

# CAP.405: DRUG TRAFFICKING (RECOVERY OF PROCEEDS) ORDINANCE

## INTRODUCTION

To fulfil its international obligations under the 1988 United Nations “Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405) (“the Ordinance”) or (“DTROP”) was enacted in 1989 to provide for the tracing, restraining, confiscation and recovery of the proceeds of drug trafficking. Together with the Organized and Serious Crimes Ordinance (Cap.455) (“OSCO”), and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap.615) (“AMLO”), the Ordinance provides the legal basis for countering transnational money laundering and criminal financing, while the United Nations (Anti-Terrorism Measures) Ordinance (Cap.575) is intended to counter the financing of terrorism. This Ordinance was enacted on 1 September 1989 and became fully effective on 1 December 1989. [0.001]

The Drug Trafficking (Recovery of Proceeds) Bill was the first piece of legislation in the area of criminal law to be proposed after the introduction of bilingual legislation in Hong Kong. While the English text was drafted in reference to the Drug Trafficking Offence Act 1986 in the United Kingdom, the Legislative Council set up a Chinese text sub-committee which was tasked with looking at and, where necessary, amending the Chinese translation of certain terms. [0.002]

The Ordinance has been updated several times. First, in 1995, provisions were introduced to lower the standard of proof for confiscation proceedings to the standard of proof applicable to civil proceedings, as well as to authorise the seizure of property reasonably suspected to represent the proceeds of drug trafficking which is about to be imported into or exported from Hong Kong. Further significant amendments were made in 2002 pursuant to the Drug Trafficking and Organized Crimes (Amendment) Ordinance. Specifically, to prevent accused persons from disposing of properties while further investigation is in progress, the Ordinance was amended to allow for the making of restraint or charging orders in relation to the property of a person who has been arrested for a drug trafficking offence or a specified offence, and released on bail or refused bail. The 2002 amendments also introduced a provision obliging persons to supply an authorised officer with documents or information in relation to the value of their property to facilitate the making of a confiscation order, and a penal provision to deter persons from knowingly dealing with restrained property. Further, the evidentiary threshold for initiating confiscation and restraint orders was lowered, and the [0.003]

requirement of actual notice to an absconded offender and that the court fix a period of time in which a defendant is required to pay a confiscation judgment were eliminated. Additionally, in 1997, several minor amendments were made to the Ordinance to reflect the handover of sovereignty.

- [0.004] The Ordinance is split into six essential parts.
- [0.005] Part I pertains to preliminary matters and sets out the date of commencement of the Ordinance, as well as the basic definitions contained within it.
- [0.006] Part II of the Ordinance deals with the confiscation of proceeds of drug trafficking. It sets out the means of obtaining confiscation orders against drug traffickers for the recovery of proceeds of drug trafficking activities. For instance, section 4 authorises the court to make a number of assumptions in relation to the property of a defendant. These assumptions are: (i) that the properties held by him since his conviction, or since a confiscation order was made in his case, are the proceeds of drug trafficking; (ii) that his expenses were met from the proceeds of drug trafficking in the six years prior to proceedings being instigated against him; and (iii) that the defendant received the property free from any other interests in it. It is for the defendant to rebut the assumptions of the court.
- [0.007] Part III pertains to enforcement, etc, of confiscation orders. It deals with the enforcement of orders for the realisation of property and confers powers to restrain the transfer of assets. Section 10 of the Ordinance deals with restraint orders and authorises the Court of First Instance to prohibit any person from dealing with realisable property, which includes property held or under the control of a defendant.
- [0.008] Part IV concerns investigations into drug trafficking. It deals with matters such as the powers to obtain information and the authority to search for evidence during an investigation. Pursuant to section 20 of the Ordinance, a court can order a person who appears to be in possession or control to produce all relevant material to which the application relates. Such materials can include books or documents, but do not include materials which are subject to legal privilege.
- [0.009] Part IVA of the Ordinance concerns the detention of certain seized property, and supplements Part II by extending the authorised officer's reach to seizing property which is being imported into or exported from Hong Kong.
- [0.010] Note that Part IVA of the Ordinance examines the confiscation regime in Hong Kong, which is essentially conviction-based. However, an exception is provided by section 24D of the Ordinance, which permits the forfeiture of property in certain circumstances if, on the balance of probabilities, it can be proved that the property is connected with drug trafficking. This is similar to section 13 of the United Nations (Anti-terrorism Measures) Ordinance (Cap.575), which also allows the confiscation of property connected to a criminal offense. The section 13 of this anti-terrorism measure empowers the Secretary for Justice to apply for the forfeiture of certain "terrorist property" on the civil standard,

whether or not "proceedings are brought against any person for an offence with which the property concerned is connected".

Part V pertains to prohibited acts in relation to proceeds of drug trafficking. Section 25 of the Ordinance is particularly important, as it prohibits a person from dealing with any property which he knows, or has reasonable grounds for believing, represents the proceeds of drug trafficking. Further, adoption of section 25A in 1995 meant that, for the first time, persons such as public accountants, were placed under a statutory duty to make a disclosure to an authorised officer if they knew or suspected that any property represented the proceeds of drug trafficking, or that it was intended to be used in that connection. Such disclosure has to be made as soon as it is reasonable to do so. Further, a "tipping-off" offence is created by section 25A whereby a person who knows or suspects that a disclosure has been made discloses this information to another person, and this is likely to prejudice the investigation of the initial disclosure. [0.011]

Part VI deals with miscellaneous matters such as compensation due to a person against whom no proceedings are instituted, where proceedings do not result in his conviction for any drug trafficking offence, or where any conviction or convictions are quashed. [0.012]

The Ordinance also sets out four schedules, specifying drug trafficking offences, setting out assets of which a charging order may be imposed, providing a template of the certificate of sentence, and detailing the term of what can be considered "specified property". [0.013]

