

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ORDINANCE

RESOLUTION

(Under section 4 of the Mutual Legal Assistance in Criminal
Matters Ordinance (Cap. 525))

RESOLVED that the Mutual Legal Assistance in Criminal Matters
(Denmark) Order, made by the Chief Executive in Council
on 12 April 2005, be approved.

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

(Made by the Chief Executive in Council under section 4 of
the Mutual Legal Assistance in Criminal Matters
Ordinance (Cap. 525) subject to the approval
of the Legislative Council)

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Ordinance to apply between Hong Kong and Denmark

(1) In relation to the scheduled arrangements for mutual legal assistance, it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 1, apply as between Hong Kong and the Kingdom of Denmark.

(2) In subsection (1), "scheduled arrangements for mutual legal assistance" (列明的相互法律協助的安排) means arrangements which are applicable to the Government and the Government of the Kingdom of Denmark, a copy of which is annexed at Schedule 2.

SCHEDULE 1

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows –

"(e) the request relates to the prosecution of a person for an external offence in a case where the person is*

(i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place^{**} or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;* or

(ii)* has undergone the punishment provided by the law of that place or Hong Kong^{**} in respect of that offence or of another external offence constituted by the same act or omission as that offence;".

2. Section 17(1) of the Ordinance shall be modified by deleting paragraph (ii).

3. Section 17(3)(b) of the Ordinance shall be modified to read as follows -

"(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that his presence is no longer required for any of the following purposes* ~~has had an opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for~~^{**} -

(i) the purpose to which the request relates; ~~or~~^{**}

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a

criminal matter in relation to which it is desirable that the person give assistance."

4. Section 23(2)(a) of the Ordinance shall be modified –
- (a) by adding "or" at the end of subparagraph (i);
 - (b) by deleting subparagraph (ii).

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

SCHEDULE 2

[s. 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE KINGDOM OF DENMARK CONCERNING MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China and the Government of the Kingdom of Denmark,

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds;

Have agreed as follows:

ARTICLE 1

SCOPE OF ASSISTANCE

(1) The Parties shall afford each other, in accordance with the provisions of this Agreement, the widest measure of mutual assistance in the investigation and prosecution of criminal offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of ordinary criminal law courts of the Requesting Party and in judicial proceedings related thereto.

(2) Assistance shall include:

- (a) taking evidence and statements from persons;
- (b) providing information, documents, articles and records, including judicial and official records, and transfer of exhibits;
- (c) identifying and locating persons;
- (d) effecting the temporary transfer of persons in custody to provide assistance;

- (e) facilitating the voluntary appearance of persons in the Requesting Party to provide assistance;
- (f) executing requests for search and seizure;
- (g) identifying, tracing, restraining, seizing, forfeiting and confiscating the proceeds of crime; and
- (h) serving of documents.

(3) In the case of requests related to fiscal offences assistance may not be refused unless the primary purpose of the investigation is the assessment or collection of tax.

(4) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not by itself give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

(5) This Agreement does not apply to offences under military law which are not offences under ordinary criminal law.

ARTICLE 2

CENTRAL AUTHORITY

(1) The Central Authorities shall process requests for mutual legal assistance made in accordance with the provisions of this Agreement.

(2) The Central Authority of Hong Kong Special Administrative Region is the Secretary for Justice or his or her duly authorised officer. The Central Authority for Denmark is the Danish Ministry of Justice. Either Party may change its Central Authority in which case it shall notify the other of the change.

(3) Requests for mutual legal assistance shall be made directly between the Central Authorities and shall be returned through the same channels. In urgent cases, a request may be transmitted through the International Criminal Police Organisation (Interpol).

ARTICLE 3

OTHER ASSISTANCE

The Parties may provide assistance pursuant to other agreements, arrangements or practices.

ARTICLE 4

GROUND FOR REFUSAL

(1) The Requested Party may and, if required by its law, shall refuse assistance if:

- (a) the Requested Party being the Government of Hong Kong Special Administrative Region, the execution of the request would impair:
 - (i) the sovereignty, security or public order of the People's Republic of China; or
 - (ii) the essential interests of Hong Kong Special Administrative Region;
- (b) the Requested Party being the Government of the Kingdom of Denmark, the execution of the request would impair the sovereignty, security, public order or other essential interests of the Kingdom of Denmark;
- (c) the request for assistance relates to an offence of a political character;
- (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, religion, nationality or political opinions;
- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requested Party or for which the Requested Party has

made a final decision to waive or discontinue proceedings;

(f) the request for assistance relates to the prosecution of a person for an offence for which the person could no longer be prosecuted if the prosecution were to take place in the jurisdiction of the Requested Party; or

(g) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(2) For the purposes of paragraph (1)(g), for offences relating to taxes, duties or customs control, it shall be immaterial that the law of the Requested Party does not impose the same kind of tax, duty or customs control or does not contain a tax, duty or customs regulation of the same kind as the law of the Requesting Party.

