

**立法會**  
***Legislative Council***

LC Paper No. LS48/15-16

**Paper for the House Committee**

**Further Report by Legal Service Division on  
Proposed Resolutions under section 4 of the  
Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)**

**Mutual Legal Assistance in Criminal Matters (Sweden) Order  
Mutual Legal Assistance in Criminal Matters (Argentina) Order**

Members may recall that at the House Committee meeting on 11 March 2016, the Legal Service Division (LSD) reported that we had written to the Administration to request, among others, clarifications of certain matters in respect of the Mutual Legal Assistance in Criminal Matters (Sweden) Order (Sweden Order) and the Mutual Legal Assistance in Criminal Matters (Argentina) Order (Argentina Order) and will report further, if necessary.

2. In response to our request, the Administration has provided the reasons for the omission and the inclusion of certain articles in the Agreement between the Government of Hong Kong and the Government of the Kingdom of Sweden in Schedule 1 to the Sweden Order and the Agreement between Hong Kong and the Argentine Republic in Schedule 1 to the Argentina Order and clarified the operation of certain articles in the two Agreements. The article-by-article comparison of the two Agreements with the model agreement and also the model agreement are provided in the Annexes to the Administration's reply. Copies of LSD's letter to the Administration and the Administration's reply (without the Annexes) are attached. Copies of the Annexes, due to their voluminous size, are not attached to this report but will be made available for Members' perusal upon request.

3. No legal or drafting difficulties have been identified in relation to the two Orders.

4. Members may also recall that at the House Committee meeting on 11 March 2016, a Member considered it necessary to form a subcommittee to study the two Orders in detail. However, since only one Member has signified to join the proposed subcommittee by the deadline for signification of membership,

Members were informed vide LC Paper No. CB(2)1182/15-16 that the proposed subcommittee has not been formed in accordance with House Rules 21(b) and 26(f). The first meeting of the proposed subcommittee scheduled for 31 March 2016 was accordingly cancelled.

Encls.

Prepared by

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Assistant Legal Adviser  
Legislative Council Secretariat  
1 April 2016

香港特別行政區政府  
保安局



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10 March 2016

Miss Rachel DAI  
Assistant Legal Adviser  
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Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong

Dear Miss DAI,

**Mutual Legal Assistance in Criminal Matters (Sweden) Order**  
**Mutual Legal Assistance in Criminal Matters (Argentina) Order**

Thank you for your letter dated 3 March 2016. Our response is set out below.

**The Sweden Order**

Article 4 – Grounds for refusal: death penalty

2. The provision has been omitted at the suggestion of the Swedish side on the ground that neither Hong Kong law nor Swedish law had offences that carry the death penalty. It was made clear at the negotiation that in the event that Sweden reintroduced such offences in the future and raised the relevant request, Hong Kong would rely on Article 4(1)(a)(ii) to refuse assistance. Sweden accepted it.

Article 14(2) – Transfer of persons in custody

3. Under Article 6(5) of the Agreement, before refusing assistance (including assistance sought under Article 14), the Requested Party shall inform the Requesting Party of the reasons for considering refusal, and consult with that Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary. Under Article 6(6), the Requested Party shall inform the Requesting Party in writing of a decision to refuse assistance and the reason therefor.

**The Argentina Order**

Article 6 – Denial of the request

***Article 6(2) – double criminality***

4. Article 6.2 is formulated as follows:-

*“The Requested Party may, and if required by its law shall, deny assistance...”*

The formulation was to cater for the different legal requirements of Hong Kong and Argentina. The Argentine side explained that the lack of double criminality is not a mandatory ground for refusal under the Argentine law. This formulation has been adopted in many other agreements on mutual legal assistance on criminal matters (MLA) Hong Kong has entered into, e.g. the agreements with Belgium (Article IV(1)), Denmark (Article 4(1)), Singapore (Article 3(4)) and Sri Lanka (Article 4(1)).

