

**HONG KONG SAR/THE NETHERLANDS AGREEMENT ON  
MUTUAL LEGAL ASSISTANCE IN  
CRIMINAL MATTERS (“THE AGREEMENT”)**

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**ARTICLE BY ARTICLE COMPARISON  
WITH THE MODEL AGREEMENT**

**PREAMBLE**

Substantially the same as the model agreement except that “investigation, prosecution” is replaced by the generic expression “criminal matters”. The “prevention of crime” was not included since the Dutch side regarded this as a matter for police co-operation.

**ARTICLE 1 - SCOPE OF ASSISTANCE**

**Paragraph (1)** is similar to the model agreement. It is slightly expanded to follow the wording in the HKSAR/Switzerland agreement (Article 1.1).

**Paragraph (2)** the sequence is rearranged, to correspond with the order of the specific forms of assistance in the articles of the Agreement.

**Paragraph (2) (b)** reflects the understanding of the parties that notwithstanding the absence of a substantive provision in the Agreement, both parties may obtain “voluntary statements” from persons. This is as opposed to testimony which may involve compelling a person to appear and be questioned.

The rest of paragraph (2) is substantially same as the model agreement. It

effectively amalgamates the contents of paragraphs (e) and (f) of Article 1 of the model agreement to form paragraph (d), and condenses paragraphs (g), (i) and (j) of Article 1 of the model agreement into paragraph (c).

**Paragraph (3)** The same formulation appears in the HK's agreements with Canada, France, Australia, New Zealand, Italy, Philippines, Korea, US and Portugal.

Paragraph (4) of Article 1 of the model agreement is omitted at the suggestion of the Dutch side on the basis that it is clear that no private person can derive any rights from an agreement which is made between governments.

#### **ARTICLE 2 – CENTRAL AUTHORITY**

Same effect as Article 2 of the model agreement. **Paragraph (1)** is expanded to comprehend the application, interpretation and implementation of the Agreement by the Central Authorities.

#### **ARTICLE 3 – OTHER ASSISTANCE**

Substantially the same as Article 3 of the model agreement.

#### **ARTICLE 4 – GROUNDS OF REFUSAL**

Title was changed at the request of the Dutch side. Not objectionable as it reflects the content of this provision.

All the mandatory grounds for refusal in the model agreement are retained with the following modifications :

**Paragraph (c)** combines part of paragraph (a) with paragraph (f) of Article 4(1) of the model agreement. It reflects clearly the different status and interests of, on the one hand, the government of PRC and on the other hand, the government of the Hong Kong SAR.

**Paragraph (g)** is a simplified version of paragraph (e) of Article 4(1) of the model agreement, but to the same effect.

**Paragraph (h)** corresponds to paragraph (g) of Article 4(1) of the model agreement.

Paragraph (2) of Article 4 of the model agreement is not included as the Dutch side did not consider that elaboration of "essential interests" was necessary. This paragraph was also omitted in the US and France agreements.

The Dutch side did not favour the inclusion of paragraph (3) of Article 4 of the model agreement because the death penalty had been abolished in both the Netherlands and Hong Kong. It was nevertheless agreed that the "essential interests" ground of refusal could be used to refuse assistance for death penalty offences if death penalty was ever reintroduced by either Party and assistance requested for a death penalty offence. The same approach was followed in the US and Philippines Agreements.

Paragraphs (4), (5) and (6) of Article 4 of the model agreement on refusing and postponing assistance are moved to Article 6 (paragraphs (5) & (6)).

## **ARTICLE 5 – REQUESTS**

**Paragraph (1)** is expanded to cover electronic means that are capable of

leaving a written record. It is consistent with the model agreement that requests shall be in writing.

**Paragraphs (2), (3) and (5)** correspond to paragraph (2) of Article 5 of the model agreement with slight modifications which are of a drafting rather than a substantive nature.

**Paragraph (4)** is a more detailed version of paragraph (3) of Article 5 of the model agreement. It requires prompt consultation with the Requested Party if confidentiality cannot be complied with.

**Paragraph (6)** is recast to reflect the fact that the Dutch side will be happy to receive requests from Hong Kong in English; the only official language for the Netherlands is Dutch - Hong Kong will never have to supply translations into Dutch.

## **ARTICLE 6 – EXECUTION OF REQUESTS**

A more detailed version of Article 6 of the model agreement, with the following modifications :

**Paragraph (1)** corresponds to paragraphs (1) and (3) of the model agreement.

**Paragraphs (3) and (4)** are new provisions. They deal with notification of the date when the request is to be executed and the right of persons to be present. The right to be present when testimony is taken is dealt with in Article 10(3); paragraph (4) of Article 6 will permit persons to be present for other requests e.g. search and seizure. A similar provision can be found in the HKSAR/Switzerland agreement (see Article 9).

