

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
(Belgium) Order, made by the Chief Executive in Council on
12 April 2005, be approved.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (BELGIUM) 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 Belgium

(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 Belgium.

(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 Belgium, 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 –*

(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(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 30 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.”.

* 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 BELGIUM
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 Belgium.

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

Agreeing that co-operation in the field of law enforcement shall be consistent with fundamental and internationally recognized human rights.

Have agreed as follows:

ARTICLE I

SCOPE OF ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, the widest measure of mutual legal assistance in the prevention, investigation and prosecution of criminal offences falling within the jurisdiction of the Requesting Party and in proceedings related thereto.

- (2) Assistance shall include:
- (a) identifying and locating persons and objects;
 - (b) serving of documents;
 - (c) the obtaining of evidence, articles or documents;
 - (d) executing requests for search and seizure;
 - (e) facilitating the personal appearance of witnesses or experts;
 - (f) effecting the temporary transfer of persons in custody to appear as witnesses or for other purposes;
 - (g) obtaining production of judicial documents or other official documents;
 - (h) tracing, restraining, forfeiting and confiscating the proceeds and instruments of crime;
 - (i) providing information, documents and records, including criminal records;
 - (j) delivery of property, including lending of exhibits; and
 - (k) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.
- (3) Assistance under this Agreement may be granted in connection with criminal offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters provided the primary purpose of the investigation is not the assessment or collection of tax.
- (4) Assistance under this Agreement does not include:
- (a) the detention or custody of persons for the purpose of extradition;
 - (b) the enforcement of criminal sentences in the Requested Party, which have been imposed in the Requesting Party; and
 - (c) the transfer of prisoners in order to serve sentences.

ARTICLE II
CENTRAL AUTHORITY

- (1) Each Party shall establish a Central Authority.

- (2) The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorised officer. The Central Authority for the Kingdom of Belgium shall be the Federal Public Service of Justice and, in urgent cases, the Office of the Federal Prosecutor. Either Party may change its Central Authority in which case it shall notify the other of the change.

- (3) Requests under this Agreement shall only be transmitted by the Central Authority of the Requesting Party to the Central Authority of the Requested Party. Requests shall be in writing. In urgent cases, the request may be sent by fax.

- (4) The Central Authority of the Requested Party shall promptly comply with requests or, as appropriate, forward them to its competent authorities for them to carry out.

- (5) All communications whose purpose is to obtain additional information may be made directly between the competent authorities responsible for executing the request.

ARTICLE III
OTHER FORMS OF ASSISTANCE

This Agreement shall not preclude assistance arising from other treaties or agreements applicable to the Parties, nor prevent other forms of assistance between the competent authorities of the Parties.

ARTICLE IV LIMITATIONS ON COMPLIANCE

- (1) The Requested Party may, and if required by its law shall, refuse assistance if:
- (a) the granting of the request would, in the case of the Government of the Hong Kong Special Administrative Region, impair the sovereignty, security or public order of the People's Republic of China or, in the case of the Government of the Kingdom of Belgium, impair the sovereignty, security or public order of the Kingdom of Belgium;
 - (b) it is of the opinion that the granting of the request would seriously impair its essential interests;
 - (c) the request for assistance relates to an offence that is, or by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character or an offence connected 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 prosecuted, punished or prejudiced on account of his or her sex, race, religion, nationality or political opinions;
 - (e) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided;
 - (f) the request for assistance is for the purpose of the prosecution of a person for an offence in respect of which the person has been

tried, and on whom final judgment has been passed, or has been pardoned in the Requested Party;

- (g) in the case of requests involving compulsory measures 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;
- (h) the request relates to a military offence that does not constitute an offence under ordinary criminal law;
- (i) the request does not comply with the provisions of Article V;
- (j) the request could lead to a judgment being pronounced by a court or tribunal established in exceptional circumstances or for exceptional cases, the operating rules and procedures of which would depart from internationally recognized principles of law.

(2) The Requested Party shall not invoke banking secrecy as an essential interest for the purpose of refusing assistance under paragraph (1)(b).