(3) The Requested Party may refuse assistance if the request relates to an offence which is punishable with death under the laws of the Requesting Party and the laws of the Requested Party do not permit such punishment for that offence unless the Requesting Party provides such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

(4) The Requested Party may refuse assistance if the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided.

ARTICLE 5

REQUESTS

(1) Requests shall be made in writing, or by any means capable of producing a written record under conditions allowing the Requested Party to establish authenticity.

(2) Requests for assistance shall include:

- (a) the name of the authority on behalf of which the request is made;
- (b) a description of the purpose of the request and the nature of the assistance requested as well as the relevance to the investigation, prosecution or proceedings;
- (c) a description of the nature of the investigation, prosecution or proceedings and the offence;
- (d) where proceedings have been instituted, details of the proceedings;

- (e) a summary of the relevant facts and laws or the text of the relevant provisions including the maximum penalty for the offence;
- (f) any requirements for confidentiality;
- (g) details of any particular procedure or formalities that the Requesting Party wishes to be followed; and
- (h) details of the period within which the request should be complied with and the reasons therefor.

(3) The Requesting Party may include any other information that is required to facilitate execution of the request.

(4) A request and all documents submitted in support of such request to Hong Kong Special Administrative Region shall be either in English or Chinese. A request and all documents submitted in support of such request to Denmark shall be in English.

ARTICLE 6

EXECUTION OF REQUESTS

(1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.

(2) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.

(3) A request shall be executed in accordance with the law of the Requested Party and the provisions of this Agreement and, as far as practicable, in accordance with the directions stated in the request, including those relating to deadlines, provided that they are not contrary to the law of the Requested Party.

(4) The Requested Party shall keep confidential a request and its contents except:

(a) where otherwise permitted by the Requesting Party; or

(b) where the Requested Party is required under its law to disclose.

(5) On the express request of the Requesting Party, the Requested Party shall, as far as practicable, provide information about the date and the place of execution of the request. Representatives of the Requesting Party may be present during the execution of the request if the Requested Party consents.

(6) The Requested Party may request additional information when it appears necessary for the execution of the request in accordance with its law or when it can facilitate such execution.

(7) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

(8) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(9) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority:

- (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and

- (b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(10) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (9)(b), it shall comply with those terms and conditions.

ARTICLE 7

LIMITATIONS ON USE

(1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished under this Agreement, including documents, articles or records, be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(2) The Requesting Party shall not disclose, transmit or use information or evidence furnished, including documents, articles or records, for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

ARTICLE 8

TAKING OF EVIDENCE AND STATEMENTS FROM PERSONS

(1) Where a request is made that evidence or a statement of a person be taken the Requested Party shall arrange to have such evidence or statement taken.

(2) In addition to the information required under Article 5(2), a request for assistance under this Article shall specify the questions or subject matter on which the person is to give evidence or statements.

(3) Where evidence is to be taken, pursuant to a request for assistance under this Article, representatives of the Requesting Party, the person to whom the investigation, prosecution or proceedings in the Requesting Party relates and their legal representatives may, subject to the laws of the Requested Party, be present, if so requested by the Requesting Party.

(4) Where a statement is to be taken pursuant to a request for assistance, representatives of the Requesting Party may be present if the Requested Party consents.

(5) Where a person is required to give evidence in the Requested Party pursuant to a request for assistance:

(a) he may decline to do so if the law of the Requested Party permits that person to decline to give evidence in similar circumstances in proceedings which originate in the Requested Party;

(b) the Requested Party shall consult with the Requesting Party regarding the execution of the request, if that person claims that there is a right to decline to give evidence under the law of the Requesting Party.

ARTICLE 9

OBTAINING OF DOCUMENTS, ARTICLES AND RECORDS

(1) Where a request is made for the obtaining of documents, articles or records, the Requested Party shall arrange to have such documents, articles or records produced.

(2) Assistance under this Article may be provided subject to such terms and conditions as the Requested Party deems necessary.

ARTICLE 10

LOCATION AND IDENTITY OF PERSONS

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person within the territory of the Requested Party as specified in the request.

ARTICLE 11

TEMPORARY TRANSFER OF PERSONS IN CUSTODY TO THE REQUESTING PARTY

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purpose of providing assistance shall, if the Requested Party consents, be temporarily transferred to the Requesting Party provided that the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Transfer may be refused:

(a) if the person in custody does not consent;

(b) if his presence is necessary at criminal proceedings pending in the Requested Party; or

(c) if there are other overriding grounds for not transferring him to the Requesting Party.

(3) Where the Requested Party advises the Requesting Party that the transferred person is no longer required to be held in custody, the Requesting Party shall ensure the person's release from custody.

