

**MUTUAL LEGAL ASSISTANCE
IN CRIMINAL MATTERS (IRELAND) ORDER**

Additional information on Articles 8(1) and 9(5)

ARTICLE 8(1)

The Hong Kong Government will attempt to comply with the confidentiality obligation under Article 8(1) by resisting any application to a court for release of information provided by Ireland. The grounds to be relied on in resisting such an application will depend on the facts of the case. One obvious ground that the Government could rely on is that the information is privileged on the ground that disclosure would be injurious to the public interest.

ARTICLE 9(5) - CLAIM OF IMMUNITY, INCAPACITY OR PRIVILEGE

1. PROCEDURES FOR TAKING OF EVIDENCE

The taking of evidence pursuant to a request made to Hong Kong under an agreement for mutual legal assistance in criminal matters is governed by section 10 of the Mutual Legal Assistance in Criminal Matters Ordinance (“MLA Ordinance”).

A. Section 10 of the MLA Ordinance

2. Under section 10 of the MLA Ordinance, the evidence will be taken before a Magistrate, in camera, if deemed necessary by the Magistrate. The evidence will be put in writing and will be certified by the Magistrate.

3. The practical procedures for taking evidence before the Magistrate are largely based on and developed from the procedures laid down in the Rules of the High Court for the taking of evidence pursuant to letters of request processed under the Evidence Ordinance ¹.

¹ A gist of the Letters of Request procedures laid down in the Rules of the High Court for taking of evidence from a witness asserting a claim of privilege under the law of the Requesting Party is set out in the Schedule.

B. Claims of immunity etc. by a witness

(1) Claims pursuant to the law of Hong Kong

4. Section 10(10) of the MLA Ordinance provides that a witness is not compellable to give evidence for a criminal matter in the Requesting Party that he could not be compelled to do so if that matter were a trial of a person for a Hong Kong offence or proceedings to determine whether a person should be tried for such an offence; or on the ground that to do so might tend to incriminate him.

(2) Claims pursuant to the law of the Requesting Party

5. In respect of a claim to privilege under the law of the Requesting Party, section 10(7) of the MLA Ordinance provides that a witness is not compellable to answer a question that the person is not compellable to answer in the criminal matter in that place.

6. Section 10(9) however provides that subsection (7) does not apply in a case where its application would be inconsistent with any provision of prescribed arrangements, as in this case.

C. Failure of a witness to give evidence

7. Section 5 of the Mutual Legal Assistance in Criminal Matters Regulation (the “Regulation”) provides that where a witness fails, *without lawful or reasonable excuse*, to answer a question or to produce a thing, the magistrate may order the person to be imprisoned or impose a fine upon him.

2. HOW A CLAIM UNDER ARTICLE 9(5) OF THE HONG KONG / IRELAND MLA AGREEMENT WOULD BE DEALT WITH IN PRACTICE

A Article 9(5) of the Hong Kong/Ireland MLA Agreement

8. Article 9(5) provides that if a witness asserts a claim of immunity, incapacity or privilege (“Claim”) *under the law of the Requested Party*, it

shall be resolved pursuant to the Requested Party's law. If the Claim is asserted *under the law of the Requesting Party*, the evidence should nonetheless be taken, and the Claim made known to the Central Authority of the Requesting Party for subsequent resolution of the Claim by the appropriate authority of the Requesting Party.

B. Procedures for taking of evidence from a witness asserting a Claim

9. Based on the practice mentioned at paragraph 1 above, if a witness who is summonsed before the Magistrate under section 10 of the MLA Ordinance asserts a Claim under Article 9(5), the following will apply:-

(1) A Claim under the law of Hong Kong as the Requested Party

10. If the witness asserts a Claim under the law of the **Requested** Party, the Claim will be resolved pursuant to the law of Hong Kong:-

- (a) The witness will be asked to state the details of the Claim and the grounds on which the Claim is made.
- (b) Counsel appearing on behalf of the Requesting Party (usually a counsel from the Department of Justice) will be invited to make submission in respect of the Claim.
- (c) The Magistrate will then determine whether the Claim is made out. If the Claim is upheld, the witness will not be required to give the evidence to which the Claim relates. If the Claim is rejected, the witness will be required to give the evidence.

