

## **Mutual Legal Assistance (Netherlands) Order**

At the meeting of the LegCo Subcommittee on the captioned Order on 9 April 2003, Members asked the Administration to clarify two aspects of the operation of Article 10(5) of the Agreement between the Government of the HKSAR and the Government of the Kingdom of the Netherlands Concerning Mutual Legal Assistance in Criminal Matters (“the MLA agreement” and see Schedule 1 to the captioned Order).

### Article 10(5) of the MLA agreement

2. Article 10 of the MLA agreement provides for the taking of testimony in the requested Party. Article 10(5) further provides that if a witness claims that there is a right to decline to give testimony under the law of the requesting Party, the Central Authority of the requested Party shall, where appropriate, consult with Central Authority of the requesting Party.

3. By exchange of notes between the Government of Hong Kong and the Government of the Kingdom of the Netherlands dated 26 August 2002, it has been agreed between the two Governments that where a request under Article 10 is executed in the presence of the authorities of the requesting Party or their legal representatives, they are considered to be competent to give advice on the law of the requesting Party. In such cases it will not be appropriate to consult the Central Authority of the requesting Party and rely on a declaration by the authority as envisaged in Article 10, paragraph 5. Rather reliance will be placed on the legal opinion of the legal representative of the requesting Party.

### Section 10 of the Mutual Legal Assistance in Criminal Matters Ordinance [Cap. 525] (“MLA Ordinance”)

4. The execution of a request from the Netherlands pursuant to the MLA agreement for the taking of evidence (testimony) of a witness in Hong Kong will be implemented under section 10 of the MLA Ordinance.

5. By section 10(4)(c) of the MLA Ordinance, the appropriate authority of the requesting place or its legal representative may be present at the proceedings where the testimony is taken<sup>1</sup>.

### Immunity under the law of the requesting Party

6. Pursuant to section 10(8) of the MLA Ordinance, a duly certified

---

<sup>1</sup> And see Article 10(3) of the MLA Agreement.

external law immunity certificate is admissible in proceedings under section 10 of the MLA Ordinance as evidence of the facts stated in the certificate. “External law immunity certificate” is defined in section 2(1) of the MLA Ordinance to mean a certificate given, or a declaration made, by a place outside Hong Kong or under a law of a place outside Hong Kong certifying or declaring that, under the law of that place, persons generally or a specified person could or could not, either generally or in specified proceedings and either generally or in specified circumstances, be required :

- (a) to answer a specified question; or
- (b) to produce a specified document.

7. By virtue of the agreement between the two Governments referred to in para. 3 above, where the Dutch authorities are represented at the proceedings before a Hong Kong magistrate for the taking of testimony pursuant to Article 10(5) of the MLA agreement, no external law immunity certificate will be produced and instead the representative or its legal experts may give his views on claims of immunity of witnesses under Dutch law. (Emphasis supplied)

8. One aspect of the query of Members is whether a Hong Kong court will be bound by the legal opinion of a Dutch legal expert on the absence of immunity under Dutch law and as such will require a witness to give evidence notwithstanding that in the witness’ view, he is entitled to immunity under Dutch law.

9. The opinion of a Dutch legal expert presented at the proceedings will have no greater status than an external law immunity certificate under section 10(8) of the MLA Ordinance. In other words, the opinion will be admissible as evidence of the facts stated; but it is not conclusive evidence and accordingly a magistrate will not be bound by it.

10. The second aspect of the query of Members is whether a witness may request that that part of his evidence in respect which he claims immunity be forwarded separately together with a summary of his claims for resolution by the authorities in the Netherlands. There is nothing in the MLA Ordinance or its subsidiary legislation which would preclude a magistrate from granting such an application. In fact were such an application made the representative of the Secretary for Justice present at the proceedings would, unless the application

was clearly unmeritorious, support it.

11. If a magistrate grants such application, the following procedures will be followed :

- (a) The witness will be asked to state the details of his claim and the grounds on which the claim is made.
- (b) The magistrate will set out in a statement the views of the Dutch legal expert, details of the witness' claim to immunity and the grounds for the claim put up by the witness.
- (c) The magistrate will proceed to take the evidence to which the claim relates. The evidence will be set out in a document separate from the rest of the evidence of the witness which is not in dispute.
- (d) The magistrate will cause the evidence which is not subject to any 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 forward to the Department of Justice as the Central Authority under the MLA agreement the deposition, the document containing the evidence to which the claim relates and his statement.
- (f) The Department of Justice will send to the Netherlands the deposition and the magistrate's statement and request the Netherlands to determine the claim about immunity. The document containing the evidence to which the claim relates will be retained by the Department of Justice pending the determination of the Netherlands regarding the claim.
- (g) If the Netherlands confirms that the claim to immunity 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 Netherlands advises that the claim is without basis, the Department of Justice will notify the witness and forward the

document to the Netherlands. This action will not prevent an interested party from contesting the admissibility of the evidence in subsequent proceedings in the Netherlands.

12. It is also submitted that a decision by a magistrate to not grant an application by a witness for separate treatment of certain part of his testimony to which the claim to immunity applies will be subject to legal challenge by a witness by way of judicial review proceedings in Hong Kong.

International Law Division  
Department of Justice  
16 April 2003

Ref. : N/MLA/003 IV