



Guide to Asset Recovery in the Hong Kong Special Administrative Region

International Law Division
Department of Justice
Hong Kong Special Administrative Region

Preface

The main purpose of this Guide is to –

- (a) outline the procedures for restraint, confiscation and repatriation of proceeds or instrumentalities of crime or their value (“asset recovery”) pursuant to international requests for legal assistance to the Hong Kong Special Administrative Region of the People’s Republic of China (“Hong Kong SAR”);
- (b) offer practical step by step guidance for effective cooperation in asset recovery cases; and
- (c) provide standing contact points for requests for assistance.

There are some important areas of international legal co-operation in criminal matters which are not covered in these *Guidelines*. In particular, Hong Kong SAR surrenders fugitive offenders to (and seeks their surrender from) other jurisdictions on the basis of operative bilateral agreements which it has concluded with those jurisdictions, or multilateral agreements which apply to both parties. Hong Kong SAR is also able, under its own bilateral agreements with other jurisdictions, to transfer and receive sentenced prisoners, for the purpose of enabling them to serve out their sentences nearer home. Asset recovery also forms part of broader assistance available under mutual legal assistance procedures with Hong Kong SAR.

Information about legal co-operation in these areas, and about negotiating agreements with Hong Kong SAR, may be obtained from Law Officer (International Law), International Law Division, Department of Justice at 7th floor, Main Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong SAR (email address : ild@doj.gov.hk).

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1. INTRODUCTION

1.1 This Guide outlines the procedures for restraint, confiscation and repatriation of proceeds or instrumentalities of crime or their value (“asset recovery”) pursuant to international requests for legal assistance to Hong Kong SAR. It provides a brief overview of the constitutional basis upon which Hong Kong SAR may provide assistance pursuant to bilateral and multilateral arrangements to foreign states. It summarizes available procedures for tracing assets and gathering key evidence in asset recovery cases. It provides information on the mutual legal assistance framework under which international requests for freezing, confiscation and repatriation of assets may be processed, as well as information on domestic criminal asset recovery procedures and civil suit action which may be pursued as alternatives. The Guide also contains a checklist of best practices to achieve positive outcomes in asset recovery requests to Hong Kong SAR.

1.2 Constitutional Background

1.2.1 In 1984 the Chinese and British Governments signed the Joint Declaration on the Question of Hong Kong, affirming that the People’s Republic of China would resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997.

1.2.2 Upon resumption of sovereignty in 1997, a Hong Kong SAR was established in accordance with the provisions of Article 31 of the Constitution of the People’s Republic of China under the principle of “one country, two systems”.

1.2.3 The Basic Law of Hong Kong SAR was enacted in accordance with the Constitution prescribing the systems to be practised in Hong Kong SAR.

1.2.4 Article 13 of the Basic Law provides that the Central People’s Government shall be responsible for the foreign affairs relating to Hong Kong SAR. It also provides that the Central People’s Government authorises Hong Kong SAR to conduct relevant external affairs on its own in accordance with the Basic Law.

1.2.5 Several provisions in the Basic Law relate to the maintenance and development of relations by Hong Kong SAR at the international level, the application of international agreements to the Region both before and after 1997, and arrangements for reciprocal juridical assistance with foreign states.

1.2.6 First, Article 151 of the Basic Law provides that Hong Kong SAR may on its own, using the name **“Hong Kong, China”** maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organisations in appropriate

fields. In addition, Article 152 permits Hong Kong SAR to participate in international organisations and conferences limited to states but affecting Hong Kong SAR in appropriate fields using the same name. Thus Hong Kong SAR continues to hold membership of a number of international organisations and initiatives under its own name “Hong Kong, China” including, for example, the Financial Action Task Force Against Money Laundering.

1.2.7 Second, Article 153 of the Basic Law provides that the **application of international agreements** to which the People’s Republic of China is or becomes a party shall be decided in accordance with the needs and circumstances of Hong Kong SAR and after seeking the views of the government of Hong Kong SAR. For example, it is under Article 153 of the Basic Law that the United Nations Convention against Corruption was applied by the Central People’s Government to the Region in February 2006. It also provides that international agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in Hong Kong SAR.

1.2.8 Third, Article 96 of the Basic Law provides that with the assistance or authorisation of the Central People’s Government, the government of Hong Kong SAR may make appropriate arrangements with foreign states for **reciprocal juridical assistance**. Accordingly, Hong Kong SAR has negotiated a number of bilateral agreements for mutual legal assistance in criminal matters with foreign states and it has implemented these agreements under its domestic law. These agreements, which follow a fairly standard model, include mechanisms for international asset recovery.

