

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ORDINANCE

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**RESOLUTION**

(Under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525))

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RESOLVED that the Mutual Legal Assistance in Criminal Matters (Italy) Order, made by the Chief Executive in Council on 14 September 1999, be approved.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL  
MATTERS (ITALY) 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  
Italian Republic**

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 Italian Republic;  
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 Italian Republic.

AGREEMENT BETWEEN  
THE GOVERNMENT OF THE HONG KONG SPECIAL  
ADMINISTRATIVE REGION OF  
THE PEOPLE'S REPUBLIC OF CHINA  
AND  
THE GOVERNMENT OF THE ITALIAN REPUBLIC  
CONCERNING  
MUTUAL LEGAL ASSISTANCE IN  
CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China, having been duly authorised by the Central People's Government of the People's Republic of China, and the Government of the Italian Republic,

Desiring to improve the effectiveness of their co-operation in criminal investigations and proceedings, and in 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 legal 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;
- (d) executing requests for search and seizure;
- (e) facilitating the personal appearance of witnesses and experts;

- (f) effecting the temporary transfer of persons in custody to appear as witnesses;
- (g) obtaining production of judicial or official records;
- (h) tracing, restraining, and forfeiting or confiscating the proceeds and instrumentalities of criminal activities;
- (i) providing information, documents and records;
- (j) delivery of property, including lending of exhibits; and
- (k) other mutual legal assistance consistent with the objects of this Agreement, which is not inconsistent with the law of the Requested Party.

(3) Assistance under this Agreement shall include assistance in connection with offences against a law relating to taxation, customs duties, foreign exchange control or other revenue matters, but not in connection with non-criminal proceedings relating thereto.

(4) Assistance shall not include:

- (a) the surrender of any fugitive offender;
- (b) the execution in the Requested Party of criminal judgments imposed in the Requesting Party, without prejudice to the provisions of Article XVII;
- (c) the transfer of persons in custody to serve sentences.

(5) This Agreement is intended solely for mutual legal assistance between the Parties and, for the avoidance of doubt, no private person is entitled under this Agreement to make or oppose any request for assistance.

## **ARTICLE II**

### **CENTRAL AUTHORITY**

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority for the Government of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his

duly authorised officer. The Central Authority for the Government of the Italian Republic shall be the Ministero di Grazia e Giustizia.

(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**

#### **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 Italian Republic or, in the case of the Government of the Hong Kong Special Administrative Region, the People's Republic of China;
  - (b) the request for assistance would seriously impair its essential interests;
  - (c) the request for assistance relates to an offence of a political character;
  - (d) the request for assistance relates to an offence only under military law, which is not an offence under the ordinary criminal law;
  - (e) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of race, sex, 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;
  - (g) the request for assistance relates to the prosecution of a person for an offence which was committed within the jurisdiction of the Requested Party and is an offence for which, under the law of that Party, the person cannot be prosecuted by reason of lapse of time;

- (h) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided;
  - (i) 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;
  - (j) the assistance requested consists of actions that would be contrary to the Requested Party's law had the offence to which it relates been the subject of criminal proceedings under its own jurisdiction, except that assistance shall not be refused on the sole ground that the actions would not be permitted at the investigation stage of such an offence under the Requested Party's law;
  - (k) the request for assistance relates to an offence which carries the death penalty under the law of the Requesting Party.
- (2) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.
- (3) 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.
- (4) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (3)(b), it shall comply with those terms and conditions.

## **ARTICLE IV**

### **REQUESTS**

(1) Requests shall be in writing. In urgent cases, requests may be transmitted by fax or through Interpol, without prejudice to the right of the Requested Party to seek the original of the request.

(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) where possible, information which is relevant to the identification or location of persons for the purpose of executing the request;
- (d) a description of the nature of the investigation, prosecution, offence or criminal matter;
- (e) a summary of the relevant facts 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 authorised by the Requesting Party.

(4) A request and all documents submitted in support of it shall be accompanied by a translation in an official language of the Requested Party, unless the Requested Party dispenses with this requirement.

## **ARTICLE V**

### **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 contrary to the law of the Requested Party, in accordance with any feasible procedures indicated in the request.

(3) If the Requesting Party expressly so requests, the Central Authority of the Requested Party shall inform it of the date when and the place where the request will be executed.

(4) If the Requesting Party expressly so requests, the authorities involved in, and persons affected by, the request for assistance and their legal representatives may be present at the execution of the request if the Requested Party agrees.

(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) 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 VI**

### **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 witnesses, experts, persons being transferred in custody and escorting officers.