In 2013, the Secretary for Security, Mr Lai Tung-kuok, had occasion to provide the Legislative Council with some information on the efficacy of the Ordinance. According to Government statistics, between 2008 and 2013, the Court of First Instance made a total of 115 restraint orders pursuant to section 10 of the Ordinance (this number includes orders made under section 15 of the Organized and Serious Crimes Ordinance (Cap.455)), involving HK\$5.4 billion. Depending on the circumstances of the individual cases, the restraint orders lasted from between several months to several years. In all 115 cases, the defendants were either charged or prosecuted. In the view of the Government, the Ordinance has been functioning well and is positively recognised by overseas counterparts, international organisations and the relevant international anti-money-laundering standard setting bodies, including the Financial Action Task Force (Hong Kong Government Press Release of 26 June 2013). [0.014]

The Hong Kong Police Force and the Customs and Excise Department are responsible for enforcing the Ordinance. The Joint Financial Intelligence Unit (the JFIU) jointly operated by the two agencies was set up in 1989 to receive reports about suspicious financial activities made under the provisions of the Ordinance. The JFIU manages the suspicious transaction reports (STRs) regime for Hong Kong and its role is to receive, analyse and store STRs and to disseminate them to the appropriate investigative unit. Both the Police Force and the Customs and Excise Department liaise with the Department of Justice in investigation and prosecution. [0.015]

**Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405)**

**Long title**

To provide for the tracing, confiscation and recovery of the proceeds of drug trafficking, to create offences relating to those proceeds or property representing those proceeds, and for incidental or related matters.

(Enacted 1989. Amended 26 of 2002 s. 2)

[The Ordinance, except section 25(1), (2), (4) and (5) and paragraph (a) of section 25(3)]	}	1 September 1989
Section 25(1), (2), (4) and (5) and paragraph (a) of section 25(3)	}	1 December 1989 <i>L.N. 297 of 1989</i>

(Originally 35 of 1989)

**COMMENTARY**

**Enactment history**

[DTROP LT.01] The Drug Trafficking (Recovery of Proceeds) Ordinance was enacted on 1 September 1989 and came fully into effect on 1 December 1989.

It was amended by section 2 of the Drug Trafficking and Organized Crimes (Amendment) Ordinance (Ord. No. 26 of 2002), which repealed the phrase “to create the offence of assisting drug traffickers to retain those proceeds” and replaced it with the phrase “to create offences relating to those proceeds or property representing those proceeds”. The amendment came into effect on 1 January 2003.

In addition to certain amendments to the Ordinances relating to confiscation orders, charging orders and restraint orders, the amendments clarified the position regarding the disclosure of items subject to legal privilege.

The provisions under the Ordinance permit the Secretary for Justice to make applications to the Court of First Instance for the restraint of the realisable property of a person arrested for, or charged with, “drug trafficking offences” as so defined under the Ordinance, and to make confiscation orders.

These provisions also empower the Court of First Instance, and the District Court, to order the confiscation of the realisable property of the defendant upon his being convicted of the relevant offence. The term “realisable property” has a wide ambit, and includes property which has been acquired through lawful means. An offence of money laundering in respect of the dealing with the proceeds of drug trafficking is provided under the Ordinance. These provisions are independent from the restraint and confiscation provisions. A range of drug trafficking offences are specified in Schedule 1 to the Ordinance, which may trigger the restraint or confiscation proceedings under that Ordinance.

**Definition of “offence” under the Ordinance**

Pursuant to section 3 of the Interpretation and General Clauses Ordinance (Cap.1), this [DTROP LT.02] includes any crime and any contravention or other breach of, or failure to comply with, any provision of any law, for which a penalty is provided.

**Definition of “property” under the Ordinance**

Pursuant to section 2(1) of the Ordinance, “property” includes both movable and [DTROP LT.03] immovable property within the meaning of section 3 of the Interpretation and General Clauses Ordinance (Cap.1).

Section 3 of the Interpretation and General Clauses Ordinance (Cap.1) defines the term “property” generally as:

- (a) money, goods, choses in action and land; and
- (b) obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition.

It further specifically defines “immovable property” as

- (a) land, whether covered by water or not;
- (b) any estate, right, interest or easement in or over any land; and
- (c) things attached to land or permanently fastened to anything attached to land.

“Movable property” is defined as “property of every description except immovable property”.

**Definition of “ordinance”**

This is defined by section 3 of the Interpretation and General Clauses Ordinance [DTROP LT.04] (Cap.1) as:

- (a) any Ordinance enacted by the Legislative Council;
- (b) any Ordinance adopted by virtue of Article 160 of the Basic Law as a law of the Hong Kong Special Administrative Region;
- (c) any subsidiary legislation made under any such Ordinance except any such subsidiary legislation which has pursuant to Article 160 of the Basic Law been declared to be in contravention of the Basic Law; and
- (d) any provision or provisions of any such Ordinance or subsidiary legislation.

**PART I  
PRELIMINARY**

**Section 1: Short title**

**Ver Date: 30/06/1997**

This Ordinance may be cited as the Drug Trafficking (Recovery of Proceeds) Ordinance.

(Enacted 1989)

## COMMENTARY

**Enactment history**

**IDTROP 1.011** The Drug Trafficking (Recovery of Proceeds) Ordinance was enacted on 1 September 1989. This section has not been amended.

