

**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
(Indonesia) Order, made by the Chief Executive in Council on
11 November 2008, be approved.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (INDONESIA) 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 Republic of Indonesia

In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance shall, subject to the modifications specified in Schedule 2, apply as between Hong Kong and the Republic of Indonesia.

SCHEDULE 1

[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 REPUBLIC OF INDONESIA 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 authorized by the Central People's Government of the People's

Republic of China to conclude this Agreement and the Government of the Republic of Indonesia (hereinafter referred to as “The Parties”);

Desiring to strengthen the close cooperation between the Parties by improving the effectiveness of the law enforcement authorities of the Parties in the investigation and prosecution of crimes, and the confiscation of criminal proceeds and resulting proceedings;

Have agreed as follows:

ARTICLE 1
SCOPE OF ASSISTANCE

1. The Parties shall, in accordance with the provisions of this Agreement, grant each other assistance in criminal matters.
2. For the purpose of this Agreement, criminal matters mean investigations, prosecutions or proceedings relating to any offence which at the time of the request for assistance, falls within the jurisdiction of the competent authorities of the Requesting Party.
3. Assistance may also be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters, but not in connection with non-criminal proceedings relating thereto.
4. Assistance shall include:
 - (a) taking evidence or statements from persons;

- (b) providing information, documents, records and items of evidence;
 - (c) locating or identifying persons or items;
 - (d) serving documents;
 - (e) executing requests for search and seizure;
 - (f) making arrangements for persons to give evidence or assist in criminal investigations, prosecutions, or proceedings in the Requesting Party;
 - (g) tracing, restraining, forfeiting, confiscating and returning the proceeds of criminal activities; and
 - (h) other assistance deemed necessary by the Requesting Party and consistent with this Agreement as well as the law of the Requested Party.
5. This Agreement applies solely to the provision of mutual assistance between the Parties. The provisions of this Agreement shall not create any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of any request for assistance.

ARTICLE 2
NON-APPLICATION

1. This Agreement does not apply to:

- (a) the arrest or detention of any person with a view to the surrender of that person;
 - (b) the enforcement in the Requested Party of criminal judgements imposed in the Requesting Party except to the extent permitted by the law of the Requested Party;
 - (c) the transfer of persons in custody to serve sentences; and
 - (d) the transfer of proceedings in criminal matters.
2. Nothing in this Agreement entitles a Party to undertake in the territory of the other Party the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other Party by its domestic law.

ARTICLE 3

OTHER ASSISTANCE

This Agreement shall not affect any existing obligations between the Parties, whether pursuant to other agreements, arrangements, or otherwise, nor prevent the Parties from providing assistance to each other pursuant to other agreements, arrangements, or otherwise.

ARTICLE 4

CENTRAL AUTHORITY

1. The Central Authorities of the Parties shall process 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 authorized officer and the Central Authority for the Republic of Indonesia is the Minister for Law and Human Rights.
3. Either Party may change its Central Authority in which case, it shall notify the other Party of the change.
4. The Central Authorities may communicate directly with each other, or, if they choose, through the Consulate General of the Republic of Indonesia in the Hong Kong Special Administrative Region.

ARTICLE 5
REQUESTS

1. Requests for assistance shall be made in writing or, where possible, by any means capable of producing a written record under conditions allowing the Requested Party to establish authenticity. In urgent situations and where permitted by the law of the Requested Party, requests may be made verbally, but in such cases the requests shall be confirmed in writing within five (5) days.
2. Requests for assistance shall include:
 - (a) the name of the competent authority conducting the investigation or criminal proceedings to which the request relates;
 - (b) the purpose of the request and the nature of the assistance sought;

- (c) a description of the nature of the criminal matter and its current status, and a statement setting out a summary of the relevant facts and law, including the maximum penalty for the offence to which the request relates;
- (d) a description of the evidence, information or other assistance sought;
- (e) the reasons for and details of any particular procedure or requirement that the Requesting Party wishes to be followed;
- (f) specification of any time limit within which compliance with the request is desired;
- (g) any special requirements for confidentiality and the reasons for it; and
- (h) such other information or undertaking as may be required under the domestic law of the Requested Party or which is otherwise necessary for the proper execution of the request.