**Paragraphs (5) and (6)** derive from Articles 4(4) and 4(5) of the model agreement.

**Paragraph (7)** corresponds to Article 6 (4) of the model agreement.

### **ARTICLE 7 – REPRESENTATION AND EXPENSES**

**Paragraph (1)** equates to Article 7(1) of the model agreement.

**Paragraph (2)** is a variation of the corresponding paragraph in Article 7 of the model agreement. (It is based on the Netherlands/Australia MLA agreement). The Dutch side considered that the matters dealt with in Article 7(2), (a), (b) and (c) of the model agreement could more conveniently be considered as matters of "extraordinary expenses" under paragraph (3).

**Paragraph (3)** is similar to paragraph (3) of Article 7 of the model agreement with the addition of the provision of “excessive burden” which derives from Article 4(2) of the model agreement.

### **ARTICLE 8 – LIMITATION ON USE**

Equivalent to Article 8 of the model agreement. Wording was taken from Articles 7(1) and (2) of the HKSAR/US agreement.

### **ARTICLE 9 – TAKING OF EVIDENCE**

Equivalent to paragraphs (1) and (2) of Article 9 of the model agreement. There is a reference to the production of exhibits which is consistent with Article 1(2)(c) of the Agreement.

The remainder of Article 9 of the model agreement forms a new Article 10 on “Taking of Testimony in the Requested Party” (see below). The reason for separation is that the production of documents in the Netherlands constitutes the taking of evidence but does not involve the taking of testimony.

**ARTICLE 10 – TAKING OF TESTIMONY IN THE REQUESTED PARTY.**

**Paragraph (1)** corresponds to the first sentence of Article 9.

**Paragraph (2)** is equivalent to Article 9 (3) of the model agreement.

**Paragraph (3)** is equivalent to Article 9 (4) of the model agreement except that “parties to the relevant proceedings” is replaced by a clearer expression, “interested persons”. It is consistent with section 10 (4) of the MLA Ordinance.

**Paragraph (4)** is equivalent to Article 9 (5) of the model agreement.

**Paragraph (5)** is equivalent to Article 9(6) of the model agreement with the addition of “where appropriate” to reflect the situation that where the legal representatives of the Requesting Party are present, no declaration (certificate) will be required. This is because the legal representatives will be able to advise as to the legal position under the Requesting Party’s law. The Dutch side prefers the term “declaration” to “certificate” as the former is more familiar to them. The term “declaration” is also consistent with the definition of “external law immunity certificate” in section 2 of the MLA Ordinance.

## **ARTICLE 11 – VIDEO CONFERENCE**

This provision is not found in the model agreement but the same provision has been included in the HKSAR's agreement with Canada. This Article permits the taking of video link evidence in specific cases under specified conditions if permitted by the laws of the Parties. At present HKSAR law does not so permit. The taking of video link evidence is however a developing international trend and the Evidence (Miscellaneous Amendment) Bill 2002 which was introduced into LegCo last year proposes to amend the law to enable the taking of evidence via live television link.

## **ARTICLE 12 - TAKING OF TESTIMONY AND PROVIDING ASSISTANCE IN THE REQUESTING PARTY**

This is a more detailed version of Article 16 of the model agreement.

**Paragraph (1)** has the same effect as Article 16 (1) of the model agreement.

**Paragraph (2)** is added at the suggestion of the Dutch side. It ensures that the necessary information is supplied to enable, in particular, the person to make a decision as to whether he will provide assistance.

**Paragraph (3)** is substantially the same as paragraph (2) of the model agreement.

**Paragraph (4)** is to same effect as Article 17(5) of the model agreement.

## **ARTICLE 13 - TRANSFER OF PERSONS IN CUSTODY TO THE REQUESTING PARTY**

A more comprehensive version of Article 15 of the model agreement.

**Paragraph (1)** is expanded to define clearly the time within which the person in custody must be returned.

**Paragraph (2)** which is included at the suggestion of the Netherlands is substantially drawn from Article 11(1) of the European Convention on Mutual Legal Assistance. This paragraph details a number of bases for refusing transfer and is not controversial. Similar provision appears in Article 19 of the HKSAR/Switzerland agreement.

**Paragraph (3)** is similar to Article 15(2) of the model agreement with a clearer indication that the person after being released from custody shall be treated in accordance with Article 12 of the Agreement.

