

立法會

Legislative Council

LC Paper No. LS11/13-14

**Paper for the House Committee Meeting
on 8 November 2013**

**Legal Service Division Report on two
Proposed Resolutions under section 4 of the
Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)**

**Mutual Legal Assistance in Criminal Matters (Spain) Order
Mutual Legal Assistance in Criminal Matters (Czech Republic) Order**

The Secretary for Security (the Secretary) has given notice to move two motions at the Legislative Council meeting of 20 November 2013. The purpose of the motions is to seek the Legislative Council's approval of the following two Orders (the two Orders) made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525):

- (a) Mutual Legal Assistance in Criminal Matters (Spain) Order (the Spain Order); and
- (b) Mutual Legal Assistance in Criminal Matters (Czech Republic) Order (the Czech Order).

2. Section 4(1) of Cap. 525 provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for mutual legal assistance (MLA), by order to which is annexed a copy of the arrangements direct that Cap. 525 shall, subject to such modifications thereto as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate. Section 4(3) provides that if the order specifies modifications, the modifications shall be summarized in a Schedule to the order.

3. Section 4(2) provides that the Chief Executive in Council shall not make an order unless the arrangements for MLA are substantially in conformity with the provisions of the Ordinance. Section 4(7) restricts the Legislative Council's power to amend such an order so that the Legislative Council may only repeal the whole order but not amend any part of it.

Agreements

4. The two Orders are made in consequence of the agreement between the Government of HKSAR and the Government of Spain signed on 15 November 2012 (the Spain Agreement) and the agreement between the Government of HKSAR and the Government of the Czech Republic signed on 4 March 2013 (the Czech Agreement) respectively.

5. The respective agreements are reproduced in the respective Schedules 1 to the two Orders. They specify the scope and procedures in relation to the provision of MLA in the investigation and prosecution of criminal offences and in proceedings related to criminal matters. They also provide for safeguards of the rights of persons involved in criminal proceedings.

Modifications

6. The respective Schedule 2 to the two Orders specify the modifications to various sections of Cap. 525, and such modifications are summarized in the respective Schedule 3 to the two Orders to comply with section 4(3) of Cap. 525.

7. Section 5(1)(d) of Cap. 525 provides that the Secretary for Justice (SJ) shall refuse assistance to a place outside Hong Kong if 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 or political opinions.

8. Modifications are made in the Czech Order to section 5(1)(d) of Cap. 525 to reflect the provisions of the Czech Agreement. The modifications extend SJ's power to refuse assistance if there are substantial grounds for believing that:

- (a) the request was made for the purpose of prosecuting, punishing, or otherwise causing prejudice to a person on account of the person's sex¹; or
- (b) the request will result in a person being subjected to torture or other cruel or inhuman or degrading treatment or punishment².

¹ This reflects the provision in Article 4(1)(d) of the Czech Republic Agreement.

² This reflects the provision in Article 4(1)(e) of the Czech Republic Agreement.

9. Modifications are made in the Spain Order to section 5(1)(d) of Cap. 525 to reflect the provisions of the Spain Agreement. The modifications extend SJ's power to refuse assistance if 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 sex³.

10. Section 5(1)(e) of Cap. 525 provides that SJ shall refuse assistance to a place outside Hong Kong if the request relates to the prosecution of a person for an external offence in a case where a person has been convicted, acquitted or pardoned by a competent court or other authority in the place, or has undergone the punishment provided by the law of that place, in respect of that offence or of another external offence constituted by the same act or omission as that offence. To reflect the provisions in the two Agreements, modifications are made to section 5(1)(e) in the two Orders, which extends SJ's power to refuse assistance if the request relates to the prosecution of a person:

- (a) 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; or
- (b) 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.

11. Section 17 of Cap. 525 provides certain immunities to a person who comes to Hong Kong from another jurisdiction to render assistance in a criminal matter. To reflect certain provisions of the two Agreements, modifications are made to section 17(3)(b) of Cap. 525 in the two Orders, which provide that such immunities shall not apply if the person, being free to leave Hong Kong, has not left within a period of 15 days after being notified that the person's presence is no longer required for any of the specified purposes.

Commencement

12. According to paragraph 10 of the LegCo Brief (File Ref.: SBCR 42/22/581/87 and SBCR 28/22/581/87), the Secretary will appoint the respective commencement dates of the two Orders by notices in the Gazette. Such dates will coincide with the dates on which the relevant agreements enter

³ This reflects the provision in Article 3(1)(d) of the Spain Agreement.

into force respectively. The respective agreements provide that they shall enter into force on the 30th day after the day on which the Contracting Parties have notified each other in writing that their respective requirements for the entry into force of the agreement have been complied with. As it is likely that Hong Kong will first complete the domestic procedures for bringing the agreement into force, the respective dates of operation of the two Agreements will depend on when Spain and the Czech Republic complete their domestic procedures and notify Hong Kong respectively.