**Section 2: Interpretation**

**Ver Date: 01/01/2003**

(1) In this Ordinance, unless the context otherwise requires –

“absconded” (Chinese Text Omitted, See Original Source), in relation to a person, includes absconded for any reason whatsoever, and whether or not, before absconding, the person had been –

- (a) taken into custody; or
- (b) released on bail; (Added 89 of 1995 s. 2)

“authorized officer” (Chinese Text Omitted, See Original Source) means –

- (a) any police officer;
- (b) any member of the Customs and Excise Service established by section 3 of the Customs and Excise Service Ordinance (Cap.342); and
- (c) any other person authorized in writing by the Secretary for Justice for the purposes of this Ordinance; (Amended L.N. 362 of 1997)

“confiscation order” (Chinese Text Omitted, See Original Source) means an order made under section 3(6);

“corresponding law” (Chinese Text Omitted, See Original Source) has the same meaning as in section 2(1) of the Dangerous Drugs Ordinance (Cap.134);

“dangerous drug” (Chinese Text Omitted, See Original Source) has the same meaning as in section 2(1) of the Dangerous Drugs Ordinance (Cap.134);

“dealing” (Chinese Text Omitted, See Original Source), in relation to property referred to in the definition of “drug trafficking”, section 10(1) or 25, includes –

- (a) receiving or acquiring the property;
- (b) concealing or disguising the property (whether by concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it or otherwise);
- (c) disposing of or converting the property;
- (d) bringing into or removing from Hong Kong the property;
- (e) using the property to borrow money, or as security (whether by way of charge, mortgage or pledge or otherwise); (Added 89 of 1995 s. 2)

“defendant” (Chinese Text Omitted, See Original Source) means a person against whom proceedings have been instituted for a drug trafficking offence (whether or not he has been convicted of that offence);

“drug trafficking” (Chinese Text Omitted, See Original Source) means doing or being concerned in, whether in Hong Kong or elsewhere, any act constituting –

- (a) a drug trafficking offence; or
- (b) an offence punishable under a corresponding law,

and includes dealing, whether in Hong Kong or elsewhere, with any property which in whole or in part directly or indirectly represents any person’s proceeds of drug trafficking; (Replaced 89 of 1995 s. 2)

“drug trafficking offence” (Chinese Text Omitted, See Original Source) means –

- (a) any of the offences specified in Schedule 1;
- (b) conspiracy to commit any of those offences;
- (c) inciting another to commit any of those offences;
- (d) attempting to commit any of those offences;
- (e) aiding, abetting, counselling or procuring the commission of any of those offences;

“interest” (Chinese Text Omitted, See Original Source), in relation to property, includes right;

“material” (Chinese Text Omitted, See Original Source) includes any book, document or other record in any form whatsoever, and any article or substance; (Replaced 87 of 1997 s. 36)

“property” (Chinese Text Omitted, See Original Source) includes both movable and immovable property within the meaning of section 3 of the Interpretation and General Clauses Ordinance (Cap.1);

“Registrar” (Chinese Text Omitted, See Original Source) means the Registrar of the High Court. (Amended 25 of 1998 s. 2)

(2) The expressions listed in the left hand column below are respectively defined or (as the case may be) fall to be construed in accordance with the provisions of this Ordinance listed in the right hand column in relation to those expressions.

Expression	Relevant provision
Benefited from drug trafficking (Chinese Text Omitted, See Original Source)	Section 3(4)
Charging order (Chinese Text Omitted, See Original Source)	Section 11(2)
Gift caught by this Ordinance (Chinese Text Omitted, See Original Source)	Section 7(9)
Making a gift (Chinese Text Omitted, See Original Source)	Section 7(10)
Proceeds of drug trafficking (Chinese Text Omitted, See Original Source)	Section 4(1)(a)
Realisable property (Chinese Text Omitted, See Original Source)	Section 7(1)
Restraint order (Chinese Text Omitted, See Original Source)	Section 10(1)
Value of gift, payment or reward (Chinese Text Omitted, See Original Source)	Section 7

Value of proceeds of drug trafficking (Chinese Text Omitted, See Original Source)	Section 4(1)(b)
Value of property (Chinese Text Omitted, See Original Source)	Section 7(4)

(Amended 89 of 1995 s. 2)

(3) This Ordinance applies to property whether it is situated in Hong Kong or elsewhere.

(4) References in this Ordinance to offences include a reference to offences committed before the commencement of this Ordinance; but nothing in this Ordinance imposes any duty or confers any power on any court in or in connection with proceedings against a person for a drug trafficking offence instituted before the commencement of this Ordinance.

(5) References in this Ordinance to property received in connection with drug trafficking include a reference to property received both in that connection and in some other connection.

(6) Subsections (7) to (13) shall have effect for the interpretation of this Ordinance.

(7) Property is held by any person if he holds any interest in it.

(8) References to property held by a person include a reference to property vested in his trustee in bankruptcy or in a liquidator.

(9) References to an interest held by a person beneficially in property include, where the property is vested in his trustee in bankruptcy or in a liquidator, a reference to an interest which would be held by him beneficially if the property were not so vested.

(10) Property is transferred by one person to another if the first person transfers or grants to the other any interest in the property.

(11) Proceedings for an offence are instituted in Hong Kong –

(a) when a magistrate issues a warrant or summons under section 72 of the Magistrates Ordinance (Cap.227) in respect of the offence;

(aa) when a person has been arrested for the offence and released on bail or has refused bail; (Added 26 of 2002 s. 2)

(b) when a person is charged with the offence after being taken into custody without a warrant; or

(c) when an indictment is preferred by the direction or with the consent of a judge under section 24A(1)(b) of the Criminal Procedure Ordinance (Cap.221),

and where the application of this subsection would result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times.