1.3 Multilateral Treaties

1.3.1 A number of multilateral agreements which apply to Hong Kong SAR and which include provision for mutual legal assistance in criminal matters are as follows:

- (a) The Convention for the Suppression of Unlawful Seizure of Aircraft 1970
- (b) The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 and its 1988 Protocol
- (c) The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973
- (d) The International Convention Against the Taking of Hostages 1979
- (e) The Convention Against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment 1984

- (f) The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988
- (g) The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 and the Fixed Platform Protocol 1988
- (h) The Convention on the Safety of United Nations and Associated Personnel 1994
- (i) The International Convention for the Suppression of Terrorist Bombings 1997
- (j) The International Convention for the Suppression of the Financing of Terrorism 1999
- (k) The United Nations Convention Against Transnational Organised Crime 2000
- (l) The United Nations Convention Against Corruption 2003
- (m) The Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia 2004

1.3.2 Parties to these Conventions may seek assistance from Hong Kong SAR pursuant to the provisions in them for mutual legal assistance.

1.4 Bilateral Agreements

1.4.1 Hong Kong SAR has signed bilateral agreements concerning mutual legal assistance with a number of jurisdictions. The agreements are given legal effect in Hong Kong SAR by orders made under the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 (“MLAO”), subject to approval of Hong Kong SAR legislature. The agreements will only enter into force upon completion by the other contracting parties too of their legal requirements for bringing the agreement into force. A current list of bilateral agreements in force can be found at <http://www.doj.gov.hk/eng/laws/table3ti.html>. All of these agreements contain provisions for tracing, restraining, confiscating and sharing proceeds of crime.

2. DOMESTIC LEGAL FRAMEWORK FOR MUTUAL LEGAL ASSISTANCE

2.1 Types of Assistance

2.1.1 Requests for mutual legal assistance in criminal matters, including those for asset recovery, are processed under the MLAO. This Ordinance was enacted in 1998 and is a purpose-built legal mechanism to facilitate and regulate the provision and obtaining of assistance in criminal matters between Hong Kong SAR and places outside Hong Kong SAR, and for matters incidental thereto or connected therewith.

2.1.2 The full text of the MLAO is available on the legislation database on the internet maintained by the Department of Justice at <https://www.elegislation.gov.hk/>.

2.1.3 Assistance can be rendered pursuant to “arrangements for mutual legal assistance” (e.g. bilateral or multilateral agreements which have been made the subject of an order under the MLAO) which are in operation, or based on the principle of reciprocity. As regards the latter, the MLAO provides that the appropriate authority of the requesting place may give an undertaking to Secretary for Justice which satisfies Secretary for Justice that the place will, subject to its law, comply with a future request by Hong Kong SAR to that place for assistance in a criminal matter. It is therefore not a prerequisite that an operative bilateral or multilateral agreement be in existence before assistance can be rendered under the MLAO.

2.1.4 The types of legal assistance available include:

- (a) taking of oral evidence and production of things before a magistrate (including by live TV link);
- (b) search and seizure of things under search warrant;
- (c) obtaining of material under production orders (e.g. on banks to produce documents);
- (d) arranging for travel of persons to another place to assist in criminal investigation or proceedings;
- (e) enforcement of external confiscation orders and restraining of dealing in property which may be subject to external confiscation orders; and
- (f) service of process.

2.1.5 Assistance can only be provided in relation to a “criminal matter”, which is defined in the MLAO to be:

- (a) an investigation;
- (b) a prosecution; or
- (c) an ancillary criminal matter.

2.1.6 Of particular relevance to requests for asset recovery, “ancillary criminal matter” is defined to mean the restraining of dealing with, or the seizure, forfeiture or confiscation of property in connection with an external offence, or the obtaining, enforcement or satisfaction of an external confiscation order.

2.1.7 “External offence” means an offence against the law of a place outside Hong Kong, and “external serious offence” means an external offence the maximum penalty for which is death, or imprisonment for not less than 24 months.

2.1.8 External confiscation order, which is a key term in relation to requests for asset recovery, is defined as:

“… an order, made under the law of a place outside Hong Kong, for the purpose of -

- (a) recovering (including forfeiting and confiscating) -
 - (i) payments or other rewards received in connection with an external serious offence or their value;
 - (ii) property derived or realised, directly or indirectly, from payments or other rewards received in connection with an external serious offence or the value of such property; or
 - (iii) property used or intended to be used in connection with an external serious offence or the value of such property; or
- (b) depriving a person of a pecuniary advantage obtained in connection with an external serious offence,

and whether the proceedings which gave rise to that order are criminal or civil in nature, and whether those proceedings are in the form of proceedings against a person or property.”