(3) Paragraph (1)(c) of this article does not apply to an offence which the Requested Party considers excluded from being a political offence by any international agreement that applies to the Parties.

(4) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

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

(6) 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.

(7) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (6)(b), it shall comply with those terms and conditions.

ARTICLE V REQUESTS

(1) Requests shall include:

- (a) the contact details of the authority on behalf of which the request is made;
- (b) a description of the nature of the investigation, prosecution, offence or criminal matter, and a summary of the relevant facts and laws;
- (c) if possible the identity and nationality of the person concerned, and the place of registered address or residence;
- (d) a description of the purpose of the request and the nature of the assistance requested;
- (e) any requirements for confidentiality;

- (f) details of any particular procedure the Requesting Party wishes to be followed; and
- (g) a statement of the desired deadline for implementation, and if possible the reasons for urgency.

(2) The request and documents in support of the request shall be sent in one of the official languages of the Requesting Party accompanied by a translation in English. Costs of translating a request or a response to a request shall be borne by the Requesting Party.

ARTICLE VI EXECUTION OF REQUESTS

(1) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

(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) 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.

(4) To the extent not incompatible with the law of the Requested Party, the competent authority in the Requested Party may authorise judges and competent authorities of the Requesting Party, as well as other persons involved in the investigation or the proceedings and mentioned in the request, to be present at

the execution of the request and to participate in the proceedings in the Requested Party.

ARTICLE VII EXPENSES

(1) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:

- (a) expenses of employing experts;
- (b) expenses of interpretation; and
- (c) travel expenses and allowances of witnesses, experts, persons being transferred in custody and escorting officers.

(2) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

ARTICLE VIII LIMITATIONS OF USE

(1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished 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 or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

ARTICLE IX
ATTENDANCE AT EXECUTION OF REQUESTS

Upon request, the Requesting Party shall be informed by the Requested Party of the date and place of execution of requests so that the authorities of the Requesting Party or other parties concerned may attend, if the Requested Party so consents.

ARTICLE X
OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

- (1) Where a request is made that evidence be taken the Requested Party shall arrange to have such evidence taken.
- (2) For the purposes of this Agreement, the giving or taking of evidence shall include the taking of testimony and the production of documents, records or other material.
- (3) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witness or person giving evidence and the subject matter about which they are to be examined.
- (4) If necessary, any questions additional to those specified in paragraph (3) of this Article, may be put to the witness or person giving evidence by the competent authority of the Requested Party, either of its own volition or if requested by any of the persons referred to in Article IX.
- (5) A person who is required to give evidence as a witness in the Requested Party pursuant to a request for assistance may decline to give evidence if the law of the Requested Party would permit the person to decline to give evidence in

similar circumstances in proceedings which originated in the Requested Party. Any privilege under the laws of the Requesting Party from giving testimony shall not be taken into consideration in the execution of requests under this Article, but any such claim shall be noted in the record.

(6) Where possible and consistent with their laws, the Parties may agree on a case by case basis that testimony shall be taken by means of video conference under specified conditions.

ARTICLE XI SERVICE OF DOCUMENTS

(1) The Requested Party shall effect service of any legal process which is transmitted to it for this purpose by the Requesting Party.

(2) The Requesting Party shall transmit a request for the service of a document pertaining to an appearance in the Requesting Party at least 40 days before the scheduled appearance.

(3) Service may be effected by simple transmission of the document to the person to be served. If the Requesting Party expressly so requests service shall be effected by the Requested Party in the manner provided for the service of analogous documents under the law of the Requested Party or in a special manner consistent with such law.

(4) The Requested Party shall, insofar as its law permits, return a proof of service in the manner required by the Requesting Party.

(5) A person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requested Party.

ARTICLE XII

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

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

(2) Subject to its law, 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.

ARTICLE XIII

CERTIFICATION AND AUTHENTICATION

Evidence, documents, records or other material transmitted by either Party pursuant to this Agreement shall not require any form of certification or authentication unless expressly requested by the Central Authority of the other Party. Material shall be certified or authenticated by consular or diplomatic officers only if the law of either Party specifically so requires.