(12) Proceedings in Hong Kong for an offence are concluded on the occurrence of one of the following events –

(a) the discontinuance of the proceedings whether by entry of a nolle prosequi or otherwise;

- (b) an order or verdict acquitting the defendant, not being an order or verdict which is subject to appeal or review within the meaning of subsection (13);
- (c) the quashing of his conviction for the offence except where, under section 83E of the Criminal Procedure Ordinance (Cap.221), an order is made that he be retried;
- (d) the grant of the Chief Executive's pardon in respect of his conviction for the offence; (Amended 15 of 1999 s. 3)
- (e) the court sentencing or otherwise dealing with him in respect of his conviction for the offence where the Secretary for Justice either does not apply for a confiscation order, or applies for a confiscation order and the order is not made; or (Amended 89 of 1995 s. 2; L.N. 362 of 1997)
- (f) the satisfaction of a confiscation order made in the proceedings (whether by payment of the amount due under the order or by the defendant serving imprisonment in default).

(12A) An application for a confiscation order made in respect of a defendant where section 3(1)(a)(ii) or (7) is applicable is concluded –

(a) if the Court of First Instance or the District Court decides not to make such an order, when it makes that decision; or (Amended 25 of 1998 s. 2)

(b) if such an order is made as a result of that application, when the order is satisfied. (Added 89 of 1995 s. 2)

(12B) An application under section 15(1A) in respect of a confiscation order made against a defendant is concluded –

(a) if the Court of First Instance decides not to vary that order, when it makes that decision; or

(b) if the Court of First Instance varies that order as a result of that application, when the order is satisfied. (Added 89 of 1995 s. 2. Amended 25 of 1998 s. 2)

(13) An order or verdict (including an order or verdict of acquittal) is subject to appeal or review so long as an appeal, further appeal or review is pending against the order or verdict; and for this purpose an appeal, further appeal or review shall be treated as pending (where one is competent but has not been instituted) until –

(a) (Repealed 79 of 1995 s. 50)

(b) the expiration of the time prescribed for instituting the appeal, further appeal or review. (Amended 79 of 1995 s. 50)

(14) Subject to subsection (15), nothing in this Ordinance shall require the disclosure of any items subject to legal privilege within the meaning of section 22. (Added 26 of 2002 s. 2)

(15) Subsection (14) shall not prejudice the operation of sections 20, 21 and 22. (Added 26 of 2002 s. 2)

(Enacted 1989)

[cf. 1986 c. 32 s. 38 U.K.]

## COMMENTARY

**Enactment history**

[DTROP 2.01] This section was originally enacted by the Drug Trafficking (Recovery of Proceeds) Ordinance on 1 September 1989.

Subsection 2(1) was subsequently amended by the provisions of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance (No. 89 of 1995). Specifically, the definition of the terms “absconded”, “dealing” and “drug trafficking” were amended by the Ordinance.

In 1997, the definition of the term “authorized officer” was amended, whereby the term “Attorney General” was replaced by the term “Secretary for Justice” pursuant to the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997).

In 1997, the definition of the term “material” was replaced pursuant to section 36 of the Mutual Legal Assistance in Criminal Matters Ordinance (Ord. No. 87 of 1997).

The definition of “Registrar” was amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998 (Ord. No. 25 of 1998).

In 2002, subsection 2(11)(aa) was added pursuant to section 2 of the Drug Trafficking and Organized Crimes (Amendment) Ordinance (Ord. No. 26 of 2002).

Subsection 2(12)(d) was amended by section 3 of the Adaptation of Laws (No. 5) Ordinance in 1999 (Ord. No. 15 of 1999).

Subsection 2(12)(e) was amended by section 2 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance in 1995 (Ord. No. 89 of 1995), and by the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997).

Subsection 2(12A)(a) was amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance 1998 (Ord. No. 25 of 1998), while section 12A(b) was added pursuant to section 2 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (Ord. No. 89 of 1995).

Subsection 2(12B)(b) was added pursuant to section 2 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance in 1995 (Ord. No. 89 of 1995), and amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998 (Ord. No. 25 of 1998).

In 1995, subsection 2(13)(a) was repealed and subsection (13)(b) was amended by section 50 of the Hong Kong Court of Final Appeal Ordinance (Ord. No. 79 of 1995).

Subsections 2(14) and 2(15) were added pursuant to section 2 of the Drug Trafficking and Organized Crimes (Amendment) Ordinance in 2002 (Ord. No. 26 of 2002).

**Specific terms defined**

[DTROP 2.02] This section provides definitions for specific words and phrases used in the Ordinance, namely, “absconded”, “authorized officer”, “confiscation order”, “corresponding

law”, “dangerous drug”, “dealing”, “defendant”, “drug trafficking”, “drug trafficking offence”, “interest”, “material”, “property” and “Registrar”.

This section also lists other expressions, which are defined in sections 3(4), 4(1)(a), 4(1)(b), 7, 7(1), 7(4), 7(9), 7(10), 10(1) and 11(2) of the Ordinance.

There are further definitions of specific words or terms included in other sections of the Ordinance, specifically in sections 17, 18, 20, 22, 23, 24A, 26 and 28, and in Schedule 2 of the Ordinance.

**Definition of “person” under the Ordinance**

This is defined by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) [DTROP 2.03] as including any public body and any body of persons, corporate or unincorporated, and the definition applies notwithstanding the word “person” in a provision creating or relating to an offence or for the recovery of any fine or compensation.

**Definition of “Hong Kong” under the Ordinance**

This is defined by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) [DTROP 2.04] as the Hong Kong Special Administrative Region, the geographical extent of which is the land and sea specified or referred to in Schedule 2 of the Interpretation and General Clauses Ordinance (Cap.1).

**Definition of an “act” under the Ordinance**

This is defined by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) [DTROP 2.05] as conduct including, when used with reference to an offence or civil wrong, an illegal omission and a series of illegal omissions.

**Definition of a “document” under the Ordinance**

This is stated by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) to [DTROP 2.06] mean any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means.

