

SBCR 3/5691/95 Pt.23

電話號碼 TEL. NO. : 2810 3523
傳真號碼 FAX. NO. : 2524 3762
來函傳真 YOUR FAX. : 2877 5029

BY FAX

30 January 2003

Legislative Council Secretariat
Legal Service Division
No.8, Jackson Road
Central
Hong Kong
(Attn : Ms Connie Fung)

Dear Ms Fung,

Mutual Legal Assistance in Criminal Matters (Ireland) Order
Mutual Legal Assistance in Criminal Matters (Netherlands) Order

I refer to your letter on the above subject of 22 January 2003. The Administration's comments on the points raised on the two Orders in your letter are as follows:

The Ireland Order

Article 6(4)

We are of the view that the term “偵查”(“investigation”) in the Chinese text suffices and covers the criminal nature of the investigation. The reference of “刑事”(“criminal”) is not necessary in the context since the subject matter of the Agreement is the mutual assistance in criminal matters and the scope of the assistance has been laid down in Article 1 of the Agreement.

Article 9(5)

We accept that the proposed rendition of “由該方有關當局解決” is a more literal rendition of the English text “for resolution by the authorities of that Party” and is consistent with a similar provision in the HK/USA Order.

Having said that, we do not believe that an amendment to the Chinese text is necessary. The Chinese text as it now stands (“由該方的中心機關在取證後解決”) states that a witness’ claim will be resolved by the Central Authority after the evidence is taken. Obviously the Central Authority will, if necessary, consult other authorities within the government in relation to any claims made by a witness. We accordingly take the view that practically speaking, the Chinese text sufficiently covers the English text.

Article 21(2)

The Chinese text as it now stands (which emphasizes the date of the receipt of notification) precisely reflects the meaning of the provision. The Party to which notice is being given cannot be regarded as being notified until it receives the notification.

The Netherlands Order

References to “request”, “request for assistance”, “the Requested Party”, “Requesting Party”

The renditions of “request” and related expressions as “請求”, “被請求方” and “請求方” are more appropriate in international agreements. This terminology has exactly the same meaning as the rendition as “要求”, “協助要求”, “被要求方” and “要求方” and is consistent with that in the Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525).

Reference to “require” in the following Articles”:

Article 5(4)

In our view, it is only a matter of style adopted by the translator. The proposed translation is better but the difference does not go to the substance of this provision. We accordingly do not consider that amendment of the Agreement is necessary.

Article 8(2)

Again a matter of style which does not affect the substance of this provision.

Article 15(2)

Again a matter of style. The proposed translation is better but the difference does not affect the substance of this provision.

Article 4: Refusal of assistance in lapse of time case

It should be note that section 5 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525) does not provide for lapse of times as a ground for refusal. Nonetheless the Requested Party will, under this Agreement, be able to refuse assistance in the case of offences which would be statute-barred under the law of the Requested Party.

Article 4: Refusal of assistance regarding death penalty cases

The Dutch delegation explained to the Hong Kong delegation that death penalty had been abolished in the Netherlands for a long time and since HK law also did not provide for the death penalty, they found it odd to insert a provision in an international agreement which made reference to it. It was agreed by the delegations that both parties could invoke the “essential interests” ground in Article(4)(c) of the Agreement if the death penalty was ever reintroduced by either Party and assistance requested for a death penalty offence. This approach has been acceptable to LegCo in the case of the Agreements with the USA and the Philippines. This understanding was reflected in an exchange of notes between the Department of Justice and the Consulate General of the Netherlands.

Article 4(g)

Section 5(1)(e) provides that assistance shall be refused if a request relates to the prosecution of a person who has been convicted, acquitted or pardoned in the requesting place.

Under the Hong Kong / Netherlands Agreement, as with most of the similar agreements entered into by Hong Kong, assistance is to be refused under Article 4(g) if a request relates to immunity from prosecution acquired in Requested Party. Hence the modification required in para. 1 of Schedule 2 to the MLA (Netherlands) Order. Article 4(g) of the Agreement is drafted in a different manner from the “usual” MLA provision; it nevertheless covers the same grounds (autrefois acquit, autrefois convict etc.)

Article 4(g)

For absolute consistency the word “request” should be translated as “協助請求”. Having said that, since there is no ambiguity resulting from this, we do not believe that it is necessary to amend the Chinese text.

Article 5(2)(b)

The proposed translation is better but we submit that this does not affect the substance of the provision.

Article 5(2)(e)

We submit that it is a matter of translation style. The proposed translation is better but any difference does not affect the substance or application of the provision.

Article 5(4)

We submit that it is a matter of translation style. The proposed translation is better but any difference does not affect the substance or application of the provision.

Article 6(1)

The proposed translation is more precise but the difference does not affect the application of the provision.

Article 6(6)

The proposed translation of “條款及條件” for “terms and conditions” is the more comprehensive translation. In the context of an international agreement which is not as precise as a statute, the expression “terms and conditions” is used in a general sense and there is no real difference intended between the two.

Article 7(3) and Article 8(2)

Please see the comments on Article 6(6) above.

Article 14(1)

The current text in the agreement was provided by Chinese language experts in the Netherlands and we agree with them it reflects the meaning of the English text although it is not a word for word translation of the English text as in the Switzerland agreement. It is submitted that Chinese text of the Article 21 of the Switzerland Order is different in terms of presentation rather than substance.

Article 14(5)

We believe that the intentions of the Parties is clear; we will nevertheless confirm this with the Netherlands side.

Article 16(1)(a)

We agree that “文書” is a more refined Chinese translation for “instruments” but the current text does not give rise to any ambiguity in interpretation.

Article 17(5)

The meaning of the current text is clear although it is not a word for word translation of “任何一方” in this paragraph.

Article 18(2)

The current text does not give rise to ambiguity in the application of this provision. The intentions of the Parties is clear that the Requested Party will not be required to provide the “originals” of the “文件、紀錄或資料”.

Article 19

We accept that “核証” is the standard translation for “certification”. However the difference does not affect the operation of the agreement because we have explained to the Netherlands side the requirement of Hong Kong law under s.32 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525).

Article 20

We agree that the proposal is a more refined translation. But the meaning and substance of the English text is already reflected in the current Chinese version.

Article 23(1)

There will not be any misunderstanding between the Parties. The provision will be spent once the Agreement enters into force. There is no need to update the Chinese text to attain a perfect word for word translation.

Article 23(2)

We would submit that it is a matter of translation style. The meaning is clearly borne out in the current version although it is not a word for word translation.

Article 24

This was discussed at the negotiations. The Dutch side considered it unnecessary. The agreed position is the processing of all requests will stop once the Agreement is terminated. Please note that termination is effective six months after notification under this Agreement.

Final clause

We submit that it is a matter of translation style. The agreement had been signed and there was no misunderstanding or ambiguity.

Yours sincerely,

(Ms Angelina Kwan)
for Secretary for Security

c.c. DoJ	(Attn : Ms Amelia Luk)	2523 7959
	(Attn : Mr John Hunter)	2877 2130
	(Attn : Mr Alan Chong)	2845 2215
	(Attn : Ms Anthea Li)	2523 7959