***Refusal of requests which relate to investigations into an external offence relating to taxation***

5. The requirement under section 5(2) of Cap. 525 is provided for under Article 1.3 of the Agreement. Article 1.3 states that the Parties shall provide assistance in connection with criminal offences against a law relating to taxation, customs duties and other revenue matters. The express reference to “criminal offence” in Article 1.3 would rule out requests the primary purpose of which is for the assessment or collection of tax which fall foul of section 5(2). Similar formulations are found in Hong Kong’s MLA agreements with France (Article 1(3)), Finland (Article 1(2)(k)) and Spain (Article 1(3)).

Article 19 – Forwarding information with a view to proceedings

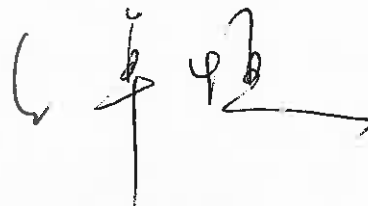
6. This Article was added at the request of Argentina to enhance cooperation between the two Parties. The provision is based on Article 21 of the European Convention on Mutual Legal Assistance in Criminal Matters. It allows spontaneous provision of criminal information to the other Party. For example, it enables a Party to pass on information concerning the commission of an offence in its own area which it does not choose to prosecute or which it cannot prosecute (for instance, where the person take refuge in the other Party). It will enable the other Party to consider exercising jurisdiction.

7. Similar provisions can be found in Hong Kong's MLA agreements with Switzerland (Article 16), Belgium (Article XX), Denmark (Article 20) and Spain (Article 18).

**Article-by-article comparison**

8. The article-by-article comparison of the two Agreements with the model agreement is attached at Annex A. The model agreement is at Annex B.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Vic YAU', with a long horizontal stroke extending to the right.

( Vic YAU )  
for Secretary for Security

cc. DoJ (Attn: Ms Anthea LI, Acting DPGC) (By fax: 3918 4792)  
(Attn: Miss Bonita WONG, GC) (By fax: 3918 4613)

**Agreement between  
the Government of the Hong Kong Special Administrative Region of  
the People's Republic of China and  
the Government of the Kingdom of Sweden  
Concerning Mutual Legal Assistance in Criminal Matters**

**Article by Article Comparison with the model Agreement**

## **Title and Preamble**

The title and preamble of the Agreement are substantially the same as the model text.

## **Article 1**

### Paragraph (1)

The wording has been revised slightly at the suggestion of the Swedish side to state that the Parties shall provide each other “the widest measure of” mutual assistance. Similar wording can be found in Hong Kong’s Agreements with The Netherlands, Belgium, Denmark, France and Switzerland.

### Paragraph (2)

This is substantially the same as the model text. Basically, the modifications are as follows:

- “Evidence, articles or documents” in Article I(2)(c) of the model text has been omitted as being unnecessary in view of sub-paragraph (g). The reference to “letters rogatory” in that Article has been omitted. Precedents can be found in many agreements signed by Hong Kong, including the Agreements with Belgium, Canada, Denmark, France, Ireland, Italy, the Netherlands and New Zealand.
- Article I(2)(j) of the model text on delivery of property etc. has been simplified and is amalgamated in sub-paragraph (g) of the Agreement.
- At the request of the Swedish side, sub-paragraph (i) on “restitution of property” has been added to the Agreement. A precedent can be found in Hong Kong’s Agreement with Switzerland.
- Sub-paragraph (j) has been added. This is intended to capture other types of assistance available to the Requesting Party which are not identified in the

preceding sub-paragraphs. Precedents can be found in Hong Kong's Agreements with Australia, Belgium, Canada, France, Italy, New Zealand, Philippines and USA.

#### Paragraph (3)

At the suggestion of the Swedish side, paragraph (3) adopts the formulation of the relevant provisions in Hong Kong's Agreements with Portugal, New Zealand, Australia, the Netherlands, Italy, Korea and the Philippines. It states that assistance shall include assistance in connection with taxation offences but exclude assistance in connection with non-criminal investigations or proceedings relating thereto.

#### Paragraph (4)

It is the same as Article I(4) of the model text.

## **Article 2**

#### Paragraph (1)

At the suggestion of the Swedish side, this adopts the formulation of the relevant provisions in Hong Kong's Agreements with Denmark, Portugal and The Netherlands.

#### Paragraph (2)

This is the same as the model text.