(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 VII**

### **LIMITATIONS OF USE**

(1) After consultation with the Requesting Party, the Requested Party may require that, insofar as the law of the Requesting Party permits, information or evidence furnished be kept confidential or be disclosed or used only subject to such terms and conditions as the Requested Party 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 VIII**

### **OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS**

(1) Where a request is made that evidence be taken for the purpose of an investigation or prosecution of criminal offence or a proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party, the Requested Party shall arrange to have such evidence taken.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.

(3) For the purposes of requests under this Article, the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.

(4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, to the extent not contrary to the law of the Requested Party, appear and question the person giving that evidence.

(5) If a person who is required to give evidence asserts a claim of immunity, incapacity, or privilege, which is provided for under the law of the Requesting Party, the evidence shall nonetheless be taken and the claim made known to the Central Authority of the Requesting Party for subsequent resolution by the authorities of that Party. If a claim is asserted for immunity, incapacity, or privilege, which is provided for under the law of the Requested Party, it shall be resolved pursuant to the Requested Party's law.

## **ARTICLE IX**

### **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 X**

### **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 in the Requesting Party within a reasonable time before the scheduled response.

(3) The Requesting Party shall transmit a request for the service of a document pertaining to an appearance in the Requesting Party at least forty days before the scheduled appearance.

(4) Proof of service shall be given :

(a) by means of a receipt dated and signed by the person served; or

(b) by means of a declaration made by the relevant authority

of the Requested Party that service has been effected and stating the form and date of such service; or

- (c) in any other feasible manner required by the Requesting Party.

The relevant document shall be sent immediately to 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 either Party, unless subsequently he voluntarily enters the jurisdiction of the Requesting Party and is there again duly served.

## **ARTICLE XI**

### **PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS**

- (1) The Requested Party shall provide copies of documents which are publicly available under its law.
- (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 XII**

### **CERTIFICATION AND AUTHENTICATION**

Evidence, 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 XIII**

## **TRANSFER OF PERSONS IN CUSTODY**

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party as a witness pursuant to this Agreement shall, if the Requested 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 within the period indicated by the Requested Party or at any earlier time when his presence in the Requesting Party is no longer required. The Requested Party may, upon the request of the Requesting Party, extend the period for returning the person in custody.

(2) Where a person in custody who is transferred pursuant to this Article becomes entitled under the law of the Requested Party to be released from custody whilst he is in the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release.

(3) A person who does not consent to be transferred under this Article shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

## **ARTICLE XIV**

### **TRANSFER OF OTHER PERSONS**

(1) If the Requesting Party considers that the personal appearance of a witness or expert in the Requesting Party is necessary it shall so inform the Requested Party. The Requested Party shall, if satisfied that arrangements for that person's security will be made by the Requesting Party, request the witness or expert to appear and advise the Requesting Party of the reply from the witness or expert.

(2) Where a request is made pursuant to this Article the Requesting Party shall advise the approximate amounts of allowances payable, including travelling and accommodation expenses.

(3) A person who declines to appear as witness or expert, when requested under this Article, shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

## **ARTICLE XV**

## **IMMUNITY**

(1) A person who consents to transfer pursuant to Article XIII or XIV 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, nor be subject to civil suit to which the person could not be subjected if he were not in the Requesting Party.

(2) Paragraph (1) shall not apply if the person, being free to leave, has not left the Requesting Party within a period of fifteen 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 Article XIII or XIV shall not be subject to prosecution based on his testimony, except for perjury or any comparable offence related to the giving of false evidence under the law of the Requesting Party.

(4) A person who consents to transfer pursuant to Article XIII or XIV shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

## **ARTICLE XVI**

### **SEARCH AND SEIZURE**

(1) The Requested Party shall carry out requests from the Requesting Party for search, seizure and delivery of any material which:

- (a) there are reasonable grounds to believe is in the Requested Party; and
- (b) is relevant to a proceeding or investigation relating to an offence the maximum penalty for which is at least two years' imprisonment under the law of the Requesting Party.

(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 XVII**

### **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 permitted by the law of the Requested Party. 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.

(5) Requests made for the purpose of this Article shall:

- (a) indicate, as much as possible, the description and location of the proceeds of crime and of any other property liable to preventive measures and confiscation, and their connection with the person charged with, or convicted of, the offence;
- (b) be accompanied, where appropriate, by a copy of any order for preventive measures made by the judicial authorities of the Requesting Party, or of the order of

confiscation made by a court of the Requesting Party and the certification that it is final.

## **ARTICLE XVIII**

### **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 XIX**

### **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 in duplicate at Rome, Italy this twenty-eighth day of October 1998 in the Chinese, English and Italian languages, each text being equally authentic.

## 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 had occurred in Hong Kong and could no longer be prosecuted in Hong Kong by reason of lapse of time;\*".

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, 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."

\* 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).

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 the Italian Republic. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Italian Republic and signed in Rome, Italy, on 28 October 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 modification summarized in Schedule 2 to the Order.