

Mutual Legal Assistance in Criminal Matters (Spain) Order

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

1. Commencement

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

2. Ordinance applies between Hong Kong and Spain

- (1) In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance, subject to the modifications specified in Schedule 2, applies as between Hong Kong and Spain.
- (2) The modifications referred to in subsection (1) are summarized in Schedule 3.

Schedule 1

[s. 2]

Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and Spain 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 to conclude this Agreement with the Government of Spain,

The Hong Kong Special Administrative Region and Spain, hereinafter referred to as the Parties,

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:

Note:[#] The Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and Spain Concerning Mutual Legal Assistance in Criminal Matters was done in the Chinese, English and Spanish languages, each text being equally authentic. The Spanish text of the Agreement is available for inspection at the Security Bureau of the Government of the HKSAR.

I. GENERAL PROVISIONS

ARTICLE 1

SCOPE OF ASSISTANCE

- (1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual legal assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.
- (2) Assistance shall include:
 - (a) identifying and locating persons;
 - (b) serving of documents;
 - (c) the obtaining of evidence including documents, articles and records;
 - (d) executing requests for search and seizure;
 - (e) facilitating the appearance of persons to provide assistance;
 - (f) effecting the temporary transfer of persons in custody to provide assistance;
 - (g) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities;
 - (h) delivery of property, including the restitution of property and lending of exhibits;

- (i) exchange of information relating to criminal acts and institution of criminal proceedings in the Requested Party; and
- (j) 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 offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters.

(4) This Agreement is intended solely for mutual assistance between the Parties. The provisions of the Agreement shall not 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.

ARTICLE 2

CENTRAL AUTHORITY

- (1) Each Party shall designate a Central Authority which shall be responsible for processing requests for mutual legal assistance in accordance with the provisions of this Agreement.
- (2) The Central Authority for the Hong Kong Special Administrative Region is the Secretary for Justice or his duly authorised officer. The Central Authority for Spain is the Ministry of Justice.
- (3) Either Party may change its Central Authority in which case it shall notify the other Party of the change.
- (4) Requests made under this Agreement shall be transmitted by the Central Authority of the Requesting Party to the Central Authority of the

Requested Party. For the purposes of the Agreement, the Central Authorities may communicate directly with each other.

ARTICLE 3

GROUND FOR REFUSAL

- (1) The Requested Party shall refuse assistance if:
- (a) the request for assistance impairs the sovereignty, security or public order of the People's Republic of China in the case of the Hong Kong Special Administrative Region, or, of Spain;
 - (b) the request for assistance relates to an offence of a political character;
 - (c) the request for assistance relates to an offence considered to be exclusively military in the Requested Party;
 - (d) there are substantial grounds to believe that the request for assistance has been made to investigate or prosecute a person for reasons of his race, religion, nationality, ethnic origin, political opinion or sex, or that the request is being made to subject that person to any form of discrimination;
 - (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 person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;

- (f) it is of the opinion that the granting of the request would seriously impair its essential interests; or
 - (g) in the case of requests involving compulsory measures, the acts or omissions alleged to constitute the offence would not have constituted an offence under the law of the Requested Party if they had occurred within the jurisdiction of that Party.
- (2) For the purpose of paragraph (1)(b) of this Article, "an offence of a political character" does not include terrorist offences or any other offence which the Requested Party considers excluded from that category by any international agreement that applies to that Party.
- (3) The Requested Party shall also 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, will not be carried out.
- (4) The Requested Party may refuse assistance if the request relates to an offence which is punishable according to the law of the Requesting Party with life imprisonment or carries a prison sentence of undetermined duration, unless the Requesting Party gives such assurance as the Requested Party considers sufficient that these penalties will not be imposed, or if imposed, will not be carried out.
- (5) 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.

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

(7) 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.

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

ARTICLE 4

FORM AND LANGUAGE OF REQUESTS

(1) Requests shall be made in writing. In urgent cases requests may be transmitted by telex, fax, electronic mail or any other means capable of affording a written record, but shall be confirmed by the original documents within 10 days thereof.

(2) Requests for assistance addressed to the Hong Kong Special Administrative Region and any supporting documents shall be accompanied by a translation into Chinese or English. Requests for assistance addressed to Spain and any supporting documents shall be accompanied by a translation into Spanish.

ARTICLE 5

CONTENT OF REQUESTS

(1) 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;
- (c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;
- (d) where proceedings have been instituted, details of the proceedings; and
- (e) a summary of the relevant facts and laws.

