

LN238-E

L. N. 238 of 2000

MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS (SWITZERLAND) 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 Switzerland

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 Swiss Federal Council; 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 Switzerland.

SCHEDULE 1 [s. 2]

Agreement Between

the Government of the Hong Kong Special Administrative
Region of the People's Republic of China

and

the Swiss Federal Council

Concerning

Mutual Legal Assistance in Criminal Matters

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The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region"), having been duly

authorized to conclude this Agreement by the Central People's Government of the People's Republic of China, and the Swiss Federal Council, hereinafter called the "Parties"

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and suppression of crime

Have agreed as follows:

CHAPTER I---GENERAL PROVISIONS

ARTICLE 1

OBLIGATION TO PROVIDE MUTUAL ASSISTANCE

1. The Parties shall provide, in accordance with the provisions of this Agreement, the widest measure of mutual assistance in investigations, prosecutions or proceedings in respect of offences the punishment of which, at the time of the request for mutual assistance, falls within the jurisdiction of the Requesting Party.

2. Assistance shall include all measures, including compulsory measures, taken to advance investigations, prosecutions or related proceedings in the Requesting Party, and in particular:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) taking testimony or other statements;
- (d) producing objects, documents, records and evidence, including exhibits;
- (e) restitution of property and money;
- (f) providing information;
- (g) executing requests for search and seizure;
- (h) facilitating the appearance of persons to give evidence or to provide other assistance;
- (i) obtaining production of judicial records or publicly available and official documents;
- (j) tracing, restraining and confiscating the proceeds and instrumentalities of crime.

ARTICLE 2

EXCLUSION

This Agreement shall not apply to the following cases:

- (a) surrender of fugitive offenders;
- (b) the enforcement or execution of final criminal judgments regarding the deprivation of liberty except to the extent permitted by the law of the Requested Party and this Agreement;
- (c) investigations or proceedings relating to an offence under military law which is not an offence under ordinary criminal law.

ARTICLE 3

GROUNDINGS FOR REFUSAL OR POSTPONEMENT

1. The Requested Party shall refuse assistance if:

(a) the request for assistance impairs the sovereignty, security or public order of Switzerland or, in the case of the Hong Kong Special Administrative Region, the People's Republic of China;

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

(c) the request for assistance relates to an offence of a political character;

(d) the request relates to an offence considered by the Requested Party to be a fiscal offence; however the Requested Party has the option of complying with the request if the investigation or proceeding concerns a fraudulent scheme or a fraud relating to a fiscal matter;

(e) 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;

(f) 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

(g) in the case of requests involving compulsory measures, 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. The Requested Party may refuse assistance if:

(a) the request for assistance relates to the prosecution of a person who could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;

(b) the Requesting Party cannot comply with any conditions relating to confidentiality or limitation as to the use of material provided; or

(c) 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.

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

4. 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.

5. If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph 4(b), it shall comply with those terms and conditions.

ARTICLE 4

APPLICABLE LAW

A request shall be executed in accordance with the law of the Requested Party.

ARTICLE 5

COMPULSORY MEASURES

When compulsory measures are requested in relation to the obtaining of evidence, the production of documents, including bank documents, search and seizure or the restraint and confiscation of criminal proceeds, these measures may not be replaced by different measures unless the Requesting Party gives its prior consent.

CHAPTER II---OBTAINING EVIDENCE

ARTICLE 6

GENERAL PRINCIPLES

1. Where a request is made that evidence be taken for the purpose of an investigation, prosecution or 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, material or objects.

ARTICLE 7

LIMITATION OF USE

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 8

SEARCH AND SEIZURE

1. The Requested Party shall carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to an investigation or proceeding 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 9

PRESENCE OF PERSONS

1. If the Requesting Party expressly so requests, the Central Authority of the Requested Party shall inform it of the date when and place where the request will be executed.
2. The authorities and persons involved and their legal representatives may be present at such execution if the Requested Party agrees.

ARTICLE 10

TAKING TESTIMONY OR OTHER STATEMENTS

1. 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 person to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
 - (b) the law of the Requesting Party would permit that person to decline to give evidence in such proceedings in the Requesting Party.
2. 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.
3. For the purpose of requests under this Article the Requesting Party shall specify the questions to be put to the person or the subject matter about which he or she is to be examined.
4. If necessary any questions additional to those specified in paragraph 3 of this Article may be put to the person by the competent authority of the Requested Party, either of its own volition or if requested by any of the persons referred to in paragraph 2 of Article 9.

ARTICLE 11

TRANSMISSION OF OBJECTS, DOCUMENTS, RECORDS AND EVIDENCE

1. Rights claimed by third parties to objects, documents, records or other evidence in the Requested Party shall not prevent their transmission to the Requesting Party.
2. Unless otherwise agreed the Requesting Party shall return what was transmitted as quickly as possible and at the end of the proceedings at the latest.

ARTICLE 12

RESTITUTION OF PROPERTY AND MONEY

Property and money obtained in connection with the commission of an offence and seized by the Requested Party may also be returned to the Requesting Party for the purpose of its restitution, having due regard to any claim concerning rights of property raised by a third person.