#### Paragraph (3)

This paragraph is developed from the model text, but in order to fulfil a legal requirement in Sweden, it specifies that Central Authorities may make requests for assistance on behalf of authorities that are responsible for criminal matters in the respective Parties.

## **Article 3**

It is substantially the same as the model text.

## **Article 4**

#### Heading

At the suggestion of the Swedish side, the heading has been changed to "grounds for refusal" in order to reflect the content of this article more precisely. Precedents can be found in Hong Kong's Agreements with Denmark, The

Netherlands, Switzerland and Singapore.

### Paragraph (1)

This is substantially the same as the model text. Basically, the modifications are as follows:

- The Chapeau, which has been revised, states that whether the grounds for refusal as listed in this paragraph are mandatory or discretionary depends on the law of the respective Parties. A precedent can be found in Hong Kong's Agreement with Sri Lanka. Where Hong Kong is the Requested Party, all grounds for refusal as listed in this paragraph shall be mandatory under section 5(1) of the Mutual Legal Assistance in Criminal Matters Ordinance (MLA Ordinance) as modified by Schedule 2 of the Mutual Legal Assistance in Criminal Matters (Sweden) Order.
- Article 4(1)(a) and 4(1)(b) is the amalgamation of Article IV(1)(a) and IV(1)(f) of the model text. Precedents can be found in Hong Kong's Agreements with Denmark and The Netherlands. At the suggestion of the Swedish side, "general principles of national law" was added in Article 4(1)(b) to reflect the legal position of Sweden.
- Article 4(1)(d) is substantially the same as Article IV(1)(c) of the model text. The wording follows section 5(1)(c) of the MLA Ordinance. Precedents can be found in Hong Kong's Agreements with Belgium, Ireland, Israel, Italy, Poland and The Netherlands.
- Article 4(1)(e) is substantially the same as Article IV(1)(d) of the model text, and provides for additional grounds for refusal, i.e. where the request for assistance has been made for the purpose of prosecuting a person on account of that person's race or sex, or that that person's position may be prejudiced for such reasons. Precedents on the addition of "sex" can be found in Hong Kong's Agreements with Belgium, Italy, Israel, New Zealand, Korea, Philippines and Singapore. Precedents on the addition of "race" can be found in Hong Kong's Agreements with New Zealand and Singapore.
- Article 4(1)(f) is substantially the same as Article IV(1)(e) of the model text. The wording follows Article 4(1)(e) of Hong Kong's Agreement with Denmark.

### Paragraph (2)

It elaborates on the standards for assessing double criminality for requests relating to taxation offences. Precedents can be found in Hong Kong's Agreements with Ireland, UK and Denmark.

### Paragraph (3)



This is substantially the same as Article IV(1)(g) of the model text.

Article IV(2) of the model text (on consideration of essential interests) has been omitted at the suggestion of the Swedish side. Precedents can be found in Hong Kong's Agreements with Denmark, The Netherlands and Poland.

At the suggestion of the Swedish side, Article IV(3) of the model text on requests relating to offences that carry the death penalty has been omitted. Neither Hong Kong law nor Swedish law has offences that carry the death penalty. In the event that Sweden later introduces such offences and raises relevant requests, Hong Kong will rely on the ground of "essential interests" in Article 4(1)(a) to refuse assistance. Precedents can be found in Hong Kong's Agreements with USA, Philippines, The Netherlands, Singapore, Malaysia, Indonesia, Japan and India.

Article IV(4) and IV(5) of the model text are Article 6(4) and 6(5) of the Agreement.

Article IV(6) of the model text was omitted at the suggestion of the Swedish side. A precedent can be found in Hong Kong's Agreements with The Netherlands.

## **Article 5**

### Paragraph (1)

This permits the making of requests through different means. Precedents can be found in Hong Kong's Agreements with Denmark and The Netherlands.

### Paragraphs (2) and (3)

These provisions on contents of requests are substantially the same as Article V(2) of the model text and are more detailed.

Articles 5(3)(a) to (d), (f), (i) and (j) are new. Similar provisions can be found in Hong Kong's Agreements with South Korea, Ireland, Philippines, New Zealand and Poland.

