Party to provide assistance.

ARTICLE XVII

SAFE CONDUCT

(1) A person who consents to provide assistance pursuant to Articles XV or XVI shall not be prosecuted,

detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or civil matter which preceded his departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article XV, and being free to leave, has not left the Requesting Party within a period of 15 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 Articles XV or XVI shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Articles XV or XVI shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to give evidence pursuant to Articles XV or XVI shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting or Requested party.

ARTICLE XVIII

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 a proceeding or investigation in relation to a criminal matter.

(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, the circumstances 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 XIX

PROCEEDS OF CRIME

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

the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

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

(3) Where a request is made for assistance in securing the confiscation of proceeds such assistance shall be given by whatever means are appropriate. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds to which the request relates.

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

ARTICLE XX

SETTLEMENT OF DISPUTES

Any dispute arising out of 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 XXI

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 the Agreement have been complied with.

(2) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

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

DONE at this day of 19...

**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.

HONG KONG SAR / CZECH REPUBLIC
AGREEMENT ON
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (“THE AGREEMENT”)

ARTICLE BY ARTICLE COMPARISON
WITH THE MODEL AGREEMENT

TITLE AND PREAMBLE

“Government” has been taken out of the text upon the request of the Czech Republic (“the CR”). The Czech delegation explained that since MLA agreements required parliamentary approval they could not as a matter of Czech law be between two governments. There are precedents in the agreements with Ukraine and Japan,

ARTICLE 1: SCOPE OF ASSISTANCE

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

Paragraph (2) is substantially the same as the model Agreement (Article I(2)), but slightly expanded and with some paragraphs consolidated. A new “catch-all” clause, paragraph (j) is added to make it more comprehensive. Similar clauses appear in other signed Agreements, e.g. Japan (1(2)(9)), Italy(I(2)(k)), Ireland (1(2)(j)), Sri Lanka (1(2)(j)), India (I(2)(k)), Finland (1(2)(l)) and Indonesia (1(4)(h)).

Paragraphs (3) and (4) are the same as the model Agreement (Article I(3) & (4)).

ARTICLE 2: CENTRAL AUTHORITY

Consistent with Hong Kong practice and provisions in other signed Agreements.

ARTICLE 3: LANGUAGE OF REQUESTS

Article 3 is an amended version of Article V(4) of the model Agreement. The amended version is more flexible. The same approach was adopted in Article 4(4) of the Agreement with Ireland.

The substance of Article III of the model text is embodied in Article 21.

ARTICLE 4: REFUSAL OR POSTPONEMENT

The title of Article IV has been amended to include as reference to postponement of its granting of assistance. It is acceptable as it reflects the contents of this Article.

Paragraph (1)(d) is substantially the same as Article IV(1)(d) of the model Agreement, with the addition of “sex” at the request of the CR. Similar formulation can be found in the agreements with Australia (IV(1)(d)), New Zealand (IV(1)(d)), Italy (III(1)(e)), South Korea (4(1)(d)), Singapore (3(1)(d)), Israel (4(1)(e)), Germany (4(1)(5)), Japan (3(1)(5)), Philippines (IV(1)(d)), Belgium (IV(1)(d)), Malaysia (4(1)(d)) and Indonesia (6(1)(d)).

Paragraph (1)(e) is added at the request of the CR in accordance with international human rights obligations. It is acceptable to Hong Kong as the same obligations apply.

Paragraphs (1)(f) to (i) are the same as Articles IV(1)(e) to (h) of the model Agreement.

ARTICLE 5: REQUESTS

Paragraph (1) excludes oral requests, but a request sent by fax is included. This is acceptable because it is essentially the same as the model Agreement which specifies that requests should be in writing. Similar formulations can be found in the Agreements with France (II(3)) and Italy (IV(1)).

Paragraphs (2)(a), (b), (f) to (h) are substantially the same as the corresponding provisions in Article V(2) of the model Agreement.

Paragraphs (2)(c) and (e) correspond to Article V(2)(c) and (e) of the model text. Changes have been made at the request of the CR to better reflect their legal requirements. Paragraph 2(d) was added at the request of the CR. All changes are consistent with Hong Kong practice. There are similar provisions in the Agreements with South Korea (5(3)(a)), Switzerland (27(1)(f)), Canada (4(2)(h)), Philippines (V(3)(a)), Germany (5(2)(7)), Malaysia¹ (6(2)(a)), Ireland (4(3)(a)), and Indonesia² (5(3)(a)).

Paragraphs (3) and (4) of Article V of the model Agreement become Article 8(1) and Article 3 of the Agreement respectively.

ARTICLE 6: EXECUTION OF REQUESTS

Substantially the same as Article VI of the model Agreement.

ARTICLE 7: REPRESENTATION AND EXPENSES

¹ Not mandatory.

² Not mandatory.

Paragraphs (1) and (3) are the same as the corresponding provisions in Article VII of the model Agreement.

Paragraph (2) has been expanded to cover fees of receivers and the extensive reproduction of documents. Similar provision covering the costs of managing property can be found in the Agreement with Germany (7(2)).

ARTICLE 8: LIMITATIONS ON USE OF INFORMATION

Paragraph (1) has the same effect as Article V(3) and Article VIII(2) of the model Agreement. Paragraph (2) is substantially the same as Article VIII(1) of the model Agreement.