ARTICLE 13

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

1. 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 14

JUDICIAL RECORDS

The Requested Party shall make available to the authorities of the Requesting Party its records of courts or other judicial authorities, including judgments and decisions, on the same conditions and to the same extent as it does to its own authorities.

ARTICLE 15

EXCHANGE OF INFORMATION FROM CRIMINAL RECORDS

Each Party shall, subject to the requirements of its law, inform the other Party of all sentences of imprisonment imposed in respect of persons who are, in the case of the Hong Kong Special Administrative Region, permanent residents or, in the case of Switzerland, nationals. Such information shall be communicated through the Central Authority at least once per year.

ARTICLE 16

SUBMITTING INFORMATION IN CONNECTION WITH PROCEEDINGS

1. Either Party may, without prior request, submit information or evidence to the other Party with a view to proceedings in that Party.
2. The Party to whom such information or evidence is submitted shall notify the other Party of any action taken and shall forward a copy of any decision made.

CHAPTER III---SERVICE OF DOCUMENTS APPEARANCE OF PERSONS

ARTICLE 17

SERVICE OF DOCUMENTS

1. The Requested Party shall effect service of writs and records of judicial verdicts and other documents which are transmitted to it for this purpose by the Requesting Party.
2. Service may be effected by simple transmission of the writ, record or other documents to the person to be served. If the Requesting Party expressly so requests, service shall be effected by the Requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law.
3. Proof of service shall be given by means of a receipt dated and signed by the person served or by means of a statement made by a competent authority in the Requested Party that service has been effected and stating the form and date of such service.

One or other of these documents shall be sent immediately to the Requesting Party. The Requested Party shall, if the Requesting Party so requests, state whether service has been effected in accordance with the law of the Requested Party. If service cannot be effected, the reasons shall be communicated immediately by the Requested Party to the Requesting Party.

4. A request for the service of a summons on an accused person who is in the Requested Party shall be sent to the Central Authority of that Party at least 30 days before the date set for the appearance. Where the person to be served is not an accused person, the request for service shall be sent to the Central Authority of the Requested Party within a reasonable time.

ARTICLE 18

APPEARANCE OF WITNESSES AND EXPERTS IN THE REQUESTING PARTY

1. Any person in the Requested Party may be called upon to appear as a witness or as an expert in an investigation or proceeding underway in the Requesting Party, if he or she is not the subject of that investigation or proceeding.

2. The Requested Party shall invite the person to appear and shall communicate the person's reply to the Requesting Party without delay.

3. Allowances and expenses shall be payable by the Requesting Party. The witness or expert shall be informed of the allowances or expenses to which he or she will be entitled and may require an advance of such allowances or expenses.

ARTICLE 19

TRANSFER OF PERSONS IN CUSTODY

1. A person in custody in the Requested Party whose appearance is requested in the Requesting Party for the purposes of providing assistance pursuant to this Agreement shall, subject to paragraph 2, be transferred from the Requested Party to the Requesting Party for that purpose, provided that the Requesting Party has guaranteed the maintenance in custody of the person and his or her subsequent return to the Requested Party.

2. Transfer may be refused if:

- (a) the person in custody does not consent to appear;
- (b) his or her presence is required for an investigation or proceeding underway in the Requested Party;
- (c) the transfer is likely to prolong detention; or
- (d) there are other overriding grounds against transfer.

3. The person transferred shall remain in detention while in the Requesting Party unless the Requested Party asks that he or she be released.

4. 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 20

FAILURE TO APPEAR

A person who fails to answer a request for his or her appearance shall not, even if a document served on him or her contains a notice of penalty, be subjected to any punishment or compulsory measure unless, subsequently, he or she voluntarily enters the Requesting Party and is there again duly served.

ARTICLE 21

SAFE CONDUCT

1. A person who consents to appear pursuant to Article 18 or 19 shall not be prosecuted, detained, or restricted in his or her personal liberty in the Requesting Party for any criminal offence or be subject to civil suit being a civil suit to which the person could not be subjected if the person were not in the Requesting Party for any act or omission which preceded his or her departure from the Requested Party.

2. A person who consents to appear pursuant to Articles 18 or 19 shall not be subject to prosecution based on his or her testimony, except for perjury.

3. A person who consents to appear pursuant to Article 18 or 19 shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

4. A person who responds to a summons from the Requesting Party to answer for acts forming the subject of proceedings against him or her shall not be prosecuted or detained or restricted in his or her personal liberty in the Requesting Party for acts or omissions which preceded his or her departure from the Requested Party and which are not specified in the summons.

5. Paragraphs 1 and 4 shall not apply if the person, being free to leave, has not left the Requesting Party within a period of 30 days after being notified that his or her appearance is no longer required, or having left the Requesting Party, has returned.

CHAPTER IV---PROCEEDS OF CRIME

ARTICLE 22

TRACING

The Requested Party shall, upon request, endeavour to ascertain whether any proceeds or instrumentalities 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 or instrumentalities may be located in its jurisdiction.

ARTICLE 23

PROVISIONAL MEASURES

Where pursuant to Article 22 suspected proceeds or instrumentalities 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 or instrumentalities of crime, pending a final determination in respect of those proceeds or instrumentalities by a Court of the Requesting Party.