2.1.9 The law therefore permits action to be taken in Hong Kong SAR to restrain, forfeit or confiscate property in relation to a foreign offence punishable by at least 24 months imprisonment in the requesting jurisdiction. This can be done whether the foreign proceedings are

criminal or civil in nature, and whether the proceedings are against persons or property. That is, the procedure allows for action in cases of confiscation following a criminal conviction, or action based on civil “*in rem*” proceedings against identifiable property arising from criminal conduct but not necessarily requiring a criminal conviction.

2.2 Contents of Requests

2.2.1 There are certain key minimum statutory requirements that must be contained in all requests for mutual legal assistance, including those relating to asset recovery. The request should be in writing and should include the following:

- (a) the particulars of the **“appropriate authority”** making the request, supported by the relevant documents or statutory provisions to enable Secretary for Justice to be satisfied as to the legal basis on which the request is made;
- (b) the name of the authority (if different from the above) concerned with the criminal investigation or proceedings to which the request relates (for example, **the judicial or prosecuting authority conducting the investigation or proceeding** relating to the request);
- (c) a description of the **nature of the criminal matter** (in particular, whether it relates to an investigation, prosecution or ancillary criminal matter, and the details of the offence alleged) and a statement setting out a summary of the laws contravened;
- (d) a statement setting out the **maximum penalty for the offence** to which the criminal matter relates;
- (e) a **summary of the relevant facts** including, in particular, the circumstances indicating their connection with any evidence sought in Hong Kong SAR;
- (f) a description of the **purpose of the request** and the nature of assistance being sought;
- (g) the **relevance of the required evidence** (that is, the manner in which the evidence is expected to assist in the investigation or to be used in the prosecution);
- (h) **details of the procedure** that the requesting place wishes Hong Kong SAR to follow in giving effect to the request, including details of the manner and form in which any information, document or thing is to be supplied under the request;

- (i) if **confidentiality** of the request is required, a statement expressing that requirement supported by reasons why confidentiality is sought;
- (j) if the **original** of a thing is requested, a statement specifying the reason for requiring the original;
- (k) details of the **period within which** the requesting place wishes the request be complied with; and
- (l) any **other information** that may assist in giving effect to the request.

2.2.2 In addition, other information may be required for specific types of assistance sought. For information specifically in relation to requests for asset recovery, please see further below. (Additional Considerations in Asset Recovery Cases)

2.2.3 The MLAO provides a number of statutory grounds on which requests will be **refused**. These are:

- (a) the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed, an offence of a **political character**;
- (b) 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;
- (c) the request relates to the prosecution of a person for an offence in respect of conduct pursuant to which the person has been convicted, acquitted, pardoned or punished (i.e. **double jeopardy**);
- (d) acceding to the request would **impair the sovereignty, security of the People's Republic of China, or the public order of the People's Republic of China or any part thereof**;
- (e) the request relates to the prosecution or punishment of a person in respect of an act or omission which, if it had occurred in Hong Kong SAR, would have constituted an **offence only under military law** and not also under the ordinary criminal law of Hong Kong SAR;
- (f) acceding to the request would seriously **impair the essential interests of Hong Kong SAR**;

- (g) the request relates to an act or omission that, if it had occurred in Hong Kong SAR, would not have constituted an offence (i.e. **dual criminality**).

A request should contain a positive statement confirming that none of the grounds at (a) – (c) above applies.

2.2.4 A request from a foreign jurisdiction that does not have a bilateral agreement with Hong Kong SAR will also be refused if the appropriate authority of the requesting place fails to provide a **reciprocity undertaking** in the body of the request. An undertaking in the following form is acceptable:

“[requesting place] undertakes that it will, subject to its laws, comply with a future request from the Hong Kong Special Administrative Region for similar assistance having a comparable effect to that requested from the Hong Kong Special Administrative Region in this case”.

2.2.5 If the offence relates to an investigation (as opposed to prosecution) of an **offence in relation to taxation**, it will be refused if the requesting place does not have an agreement in effect with Hong Kong SAR for mutual legal assistance. If such an agreement exists, the requesting place should provide in the body of the request information to satisfy Secretary for Justice that the primary purpose of the request is not the assessment or collection of taxation; otherwise the request will also be refused. These restrictions do not apply if a criminal prosecution has commenced.

2.2.6 There is no **death penalty** in Hong Kong SAR. If a request for assistance from abroad relates to an offence punishable by death, the request may be refused if the requesting place fails to give an undertaking that satisfies Secretary for Justice that the death penalty will not be imposed or, if imposed, will not be carried out.

2.2.7 A full “Guidelines for making applications under the Mutual Legal Assistance in Criminal Matters Ordinance” can be found on the Department of Justice website at <http://www.doj.gov.hk/lawdoc/mla.pdf>.