Article V(3) of the model text on obligation to keep a request and its contents confidential is now Article 8(1) of the Agreement.

### Paragraph (4)

In this article "unless agreed otherwise" has been added because Sweden can handle requests in English from Hong Kong. This adds flexibility to the processing of requests. Precedents can be found in Hong Kong's Agreements with Italy and South Korea.

## **Article 6**

### Paragraph (1)

This is the same as Article VI(1) of the model text.

### Paragraph (2)

This is substantially the same as the model text. Precedents of the added “the provisions of this Agreement” in this Article can be found in Hong Kong’s Agreements with The Netherlands and Denmark.

### Paragraph (3)

This is the same as the model text.

### Paragraphs (4) and (5)

These are the same as Article IV(4) and IV(5) of the model text.

### Paragraph (6)

This is the same as Article VI(4) of the model text.

## **Article 7**

### Paragraph (1)

This is the same as Article VII(1) of the model text.

### Paragraph (2)

- Article 7(2)(a) to (c) are the same as the model text.
- Sub-paragraph (d) has been revised to state that the Requesting Party is only responsible for the expenses of those who travel between the Requesting Party and the Requested Party.
- Following the European Convention on Mutual Legal Assistance 2000, sub-paragraph (e) is added to state that the expenses related to video conferences shall be borne by the Requesting Party.

### Paragraph (3)

This is substantially the same as the model text.

## **Article 8**

## Heading

The word “Confidentiality” is added to the heading to reflect the content of this article. Precedents can be found in Hong Kong’s Agreements with Australia and Indonesia.

## Paragraph (1)

It follows Article V(3) of the model text. At the request of the Swedish side, the qualification “The Requested Party shall, to the extent permitted by its law and if so requested, shall keep the request ... confidential” is added to reflect Sweden’s law on freedom of information. Similar provisions can be found in Hong Kong’s Agreements with the United Kingdom and USA.

## Paragraph (2)

It is formulated based on Article VIII(1) of the model text. The qualification “The Requested Party, to the extent permitted by its law and if so requested, shall keep confidential ... information provided” is also added. A precedent can be found in Hong Kong’s Agreement with Italy.

## Paragraph (3)

It is substantially the same as Article VIII(2) of the model text.

# **Article 9**

This article is substantially the same as Article IX of the model text.

Article IX(3) of the model text is now Article 5(3)(e) of the Agreement.

# **Article 10**

This is a new provision allowing both Parties to take evidence by video conference. Precedents can be found in Hong Kong’s Agreements with Israel and The Netherlands.

# **Article 11**

This is substantially the same as Article XII of the model text.

## Paragraph (3)

At the request of the Swedish side, Article 11(3) states that a request for service of a document requiring the person served to appear in the Requesting Party shall reach the Requested Party 30 days before the scheduled appearance. This

requirement is in line with the reasonable time as stated in Article XII(2) of the model text.

At the request of the Swedish side, in the Agreement the reference to notices of outstanding warrants or other judicial orders in Article XII(3) of the model text has been omitted. Precedents can be found in Hong Kong's many agreements with foreign jurisdictions, including those with Canada, Belgium, Denmark, France, Italy, Poland, The Netherlands, USA, Singapore, Switzerland and the United Kingdom.

## **Article 12**

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

## **Article 13**

This is substantially the same as Article XIV of the model text. Precedents can be found in Hong Kong's Agreements with the Netherlands, Poland and Belgium.

## **Article 14**

This article is substantially the same as Article XV of the model text.

### Paragraph (1)

It specifically sets out the purposes of the transfer of a person in custody to the Requesting Party and states that such transfer is not for the investigation of any criminal liability of the person, so as to reflect the requirements of the Swedish law. It is also in line with the Hong Kong law and practice. Precedents can be found in Hong Kong's Agreements with France and Italy.

### Paragraph (2)

It identifies the grounds for refusal of transfer. Precedents can be found in Hong Kong's Agreements with Denmark, The Netherlands and Switzerland.

### Paragraph (3)

It is substantially in line with Article XV(2) of the model text, and follows the wording in Hong Kong's Agreements with Australia, Canada and the Netherlands.

