

L. N. 378 of 1998

MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS (UNITED KINGDOM) ORDER

(Made by the Chief Executive in Council under section 4
of the Mutual Legal Assistance in Criminal Matters
Ordinance (Cap. 525) subject to the approval
of the Legislative Council)

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary
for Security by notice in the Gazette.

2. Ordinance to apply between Hong Kong
Special Administrative Region and
United Kingdom

In relation to the arrangements for mutual legal assistance---

(a) which are applicable to the Government of the Hong Kong Special Administrative
Region and the Government of the United Kingdom of Great Britain and Northern Ireland;
and

(b) a copy of which is annexed at Schedule 1,

it is hereby directed that the Ordinance shall, subject to the modifications to the
Ordinance summarized in Schedule 2, apply as between the Hong Kong Special
Administrative Region and the United Kingdom of Great Britain and Northern Ireland.

SCHEDULE 1 [s. 2]

Agreement Between
the Government of the Hong Kong
Special Administrative Region
of the People's Republic of China
and
the Government of the United Kingdom of
Great Britain and Northern Ireland
Concerning
Mutual Legal Assistance in
Criminal Matters

CONTENTS

Article

Preamble

I Scope of assistance

II Central Authority

III Other assistance

- IV Limitations on compliance
- V Requests
- VI Execution of requests
- VII Representation and expenses
- VIII Limitations of use
- IX Obtaining of evidence, articles or documents
- X Statements of persons for investigation
- XI Location or identity of persons
- XII Service of documents
- XIII Publicly available and official documents
- XIV Certification and authentication
- XV Transfer of persons in custody
- XVI Transfer of other persons
- XVII Safeguards
- XVIII Search and seizure
- XIX Proceeds of crime
- XX Settlement of disputes
- XXI Application of Agreement
- XXII Entry into force and termination

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region"), having been duly authorised by the Central People's Government of the People's Republic of China, and the Government of the United Kingdom of Great Britain and Northern Ireland ("United Kingdom");

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation and prosecution of crime and the tracing, restraint and confiscation of criminal proceeds and instrumentalities of crime;

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 crime 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 crime;
- (i) providing information, documents and records; and
- (j) delivery of property, including lending of exhibits.

(3) 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 for the Hong Kong Special Administrative Region shall be the Department of Justice. The Central Authority for the United Kingdom shall be the Home Office.
- (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 also 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 the United Kingdom or, in the case of the Government of the Hong Kong Special Administrative Region, of the People's Republic of China.
 - (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) it is of the opinion that the granting of the request would seriously impair its essential interests;

(g) 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; and

(h) the request concerns restraint or confiscation of proceeds or instrumentalities of an offence which, had it occurred within the jurisdiction of the Requested Party, would not have been an offence in respect of which a confiscation order could have been made.

(2) For the purposes of paragraph (1)(f), the Requested Party may take into account whether the provision of assistance could prejudice the safety of any person.

(3) For the purposes of paragraph (1)(g):

(a) the totality of the acts or omissions alleged to constitute the offence against the law of the Requesting State shall be considered and not merely the legal elements of that offence;

(b) for offences relating to taxes, duties, or customs controls, it shall be immaterial that the law of the Requested Party does not impose the same kind of tax, duty or customs control or does not contain a tax, duty or customs regulation of the same kind as the law of the Requesting Party.

(4) The Requested Party shall 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.

(5) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(6) 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 the assistance sought should only be granted in part or subject to such terms and conditions as the Requested Party deems necessary.

(7) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (6)(b) of this Article, 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 24 hours.
- (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) the court order, if any, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order;
 - (e) where proceedings have been instituted, details of the proceedings;
 - (f) a summary of the relevant facts and laws;
 - (g) any requirements for confidentiality;
 - (h) details of any particular procedure the Requesting Party wishes to be followed;
 - (i) details of the period within which the request should be complied with; and
 - (j) the identity of the person or persons to be or being investigated or prosecuted.
- (3) All documents submitted in support of a request shall, if required by the Requested Party, be accompanied by a translation into an official 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 subject to 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 expenses of executing a request within its jurisdiction, except:

- (a) fees of counsel retained at the request of the Requesting Party;
- (b) fees of experts;
- (c) expenses of translation;
- (d) travel expenses and allowances of persons; and
- (e) other expenses to the extent that these are of an extraordinary nature.

The Requested Party shall decide which expenses other than expenses at (a) to (d) in this paragraph are expenses of an extraordinary nature.

(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 ON USE

(1) The Requested Party shall use its best efforts to keep confidential a request and its contents except:

- (a) where otherwise authorised by the Requesting Party; or
- (b) to the extent necessary to execute the request.

(2) Except in relation to any document which the Requesting Party is or would be under a legal duty in criminal proceedings to disclose, the Requested Party, after consultation with the Requesting Party, may require that information or evidence furnished or to be furnished pursuant to this Agreement be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(3) Except in relation to any document which the Requesting Party is under a legal duty in criminal proceedings to disclose, 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.

(4) Where the Requesting Party indicates that it would be unable to comply with any conditions in relation to confidentiality or limitation as to disclosure or use of any information or evidence were it to be furnished under this Agreement, the Requested Party may refuse assistance.