2.3 Additional Considerations in Asset Recovery Cases

2.3.1 An **external confiscation order may be registered** and enforced in Hong Kong SAR through an application made by Secretary for Justice, on behalf of the requesting place, to the Court of First Instance in Hong Kong SAR.

2.3.2 **An application to the Court must contain sufficient**

information to satisfy it that:

- (a) at the time of the registration, the external confiscation order is in force and not subject to appeal;
- (b) the person, in respect of whom or in relation to whose property the external confiscation order was made, received notice of the proceedings and had the opportunity of defending the proceedings, if that person did not appear in the proceedings; and
- (c) the enforcement of the external confiscation order in Hong Kong SAR would not be contrary to the interests of justice.

2.3.3 Secretary for Justice may also apply to the Court of First Instance for **an order prohibiting dealing in property (restraint order)**. The Court will make an order if it is satisfied that:

- (a) proceedings have been instituted in a place outside Hong Kong SAR;
- (b) the proceedings have not been concluded; and
- (c) either an external confiscation order has been made in the proceedings or there are reasonable grounds for believing an external confiscation order may be made in them.

2.3.4 An order restraining dealing in property may also be obtained where the court is satisfied that proceedings are to be instituted in a place outside Hong Kong SAR and it appears that an external confiscation order may be made in those proceedings.

2.3.5 Accordingly, it is important that **a request to Hong Kong SAR seeking to register an external confiscation order or to restrain dealing in property should also contain the above information (as applicable)** so that application can be made to the court for the necessary orders on behalf of the requesting place.

2.3.6 To simplify proof of evidentiary matters, the MLAO allows for **proof of certain facts by a certificate** ("section 30(1) certificate") issued by the appropriate authority of the requesting place. In particular, such a certificate shall be admissible as evidence of the facts so stated. The facts that may be proved by the certificate are as follows:

- (a) that a proceeding has been instituted and has not been concluded, or that a proceeding is to be instituted, in the requesting place;
- (b) that an external confiscation order is in force and not subject to appeal;

- (c) that all or a certain amount of the sum payable under an external confiscation order remains unpaid in the requesting place, or that other property recoverable under an external confiscation order remains unrecovered in the requesting place;
- (d) that any person has been notified of any proceeding in accordance with the law of the place; or
- (e) that an order (however described) made by a court in the requesting place has the purpose of –
 - (i) recovering (including forfeiting and confiscating) -
 - (A) payments or other rewards received in connection with an external serious offence or their value;
 - (B) property derived or realised, directly or indirectly, from payments or other rewards received in connection with an external serious offence or the value of such property; or
 - (C) property used or intended to be used in connection with an external serious offence or the value of such property; or
 - (ii) depriving a person of a pecuniary advantage obtained in connection with an external serious offence.

2.3.7 In addition, a **statement contained in document which purports to have been received in evidence or summarises evidence given in proceedings in a court in a place outside Hong Kong SAR is admissible as evidence of any fact stated therein** if duly certified. A document is duly certified if it purports to be certified by a judge, magistrate, or officer of the court in the place outside Hong Kong SAR concerned, or by or on behalf of the appropriate authority of the place.

2.3.8 The MLAO also allows for **proof of foreign court orders** if the order bears the seal of the court in the place outside Hong Kong SAR or is signed by any person in his capacity as judge, magistrate or officer of the court in the place outside Hong Kong SAR. Certified copies may also be put in proof if the copy purports to be certified by a judge, magistrate, or officer of the court in the place outside Hong Kong SAR concerned, or by or on behalf of the appropriate authority of the place.

3. STEPS IN MAKING ASSET RECOVERY REQUESTS TO HONG KONG SAR

3.1 The Different Stages of Asset Recovery

3.1.1 Steps will normally be required to:

- (a) trace and identify assets;
- (b) gather evidence;
- (c) freeze or restrain assets;
- (d) confiscate or register foreign confiscation orders;
- (e) share and repatriate assets.

3.1.2 The tracing and identification of assets, together with the gathering of some evidence is performed at the law enforcement level in the first instance. Evidence may also be gathered formally through mutual legal assistance procedures. Freezing and confiscation of assets is achieved through mutual legal assistance procedures, or alternatively through domestic asset recovery procedures. The sharing and repatriation of assets is performed as policy function of Secretary for Justice in accordance with domestic law and applicable international instruments.

3.2 Tracing and Identification of Assets

3.2.1 Before making any request to trace and identify assets in Hong Kong SAR, the overseas competent authority should ensure that principles of legality, necessity and proportionality are followed. Specifically, the requesting authority needs to satisfy Hong Kong SAR law enforcement agencies that there are valid reasons for making the request and supply the following minimum supporting information:

- Confirmation that an official investigation is being undertaken by the competent authority against the named individuals or corporate entities;
- The nature of the allegations against the suspects including brief background facts and a brief description of the alleged offence(s) committed;
- The full name, other identifying particulars and known assets of the concerned individual or legal person in Hong Kong SAR (e.g. bank account in Hong Kong SAR); and
- Identification of the requestor including name, role, organization, official position and contact details.