Consultation

13. As advised by the Clerk to the Panel on Security, the Panel has not been consulted on the two Orders. Members have been advised of the Spain Agreement and the Czech Agreement respectively vide LegCo Briefs issued by the Security Bureau in November 2012 and March 2013 respectively (see LegCo Brief (File Ref.: SBCR 28/22/581/87 Pt. 3) and LegCo Brief of March 2013 (no reference number)).

Concluding Observations

14. The Legal Service Division has asked the Administration to clarify certain matters and to provide a comparison of the two Agreements with the model agreement. The relevant correspondence is attached for Members' reference. A further report will be made, if necessary.

Carrie WONG
Assistant Legal Adviser
Legislative Council Secretariat
6 November 2013

Encl.



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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4 November 2013

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2 Tim Mei Avenue
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(Attn: Mr Vic YAU
Prin AS (Security) A)

Dear Mr YAU,

Mutual Legal Assistance in Criminal Matters (Spain) Order
Mutual Legal Assistance in Criminal Matters (Czech Republic) Order

I am scrutinizing the above Orders with a view to advising Members and should be grateful if you could clarify the following matters:

The Spain Order

Article 3 (Grounds for refusal)

Section 5(3)(c) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) provides that subject to certain conditions, a request by a place outside Hong Kong for assistance may be refused by the Secretary for Justice (SJ) if the request relates to an external serious offence punishable with death. Please clarify how its context differs from Article 3(3) of the Spain Agreement to justify the use of the imperative "shall" here.

It appears that unlike Article 4(1)(e) of the Czech Order, the Requested Party may not refuse a request for assistance on the ground that the person would be subjected to torture or other cruel or inhuman or degrading treatment or punishment. Please provide the reason for the difference.

The Czech Order

Article 4 (Refusal or postponement of assistance)

It appears "terrorist offences or any other offence which the Requested Party considers excluded from the political character offence category by any international agreement that applies to the Requested Party" would not be caught by Article 4(1)(b) of the Czech Agreement. If so, please provide the reason for the difference with the provision in Article 3(2) of the Spain Agreement.

Under section 5(1)(e) of Cap. 525, a request for assistance shall be refused if, in the opinion of SJ, the request relates to the prosecution of a person for an external offence in a case where the person has undergone the punishment provided by the law of the place in respect of that offence or of another external offence constituted by the same act or omission as that offence. It appears that no provision has been made in Article 4(1)(f) of the Czech Agreement to cater for the scenario where the relevant person has undergone the punishment provided by the law of the place in respect of an external offence or of another external offence constituted by the same act or omission as that external offence as set out in section 5(1)(e) of Cap. 525. Hence, SJ's power to refuse a request for assistance may have been restricted. Is there any reason for not including such a scenario?

Article 17 (Safe conduct)

Sections 17(1)(b)(ii) and 23(2)(a)(ii) of Cap. 525 provide respectively for immunity from civil suit to a person for any act or omission of the person that occurred before his departure from the place outside Hong Kong/Hong Kong where he is rendering assistance in a place outside Hong Kong or in Hong Kong. Unlike Article 17(1)(a) of the Czech Agreement which builds in the time element as in the underlined part of those sections, Article 17(1)(b) is silent on the time element. Is there any reason for the difference?

Article 23 (Entry into force and termination)

Unlike Article 25 of the Spain Agreement, there is no application provision in the Czech Agreement to provide that the agreement shall apply to any request for assistance is presented after the date of the Agreement's entry into force even if the relevant act or omission occurred prior to that date. Is there any reason for not including such a provision?

Application provision

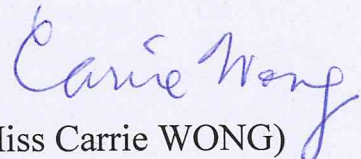
Unlike Article 26(2) of the Spain Agreement, there is no application provision in the Czech Agreement to the effect that any request for assistance which has been received prior to the date on which the Agreement ceases to have effect shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force. Is there any reason for not including such a provision?

The two Orders

In line with the usual practice, please provide an article-by-article comparison of the two Agreements with the model agreement together with the model agreement.

I would appreciate it if you could let us have the Administration's reply in both languages on or before the House Committee meeting on 8 November 2013.

Yours sincerely,



(Miss Carrie WONG)
Assistant Legal Adviser

c.c. Clerk to the House Committee