**Definition of “Registrar of the High Court” under the Ordinance**

This is defined by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) [DTROP 2.07] as the Registrar of the High Court and any Senior Deputy Registrar, Deputy Registrar or Assistant Registrar of the High Court.

**Definition of “court” under the Ordinance**

This is stated by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) [DTROP 2.08] to be any court of the Hong Kong Special Administrative Region of competent jurisdiction.

**Definition of “liquidator” under the Ordinance**

This is defined in section 2 of the Deposit Protection Scheme Ordinance (Cap.581) as [DTROP 2.09] a liquidator appointed by virtue of or under section 194 of the predecessor Companies Ordinance. Section 194 has been retained in the retitled Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32).

In *Re Male Law Kin Man* [1992] HKCFI 331, [1992] HKC 282, the Court reminded parties that a liquidator should take a neutral stand and admonished the liquidator in the proceedings for taking an adversarial approach:

“[a]lthough the provisional liquidator is an officer of the court whose duty it is to act impartially, both before Barnett J. and in the evidence filed he has taken an adversarial approach by opposing the Attorney General’s application for leave. The duty to act impartially is conveniently set out in McPherson *The Law of Company Liquidation* Third Edition at p 217 which reads : –

“[i]n Gooch’s case (1871) 7 Ch App 207 at 211, it was stated to be: ‘of the utmost importance that the liquidator should ... maintain an even and impartial hand between all individuals whose interests are included in winding up. He should have no leaning for or against any individual whatever.’

In other words, a liquidator should take a neutral stance upon such applications and present any information that will be of assistance to the court. It is not his duty to take sides” (para 9).

#### Definition of “magistrate” under the Ordinance

[DTROP 2.10] This is defined by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) as any person appointed to be a permanent or special magistrate under the Magistrates Ordinance (Cap.227).

#### Definition of “judge” under the Ordinance

[DTROP 2.11] For the purposes of this section, the word “judge” is defined in section 9C of the Criminal Procedure Ordinance (Cap.221) as a Justice of Appeal, a judge of the Court of First Instance or a deputy judge of the Court of First Instance.

#### Definition of “Chief Executive” under the Ordinance

[DTROP 2.12] Section 3 of the Interpretation and General Clauses Ordinance (Cap.1) defines Chief Executive as:

- (a) the Chief Executive of the Hong Kong Special Administrative Region; and
- (b) a person for the time being assuming the duties of the Chief Executive according to the provisions of Article 53 of the Basic Law.

Prior to the handover in 1997, the functions of the Chief Executive under this Ordinance were performed by the Governor. The Ordinance was retroactively amended in 1999 to reflect the change (see Ord. 15 of 1999).

#### Definition of “Secretary for Justice” under the Ordinance

[DTROP 2.13] This is defined by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) as the Secretary for Justice of the Hong Kong Special Administrative Region. Before the handover in 1997, the functions of the Secretary for Justice with respect to this Ordinance were performed by the Attorney General.

#### Definition of “Court of First Instance” under the Ordinance

This is stated by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) [DTROP 2.14] to mean the Court of First Instance of the High Court. Before the handover in 1997, this Court was known as the High Court of the Supreme Court of Hong Kong. Thus, references to the previous name in the Ordinance were updated in 1997, pursuant to the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997).

#### Definition of “District Court” under the Ordinance

This is defined by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) [DTROP 2.15] as the District Court of the Hong Kong Special Administrative Region.

#### Definition of the concept of “*nolle prosequi*” under the Ordinance

Proceedings on indictment in the Court of First Instance, by charge in the District Court [DTROP 2.16] and for an indictable offence in the Magistrates’ Court may be stayed by the entry of a *nolle prosequi* but only upon the direction of the Secretary for Justice.

A *nolle prosequi* does no more than stay the prosecution, which may be recommenced if the interests of public justice so require. It is an exceptional procedure, to be exercised in cases such as where an accused suffers from a cognitive or physical incapacity that is likely to be permanent, or where it would prevent the interests of public justice being thwarted (for example, where interference with a witness cannot be adequately addressed by an adjournment). See paragraph 10.4 and 10.5 Prosecution Code published by the Department of Justice (available at: <http://www.doj.gov.hk/eng/public/pubsoppapptoc.html>).

#### Items subject to “legal privilege”

This is stated by section 22 of the Ordinance:

[DTROP 2.17]

- (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
- (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
- (c) items enclosed with or referred to in such communications and made –
  - (i) in connection with the giving of legal advice; or
  - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,

when they are in the possession of a person who is entitled to possession of them, but excluding, in any case, any communications or item held with the intention of furthering a criminal purpose.

The definition of “items subject to legal privilege” sets out the common law definition of legal professional privilege as held in *R v Central Criminal Court, ex p Francis and Francis* [1989] 1 AC 346. The House of Lords also held that “items held with the intention of furthering a criminal purpose” cover documents which were

held innocently by a solicitor but intended by the solicitor's client or even a third party to be used to further a criminal purpose. Such documents are not protected from disclosure.

Amendments to the Ordinance (by the Drug Trafficking and Organized Crimes (Amendment) Ordinance 2002) clarified that the Ordinance did not require the disclosure of any items subject to legal privilege. These amendments do not have retrospective effect. As to the position before the amendments. See *Pang Yiu Hung Robert v Commissioner of Police* [2002] HKEC 1482.

Both cases of *Pang Yiu Hung Robert v Commissioner of Police* [2002] HKEC 1482 and *Messrs Ip & Willis* [1990] HKLR 154 examined the types of documents that may or may not be covered by legal privilege when powers of investigation are being executed.

Also, in the matter of *Shun Tak Holdings v Commissioner of Police* [1995] 1 HKCLR 48, the Court looked at the instance where there is doubt as to whether documents seized by the police under powers of search must indeed be privileged, and the Court may look at the document itself to decide if the claim to privilege is well founded.