(2) A Claim under the law of the Requesting Party

11. The effect of the 2nd sentence of Article 9(5) is that a witness asserting a Claim under the law of the Requesting Party will be required to give evidence to which the Claim relates, pending the subsequent resolution of the Claim by the Requesting Party:-

- (a) The witness will be asked to state the details of the Claim and the grounds on which the Claim is made.
- (b) The Magistrate will then set out in a statement the details of and grounds for the Claim.

- (c) The Magistrate will proceed to take the evidence to which the Claim relates. The evidence will be taken in a document which is separate from the rest of the evidence of the witness.
- (d) The Magistrate will cause the rest of the evidence which is not subject to the Claim to be reduced in writing in a deposition. The deposition will then be signed by both the Magistrate and the witness.
- (e) The Magistrate will then forward to the Department of Justice as the Central Authority the deposition, the document containing the evidence to which the Claim relates and his statement.
- (f) The Department of Justice will send to the Requesting Party the deposition and the Magistrate's statement, and request the Requesting Party to determine on the Claim based on the details of and grounds for the Claim set out in the Magistrate's statement. The document containing the evidence to which the Claim relates will be retained by the Department of Justice pending the Requesting Party's determination of the Claim.
- (g) If the Requesting Party confirms that the Claim is valid, the Department of Justice will notify the witness. The document which contains the evidence to which the Claim relates will then be transmitted to the witness for his custody and retention.
- (h) If the Requesting Party confirms that the Claim is without basis, the Department of Justice will notify the witness and forward the document to the Requesting Party. This action will not prevent an interested Party from contesting the admissibility of the evidence in subsequent proceedings in the Requesting Party.

12. It is a usual practice for a witness to be contacted before the examination and be supplied a list of the questions (or areas of questions) to be asked and the things to be produced in advance. The witness will

have ample opportunity, well in advance of the examination, to consider and seek advice, if deemed necessary, as to whether any action should be taken in respect of the summons, including whether any Claim should be asserted in respect of any of the evidence sought.

3. POLICY BEHIND THE APPROACH ADOPTED IN THE 2ND SENTENCE OF ARTICLE 9(5)

13. The rationale behind the approach is to prevent the possibility of claims pursuant to the law of the Requesting Party being deployed as a delaying tactic to obstruct the provision of assistance under the Agreement.

14. In practice, the common types of privileges accorded to witnesses under the laws of other jurisdictions are usually covered under the law of Hong Kong, such as legal privilege, spousal privilege and privilege against self-incrimination. If a witness asserts a Claim under the law of the Requesting Party, he will, in most cases, be able to assert a similar Claim under the law of Hong Kong and hence be exempted from giving the evidence to which the Claim relates, if the Claim is made out.

15. We do not believe that our negotiating partners will request us to take evidence that they would be prevented from taking in their own jurisdiction (assuming the evidence was available there). This would be tantamount to acting in bad faith. And, of course, before the Requesting Party receives the evidence it will have to specifically confirm that the claim made by the witness is without basis.

**International Law Division
Department of Justice**

Schedule

Procedures for the taking of evidence pursuant to a letter of request from a witness who asserts a claim to privilege under the law of the requesting jurisdiction

[Order 70 rules 6 of the Rules of the High Court]

Under Order 70 rules 6 of the Rules of the High Court, where a witness claims to be exempted from giving any evidence under section 77(1)(b) of the Evidence Ordinance, the Examiner or the Court may require the witness to give the evidence to which the claim relates. Rule 6(3) makes detailed provisions regarding the handling of the evidence so obtained, namely:-

- the evidence shall be contained in a document separate from the remainder of the deposition of the witness;
- the examiner shall set out in a statement the claim and the ground on which the claim was made;
- the statement will be sent by the examiner to the Registrar of the High Court together with the deposition of the witness;
- the Registrar shall retain the document containing the evidence and send the statement to the requesting court requesting for determination of the claim;
- if the claim is rejected by the requesting court, the Registrar shall send to the requesting court the document containing that part of the evidence;
- if the claim is upheld by the court the Registrar shall send the document to the witness;
- In either case, the Registrar shall notify the witness and the applicant of the requesting court's determination.