3. Requests for assistance may also, to the extent necessary, contain the following information:

- (a) the identity, nationality and location of the person or persons who are the subject of the investigation or criminal proceedings;
- (b) the identity and location of any person from whom evidence is sought;

- (c) the identity and location of a person to be served, that person's relationship to the criminal proceedings, and the manner in which service is to be made;
 - (d) information on the identity and whereabouts of a person to be located;
 - (e) a description of the manner in which any testimony or statement is to be taken and recorded;
 - (f) a list of questions to be asked of a witness;
 - (g) a description of the documents, records or items of evidence to be produced as well as a description of the appropriate person to be asked to produce them and, to the extent not otherwise provided for, the form in which they should be produced and authenticated;
 - (h) a statement as to whether sworn or affirmed evidence or statements are required;
 - (i) a description of the property, asset or article to which the request relates, including its location; and
 - (j) any court order relating to the assistance requested and a statement relating to the finality of that order.
4. The request and documents and other relevant material submitted in support of the request shall be in the English language and, if requested, accompanied by a translation into an official language of the Requested Party.

5. If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, the Requested Party may request additional information. The Requesting Party shall supply such additional information as the Requested Party considers necessary to enable the request to be fulfilled.

ARTICLE 6

LIMITATIONS ON ASSISTANCE

1. Assistance shall be refused if:
 - (a) the request relates to an offence that is regarded by the Requested Party as an offence of a political character;
 - (b) the request relates to an offence only under military law;
 - (c) the request relates to the prosecution of a person for an offence in respect of which the person has been finally convicted, acquitted, pardoned or has served the sentence imposed in the Requested Party;
 - (d) there are substantial grounds for believing that the request for assistance has been made for the purpose of investigating, prosecuting or punishing a person on account of that person's race, sex, religion, nationality or political opinions, or, that the request for assistance will result in that person being prejudiced for any of those reasons;

- (e) the provision of the assistance would impair the sovereignty, security, public order or essential interests of the Republic of Indonesia or in the case of the Hong Kong Special Administrative Region, the sovereignty of the People's Republic of China, or the security or public order of the People's Republic of China or any part thereof or the essential interests of the Hong Kong Special Administrative Region;
- (f) the acts or omissions alleged to constitute the offence to which the request relates, would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence; or
- (g) there is no assurance from the Requesting Party that the assistance requested will not be used for purposes other than those stated in the request without the prior consent of the Requested Party.

2. The Requested Party may refuse assistance if, in its opinion:

- (a) the provision of the assistance would, or would be likely to prejudice the safety of any person, whether that person is within or outside the territory of the Requested Party; or
- (b) the provision of the assistance would impose an excessive burden on the resources of the Requested Party.

3. Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.

4. The Requested Party may postpone the execution of the request if its immediate execution would interfere with any ongoing criminal matters in the Requested Party. The Requested Party may also postpone the delivery of documents if such documents are required for civil proceedings in that Party, in which case the Requested Party shall, upon request, provide certified copies of documents.
5. Before refusing a request or postponing its execution pursuant to this Article, the Requested Party shall consider whether assistance may be granted subject to certain conditions.
6. If the Requesting Party accepts assistance subject to the terms and conditions required under paragraph 5, it shall comply with such terms and conditions.
7. If the Requested Party refuses or postpones assistance, it shall promptly inform the Requesting Party of the grounds of refusal or postponement.

ARTICLE 7
EXECUTION OF REQUESTS

1. Requests for assistance shall be carried out promptly by the competent authorities of the Requested Party in accordance with the law of that Party and, to the extent that law permits, in the manner requested by the Requesting Party.
2. The Requested Party shall promptly inform the Requesting Party of circumstances, when they become known to the Requested Party, which are likely to cause a significant delay in carrying out the request.

ARTICLE 8
RETURN OF MATERIAL TO REQUESTED PARTY

Where required by the Requested Party, the Requesting Party shall return material provided under this Agreement when it is no longer needed for the criminal matter to which the request relates.

ARTICLE 9
CONFIDENTIALITY AND LIMITATION ON USE

1. The Requested Party shall use its best efforts to keep confidential a request for assistance, the contents of the request and its supporting documentation, and any action taken pursuant to the request. If the request cannot be executed without breaching confidentiality, the Requested Party shall so inform the Requesting Party before executing the request, and the Requesting Party shall advise whether it nevertheless wishes the request to be executed.
2. The Requesting Party shall use its best efforts to keep confidential the information and evidence provided by the Requested Party, except to the extent that the evidence and information is needed for the criminal matters to which the request relates and where otherwise authorized by the Requested Party.
3. The Requesting Party shall use its best efforts to ensure that the information or evidence is protected against loss, unauthorized access, modification, disclosure or misuse.
4. The Requesting Party shall provide assurances that it will not use the information or evidence obtained, or anything derived therefrom, for

purposes other than those stated in a request without the prior consent of the Requested Party.