## PART II CONFISCATION OF PROCEEDS OF DRUG TRAFFICKING

### Section 3: Confiscation orders

Ver Date: 01/01/2003

- (1) Where –
- (a) either –
- (i) in proceedings before the Court of First Instance or the District Court a person is to be sentenced in respect of one or more drug trafficking offences and has not previously been sentenced in respect of his conviction for the offence, or as the case may be, any of the offences concerned; or
- (ii) proceedings for one or more drug trafficking offences have been instituted against a person but have not been concluded because the person –
- (A) has died; or
- (B) has absconded; and
- (b) an application is made by or on behalf of the Secretary for Justice for a confiscation order, (Amended L.N. 362 of 1997)
- the Court of First Instance or the District Court, as the case may be, shall act as follows. (Replaced 89 of 1995 s. 3. Amended 25 of 1998 s. 2)
- (2) The court shall first –
- (a) where subsection (1)(a)(i) is applicable –
- (i) impose on the person such period of imprisonment or detention (if any) as is appropriate in respect of the offence, or as the case may be, the offences concerned;

- (ii) make such order or orders (other than a confiscation order) in relation to sentence as is appropriate in respect of the offence, or as the case may be, the offences concerned, and such order or orders may be or include any order –
- (A) imposing any fine on the person;
- (B) involving any payment by the person; or
- (C) under section 38F or 56 of the Dangerous Drugs Ordinance (Cap.134), or under section 72, 84A, 102 or 103 of the Criminal Procedure Ordinance (Cap.221);
- (b) where subsection (1)(a)(ii)(A) is applicable, be satisfied that –
- (i) the person has died; and
- (ii) having regard to all relevant matters before it, the person could have been convicted in respect of the offence, or as the case may be, the offences concerned;
- (c) where subsection (1)(a)(ii)(B) is applicable, be satisfied that –
- (i) the person has absconded and that not less than 6 months have elapsed beginning with the date which is, in the opinion of the court, the date on which the person absconded;
- (ii) in the case of –
- (A) a person who is known to be outside Hong Kong and whose exact whereabouts are known –
- (I) reasonable steps have been taken, but have been unsuccessful, to obtain the return of that person to Hong Kong for the purposes of the proceedings concerned;
- (II) if that person is in custody outside Hong Kong for purposes other than the purposes referred to in sub-sub-paragraph (I), he is in such custody by virtue of conduct which would constitute an indictable offence if it had occurred in Hong Kong; and
- (III) notice of those proceedings was given to that person in sufficient time to enable him to defend them;
- (B) subject to subsection (2A), a person whose exact whereabouts are not known –
- (I) reasonable steps have been taken to ascertain the person's whereabouts (including, if appropriate, a step mentioned in paragraph (a), (b) or (c) of rule 5(1) of Order 65 of the Rules of the High Court (Cap.4 sub. leg. A)); and
- (II) notice of those proceedings, addressed to that person, has been published in a Chinese language newspaper, and an English language newspaper, circulating generally in Hong Kong; and (Replaced 26 of 2002 s. 2)
- (iii) having regard to all relevant matters before it, the person could have been convicted in respect of the offence, or as the case may be, the offences concerned. (Replaced 89 of 1995 s. 3)



COMMENTARY

**Enactment history**

[DTROP 28.01] This section was originally enacted by the Drug Trafficking (Recovery of Proceeds) Ordinance on 1 September 1989.

Subsection 28(1) was amended by the Adaptation of Laws (No. 5) Ordinance in 1999 (Ord. No. 15 of 1999), whereby the term "Governor" was replaced by the term "Chief Executive".

Subsection 28(1)(a) was also amended by the Adaptation of Laws (No. 5) Ordinance in 1999 (Ord. No. 15 of 1999), whereby the term "or place" was added between the words "territory" and "outside".

Subsection 28(3A) was added pursuant to section 36 of the Mutual Legal Assistance in Criminal Matters Ordinance in 1997, while subsection (4)(b) was replaced pursuant to section 36 of the same Ordinance (Ord. No. 87 of 1997).

**Definition of "Chief Executive in Council" under the Ordinance**

[DTROP 28.02] This is defined by section 3 of the Interpretation and General Clauses Ordinance (Cap.1) as the Chief Executive acting after consultation with the Executive Council.

**Section 27 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525) as referred to in subsection 28(3A) of the Ordinance**

[DTROP 28.03] Section 27 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525), states the following:

- (1) Where a place outside Hong Kong requests the Secretary for Justice to make arrangements –
  - (a) for the enforcement of an external confiscation order; or
  - (b) where an external confiscation order may be made in a proceeding which has been or is to be instituted in that place, to restrain dealing in any property against which the order may be enforced or which may be available to satisfy the order, then the Secretary for Justice may, in relation to that request, act for that place under the provisions of Schedule 2.
- (2) A request under subsection (1) shall, unless the contrary is shown, be deemed to constitute the authority of the place outside Hong Kong concerned for the Secretary for Justice to act on its behalf in any proceedings in the Court of First Instance under section 28 or under any provision of Schedule 2.

**Circumstances in which an external confiscation order may be made**

[DTROP 28.04] In *Attorney General of Hong Kong v Ko Sai Man* [1992] HKCA 260, [1992] 1 HKC 33, the questions arose whether in respect of a foreign warrant, criminal proceedings had to be on foot or whether the warrant had to be "final", in order for section 28 of the Ordinance to be applicable. At the Court of First Instance (which was called "High Court" at the time) level, a restraint order has initially been made but, in a subsequent decision, it

was not renewed or continued. The Attorney General then appealed to the Court of Appeal to have the restraint order restored. The judges allowed the appeal, holding that the warrant in that case had been directed to realisable property as defined by previous section 7(1) of the Ordinance and that it was an order plainly within the ambit of this provision. Contrary to the view of the Court of First Instance when it refused to continue the order, the Court of Appeal found that there was no requirement in the context of external confiscation orders that there should be criminal proceedings on foot or that the order should be "final". The Court justified its interpretation by contrasting section 28 of the Ordinance to registration under subsequent section 29(1)(a) and realisation under previous section 12(1) of the Ordinance, where a "final" order is required.