### Paragraph (4)

It reflects the provision of section 24 of the M LA Ordinance. Hong Kong's Agreements with Poland, USA, Korea, Belgium and Ireland have included similar provisions.

#### Paragraph (5)

This Article and Article 15(3) taken together are equivalent to Article XVII(5) of the model text.

### **Article 15**

#### Paragraph (1)

It is substantially the same as Article XVI(1) of the model text.

#### Paragraph (2)

It is substantially the same as Article XVI(2) of the model text, save that the requirement in the model text that the Requested Party must be satisfied that satisfactory arrangement for that person's security will be made by the Requesting Party has been omitted, as it should be a matter for that person to consider in deciding whether to consent to travel to the Requesting Party. Precedents can be found in Hong Kong's many agreements with foreign jurisdictions, including those with Canada, France, Ireland, the USA, the UK, Denmark and Belgium.

### **Article 16**

It is substantially the same as Article XVII of the model text, but it does not include immunity from civil suits under Article XVII(1) of the model text because Sweden is unable to afford such protection. However, as provision of assistance in the Requesting Party is voluntary in nature, the person concerned may take this factor into account before making his decision whether to consent to provide assistance. Precedents can be found in Hong Kong's Agreements with Poland, Israel, Canada, UK and USA.

### **Article 17**

This article is substantially the same as Article XVIII of the model text.

### **Article 18**

This article is substantially the same as Article XIX of the model text.

#### Paragraph (3)

The second sentence in Article XIX(3) of the model text citing examples of means of providing assistance has been omitted from this paragraph at the request of the Swedish side. Precedents can be found in Hong Kong's Agreements with

Belgium, Denmark, France, The Netherlands and the United Kingdom.

#### Paragraph (5)

It provides for a definition of proceeds of crime. Precedents can be found in Hong Kong's Agreements with Australia, New Zealand, Philippines, Singapore, the United Kingdom and Ukraine.

### **Article 19**

This is substantially the same as Article XX of the model text.

### **Article 20**

This is substantially the same as Article XXI of the model text. At the suggestion of the Swedish side, the requirement of "written notice" is inserted in paragraph. Precedents can be found in Hong Kong's Agreements with Australia, Korea, Israel, the Netherlands, Singapore, Philippines and USA.

### **Language texts of the Agreement**

As the negotiation was conducted in English, it was agreed that in the event of divergence in interpretation of the different language texts of this Agreement, the English text shall prevail. Precedents can be found in Hong Kong's Agreements with Israel, Singapore, Ukraine and Poland.

### **Others**

The provisions of Article X (regarding obtaining statements of persons) and Article XI (regarding location or identity of persons) of the model text are omitted at the request of the Swedish side. Given that Article 1(2)(a) and (c) of the Agreement have covered the relevant items of assistance and that Articles X and XI of the model text do not contain substantive contents on execution of requests, omission of the above provisions will not affect the processing of requests. Precedents can be found in Hong Kong's Agreements with Italy, Belgium, France, Korea, Denmark, The Netherlands and Switzerland.

**Agreement between  
the Hong Kong Special Administrative Region of  
the People's Republic of China and  
the Argentine Republic  
on Mutual Legal Assistance in Criminal Matters**

**Article-by-article Comparison with the model Agreement**

## **Title and Preamble**

The title and preamble of the Agreement are substantially the same as the model text. At the suggestion of the Argentine side, the Agreement was made between the two places (not governments). Hong Kong's Agreement with Ukraine is a precedent.

## **Article 1**

This article is substantially the same as the model text.

### Paragraph 3

This is substantially the same as Article I(3) of the model text. It states that assistance shall include assistance in connection with taxation offences. The formulation follows Hong Kong's Agreements with France, Germany, Russia and Spain.

### Paragraph 5

This is a new provision. It states the matters to which the Agreement shall not apply. Precedents can be found in Hong Kong's Agreements with Switzerland, Malaysia and Indonesia.

## **Article 2**

### Paragraph 1

This is substantially the same as Article II(1) and (2) of the model text.

### Paragraph 2

This is a new provision, providing that the Central Authorities shall communicate directly with one another. Precedents can be found in Hong Kong's Agreements with Spain and Czech.

