

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ORDINANCE

RESOLUTION

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

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

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS (SOUTH KOREA) 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
Republic of Korea**

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 Republic of Korea; 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 Republic of Korea.

AGREEMENT BETWEEN
THE GOVERNMENT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION OF
THE PEOPLE'S REPUBLIC OF CHINA
AND
THE GOVERNMENT OF THE REPUBLIC OF KOREA
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 Republic of Korea (hereinafter referred to as "the Parties"),

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and other forms of mutual assistance in criminal matters,

Have agreed as follows :

Article 1
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 or items;
- (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 persons to give testimony or to assist in investigations;
- (f) effecting the temporary transfer of persons in custody to give testimony;
- (g) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities;
- (h) providing information, documents and records, including judicial or official records;
- (i) delivery of property, including lending of items which have been produced in evidence; and
- (j) other form of assistance not prohibited by the laws of the Requested Party.

3. Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters, but not in connection with non-criminal proceedings relating thereto.

4. The present Agreement does not apply to :

- (a) the surrender of any person;
- (b) the execution in the Requested Party of criminal judgments imposed in the Requesting Party except to the extent permitted by the law of the Requested Party and this Agreement;
- (c) the transfer of prisoners to serve sentences; or
- (d) the transfer of proceedings in criminal matters.

5. 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.

Other Arrangements

This Agreement shall not affect obligations subsisting between the Parties whether pursuant to other agreements, arrangements or otherwise, or prevent the Parties from providing or continuing to provide assistance to each other pursuant to other agreements, arrangements or otherwise.

Article 3 Central Authority

1. Each Party shall designate 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 authorised officer. The Central Authority for the Republic of Korea shall be the Minister of Justice or an official designated by that Minister.
3. Requests under this Agreement shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party, either directly or through such other channel as their law may require.

Article 4 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 Republic of Korea 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, sex, 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; or
- (g) if the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

2. For the purpose of paragraph 1(f) the Requested Party may include in its consideration of essential interests whether the provision of assistance could unduly prejudice the safety of any person.

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 5 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 14 days thereafter.

2. Requests for assistance shall include :

- (a) the name of the authority conducting the investigation or proceedings to which the request relates;
- (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 a summary of the relevant fact and laws, including the maximum penalty for the offence in relation to which the assistance is requested;
- (d) whether or not proceedings have been instituted, and where proceedings have been instituted, details of the proceedings;
- (e) any requirement for confidentiality and the reasons therefor;

- (f) where the Requesting Party wishes a particular procedure to be followed, details of that procedure; and
- (g) details of the period within which the request should be complied with.

3. Requests for assistance, to the extent necessary and possible, shall also include :

- (a) information on the identity, nationality and location of any person from whom evidence is sought;
- (b) information on the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;
- (c) information on the identity and whereabouts of a person to be located;
- (d) a description of the place or person to be searched and of the items to be seized;
- (e) information as to the allowances and expenses to which a person asked to appear in the Requesting Party will be entitled; and
- (f) such other information as is necessary for the proper execution of the request.

4. If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information.

5. All documents submitted in support of a request shall be in or translated into an official language of the Requested Party, unless the Requested Party dispenses with this requirement.

Article 6 Execution of Requests

1. Requests for assistance shall be executed promptly through the Central Authority of the Requested Party.

2. A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

3. The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.

4. The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

Article 7 Limitations of Use

1. 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.

2. 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.

3. The assistance shall be refused if the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided.

4. Information and evidence which has been made public in the Requesting Party in accordance with paragraphs 1 or 2 may thereafter be used for any purpose.

Article 8 Protection of Confidentiality

The Requested Party, if so requested, shall use its best efforts to keep confidential a request, its contents, supporting documents and any action taken pursuant to the request. If the request cannot be executed without breaching the requested confidentiality, the Requested Party shall so inform the Requesting Party, which shall then determine whether the request should nevertheless be pursued.

Article 9 Obtaining of Evidence, Articles or Documents

1. The Requested Party shall, in conformity with its law and upon request, take testimony, or otherwise obtain statements of persons or require them to produce items of evidence or other material for transmission to the Requesting Party.

2. For the purpose 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.

3. The Requested Party shall permit such persons as are specified in the request to be present during the execution of the request and, to the extent permitted by its law, shall allow such persons to question the person giving the testimony or evidence or to submit the questions to be posed to that person.

4. 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.

5. 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 10 Service of Documents

1. The Requested Party shall serve any document transmitted to it for this purpose.

2. The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party not less than thirty days before the scheduled response or appearance. In urgent cases, the Requested Party may waive this requirement.

3. The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party. If service cannot be effected, the Requesting Party shall be so informed and advised of the reasons.

4. 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 11 Return of Material to the Requested Party

Where required by the Requested Party, the Requesting Party shall return as soon as possible any material provided under this Agreement.

Article 12 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 13

Availability of Persons in Custody to Give Evidence or Assist Investigations

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

3. For the purpose of this Article, the person transferred shall receive credit for service of the sentence imposed in the Requested Party for time served in the custody of the Requesting Party.

Article 14

Availability of other Persons to Give Evidence or Assist Investigations

1. The Requesting Party may request the assistance of the Requested Party in inviting a person to appear as a witness in the proceedings or assist in the investigations. That person shall be informed of any expenses and allowances payable.

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.

3. The Requested Party shall promptly inform the Requesting Party of the person's response.

Article 15 Safe Conduct

1. A person who consents to provide assistance pursuant to Articles 13 or 14 shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or civil matter which preceded his departure from the Requested Party.

2. Paragraph 1 shall not apply if the person, not being a person in custody transferred under Article 13, 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 Article 13 or 14 shall not be subject to prosecution based on his testimony, except for perjury or contempt of court.

4. A person who consents to provide assistance pursuant to Article 13 or 14 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 Article 13 or 14 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

Article 16 Search and Seizure

1. The Requested Party shall, in so far as its law permits, carry out a request for search, seizure and delivery of any material to the Requesting Party provided that the request includes the information justifying such action under the laws of the Requested 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 material seized.

3. The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party, including any terms and conditions to protect third party interests in the material.

Article 17 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 within the limits 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. The Requested Party in control of forfeited proceeds shall dispose of them in accordance with its law. To the extent permitted by its laws and upon such terms as it deems appropriate, the

Requested Party may transfer forfeited proceeds to the Requesting Party.

Article 18
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 19
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) the expenses associated with conveying any person to or from the territory of the Requested Party at the request of the Requesting Party, and any allowances or expenses payable to that person while in the Requesting Party pursuant to a request under Article 13 or 14;
- (b) fees and expenses of experts;
- (c) fees of outside counsel retained at the request of the Requesting Party; and
- (d) expenses of translation.

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 or whether assistance shall be discontinued.

Article 20 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 21 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. This Agreement applies to any requests presented after its entry into force even if the relevant acts or omissions occurred prior to this Agreement entering into force.

3. Each of the Parties may terminate this Agreement at any time by giving notice in writing to the other. In that event the Agreement shall cease to have effect three months after the 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 the Hong Kong Special Administrative Region, this Seventeenth day of November One Thousand Nine Hundred and Ninety Eight in the Chinese, Korean 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 place⁷** 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 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 Republic of Korea. 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 Republic of Korea and signed in Hong Kong on 17 November 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.