**Section 29: Registration of external confiscation orders**

Ver Date: 01/07/1997

Remarks:

Amendments retroactively made - see 25 of 1998 s. 2

(1) On an application made by or on behalf of the government of a designated country, the Court of First Instance may register an external confiscation order made there if –

- (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
- (b) it is satisfied, where any person against whom, or in relation to whose property, the order is made does not appear in the proceedings, that he received notice of the proceedings, in accordance with the law of the designated country, in sufficient time to enable him to defend them; and (Replaced 89 of 1995 s. 26)
- (c) it is of the opinion that enforcing the order in Hong Kong would not be contrary to the interests of justice.

(2) In subsection (1) "appeal" (Chinese Text Omitted, See Original Source) includes –

- (a) any proceedings by way of discharging or setting aside a judgment; and
- (b) an application for a new trial or a stay of execution.

(3) The Court of First Instance shall cancel the registration of an external confiscation order if it appears to the Court of First Instance that the order has been satisfied by payment of the amount due under it or by the person against whom it was made serving imprisonment in default of payment or by any other means.

(Amended 25 of 1998 s. 2) [cf. 1986 c. 32 s. 26A U.K.]

COMMENTARY

**Enactment history**

This section was originally enacted by the Drug Trafficking (Recovery of Proceeds) Ordinance on 1 September 1989. [DTROP 29.01]

It was retroactively amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998 (Ord. No. 25 of 1998).

Subsection 29(1)(b) was replaced pursuant to section 26 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance in 1995 (Ord. No. 89 of 1995).

**Question of whether Hong Kong courts have jurisdiction to register foreign in rem orders**

[DTROP 29.02] In *Anwide Co Ltd v Law Kin Man* (unrep., CACV 188/1994, 26 May 1995), the Court of Appeal dealt, amongst others, with the question of whether Hong Kong courts had jurisdiction to register foreign *in rem* orders.

The appellant had, at the first instance level, argued that this question had to be answered by the application of common law principles. The respondent contended that the Ordinance created a statutory scheme which was not to be construed by reference to common law principles. The judges agreed, holding that:

“... the legislature plainly had in mind to introduce the new and simple procedure set out in [section 29]. Provided the judge hearing the application is satisfied that the order sought to be registered is one which is aimed at the proceeds of drug trafficking; that where the order is against the person, that person had noticed; and that generally registration is in the interest of justice, the order ought to be registered. There is no warrant, in my view, for the proposition that the judge has to embark upon a consideration of common law principles and the conflict of laws before registering an ECO (External Confiscation Order)”.

After the amendments to section 29 of the Ordinance in 1995, in particular by the new subsection 29(1)(b), it became clear that the section applies to both *in rem* and *in personam* orders, and that the law to look at to determine if the foreign court has jurisdiction to try a defendant in absentia is the law of the place outside Hong Kong. See *Re Rafat Ali Rizvi*, [2014] HKCFI 163, at paras 61-62.

With respect to subsection 29(1)(b), the Court of First Instance in *Re Rafat Ali Rizvi* also held that:

“... it is important to note that the amendment does not stipulate that the property concerned has to be situated in Hong Kong and that the mode of serving of the notice of the proceedings in the foreign country has to conform with Hong Kong practice. The absence of such stipulations in the wake of the decision of *Re Law Kin Man* must show that the legislature was in recognition of the decision of the case.”

**Definition of “contrary to the interests of justice” as stated in subsection 29(1)(c) of the Ordinance**

[DTROP 29.03] According to subsection 29(1)(c) of the Ordinance, the Court of First Instance has a discretion not to register an external confiscation order if it is of the opinion that enforcing the order in Hong Kong would be: “contrary to the interests of justice”.

In *Secretary for Justice v Chan Thao Phoumy* (unrep., HCMP 1895/2007, 15 November 2010), the question arose as to whether ongoing criminal proceedings in the District Court may have an impact on the Court’s determination of whether enforcing an order was in the interests of justice. The Court did not provide a definitive answer:

“... [i]t is arguable, and the Court would not like to put it higher than that at this stage, that the hypothetical finding by the District Court would be relevant to the Court’s determination of whether the enforcement of the external confiscation order would or would not be contrary to the interests of justice. All this boils down to this. That is to say, this Court may not be able to fully dispose of the question of whether to register the external confiscation order at the present hearing without knowing in advance the outcome of the District Court prosecution”.

**Procedures**

See Order 115, rules 12–20 of the Rules of the High Court (Cap.4A) for procedures [DTROP 29.04] relating to application for registration, notice of registration, application to vary or set aside registration and variation, satisfaction and discharge of registered order.

**Section 30: Evidence of corresponding law**

Ver Date: 30/06/1997

Section 43 of the Dangerous Drugs Ordinance (Cap.134) shall apply in relation to proceedings under this Ordinance as it applies in relation to proceedings for an offence under that Ordinance.

(Enacted 1989)

**COMMENTARY**

**Enactment history**

This section was originally enacted by the Drug Trafficking (Recovery of Proceeds) [DTROP 30.01] Ordinance on 1 September 1989.