Paragraph (3) is added at the request of the CR. It is an expanded version of Article VIII(2) of the model Agreement and permits the use of information obtained pursuant to a request to certain defined purposes that are not specified in the request. Those defined purposes are consistent with the spirit of the Agreement and, hence, are acceptable.

ARTICLE 9: OBTAINING OF EVIDENCE, DOCUMENTS, ARTICLES OR RECORDS

The title has been expanded to be more comprehensive and consistent with the contents of the Article.

Paragraph (1) is a consolidation of Article IX (1) and (2) of the model Agreement. The new paragraph (1) is modelled on Article 3 of the European Convention on Mutual Assistance in Criminal Matters at the request of the CR. It has the same effect as paragraphs (1) and (2) of the model text and is more concise.

Paragraphs (2) to (5) are identical to Article IX (3) to (6) of the model Agreement.

ARTICLE 10: OBTAINING STATEMENTS OF PERSONS

Article 10 is identical to Article X the model Agreement.

ARTICLE 11: LOCATION OR IDENTITY OF PERSONS

Article 11 is identical to Article XI the model Agreement.

ARTICLE 12: SERVICE OF DOCUMENTS

Article 12 is substantially the same as Article XII of the model Agreement.

ARTICLE 13: PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

Article 13 is substantially the same as Article XIII of the model Agreement.

ARTICLE 14: CERTIFICATION AND AUTHENTICATION

Article 14 has been amended to specifically state that no consular certification is required. This amendment is acceptable as neither Hong Kong nor Czech law requires such certification or authentication.

ARTICLE 15: TRANSFER OF PERSONS IN CUSTODY

Paragraph (1) is identical to Article XV(1) of the model Agreement.

Paragraph (2) is substantially the same as Article XV(2) of the model Agreement.

ARTICLE 16: TRANSFER OF OTHER PERSONS

Paragraph (1) has been slightly amended into the more appropriate wording “inviting a person to appear”, since the Requested Party cannot “make available” a person to provide assistance. The substance is the same as Article XVI(1) of the model text.

Paragraph (2) Consequent upon changes to paragraph (1), the new paragraph (2) limits the obligation of the Requested Party to informing the Requesting Party of the person’s response and not to oblige the Requested Party to consider the question of the person’s security as in Article XVI(2) of the model Agreement. The question of security is for the person himself to consider when deciding whether to agree to appear.

Paragraph (3) deals with the question of the person’s expenses. There is similar provision in other signed Agreements, e.g. Canada (13(2)), France (XV(1)), Belgium (XV), Switzerland (18) and Singapore (8).

ARTICLE 17: SAFE CONDUCT

Paragraph (1) deals separately with criminal and civil immunity. It is substantially the same as Article XVII (1) of the model Agreement. A similar formulation can be found in HKSAR's agreement with Ukraine (17).

Paragraphs (2) to (5) are the same as Article XVII (2) – (5) of the model Agreement.

ARTICLE 18: SEARCH AND SEIZURE

Paragraphs (1) and (2) are the same as Article XVIII (1) and (2) of the model Agreement.

Paragraph (3) has been amended at the request of the CR to include a second sentence to the effect that the Requesting Party may dispose of seized property provided that the Requested Party consents. This is consistent with the approach in Article XVIII(3) of the model Agreement.

ARTICLE 19: PROCEEDS OF CRIME

Paragraphs (1), (2) and (4) are substantially the same as Article XIX of the model Agreement.

Paragraph (3) has been amended to restrict the execution of the request to that provided by the laws of the Requested Party. This is appropriate since the Hong Kong SAR can only provide assistance pursuant to the Mutual Legal Assistance in Criminal Matters Ordinance [Cap. 525], in cases where the offence carries a maximum penalty of 2 years or more, under Laws of the Hong Kong SAR.

ARTICLE 20 : SPONTANEOUS INFORMATION

New Article added at the request of the CR. The Article allows law enforcement agencies to provide to each other information considered relevant for criminal proceedings without a request. Similar formulation can be found in the agreements with Belgium and Switzerland. Paragraphs (2) and (3) provide that the use of information may be restricted.

ARTICLE 21: SETTLEMENT OF DISPUTES

Article 21 is identical to Article XX of the model Agreement.

ARTICLE 22: COMPATIBILITY WITH OTHER AGREEMENTS

Article 22 is substantially the same as Article III of the model Agreement.

ARTICLE 23: ENTRY INTO FORCE AND TERMINATION

Paragraph (1) is the same as Article XXI(1) of the model Agreement.

Paragraph (2) has been amended at the request of the CR to provide for termination to take effect 6 months after the giving of notice. The second sentence of Article XXI(2) of the model Agreement, which provides for the continuous execution of requests made prior to the service of the termination notice, has been deleted at the request of the CR. A similar deletion was made in the Agreement with the Philippines.

SIGNATURE PARAGRAPH

The English text is made the prevailing text in case where disputes concerning interpretation arise. This is acceptable since the agreement was negotiated in English and English is an official language of the Hong Kong SAR.

Precedents can be found in HKSAR's agreements with Ukraine, Poland, Singapore, Finland and Indonesia.