ARTICLE 12

VOLUNTARY APPEARANCE OF OTHER PERSONS IN THE REQUESTING PARTY

(1) The Requesting Party may request the assistance of the Requested Party in inviting a person within the territory of the Requested Party to appear in the Requesting Party to provide assistance.

(2) The request shall contain the following information:

(a) the reason for the request;

(b) the dates on which the person shall appear;

(c) information with regard to travel to and accommodation in the Requesting Party and any allowance payable to the person; and

(d) name of a representative in the Requesting Party who can be contacted concerning the practical arrangements.

(3) Upon receipt of such a request the Requested Party shall invite the person to travel to the Requesting Party and inform the Requesting Party of the person's response.

ARTICLE 13

SAFE CONDUCT

(1) A person who consents to provide assistance pursuant to Articles 11 and 12 shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party, except as provided in Article 11.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 11, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles 11 or 12 shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Articles 11 or 12 shall not be required to provide assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to give evidence or provide assistance pursuant to Articles 11 or 12 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 14

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and transmission of any material to the Requesting Party.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is transmitted to the Requesting Party.

ARTICLE 15

PROCEEDS OF CRIME

(1) The Requested Party shall, upon request, endeavour to identify and trace any proceeds of crime located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In addition to the information required under Article 5(2), the Requesting Party shall state in the request the basis of its belief that such proceeds may be located in the jurisdiction of the Requested Party.

(2) Where pursuant to paragraph (1) proceeds of crime are found the Requested Party shall upon request take such provisional measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those proceeds of crime, pending a final determination in respect of those proceeds by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds of crime such request shall be executed pursuant to the laws of the Requested Party.

(4) In addition to the information required under Article 5(2), a request made under paragraph (3) shall be accompanied by a copy of the confiscation order made by the court in the Requesting Party and a declaration by the Central Authority of the Requesting Party that the confiscation order is final and enforceable.

(5) Proceeds of crime confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(6) For the purposes of this Agreement "proceeds of crime" includes –

- (a) property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property derived or realised, directly or indirectly, from the commission of an offence or the value which represents such property; and
- (b) property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.

ARTICLE 16

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law the Requested Party shall provide copies of publicly available documents.

(2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

ARTICLE 17

SERVICE OF DOCUMENTS

(1) The Requested Party shall serve any document transmitted in accordance with this Agreement to it for the purpose of service.

(2) A request for service of documents shall be accompanied by a short summary of their contents.

(3) Where there is reason to believe that the person to be served does not understand the language in which the document is originally drawn up, the Parties shall consult with each other in order to determine whether it should be translated into one of the official languages of the Requested Party or any other language.

(4) The Requesting Party shall transmit a request for the service of documents pertaining to a response or appearance in the

Requesting Party within a reasonable time before the scheduled response or appearance.

(5) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(6) A person who has been served with a document requiring appearance in the Requesting Party as a witness and who has failed to appear or has declined to appear shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requested Party or the Requesting Party.

ARTICLE 18

REPRESENTATION AND COSTS

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Parties shall not claim from each other the refund of any costs resulting from the execution of a request under this Agreement, except:

(a) fees of counsel and experts engaged by the Requested Party at the specific request of the Requesting Party;

(b) costs incurred by the attendance of representatives from the Requesting Party in the Requested Party;

(c) costs incurred by the temporary transfer of persons in custody; and

(d) costs of a substantial or extraordinary nature.

(3) The arrangements for the payment of costs under paragraphs (2)(a) and (d) shall be made by consultation and agreement with each other prior to the execution of the request.

ARTICLE 19

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. In any case certification and authentication by the Central Authorities of the Parties is sufficient.

ARTICLE 20

SUBMITTING INFORMATION IN CONNECTION WITH PROCEEDINGS

(1) When a Party becomes aware that an offence has been committed within the jurisdiction of the other Party, the first Party may

request the second Party to consider taking appropriate action under the law of that Party.

(2) The first Party may without prior request submit information or evidence to the second Party with a view to proceedings in that Party.

(3) The first Party may request information from the second Party about any action taken by it.

ARTICLE 21

SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

ARTICLE 22

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.

(2) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

In witness whereof the undersigned, being duly authorised by their respective governments have signed this Agreement.

Done at the Hong Kong Special Administrative Region, this twenty-third day of December Two thousand and Four in the Chinese, English and Danish languages, each text being equally authentic. In case of divergence of interpretation, the English text shall prevail.

Clerk to the Executive Council

COUNCIL CHAMBER

12 April 2005

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the Kingdom of Denmark. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Kingdom of Denmark and signed in Hong Kong on 23 December 2004. A copy of those arrangements is annexed at Schedule 2 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 1 to the Order.