Such requests should be made in writing through official channels such as the Interpol network or the secured web of the Egmont Group of Financial Intelligence Units, etc.

3.3 Gathering of Information and Evidence

3.3.1 Apart from making request to trace and identify assets, overseas competent authorities may also request the relevant law enforcement agencies in Hong Kong SAR to exchange information on individuals and legal persons with a view to furthering the asset recovery exercise. Similarly, the requesting authority should satisfy that valid grounds exist and provide supporting information as stated above. On a case-by-case basis, Hong Kong SAR law enforcement agencies may be able to provide information such as personal details of relevant persons, bank account-related information, for example, transaction details, authorised signatory, etc.

3.3.2 Moreover, Hong Kong SAR law enforcement agencies may also be able to provide relevant information from the public domain such as the Companies Registry, etc.

3.3.3 All information provided by Hong Kong SAR law enforcement agencies to the requesting authority is supplied on the strict understanding that the information is confidential and for intelligence purposes only. Under no circumstances should the information be adduced as evidence in any judicial proceedings. The information should not be disseminated to another agency or third party without prior express consent from the requested agency.

3.3.4 Mutual legal assistance requests may also be made for the formal gathering of evidence for use in foreign court proceedings, including most frequently for the production of bank records and also as appropriate for execution of search warrants or the taking of testimony. For further information on these procedures, please refer to the section on the Domestic Legal Framework for Mutual Legal Assistance above and the “Guidelines for making applications under the Mutual Legal Assistance in Criminal Matters Ordinance” at <http://www.doj.gov.hk/lawdoc/mla.pdf>.

3.4 Mutual Legal Assistance Requests to Restrain Assets and to Register Foreign Confiscation Orders

3.4.1 The Mutual Legal Assistance Unit (“MLA Unit”) of the International Law Division, Department of Justice, discharges the responsibilities of the Central Authority of Hong Kong SAR for the purpose of mutual legal assistance in criminal matters, including in asset recovery cases.

3.4.2 Foreign authorities may seek advice from the MLA Unit on the preparation of requests to Hong Kong SAR, and draft requests may be forwarded to the MLA Unit for comment, to ensure compliance with Hong Kong SAR's statutory requirements.

3.4.3 All requests for legal assistance under the MLAO, including asset recovery cases, should be addressed to "Secretary for Justice", who is the head of the Department of Justice. It is not necessary for requests to be sent through the diplomatic or consular channel, unless it is a requirement of the requesting place (in which case the request should be sent via the consular representative of the requesting place in Hong Kong SAR). In all other cases, requests may be sent directly to:

The Mutual Legal Assistance Unit
Department of Justice

7/F, Main Wing
Justice Place
18 Lower Albert Road
Central, Hong Kong SAR
Fax: (852) 3918 4792
Email: ild@doj.gov.hk

3.4.4 Upon receipt, the request will be assigned to counsel within the MLA Unit. MLA counsel will acknowledge receipt of the request and obtain the appointment of a law enforcement officer to assist in its execution. This will be an officer from the Hong Kong Police Force, the Customs & Excise Department, or the Independent Commission Against Corruption depending upon the nature of the case under investigation or prosecution. They are all "authorised officers" under the MLAO.

3.4.5 Should the request on review fail to meet the minimum legal standards for processing under the MLAO, or should additional information or clarification be required, assigned counsel will give the necessary feedback to the requesting jurisdiction so that remedial action may be taken before the request proceeds.

3.4.6 Once the request is in a form that it can be lawfully processed, notice is given to the Office of the Commissioner of the Ministry of Foreign Affairs based in Hong Kong SAR. Under the MLAO, the Central People's Government may give instructions in the case on the ground that if the instruction were not complied with the interests of the People's Republic of China in matters of sovereignty, security or public order would be significantly affected. In urgent cases (for example, where restraint orders are required at short notice) this notification procedure will be expedited.

3.4.7 Secretary for Justice formally authorises execution of the request. Such power has been delegated to Law Officer (International Law), and MLA counsel has the responsibility to obtain this internal clearance before execution of the request proceeds.

3.4.8 Upon authorisation by Secretary for Justice, the law enforcement officer assigned to assist in execution of the request will commence background inquiries if this has not already occurred directly at the law enforcement level prior to the making of the request. In asset recovery cases, the officer may make informal inquiries with banks and other institutions named in the request to verify, as far as possible, the accuracy of the information contained in the request concerning the named/numbered bank accounts and other property held by or on behalf of named persons or entities. In all cases, Hong Kong SAR and overseas law enforcement officers are encouraged to work together on the case before the formal request for assistance is made, thus ensuring greater certainty and accuracy of the information contained in the request.