(2) If necessary, requests for assistance may include:

- (a) any requirements for confidentiality;
- (b) details of any particular procedure the Requesting Party wishes to be followed;
- (c) details of the period within which the request should be complied with; and
- (d) any other information which is required to facilitate execution of the request.

ARTICLE 6

EXECUTION OF REQUESTS

- (1) The Central Authority of the Requested Party shall promptly execute the request or transmit it to its competent authority for execution.
- (2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited thereby, in accordance with the directions stated in the request so far as practicable.
- (3) 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.
- (4) 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.
- (5) The Requested Party shall use its best efforts to keep confidential a request and its contents except to the extent necessary to execute it.

ARTICLE 7

EXPENSES

- (1) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:
 - (a) fees of counsel retained at the request of the Requesting Party;

- (b) fees of experts;
- (c) expenses of translation; and
- (d) travel expenses and allowances of persons who travel between the Requesting and Requested Parties.

- (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 8

CONFIDENTIALITY

- (1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished, 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 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.

II. FORMS OF ASSISTANCE

ARTICLE 9

OBTAINING EVIDENCE, DOCUMENTS ARTICLES AND RECORDS

- (1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party, 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 production of documents, articles and records.
- (3) For the purposes of requests under this Article, the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.
- (4) Where evidence is to be taken, pursuant to a request for assistance under this Article, the person to whom the investigation, prosecution or proceeding in the Requesting Party relates, the person who is to give evidence and representatives of the Requesting party may, subject to the laws of the Requested Party, appear or have legal representation or both for the purpose of questioning the person giving the evidence.
- (5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to do so where either:
 - (a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or

- (b) the law of the Requesting Party would permit such witness to decline to give evidence in similar proceedings in the Requesting Party.

- (6) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate issued by a competent authority of the Requesting Party.

ARTICLE 10

OBTAINING VOLUNTARY STATEMENTS OF PERSONS

Where a request is made to obtain a voluntary statement of a person for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

ARTICLE 11

TESTIMONY BY VIDEO CONFERENCE

Where possible and consistent with the laws of both Parties, the Parties may agree that testimony may be taken by means of video conference under specified conditions.

ARTICLE 12

SERVICE OF DOCUMENTS

- (1) The Requested Party shall serve any document transmitted to it for the purpose of service.
- (2) The Requesting Party shall transmit a request for the service of a document that requires a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.
- (3) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.
- (4) A person who fails to comply with a summons to appear in the Requesting Party shall not thereby be liable to any penalty or coercive measure pursuant to the law of either Party.

ARTICLE 13

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

Subject to its law, at the request of the Requesting Party, the Requested Party:

- (a) shall provide copies of official documents, records and information available to the public; and
- (b) 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. If assistance stipulated in this sub-paragraph is refused, the Requested Party shall not be obliged to reveal its reason for refusal.

ARTICLE 14

ASSISTANCE IN THE REQUESTING PARTY

- (1) The Requesting Party may request the assistance of the Requested Party in inviting a person to provide assistance in the Requesting Party pursuant to this Agreement.
- (2) 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 15TEMPORARY TRANSFER OF PERSONS IN CUSTODY
TO PROVIDE ASSISTANCE

- (1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purpose of providing assistance pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents 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.

ARTICLE 16

IMMUNITY

(1) A person who consents to provide assistance pursuant to Articles 14 or 15:

- (a) 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 15;
- (b) shall not be subject to a civil suit to which the person could not be subject if he were not in the Requesting Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 15, 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 14 or 15 shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Articles 14 or 15 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 provide assistance pursuant to Articles 14 or 15 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 17

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 an investigation, prosecution or proceeding in relation to a criminal matter.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place and 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 18

EXCHANGE OF INFORMATION RELATING TO CRIMINAL PROCEEDINGS

(1) Either Party may, without prior request, submit information or evidence to the other Party with a view to the institution of criminal proceedings in that Party.

(2) The Party to whom such information or evidence is submitted shall notify the other Party of any action taken and shall forward a copy of any decision made in respect thereof.

ARTICLE 19

PROCEEDS AND INSTRUMENTALITIES OF CRIME

(1) A Party may request the identification or adoption of precautionary measures regarding property, instrumentalities or proceeds of a crime that are located in the territory of the other Party.