ARTICLE 10
SERVICE OF DOCUMENTS

1. The Requested Party shall, to the extent its law permits, carry out requests for the service of documents in respect of a criminal matter.
2. A request for service of a summons requiring the appearance of a person as a witness in the Requesting Party shall be made to the Requested Party not less than forty five (45) days before the scheduled appearance. In urgent cases, the Requested Party may waive this requirement.
3. The Requested Party shall forward to the Requesting Party proof of service of the documents. If service cannot be effected, the Requesting Party shall be so informed and advised of the reasons.
4. A person who fails to comply with any process served on him or her shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or the Requested Party.

ARTICLE 11
TAKING OF EVIDENCE

1. The Requested Party shall, to the extent its law permits and upon request, take testimony, or otherwise obtain statements of persons or require them to produce items of evidence for transmission to the Requesting Party.

2. The Requested Party shall, to the extent its law permits, allow the presence of such persons as are specified in the request during the execution of request, and may also allow such persons and their legal representatives to question the person whose testimony or evidence is being taken. In the event that such direct questioning is not permitted, such persons shall be allowed to submit written questions.
3. A person from whom evidence is to be taken in the Requested Party pursuant to a request under this Article may decline to give evidence where the law of the Requested Party or that of the Requesting Party so provides.
4. If any person in the Requested Party claims that there is a right or obligation to decline to give evidence under the law of the Requesting Party, the Requesting Party shall, upon request, provide a certificate to the Requested Party as to the existence of that right. In the absence of evidence to the contrary, the certificate shall be sufficient evidence of the matters stated in it.
5. For the purposes of this Article, the taking of evidence includes the production of documents or other material.

ARTICLE 12

AVAILABILITY OF PERSONS IN CUSTODY TO GIVE EVIDENCE OR PROVIDE ASSISTANCE

1. A person in custody in the Requested Party may, at the request of the Requesting Party, be temporarily transferred to that Party to give evidence or to provide assistance in criminal proceedings in that Party.

2. The Requested Party shall transfer a person in custody to the Requesting Party only if:
 - (a) the person freely consents to the transfer; and
 - (b) the Requesting Party agrees to comply with any conditions specified by the Requested Party relating to the custody or security of the person to be transferred.
3. Where the Requested Party advises the Requesting Party that the transferred person is no longer required to be held in custody, that person shall be released.
4. A person who is transferred pursuant to a request under this Article shall be returned to the Requested Party in accordance with arrangements agreed by the Requested Party as soon as practicable after that person has given evidence or provided assistance or at such earlier time as the person's presence is no longer required.
5. A person transferred shall receive credit for service of the sentence imposed in the Requested Party for the time spent in custody in the Requesting Party.
6. A person who does not consent to give evidence or to provide assistance under this Article shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or the Requested Party.

ARTICLE 13

AVAILABILITY OF OTHER PERSONS TO GIVE EVIDENCE OR PROVIDE ASSISTANCE

1. The Requesting Party may request the assistance of the Requested Party in inviting a person, not being a person to whom Article 12 of this Agreement applies, to give evidence or provide assistance in the Requesting Party. The Requesting Party shall undertake to make satisfactory arrangements for the safety of such person and provide information on any expenses or allowances payable.
2. The Requested Party shall invite the person and promptly inform the Requesting Party of the person's response. If the person consents, the Requested Party shall take all necessary steps to facilitate the request.
3. A person who does not consent to give evidence or to provide assistance under this Article shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or the Requested Party.

ARTICLE 14

SAFE CONDUCT

1. Subject to paragraph 2 of this Article, where a person is in the Requesting Party pursuant to a request made under Articles 12 or 13 of this Agreement:
 - (a) the person shall not be detained, prosecuted or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his or her departure from the Requested Party;

- (b) the person shall not be subject to civil proceedings to which the person could not be subjected if he or she were not in the Requesting Party; and
 - (c) the person shall not, without his or her consent, be required to give evidence in any criminal proceedings or to assist in any criminal investigation other than the criminal matter to which the request relates.
2. Paragraph 1 of this Article ceases to apply if that person, being free to leave, has not left the Requesting Party within a period of fifteen (15) days after he or she has been officially notified that his or her presence is no longer required or, having left, has returned.
 3. A person who consents to give evidence pursuant to Articles 12 or 13 of this Agreement shall not be subject to prosecution based on his or her testimony, except for perjury or contempt of court.