ARTICLE IX

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

(1) Where a request is made that evidence be taken for the purpose of a criminal

investigation, prosecution of a criminal offence or a proceeding in relation to a criminal matter in 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 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

STATEMENTS OF PERSONS

Where a request is made to obtain the statement of a person 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 subpoena or other process requiring the appearance of any person as a witness or defendant in criminal proceedings before a court of the Requesting Party and any document issued by a court exercising criminal jurisdiction which records a decision of that court and which is transmitted to it for the purposes of service.

(2) The Requesting Party shall transmit a request for the service of a document in the Requesting Party within a reasonable time before a response or appearance is due.

(3) The Requested Party shall, subject to its law, provide a proof of service in the manner required by the Requesting Party.

ARTICLE XIII

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law the Requested Party shall provide copies of the following documents within its jurisdiction:

--- public records;

--- publicly available judicial records.

(2) The Requested Party may at its discretion 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

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 Requested Party consents, be transferred from that Party to the Requesting Party for that purpose, provided:

(a) the person consents; and

(b) the Requesting Party has guaranteed the maintenance in custody of the person while the sentence of imprisonment remains in force; and

(c) the Requesting Party has guaranteed such person's subsequent return to the Requested Party.

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) Upon receipt of such a request the Requested Party shall invite the person to

travel to the Requesting Party and inform the Requesting Party of the person's response.

ARTICLE XVII

SAFEGUARDS

(1) A person who consents to provide assistance pursuant to this Agreement shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party while he is in the area of the Requesting Party giving assistance under this Agreement.

(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 provide assistance pursuant to this Agreement shall not, subject to the law of the Requested Party, be required to give evidence in any proceedings other than the proceedings to which the request relates.

(4) A person who fails to comply with a subpoena or other process served pursuant to Article XII or who does not consent to provide assistance pursuant to Article XV or Article XVI shall not by reason thereof be liable to any penalty or coercive measure under the law of either 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 as to return and safe custody 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 or instrumentalities of a crime 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 or instrumentalities may be located in its jurisdiction.

(2) Where suspected proceeds or instrumentalities of crime are found, the Requested

Party shall, upon request, take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds or instrumentalities of crime, pending a final determination in respect of those proceeds or instrumentalities by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities such assistance shall be given by whatever means are permitted by the law of the Requested Party.

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

(5) For the purposes of this Agreement:

(a) "confiscation" means any measure resulting in the deprivation of property;

(b) "proceeds of crime" means any property derived or realised, directly or indirectly, by any person as a result of criminal activity, or the value of any such property;

(c) property includes money and all kinds of moveable or immoveable and tangible or intangible property and includes any interest in such property.

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

APPLICATION OF THE AGREEMENT

This Agreement shall apply:

(1) in relation to the United Kingdom

(a) to England and Wales, Scotland, and Northern Ireland; and

(b) to any territory for whose international relations the United Kingdom is responsible and to which this Agreement shall have been extended, subject to any modifications, by an exchange of notes through the diplomatic channel; and

(2) in relation to the Hong Kong Special Administrative Region, to the Hong Kong Special Administrative Region.

ARTICLE XXII

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 this Agreement shall cease to have effect on receipt of

that notice. Requests for assistance which have been received prior to termination of this Agreement shall nevertheless be processed in accordance with the terms of this Agreement as if it was still in force.

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

DONE at the Hong Kong Special Administrative Region, this twenty-third day of January one thousand nine hundred and ninety eight in the Chinese and English languages, each text being equally authentic

SCHEDULE 2 [s. 2]

Modifications to the Ordinance

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows---

"(e) the request relates to the prosecution of a person---

(i)* 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 the place or Hong Kong*; or

(B) has undergone the punishment provided by the law of that place or Hong Kong*,

in respect of that offence or of another external offence constituted by the same act or omission as that offence;

(ii) in respect of an act or omission that, if it had occurred in Hong Kong, could no

longer be prosecuted in Hong Kong by reason of lapse of time; *".

2. Section 5(1)(f) of the Ordinance shall be modified by deleting "or" at the end.

3. Section 5(1)(g) of the Ordinance shall be modified by deleting the full stop and substituting

"; or".

4. Section 5(1) of the Ordinance shall be modified by adding---

"(h) the request relates to the enforcement of an external confiscation order, or to restraining

dealing in any property against which the order may be enforced or which may be available to satisfy the order, but the act or omission constituting the external serious

offence to which the order relates, if it had occurred in Hong Kong, would not have constituted a Hong Kong serious offence in respect of which a Hong Kong confiscation order could be made. *".

5. Section 17(1) of the Ordinance shall be modified by deleting paragraph (ii).

6. Section 17(3)(b) of the Ordinance shall be modified to read as follows---

"(b) the person has had an opportunity of leaving Hong Kong, 15 days have expired since

that opportunity* and

the person* has remained in Hong Kong otherwise than for---

(i) the purpose to which the request relates; or

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong

certified in writing by the Attorney General**

Secretary for Justice* to be a criminal

matter in relation to which it is desirable that the person give assistance. "

7. Section 23(2)(a) of the Ordinance shall be modified---

(a) by adding "or" at the end of subparagraph (i);

(b) by deleting subparagraph (ii).

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

Mable CHAN

Clerk to the Executive Council

Council Chamber

13 October 1998

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between the Hong Kong Special Administrative Region and the United Kingdom of Great Britain and Northern Ireland. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region and the United Kingdom of Great Britain and Northern Ireland and signed in the Hong Kong Special Administrative Region on 23 January 1998. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.