### Paragraph 3

This is a new provision, providing that the Central Authorities shall consult to make the present Agreement as effective as possible. Precedents can be found in Hong Kong's Agreement with Switzerland.

## **Article 3**

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

## **Article 4**

### Paragraph 1

This is substantially the same as Article V(1) of the model text, and adds that in urgent cases requests may be transmitted by facsimile, electronic mail or other means of communication.

### Paragraphs 2 and 3

Article 4.2 and 4.3 are on the contents of requests. They are substantially the same as Article V(2) of the model text, and contain more details. Article 4.3(a) to (f), (h), (k) and (l) are new provisions. Similar provisions can be found in Hong Kong's Agreements with South Korea, Ireland, the Philippines and Poland.

### Paragraph 4

This was added at the request of the Argentine side, allowing the Requested Party to request additional information. This is in line with Hong Kong's practice.

### Paragraph 5

This is substantially the same as Article V(4) of the model text.

## **Article 5**

### Paragraph 1

This is substantially with the same as Article VI(1) and (2) of the model text.

### Paragraph 2

This provision in effect combines Article IV(4), (5) and (6). Precedents can be found in Hong Kong's Agreements with Poland and the USA.

### Paragraph 3



This is substantially the same as Article VI(3) of the model text.

#### Paragraph 4

This is substantially the same as Article V(3) of the model text, and the requirement that “if the request cannot be executed without breaching the requested confidentiality, the Requested Party shall so inform the Requesting Party,” is added. Precedents can be found in Hong Kong’s Agreements with Indonesia and South Africa.

#### Paragraph 5

This was added at the suggestion of the Argentine side and is a new provision. Precedents can be found in Hong Kong’s Agreements with Malaysia, South Africa, Indonesia and the USA.

#### Paragraph 6

This is substantially the same as Article VI(4) of the model text.

## **Article 6**

#### Paragraph 1

This contains the grounds for refusal of assistance provided for in Article IV (1) (except sub-paragraphs (g) and (h)) of the model text. The grounds under Article IV(1)(h) and (g) of the model text were moved to Article 6(2) and (4) of the Agreement respectively.

For Article 6(1)(b), at the suggestion of the Argentine side, the request being made for the purpose of prosecuting and punishing a person on the grounds of sex and social conditions is added as refusal grounds, to reflect Argentina’s legal requirements. Precedents on the inclusion of “sex” can be found in Hong Kong’s Agreements with Belgium, Italy, Israel, New Zealand, South Korea, the Philippines and Singapore. “Social conditions” was added at the suggestion of the Argentine side, and is in line with the objective of the agreement, which entails the refusal of a request not made for the purpose of preventing, investigating or prosecuting crimes.

#### Paragraph 2

The lack of double criminality is not a mandatory ground of refusal under the Argentine law, but is a mandatory ground under Hong Kong law. The formulation of this Article caters for the different legal requirements of both sides. Precedents can be found in Hong Kong’s Agreements with Belgium, Denmark, Singapore and Sri Lanka.

Article IV (2) of the model text (regarding “consideration of essential interests”)

was omitted at the request of the Argentine side. Precedents can be found in Hong Kong's many agreements with foreign jurisdictions, including those with Denmark, the Netherlands and Poland.

#### Paragraph 3

This is substantially the same as Article IV(3) of the model text.

### **Article 7**

This article is substantially the same as Article IX of the model text.

#### Paragraph 3

This provision corresponds to Article IX(5) of the model text. Paragraph 3(b) provides that the evidence shall nonetheless be taken even if the person claims that the law of the Requesting Party would permit him to decline to give evidence, with the claim to be subsequently resolved by the Requesting Party. Precedents can be found in Hong Kong's Agreements with the USA, Israel, Ireland, France and Italy.

### **Article 8**

This is substantially the same as Article XIII(2) of the model text.

### **Article 9**

#### Paragraph 1

This is a new provision, providing that the requested documents etc. shall be transmitted as originals or certified copies. It is in line with Hong Kong's practice in processing requests.