3.5 Restraint Orders

3.5.1 If a restraint order is sought, MLA counsel will draft the necessary application to the Court of First Instance and will work with the law enforcement officer to prepare an affidavit or information in support of the application. The request for assistance will not usually be exhibited to the application to court, but the law enforcement officer's affidavit filed in court will set out all relevant details drawn from the contents of the request as appropriate. If a section 30(1) certificate or copies of foreign orders have been provided by the requesting place, these will be exhibited to the affidavit in support of the application.

3.5.2 Once the papers have been prepared and filed, a hearing can be obtained at short notice and within a matter of days. The application is heard *ex parte* (i.e. without the defendants' knowledge or participation) and MLA counsel will seek a restraint order from the court. If the court is satisfied that the necessary statutory conditions for the making of the order have been met and that it is an appropriate case to do so, it will issue the order.

3.5.3 The initial restraint order obtained *ex parte* is an interim order for a limited period only. The inter parties hearing of the application is adjourned to some date in the future (the return date). This is to enable time for service of the initial restraint order and related papers on the defendants and other persons affected by the order (e.g. banks). In most cases involving international requests for asset recovery, the defendants will be located abroad and often resident in the requesting place. A period of about two months is accordingly usually allowed to effect service. If more time is needed, time may be extended. MLA counsel will forward the papers to the requesting jurisdiction and require an affidavit of service be provided in return within the stipulated period.

3.5.4 At the return date, proof of service of the order on the defendants and other affected parties will be provided to the court. The defendants or affected parties may attend or be represented and oppose the continuation of the restraint order. Should there be no appearance by these persons the court will usually grant the continuation of the restraint order "until further order of the court". This is an order for indefinite period, and it continues to run whilst proceedings in the requesting jurisdiction are prosecuted to completion and a final forfeiture or confiscation order is obtained.

3.5.6 Should any other party appear on the return date and contest the proceedings, the court will hear argument and decide whether to maintain or discharge the restraint order. Depending on the nature of the arguments raised in any defended application, MLA counsel will usually require more information or assistance from the requesting place to best present its case in court.

3.5.7 The defendants are entitled to apply for legal expenses and living expenses from property under restraint in Hong Kong SAR, although Secretary for Justice ensures as far as possible that this right is not abused. The defendants will usually be required to provide an affidavit of means to disclose all property world-wide.

3.5.8 Depending upon how long it takes the requesting jurisdiction to obtain final confiscation or forfeiture orders, the restraint orders may be maintained for a number of years in Hong Kong SAR. Should property made subject to a restraint order require active management (e.g. apartments operating under lease arrangements), the court may appoint a receiver to manage the property pending further order of the court. The receiver's fees incurred in managing the property are drawn from the funds of property under restraint. The requesting jurisdiction may be asked to provide an indemnity for the fees.

3.6 Registration and Enforcement of Forfeiture/ Confiscation Orders

3.6.1 Once a final forfeiture or confiscation order has been obtained in the requesting jurisdiction, a request may be sent to Hong Kong SAR to register and enforce the order. Again, MLA counsel will work with the law enforcement officer assigned to draft the necessary application to court and the related papers. The law enforcement officer will sign an affidavit based on the contents of the request.

3.6.2 It is highly recommended that at the registration and enforcement stage, the appropriate authority of the requesting place provide a section 30(1) certificate certifying the following matters, adapted as necessary:

- (a) that an external confiscation order is in force and not subject to appeal;

- (b) that all or a certain amount of the sum payable under an external confiscation order remains unpaid in the requesting place, or that other property recoverable under an external confiscation order remains unrecovered in that place;
- (c) that any person has been notified of any proceeding in accordance with the law of the place; or
- (d) that an order (however described) made by a court in the requesting place has the purpose of -
 - (i) recovering (including forfeiting and confiscating) -
 - (A) payments or other rewards received in connection with an external serious offence or their value;
 - (B) property derived or realised, directly or indirectly, from payments or other rewards received in connection with an external serious offence or the value of such property; or
 - (C) property used or intended to be used in connection with an external serious offence or the value of such property; or
 - (ii) depriving a person of a pecuniary advantage obtained in connection with an external serious offence.

Originals or certified copies of the final confiscation or forfeiture orders should also be included in the request.

3.6.3 MLA counsel will make application to the Court of First Instance to register the external confiscation order, usually on an ex parte basis. Notice of the registration must be then served on the defendants and other affected parties and they will have a fixed period of time within which they may apply to the court to set aside the registration. If no such steps are taken, MLA counsel will make a further application to enforce the external confiscation order.