ARTICLE XIV

TRANSFER OF PERSONS IN CUSTODY

(1) A person in custody in the Requested Party who is needed for purposes of assistance under this Agreement in the Requesting Party shall be transferred from the Requested Party to the Requesting Party, provided the Requested Party

and the person consent and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody.

(3) Time spent in custody in the Requesting Party shall be treated as part of the sentence to be served in the Requested Party.

ARTICLE XV

TRANSFER OF OTHER PERSONS

(1) If the Requesting Party considers the personal appearance of a witness or expert for the purpose of providing assistance necessary it shall so inform the Requested Party. The Requested Party shall invite the witness or expert to appear and advise the Requesting Party of the reply from the witness or expert.

(2) Where a request is made pursuant to this Article the Requesting Party shall advise the approximate amounts of allowances payable, including travelling and accommodation expenses. If a witness or expert so requests, the Requesting Party may make a down payment.

ARTICLE XVI

IMMUNITY

(1) A person who consents to transfer pursuant to Articles XIV or XV shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or be subject to civil suit being a civil suit to

which the person could not be subjected if the person were not in the Requesting Party for any act or omission which preceded his departure from the Requested Party.

(2) A person who consents to transfer pursuant to Articles XIV or XV shall not be subject to prosecution based on his testimony, except for perjury.

(3) A person who consents to transfer pursuant to Articles XIV or XV shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

(4) A person who does not consent to transfer pursuant to Articles XIV or XV shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

(5) A person who responds to a summons from the Requesting Party to answer for acts forming the subject of proceedings against him shall not be prosecuted or detained or restricted in his personal liberty in the Requesting Party for acts or omissions which preceded his departure from the Requested Party and which are not specified in the summons.

(6) Paragraphs (1) and (5) shall not apply if the person, being free to leave, has not left the Requesting Party within a period of 30 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

ARTICLE XVII

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to a proceeding or investigation in relation to a criminal matter, where the offence is punishable under the law of the Requesting Party with a maximum term of imprisonment of:

- (a) in the case of requests to the Hong Kong Special Administrative Region, not less than 24 months; and
- (b) in the case of requests to the Kingdom of Belgium, not less than 12 months.

(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 delivered to the Requesting Party.

ARTICLE XVIII PROCEEDS OF CRIME

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime against the law of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

(2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent

any dealing in, transfer or disposal of, those suspected 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) Proceeds of crime confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(5) Proceeds of crime include instruments used in connection with the commission of an offence.

ARTICLE XIX

PROVISION OF OTHER INFORMATION IN CONNECTION WITH PROCEEDINGS

(1) Where an offence has been committed within the area of a Party and that offence may also be prosecuted by the other Party the former Party may inform the latter Party if it decides not to prosecute the offence. Upon request, the former Party may provide information and evidence in relation to that offence.

(2) If jurisdiction over the offence is established in the latter Party it shall inform the other Party of the options and legal remedies available to persons within its jurisdiction.

ARTICLE XX

SPONTANEOUS INFORMATION

Without prejudice to its own investigations or proceedings a Party may, without prior request, forward to the other Party information concerning the commission of criminal offences when it considers that such information might assist the receiving Party in carrying out investigations or proceedings or might lead to a request by that Party under this Agreement.

ARTICLE XXI 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 XXII ENTRY INTO FORCE AND TERMINATION

- (1) This Agreement shall enter into force on the first day of the second month after the month in 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) This Agreement shall apply to requests whether or not the relevant acts or omissions occurred prior to the Agreement entering into force.
- (3) Either 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 thereto by their respective Governments, have signed this Agreement.

DONE in duplicate in Brussels this twentieth day of September, Two Thousand and Four in the Chinese, English, Dutch and French languages, each text being equally authentic.

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 Belgium. 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 Belgium and signed in Brussels on 20 September 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.