#### Paragraph 2

This is a new provision and is in line with the requirements under section 12(11) of the Mutual Legal Assistance in Criminal Matters Ordinance (MLAO).

### **Article 10**

This is substantially the same as Article XVIII of the model text. Paragraph 3 is a new provision, providing that property shall be transmitted through the Central Authorities. It is in line with Hong Kong's practice in processing requests.

### **Article 11**

This is a new provision, allowing both sides to take evidence by video conference. Precedents can be found in Hong Kong's Agreements with Israel and the Netherlands.

## **Article 12**

### Paragraph 1

This is substantially the same as Article XVI of the model text, but the requirement in the model text that the Requested Party must be satisfied that satisfactory arrangement for that person's security will be made by the Requesting Party has been omitted, as it should be a matter for that person to consider in deciding whether to consent to travel to the Requesting Party. Precedents can be found in Hong Kong's Agreements with Canada, France, Ireland, the USA, the UK, Denmark and Belgium.

### Paragraph 2

This is a new provision, providing that the Requesting Party shall indicate the extent to which expenses will be paid, and the Requested Party shall promptly inform the Requesting Party of the response of the person. Precedents can be found in Hong Kong's Agreements with France and Israel.

## **Article 13**

This is substantially in line with Article XV of the model text. Paragraph (2) is more detailed than the model text, providing for the arrangements and limitations for transfer of persons in custody. Precedents can be found in Hong Kong's Agreements with Japan, Indonesia and the USA.

## **Article 14**

### Paragraph 1

This sub-article has not incorporated the immunity from civil suits under Article XVII(1) of the model text, because the Argentina cannot provide this immunity. However, as the travel to the Requesting Party to provide assistance is on a voluntary basis, the person may take this factor into account when considering whether to consent to provide the assistance. Precedents can be found in Hong Kong's Agreements with Poland, Israel, Canada, the UK and the USA.

### Paragraph 2

This is a new provision, providing for the immunities available to a person who consents to appear in the Requesting Party to answer for himself. Precedents can be

found in Hong Kong's Agreement with France and Switzerland.

#### Paragraphs 3 to 5

These are substantially the same as Article XVII(3) to (5) of the model text.

#### Paragraph 6

This is substantially the same as Article XVII(2) of the model text, save that the period of safe conduct was changed at the suggestion of the Argentine side from fifteen to ten days from the date when the person's presence is no longer required in the Requesting Party.

### **Article 15**

#### Paragraphs 1 to 2

These are substantially the same as Article XIX(1) to (3) of the model text.

#### Paragraph 3

This carries the same meaning as Article XIX(4) of the model text. Precedents can be found in Hong Kong's Agreements with Japan and Poland.

### **Article 16**

This is a new provision. Its contents are in line with the provisions in the MLAO that protect the interests and rights of bona fide third parties (sections 10(14), 12(11), 15(5)(c) and sections 7(6) and 8(7) of Schedule 2). Precedents can be found in Hong Kong's Agreements with Indonesia, the Netherlands and Malaysia.

### **Article 17**

#### Paragraphs 1 to 3

These are substantially the same as Article XII(1), (2) and (4) of the model text.

The provision regarding notice of outstanding warrants or other judicial orders in Article XII(3) of the model text was omitted at the request of the Argentine side. Precedents can be found in Hong Kong's Agreements with France, USA, Germany and Switzerland.

Article XII(5) of the model text was omitted at the suggestion of the Argentine side. The Argentine side considered that for cases where Hong Kong is the Requesting Party, this paragraph would restrict the Argentine court's power to impose compulsory measures to obtain evidence. For cases where Hong Kong is

the Requested Party, section 31(3) of the MLA Ordinance requires that failure to comply with any process is not an offence. The wording “The Requested Party shall serve ... in accordance with and subject to its laws” was specifically added to Article 17(1) of the Agreement.

## **Article 18**

### **Paragraphs 1 and 2**

These are substantially the same as Article VII(2) and (3) of the model text.

Article VII(1) of the model text is omitted at the suggestion of the Argentine side. The Argentine side indicated that it would refer requests to its competent authorities for processing, and it would not represent the Requesting Party in proceedings.