3.6.4 This may be done by appointment of a receiver to sell up realisable property, or in cases where only funds in bank accounts are involved, an order may be obtained directing payment into court.

3.7 Domestic Asset Recovery : Restraint and Confiscation Action

3.7.1 As an alternative to restraining property and registering foreign confiscation orders through mutual legal assistance procedures, action may be taken domestically by Hong Kong SAR authorities to confiscate assets based on Hong Kong offences.

3.7.2 The Organized and Serious Crimes Ordinance, Cap. 455 ("OSCO") and the Drug Trafficking (Recovery of Proceeds) Ordinance Cap. 405 ("DTROP") contain similar and parallel provisions to restrain and confiscate realisable property of defendants of specified offences and drug trafficking offences committed in Hong Kong SAR.

3.7.3 Counsel from the Prosecutions Division may apply to the Court of First Instance for a domestic restraint order against a defendant provided that the following criteria are satisfied:-

- (a) proceedings have been instituted in Hong Kong SAR against the defendant for a specified offence or a drug trafficking offence;
- (b) those proceedings have not been concluded;
- (c) there is reasonable cause to believe that the defendant has benefited from the specified offence or the drug trafficking offence; and
- (d) the benefit of the offence exceeds HK\$100,000.

3.7.4 "Specified Offences" are widely defined in Schedules 1 and 2 to OSCO. They include money laundering, bribery, theft, fraud, drug trafficking, triad-related and organized crimes, trade description and copyright offences and most of the more serious offences.

3.7.5 The law and the procedure governing the domestic restraint order application under OSCO and DTROP are almost the same as those under MLAO.

3.7.6 All assets under the effective control of a defendant which are frozen by a domestic restraint order will be confiscated to the Government of Hong Kong SAR upon the conviction of the defendant of the specified offence or drug trafficking offence.

3.7.7 Confiscation orders can also be made against a defendant who is an absconder or a deceased person provided it can be proved to the Court of First Instance, on balance of probabilities, that the defendant could have been convicted of the specified offence or drug trafficking offence.

3.8 Civil Proceedings to Recover Assets

3.8.1 A further possible option is for the party seeking recovery to institute private civil proceedings in Hong Kong SAR against persons holding or having an interest in the property sought to be recovered. In such cases, Hong Kong SAR authorities will not be involved in the legal proceedings nor represent the foreign government or party seeking recovery. Requesting parties should instruct Hong Kong SAR law firms

should they wish to pursue this option for recovery.

3.8.2 Under Hong Kong SAR law, a claim by an unsecured judgment creditor, even when the claimant is a genuine victim of the offence, has no priority over a prospective confiscation order. Therefore, a party seeking to enforce a debt or recover a loss from the property should proceed with its claim promptly before the making of the domestic restraint order.

3.8.3 Both OSCO and DTROP specify that the purpose of a restraint order is for satisfying a confiscation order to be made against that property only.

3.8.4 A restraint order may be discharged on the ground that the evidence is insufficient to secure a conviction against the defendant but it will not be discharged to give way to a civil claim initiated by an interested party.

3.9 Sharing and Repatriation of Recovered Assets

3.9.1 Hong Kong SAR does share assets recovered pursuant to mutual legal assistance requests. The standard provision on sharing in Hong Kong SAR's bilateral agreements provides that proceeds confiscated shall be retained by the requested party unless otherwise agreed upon between the parties. This allows for a presumption that the assets will remain with the requested party but provides for flexibility and sharing on a case by case basis.

3.9.2 Hong Kong SAR has adopted an asset sharing policy which enables it to meet obligations under international instruments to share or repatriate assets in full where appropriate, including in cases where victims of fraud need to be compensated and in corruption cases.

3.9.3 Under mutual legal assistance procedures, once funds are realised at the enforcement stage by the receiver or otherwise they must be paid into the Court of First Instance. The registrar of the court will hold the funds for a period of 5 years pending an application by or on behalf of the government of a "prescribed place" for sharing. "Prescribed places" are places with which Hong Kong SAR has prescribed "arrangements for mutual legal assistance" under the MLAO; that is arrangements which have been made the subject of an order under the MLAO. All of Hong Kong SAR's bilateral agreements for mutual legal assistance in criminal matters have been made the subject of orders under the MLAO so there does exist a legal mechanism to share with such places. Orders have also been made under the MLAO to apply relevant multilateral instruments such as the United Nations Convention Against Transnational Organized Crime and the United Nations Convention Against Corruption so as to enable sharing or repatriation of recovered assets with other parties to these Conventions in accordance with convention obligations.