**Paragraph (4)** is to the same as effect Article 17(5) of the model agreement.

#### **ARTICLE 14 - SAFE CONDUCT**

This Article is similar to Article 17 of the model agreement.

**Paragraphs (4) and (5)** are additional provisions which deal with the rights of the person giving testimony. They are worthwhile and consistent with Articles 10 (4) and 10 (5) of the Agreement.

Paragraph (5) of the model agreement has been omitted as the last paragraphs in both Articles 12 and 13 of the Agreement are to the same effect.

#### **ARTICLE 15 - SEARCH AND SEIZURE**



This Article is substantially the same as Article 18 of the model agreement.

**Paragraph (1)** is expanded to spell out what is comprehended by "material".

## **ARTICLE 16 - CONFISCATION**

This Article corresponds to Article 19 of the model agreement.

**Paragraph (1)** provides for the definition of “proceeds of crime”. It is substantially derived from the United Nations Convention against Transnational Organised Crime (the meaning of “property” and “proceeds of crime”). The definition of “proceeds of crime” includes instrumentalities of the crime which is provided in most of the HKSAR’s agreements. It is consistent with the definition of "external confiscation order" in section 2 of the MLA Ordinance.

**Paragraphs (2) and (3)** correspond to Articles 19(1) and 19(2) of the model agreement.

**Paragraph (4)** is a simplified version of Article 19(3) of the model agreement but to the same effect.

**Paragraph (5)** is added to ensure that the necessary information and documentation are supplied to facilitate action to be taken by the Requested Party. Similar provision was included in the agreement with Italy (see Article XVII (5)).

**Paragraph (6)** is substantially the same as Article 19(4) of the model agreement.

**Paragraph (7)** is included at the suggestion of the Dutch side to ensure that “third party’s rights” are respected. Similar provisions can be found in the HK’s agreements with New Zealand and Australia - Articles XIX(5) and XIX(4) respectively.

### **ARTICLE 17 - SERVICE OF DOCUMENTS**

This Article corresponds to Article 12 of the model agreement.

**Paragraph (1)** The requirement of translation was proposed by the Dutch side on the basis that the person being served with the documents should understand the nature of the document. Not objectionable as it reflects the usual practice.

**Paragraphs (2) & (3)** are an expansion of Article 12(2) of the model agreement. Paragraph (2) deals with service of a document pertaining to a response and paragraph (3) deals with the service of a document pertaining to an appearance. The Dutch side considered that where a person had to travel to appear in the other jurisdiction a clearly defined period of time should be set out. Similar provisions can be found in the HK’s agreements with France and Italy (Article XI and Article X respectively).

**Paragraph (4)** specifies the means of proving service. A similar provision is included in the HKSAR/Switzerland agreement (Article 17(3)).

**Paragraph (5)** is the same as Article 12 (5) of the model agreement.

### **ARTICLE 18 - PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS**

Same as Article 13 of the model agreement.

### **ARTICLE 19 - CERTIFICATION**

A slight variation of Article 14 of the model agreement. Certification/authentication by diplomatic or consular officers has been omitted as neither HKSAR nor Dutch law so requires and replaced by a reference to certification by the Central Authority of the Requested Party following the precedent in the HKSAR/Switzerland agreement (Article 31(2)).

### **ARTICLE 20 – PROVISION OF INFORMATION IN CONNECTION WITH PROCEEDINGS**

There is no counterpart in the model agreement; Article 16 of the HKSAR/Switzerland agreement is however to the same effect. It deals with a party passing on information concerning the commission of an offence committed within its jurisdiction where it chooses not to prosecute. It will assist the other party to consider exercising extra-territorial jurisdiction to prosecute the offence if it has the capacity to do so.

### **ARTICLE 21 – SETTLEMENT OF DISPUTES**

Same as Article 20 of the model agreement.

### **ARTICLE 22 - TERRITORIAL APPLICATION**

This Article is necessary as the Dutch side has to consult its territories to ascertain whether it wishes the Agreement to extend to them. Article XXI of the HKSAR/UK agreement is included for the same reason.

## **ARTICLE 23 – ENTRY INTO FORCE**

**Paragraph (1)** is a variation of the normal 30-day rule for entry into force.

**Paragraph (2)** is included for the avoidance of doubt. Same provisions can be found in HK's agreements with US, Philippines, New Zealand and Korea.

## **ARTICLE 24 – TERMINATION**

Effective date of termination has been changed from “immediate effect after notification” to “6 months after notification”. ~~to Hong Kong~~ Some of HK's Agreements (Australia, USA) provide for a 3 month period. The Dutch side preferred 6 months with a view to enabling any outstanding requests to be complied with.