## **Article 19**

This is a new provision, allowing either party to, without prior request, submit information or evidence to the other party. Precedents can be found in Hong Kong’s many Agreements with foreign jurisdictions, including those with Spain, Czech and Switzerland.

## **Article 20**

This is substantially the same as Article XIV of the model text.

## **Article 21**

This is substantially the same as Article XX of the model text.

## **Article 22**

This is substantially the same as Article XXI of the model text, and adds paragraph (2) at the suggestion of the Argentine side, providing that the Agreement may be amended. Precedents can be found in Hong Kong’s Agreements with Indonesia and Malaysia.

## **Language texts of the Agreement**

As the negotiation of this Agreement was conducted in English, the two sides agreed that the English text should prevail in case of any divergence of interpretation

of the different language texts of the Agreement. Precedents can be found in Hong Kong's Agreements with Israel, Singapore, Ukraine and Poland.

## **Others**

Article III of the model text ("Other Assistance") is omitted. Precedents can be found in Hong Kong's Agreement with Italy. Articles X ("Obtaining Statements of Persons") and XI ("Location or Identity of Persons") are omitted at the suggestion of the Argentine side. This poses no material difference as the relevant items of assistance have been covered by Article 1.2(a) and (d) of the Agreement, and that the two Articles in the model text do not contain substantive contents. Precedents can be found in Hong Kong's Agreements with Italy, Belgium, France, South Korea, Denmark, the Netherlands and Switzerland.

#279452

**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 authorized 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:
  - (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 omission 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.
- (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.

## **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;
  - (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 reasons 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:

(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 witness 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 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 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) Paragraphs (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..

*[MLA\_model text\_JLG\_e.DOC]*





立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF :  
本函檔號 OUR REF : LS/R/5/15-16  
電話 TELEPHONE : 3919 3504

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By Fax (2524 3762)

3 March 2016

Mr YAU Cheuk-hang, Vic  
Principal Assistant Secretary for Security  
Security Bureau  
10th floor, East Wing  
Central Government Offices  
2 Tim Mei Avenue  
Tamar  
Hong Kong

Dear Mr YAU,

**Mutual Legal Assistance in Criminal Matters (Sweden) Order**  
**Mutual Legal Assistance in Criminal Matters (Argentina) Order**

We are scrutinizing the above Orders with a view to advising Members and should be grateful if you could clarify the following matters:

**The Sweden Order**

Article 4 - Grounds for refusal

There is no provision under Article 4 of the Agreement with Sweden to cover the situation of refusal of assistance if the request relates to an external serious offence punishable with death. Is there any reason for not including such a provision, having regard to section 5(3) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)?

Article 14 - Transfer of persons in custody

Article 14(2) of the Agreement with Sweden sets out the grounds on which the transfer of persons in custody for the purpose of providing assistance may be refused. Is the Requested Party required to give the reason for refusal to the Requesting Party?

## **The Argentina Order**

### Article 6 - Denial of the request

Section 5(1)(g) of Cap. 525 provides that a request by a place outside Hong Kong for assistance shall be refused if, in the opinion of the Secretary for Justice, the request relates to an act or omission that, if it had occurred in Hong Kong, would not have constituted a Hong Kong offence. Please explain why "may" instead of "shall" is used in Article 6, paragraph 2 of the Agreement with Argentina to make it a discretionary ground for refusal.

There is no provision under Article 6 of the Agreement with Argentina to cover the situation of refusal of assistance where the criminal matter to which a request for assistance relates is an investigation into an external offence relating to taxation. Is there any reason for not including such a provision, having regard to section 5(2) of Cap. 525?

### Article 19 - Forwarding information with a view to proceedings

Please explain the reasons for inclusion of Article 19 in the Agreement with Argentina.

## **Model Agreement**

To assist Members in scrutinizing the Orders, please provide an article-by-article comparison of the two Agreements with the model agreement together with the model agreement.

To enable us to advise Members properly, we would appreciate it if you could let us have your reply in both English and Chinese languages by 7 March 2016.

Yours sincerely,



(Rachel DAI)  
Assistant Legal Adviser

cc. DoJ (Attn: Miss Bonita WONG, GC (By Fax: 3918 4613))

LA

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