3.9.4 If a foreign jurisdiction does not have a bilateral agreement with Hong Kong SAR or is not a party to a relevant multilateral agreement which has been applied under the MLAO, there is no statutory basis for sharing. Jurisdictions are encouraged to enter bilateral agreements for mutual legal assistance with Hong Kong SAR because, amongst other things, these agreements contain asset sharing mechanisms which may not otherwise be available to requesting parties.

3.9.5 Hong Kong SAR has a solid record of sharing and repatriating assets with foreign jurisdictions under mutual legal assistance procedures in cases of substantial value; including in drug, fraud and corruption cases.

4. CHECKLIST FOR EFFECTIVE COOPERATION IN ASSET RECOVERY CASES

4.1 Set out below are suggestions for effective cooperation with Hong Kong SAR in relation to requests for assistance in asset recovery cases:

- Make early contact direct at the law enforcement level to obtain as much relevant information as possible and to verify existing information. In Hong Kong SAR, the JFIU (Joint Financial Intelligence Unit) may be contacted direct. Details may be found at www.jfiu.gov.hk (Email: jfiu@police.gov.hk).
- Make early contact with the Mutual Legal Assistance Unit, International Law Division of the Department of Justice. The Unit will advise on draft requests by fax or email. It will also give advice on how best to take forward a pending request taking into account the needs of the requesting place. The Unit may be contacted by email: ild@doj.gov.hk.
- Ensure that there is identifiable property in Hong Kong SAR to be restrained or confiscated. Hong Kong SAR authorities cannot act on a request to restrain or confiscate assets which does not identify particular property. Also, show and establish the relationship between that identified property and the defendants. If the property is held by third parties, the basis upon which you seek to confiscate this property in your proceedings must be made clear.
- Be clear about the status of the proceedings in your jurisdiction. If proceedings which may lead to a confiscation or forfeiture order have not yet been instituted, you should describe the proceedings to be instituted and give a time frame for institution of those proceedings. If proceedings have already been instituted, you should provide a description of the nature of those proceedings and the stage reached to date.
- Provide a clear summary of facts, of the matters under investigation and include all other required items in the request (see Contents of Requests above). To assist in proof of evidential matters, make use of a section 30(1) certificate as appropriate and provide copies of relevant court orders.
- Once the request is ready to be sent, send it direct from your central authority to the central authority of Hong Kong SAR, namely the Mutual Legal Assistance Unit. It is not

necessary to send the request through the consular or diplomatic route, which may cause delay. Requests may be sent in English or Chinese which are both official languages of Hong Kong SAR.

- Be sure to send the request in sufficient time for action to be taken. If action in your jurisdiction is due to go overt at any time (thus putting the property in Hong Kong SAR at risk of movement or dissipation), please allow sufficient lead in time for Hong Kong SAR to process the request and apply to court for the necessary restraint orders. Co-ordinated action can be facilitated through the Mutual Legal Assistance Unit.
- Once funds have been restrained in Hong Kong SAR, continue to actively litigate the proceedings in your jurisdiction. Restrained funds cannot be realised in Hong Kong SAR and paid across until you have obtained a final forfeiture or confiscation order in your jurisdiction.
- If the proceedings are actively litigated in Hong Kong SAR, be prepared to provide all further evidence and assistance as necessary to Hong Kong SAR authorities to best represent your interests in the contested proceedings.
- In complex cases, consider engaging a law firm to assist your efforts in working with Hong Kong SAR authorities to process and/or litigate your request; particularly if your own authorities are under-resourced and/or unable to provide or facilitate what is required by Hong Kong SAR authorities.
- Prior to sending the request for registration and enforcement of your confiscation or forfeiture order once obtained, ensure that the order is final (not subject to appeal) and that all persons affected by the order were given notice of your proceedings prior to the order becoming final to enable them to defend it.
- Once your order has been registered and enforced in Hong Kong SAR and the funds paid into court, consider an application for asset sharing. The request for sharing should be made to the Mutual Legal Assistance Unit and it should set out reasons for the sharing and the proposed amount. This request should be made early and certainly within 5 years of the funds being paid into court in Hong Kong SAR.

5. LIST OF CONTACT POINTS

Joint Financial Intelligence Unit, Hong Kong Police Force

Telephone: (852) 2866 3366
Fax: (852) 2529 4013
Email: jfiu@police.gov.hk

Mutual Legal Assistance Unit, International Law Division, Department of Justice

Deputy Law Officer (Mutual Legal Assistance)
Telephone: (852) 3918 4767
Fax: (852) 3918 4792
Email: ild@doj.gov.hk

Proceeds of Crime Section, Prosecutions Division, Department of Justice

Assistant Director of Public Prosecutions (Proceeds of Crime)
Telephone: (852) 3902 8024
Fax: (852) 3902 8347
Email: prosrdu3@doj.gov.hk