(2) Where, pursuant to paragraph (1), suspected proceeds or instrumentalities 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 or instrumentalities, pending a final determination in respect of those proceeds or instrumentalities by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities such request shall be executed pursuant to the laws of the Requested Party. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds or instrumentalities to which the request relates.

(4) The Party that has custody over proceeds or instrumentalities of crime shall dispose of them in accordance with its law. Either Party may transfer all or part of such assets, or the proceeds of their sale, to the other Party, to the extent permitted by the law of the transferring Party and upon such terms as may be agreed by both Parties.

(5) For the purposes of this Agreement:

(a) "proceeds of crime" includes—

(i) property which represents the equivalent value of property and other benefits derived from the commission of an offence; and

(ii) property derived or realized directly or indirectly from the commission of an offence;

(b) "instrumentalities of crime" includes property used or intended to be used in connection with the commission of an offence or the equivalent value of such property.

ARTICLE 20

RETURN OF DOCUMENTS, RECORDS AND ITEMS OF EVIDENCE

Upon the request of the Requested Party, the Requesting Party shall return such documents, records or items furnished to it in execution of a request as soon as possible. If agreed between the Central Authorities, such documents, records or items shall be disposed of in a mutually acceptable manner.

III. FINAL PROVISIONS

ARTICLE 21

EXEMPTION FROM AUTHENTICATION

For the purpose of application of this Agreement documents and translations drafted or certified by the courts or a competent authority of

either Party shall be admitted in proceedings without any form of authentication.

ARTICLE 22

COMPATIBILITY WITH OTHER INTERNATIONAL AGREEMENTS

Assistance and procedures set out in this Agreement shall not prevent either of the Parties from granting assistance to the other Party through other applicable international agreements or pursuant to the law of each Party.

ARTICLE 23

CONSULTATION

The Central Authorities of the Parties may consult with each other to promote the most effective use of this Agreement and agree upon such practical measures as may be necessary to facilitate the implementation of the Agreement.

ARTICLE 24

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 25

APPLICATION

This Agreement shall apply to any request presented after the date of its entry into force even if the relevant acts or omissions occurred prior to that date.

ARTICLE 26

ENTRY INTO FORCE AND TERMINATION

- (1) This Agreement shall enter into force 30 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 90 days after the day on which notice is received by the other Party. Requests for assistance which have been received prior to the date on which the Agreement ceases to have effect shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement were still in force.

In witness whereof the undersigned have signed this Agreement

Done in duplicate in Madrid, this Fifteenth day of November, Two thousand and Twelve in the Chinese, English and Spanish languages, each text being equally authentic.

Schedule 2

[s. 2 & Sch. 3]

Modifications to the Ordinance

1. Section 5(1)(d) of the Ordinance is modified to read as follows—

“(d) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, religion, nationality, ethnic origin, ~~or~~** political opinions or sex”;.
2. Section 5(1)(e) of the Ordinance is 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;”.
3. Section 5(1) of the Ordinance is modified by adding—

“(ea) the request relates to the prosecution of a person in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time;^{*}”.
4. Section 17(3)(b) of the Ordinance is 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 the person’s 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 text underlined is added. (The underlining is for ease of identifying the modification).

^{**} The text crossed out is deleted. (The crossing out is for ease of identifying the modification).

Schedule 3

[s. 2]

Summary of Modifications to the Ordinance

1. Sections 1, 2 and 3 of Schedule 2 specify modifications to section 5(1) of the Ordinance so that a request by a place outside Hong Kong for assistance under the Ordinance must also be refused if, in the opinion of the Secretary for Justice—
 - (a) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's ethnic origin or sex;
 - (b) the request relates to the prosecution of a person for an external offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in Hong Kong, or has undergone the punishment provided by the law of Hong Kong, in respect of that offence or of another external offence constituted by the same act or omission as that offence;
 - (c) the request relates to the prosecution of a person in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time.
2. Section 4 of Schedule 2 specifies modifications to section 17(3)(b) of the Ordinance to more precisely delineate the circumstances under which a person who is in Hong Kong to give assistance in relation to a criminal matter, pursuant to a request made by the Secretary for Justice, ceases to have immunities under section 17(1) of the Ordinance.



Clerk to the Executive Council

COUNCIL CHAMBER

23rd October, 2013

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (*the Ordinance*) applies as between Hong Kong and Spain. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region and Spain and signed in Madrid on 15 November 2012. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications specified in Schedule 2 to the Order. The modifications are summarized in Schedule 3 to the Order.