ARTICLE 15

PROVISION OF PUBLICLY AVAILABLE DOCUMENTS AND OTHER RECORDS

1. The Requested Party shall provide to the Requesting Party copies of publicly available documents or records.
2. The Requested Party may, subject to its domestic law and practice, provide the Requesting Party with copies of any documents or records in the possession of government departments and agencies that are not publicly available.

ARTICLE 16
SEARCH AND SEIZURE

1. The Requested Party shall, to the extent its law permits, carry out requests made in respect of a criminal matter in the Requesting Party for the search, seizure and delivery of material to that 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 and circumstances of seizure, and the subsequent custody of the material seized.
3. The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party.

ARTICLE 17
PROCEEDS OF CRIME

1. The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of crime are located within its jurisdiction and shall notify the Requesting Party of the results 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. The Requested Party shall, to the extent its law permits, give effect to a final order forfeiting or confiscating the proceeds of crime made by a court of the Requesting Party.
4. In the application of this Article, the rights of bona fide third parties shall be respected under the law of the Requested Party. Where there is a claim from a third party, the Requested Party shall represent the interests of the Requesting Party in seeking to retain the proceeds until a final determination by a competent court in the Requesting Party.
5. The Requested Party shall dispose of confiscated proceeds in accordance with its law. Where these proceeds derive from offences of corruption relating to public funds or property the Requested Party shall, having deducted the expenses incurred in recovering the proceeds, return the balance of the proceeds to the Requesting Party.
6. For the purposes of this Agreement, “proceeds of crime” includes:
 - (a) property which represents the value of property and other benefits derived from the commission of an offence;
 - (b) property derived or realized directly or indirectly from the commission of an offence; and
 - (c) property used or intended to be used in connection with an offence or the value of such property.

ARTICLE 18
CERTIFICATION AND AUTHENTICATION

1. Subject to paragraph 2, a request for assistance, the documents in support thereof, and documents furnished in response to a request, shall not require any form of certification or authentication.
2. Where, in a particular case, the Requested or Requesting Party requests that documents be authenticated, the documents shall be duly authenticated in the manner provided in paragraph 3.
3. Documents are authenticated for the purpose of this Agreement if:
 - (a) they purport to be signed or certified by a judge or other official in or of the Party sending the documents; and
 - (b) they purport to be sealed with an official seal of the Party sending the documents or of a Minister, a Department or official of the Government, of that Party.

ARTICLE 19
REPRESENTATION AND EXPENSES

1. Unless otherwise provided in this Agreement, the Requested Party shall make all necessary arrangements for the representation of the Requesting Party in all proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.
2. The Requested Party shall meet the cost of fulfilling the request for assistance except that the Requesting Party shall bear:

- (a) the travel and accommodation expenses and any other allowances of a person who provides assistance pursuant to a request under Articles 11, 12 or 13 of this Agreement;
 - (b) the expenses of custodial or escorting officers; and
 - (c) fees and expenses of experts and those associated with the translation of documents.
3. If it becomes apparent that the execution of the request requires expenses of an extraordinary nature, the Parties shall consult to determine the terms and conditions under which the assistance can be provided.

ARTICLE 20
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 21
AMENDMENT

This Agreement may be amended at any time by mutual consent of both Parties and such amendments shall enter into force thirty (30) days after the date on which the Parties have notified each other in writing that their respective domestic requirements for the entry into force of the amendments have been complied with.

ARTICLE 22
ENTRY INTO FORCE AND TERMINATION

1. This Agreement shall enter into force thirty (30) days after the date on which the Parties have notified each other in writing that their respective domestic 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 Party may terminate this Agreement by notice in writing at any time and this Agreement shall cease to be in force six (6) months after the date on which notice is given.
4. Requests for assistance which have been received prior to termination of this Agreement 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, being duly authorized thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at Hong Kong on the Third day of April Two Thousand and Eight in the Chinese, English and Indonesian languages. All texts are equally authentic. If there is any divergence of interpretation, the English text shall prevail.

SCHEDULE 2

[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 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 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).

Clerk to the Executive Council

COUNCIL CHAMBER

11 November 2008

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (“the Ordinance”) shall apply as between Hong Kong and the Republic of Indonesia. 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 Republic of Indonesia and signed in Hong Kong on 3 April 2008. 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.