ARTICLE 24

CONFISCATION

1. Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities of crime such assistance shall be given by whatever means as 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 or instrumentalities of crime to which the request relates.
2. Proceeds or instrumentalities of crime confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

ARTICLE 25

SPONTANEOUS INFORMATION

Without prejudice to its own investigations or proceedings a Party may, without prior request, forward to the other Party information on proceeds or instrumentalities of crime when it considers that the disclosure of such information might assist the receiving Party in carrying out investigations or proceedings or might lead to a request by that Party under this Agreement.

CHAPTER V---PROCEDURE

ARTICLE 26

CENTRAL AUTHORITY

1. Each Party shall establish a Central Authority.
2. The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorized officer. The Central Authority for Switzerland shall be the Federal Office for Police Matters of the Federal Department of Justice and Police in Bern.
3. Requests under this Agreement shall only be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.
4. The Central Authorities of the Parties shall communicate directly with each other.
5. The Central Authority may also transmit requests through Interpol.

ARTICLE 27

CONTENTS OF REQUESTS

1. Requests for assistance shall be in writing and 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;
 - (d) a summary of the relevant facts (date, place and circumstances in which the offence was committed) giving rise to the investigation or proceedings in the Requesting Party, unless the request is one for service within the meaning of Article 17;
 - (e) the text of the statutory provisions or where this is not possible a statement of the relevant law applicable;
 - (f) where possible, the complete name, place and date of birth, nationality and address of the person who is the subject of the investigation or proceedings as of the date the request is made;
 - (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.
2. In addition, requests for assistance shall include:
 - (a) in the case of service of documents, the name and address of the person to be served;
 - (b) in the case of a request for the taking of testimony or other statements, the subject matter regarding which the person is to be heard, including, if necessary, a list of questions to be asked;
 - (c) in the case of a request for the transfer of a person in custody, the person's identity and a description of the persons responsible for his or her custody during the transfer, of the place to which he or she will be transferred and the maximum length of the period of the transfer.
3. Subject to Article 16 of this Agreement, the Requested Party shall not ask that the request be accompanied by evidence.

ARTICLE 28

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. In cases of urgency, the Central Authority of the Requested Party shall use its best endeavours to commence action on a request in advance of receipt of all the documentation.
3. If the request does not conform with the provisions of this Agreement, the Central

Authority of the Requested Party shall inform the Central Authority of the Requesting Party without delay with a view to having the request appropriately amended.

4. 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.

5. 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.

6. After the request has been executed, the competent authority shall forward to the Central Authority of the Requested Party the original of the request and the information and evidence gathered. The Central Authority shall be responsible for ensuring that the execution is complete and accurate and shall communicate the results thereof to the Central Authority of the Requesting Party.

ARTICLE 29

CONFIDENTIALITY

Subject to the provisions of its domestic law the Requested Party shall keep the request and the information contained therein confidential except when otherwise authorized by the Requesting Party.

ARTICLE 30

OBLIGATION TO INFORM IN CASES OF REFUSAL

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 31

FORMALITY REQUIREMENTS

1. Documents, transcripts, records, statements, as well as other material or objects shall be exempted from any legalization requirement.

2. Documents, transcripts, records, statements as well as other material or objects which are to be transmitted to the Requesting Party shall only be certified if the Requesting Party so requests. For that purpose certification by the Central Authority of the Requested Party shall be sufficient.

3. Documents, transcripts, records, statements as well as other material or objects shall not be required to be certified or authenticated by consular or diplomatic officers.

ARTICLE 32

LANGUAGE

All documents submitted in support of a request shall be accompanied by a

translation into an official language of the Requested Party to be specified by the Requested Party in each case.

ARTICLE 33

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 interpretation; and

(d) travel expenses and allowances of persons involved in the execution of a request.

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.

CHAPTER VI---OTHER ASSISTANCE

ARTICLE 34

POLICE COOPERATION

When compulsory measures are not required assistance may be provided between the respective police or other law enforcement agencies of the Parties. Communications in relation to such assistance shall normally be through Interpol.

ARTICLE 35

OTHER BASES FOR ASSISTANCE

The Parties may provide assistance pursuant to other agreements or arrangements as well as assistance consistent with the objects of this Agreement which can be otherwise provided for under domestic law.

CHAPTER VII---FINAL PROVISIONS

ARTICLE 36

CONSULTATIONS

If they think it useful, the Central Authorities shall exchange views, orally or in writing, on the application or implementation of this Agreement, in general terms or in a particular case.

ARTICLE 37

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 38

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 were still in force.

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

DONE at the Hong Kong Special Administrative Region this fifteenth day of March One Thousand Nine Hundred and Ninety Nine in duplicate, in Chinese, German and English, 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 for an external offence in a case where the person---

(i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place--, ** or Hong Kong; * or

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

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

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

"(b) the person has had an opportunity of leaving Hong Kong, 30 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. ".

* 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

14 September 1999

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 Switzerland. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region and the Swiss Federal Council and signed in the Hong Kong Special Administrative Region on 15 March 1999. 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.