

Mutual Legal Assistance in Criminal Matters (Ireland) Order

**Clause-by-Clause Comparison
between the HKSAR/Ireland MLA Agreement
and the model MLA Agreement**

PREAMBLE

The Preamble is substantially the same as that in the model Agreement except that the term “Instrumentalities of crime” was included at Ireland’s suggestion in order to spell out that assistance in relation to both proceeds and instrumentalities of crime are covered in the Agreement. Similar additions can be found in HKSAR’s Agreements with the UK, US and France. This addition is consistent with the definition of “external confiscation order” in the Mutual Legal Assistance in Criminal Matters Ordinance (“MLA Ordinance”) which also encompasses the recovery of instrumentalities of crime. Corresponding amendments are also made in Article 19 of the Agreement.

ARTICLE 1 – SCOPE OF ASSISTANCE

Substantially the same as the model Agreement, except that a provision corresponding to Article 1(3) of the model Agreement is moved to Article 6(1)(j) of the Agreement as an additional ground for refusing assistance.

ARTICLE 2 – CENTRAL AUTHORITY

Substantially the same as the corresponding Article in the model Agreement except the following changes:-

- *paragraph (2)* includes provision for either party to change its Central Authority. Similar provisions occur in Article II(2) of the HK/NZ Agreement and Article 2(2) of the HK/Portugal Agreement.
- *paragraph (3)* provides for direct communication between the Central Authorities. A comparable provision is also included in the HK/Portugal Agreement [Article 2(3)].

ARTICLE 3 – OTHER AGREEMENTS OR ARRANGEMENTS

The Article is similar to provisions in other signed Agreements [eg. Article 2 of HK/Korea Agreement and Article III of HK/Philippines Agreement].

ARTICLE 4 – FORM AND CONTENTS OF REQUESTS

This is a more detailed Article than Article 5 of the model Agreement. It is substantially the same as Article 4 of the HK/USA Agreement with the addition of Article V(2)(j) of the HK/UK Agreement as Article 4(2)(f). Article 5(3) of the model Agreement (on confidentiality) is incorporated into Article 8(1).

ARTICLE 5 – EXECUTION OF REQUESTS

To the same effect as Article 6 of the model Agreement.

ARTICLE 6 - LIMITATIONS ON ASSISTANCE

Article 6(1) is substantially the same as Article 4(1) of model Agreement with the following modification :-

- ☒ for subparagraphs (b) and (d), a subjective element is introduced; this is consistent with section 5(1) of the MLA Ordinance
- ☒ subparagraph (c) adopts the wording of Article 3(3)(a) of the HK/USA Agreement.
- ☒ subparagraph (i) is taken from Article 4(3) of the model Agreement
- ☒ subparagraph (j) is taken from Article 1(3) of the model Agreement.

Article 6(3) is included at Ireland's suggestion for the purposes of construing Article 6(1)(h). The provision is modelled upon Article IV(3) of the HK/UK Agreement.

Article 6(5)(b) is amended so as to allow for partial execution of a request. Similar provision can be found in Article IV(6)(b) of HK/UK Agreement.

ARTICLE 7 - REPRESENTATION AND EXPENSES

Article 7(1) and (3) is the same as Article 7(1) & (3) of the model Agreement.

Article 7(2) is substantially the same as Article 7(2) of the model Agreement with

the following modification: -

- subparagraph (c) is expanded to expressly include interpretation expenses.
- subparagraph (e) is included at Ireland's suggestion and is the same as Article VII(2)(e) of the HK/UK Agreement.

ARTICLE 8 - LIMITATIONS ON USE

Article 8(1) covers Article 5(3) of the model Agreement regarding the Requested Party's obligation to keep the request and other information confidential.

Article 8(2) and (3) is derived from Article 8(2) of the model Agreement concerning the Requesting Party's obligation to keep evidence etc confidential.

ARTICLE 9 - OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

To the same effect as Article 9 of the model Agreement except :-

- *paragraph (4)* is revised to reflect the requirements of section 10(4) of the MLA Ordinance.
- *paragraph (5)* is modelled upon Article 9(5) of the HK/US Agreement. This paragraph provides that evidence shall nonetheless be taken if the witness asserts a claim of immunity etc under the law of the Requesting Party. This is consistent with section 10(7) and (9) of the MLA Ordinance. Similar provisions can be found in HK/France Agreement (Article X.5) and HK/Italy Agreement (Article VIII(5)).

ARTICLE 10 - OBTAINING STATEMENTS OF PERSONS

Same as Article 10 of the model Agreement except that the purpose of the request [i.e. "investigation, prosecution or proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party"] is revised to align with Article 9(1).

ARTICLE 11 - LOCATION OR IDENTITY OF PERSONS

Same as Article 11 of the model Agreement.

ARTICLE 12 - SERVICE OF DOCUMENTS

Same as Article 12 of the model Agreement.

ARTICLE 13 - PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

The only modification is that Article 13(2) of the Agreement includes the term “at its discretion” at Ireland’s suggestion to emphasize the discretionary nature of the granting of such assistance. This is the same as Article XIII.2 of the HK/UK Agreement.

ARTICLE 14 - CERTIFICATION AND AUTHENTICATION

Same as Article 14 of the model Agreement.

ARTICLE 15 - TRANSFER OF PERSONS IN CUSTODY

Article 15 is substantially the same as the model Agreement except :-

- *paragraph 2(c)* which makes clear that a receiving party shall not require the sending Party to initiate extradition proceedings for the return of the person transferred. Such provision can also be found in Article 11(3)(c) of HK/US Agreement.
- *paragraph (2)(d)* which provides that the person transferred shall receive credit for the time served in the custody of the receiving Party. Similar provision can be found in Article 11(3)(d) of the HK/US Agreement and Article 13(3) of the HK/Korea Agreement. This is consistent with section 24 of the MLA Ordinance.

ARTICLE 16 - TRANSFER OF OTHER PERSONS

Article 16(1) makes clear that the Requested Party can only invite the person to appear in the Requesting Party but cannot compel him.

Article 16(2) is similar to Article XVI(2) of the HK/UK Agreement, which obliges the Requested Party to inform the Requesting Party of the person’s response.

ARTICLE 17 - SAFE CONDUCT

Article 17 is substantially the same as Article 17 of the model Agreement except that “contempt” is added to align with section 23(2)(b)(ii) of the MLA Ordinance.

ARTICLE 18 - SEARCH AND SEIZURE

This Article is substantially similar to Article 18 of the model Agreement except that Article 18(3) is refined to make it clear that the conditions which may be imposed relate to the return and safe custody of the property and third party interests.

This is an amalgamation of Article XVIII.3 of the HK/UK Agreement and Article 16 of the HK/Korea Agreement.

ARTICLE 19 - ASSISTANCE IN PROCEEDINGS RELATING TO PROCEEDS OF CRIME

This Article is substantially the same as Article 19 of the model Agreement with the following additional provisions:-

- ☐ instrumentality of crime are expressly included (see comments above on the Preamble)
- ☐ *Article 19(4)* contains more detailed provisions concerning the disposition or sharing of the proceeds and instrumentalities confiscated. This is consistent with section 10(7) of Schedule 2 to the MLA Ordinance which empowers the Secretary for Justice to give directions on the payment of proceeds to the Requesting Party.

ARTICLE 20 - SETTLEMENT OF DISPUTES

Same as Article 20 of the model Agreement.

ARTICLE 21 - ENTRY INTO FORCE AND TERMINATION

Same as Article 21 of the model Agreement except that there is a 3 months' period from the date of notification before the Agreement ceases to have effect.