**Section 43 of the Dangerous Drugs Ordinance (Cap.134) as referred to under this section 30 of the Ordinance**

The section reads:

[DTROP 30.02]

“A document purporting to be issued by or on behalf of the government of a country and purporting to state the terms of a corresponding law in force in that country shall be admitted in evidence, in proceedings for an offence under this Ordinance before any court, on its production by the prosecution without further proof, and such document shall be conclusive evidence:

- (a) that it is issued by or on behalf of the government of that country;
- (b) that the terms of such law are as stated in the document; and

- (c) that any facts stated in the document to constitute an offence under such law do constitute such offence.”

**Section 31: Amendment of schedules**

**Ver Date: 01/07/1997**

Remarks:

Amendments retroactively made – see 15 of 1999 s. 3

(1) The Chief Executive in Council may, by order, amend Schedule 1, 2 or 3. (Amended 15 of 1999 s. 3)

(2) The Legislative Council may, by resolution, amend Schedule 4.

(Replaced 89 of 1995 s. 27)

**COMMENTARY**

**Enactment history**

[DTROP 31.01] This section was originally enacted by the Drug Trafficking (Recovery of Proceeds) Ordinance on 1 September 1989.

It was replaced pursuant to section 27 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance in 1995 (Ord. No. 89 of 1995).

Subsection 31(1) was retroactively amended by section 3 of the Adaptation of Laws (No. 5) Ordinance in 1999 (Ord. No. 15 of 1999), whereby the term “Governor” was replaced by the term “Chief Executive”.

**Amendments to schedules**

[DTROP 31.02] Section 31 is self-explanatory as the: (i) Chief Executive is empowered to amend Schedules 1, 2, and 3 when needed by order; and (ii) the Legislative Council is subsequently empowered to amend Schedule 4 by a resolution brought forth accordingly.

**SCHEDULE 1  
DRUG TRAFFICKING OFFENCES**

**Ver Date: 01/01/2003**

[sections 2 & 3]

(Replaced 26 of 2002 s. 2)

Offence	Description*
section 4(1), Dangerous Drugs Ordinance (Cap.134)	trafficking in a dangerous drug
section 4A, Dangerous Drugs Ordinance (Cap.134)	trafficking in purported dangerous drug
section 5(1), Dangerous Drugs Ordinance (Cap.134)	supplying or procuring a dangerous drug to or for unauthorized persons

section 6(1), Dangerous Drugs Ordinance (Cap.134)	manufacturing a dangerous drug
section 9(1), (2) and (3), Dangerous Drugs Ordinance (Cap.134)	cultivating, supplying, procuring, dealing in, importing, exporting, or possessing cannabis plant or opium poppy
section 35, Dangerous Drugs Ordinance (Cap.134)	keeping or managing a divan for the taking of dangerous drugs
section 37, Dangerous Drugs Ordinance (Cap.134)	permitting premises to be used for unlawful trafficking, manufacturing or storage of dangerous drugs
section 40(1)(c), Dangerous Drugs Ordinance (Cap.134)	aiding, etc. offence under a corresponding law
section 25, Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405)	dealing with property known or believed to represent the proceeds of drug trafficking

\*Note: The short description of offences in this Schedule is for ease of reference only. (Amended 52 of 1992 s. 12; 89 of 1995 s. 28)

**COMMENTARY**

**Enactment history**

This section was originally enacted by the Drug Trafficking (Recovery of Proceeds) Ordinance on 1 September 1989. [DTROP Sched 1.01]

It was first amended by section 12 of the Dangerous Drug (Amendment) (No 2) Ordinance (Ord. No. 52 of 1992).

It was subsequently amended by section 28 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance in 1995 (Ord. No. 89 of 1995).

In 2002, pursuant to section 2 of the Drug Trafficking and Organized Crimes (Amendment) Ordinance, the term “[s. 2]” was replaced by the term “[ss. 2 & 3]” (Ord. No. 26 of 2002).

**SCHEDULE 2  
ASSETS ON WHICH A CHARGING ORDER MAY BE IMPOSED**

**Ver Date: 01/07/1997**

Remarks:

Amendments retroactively made - see 25 of 1998 s. 2

[section 11]

1. Land in Hong Kong.
2. Securities of any of the following kinds –

- (a) Government stock;
  - (b) stock of any body incorporated in Hong Kong;
  - (c) stock of any body incorporated outside Hong Kong or of any state or territory outside Hong Kong, being stock registered in a register kept at any place within Hong Kong;
  - (d) units of any unit trust in respect of which a register of the unit holders is kept at any place within Hong Kong.
3. In this Schedule –
- (a) the terms “Government stock” (Chinese Text Omitted, See Original Source) and “land” (Chinese Text Omitted, See Original Source) have the same meaning as in section 2 of the High Court Ordinance (Cap.4); (Amended 25 of 1998 s. 2)
  - (b) the terms “stock” (Chinese Text Omitted, See Original Source) and “unit trust” (Chinese Text Omitted, See Original Source) have the same meaning as in section 20A of that Ordinance.

#### COMMENTARY

**[DTROP**    **Enactment history**

**Sched 2.01]** This section was originally enacted by the Drug Trafficking (Recovery of Proceeds) Ordinance on 1 September 1989.

It was retroactively amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998 to reflect the re-naming of the Supreme Court Ordinance (Ord. No. 25 of 1998).

**[DTROP**    **Definition of “government stock” and “land” under section 2 of the High Court Ordinance (Cap.4)**

**Sched 2.02]** Under section 2, “Government stock” means any stock issued by the Government or any funds of or annuity granted by the Government, and “land” includes:

- (a) land covered by water;
- (b) any estate, right, interest or easement in or over any land; and
- (c) things attached to land or permanently fastened to anything attached to land.

**[DTROP**    **Definition of “section 20A of the High Court Ordinance (Cap.4)” as referred to under this schedule 2 of the Ordinance**

**Sched 2.03]** This section 20A of the High Court Ordinance (Cap.4) states the following:

- (1) Subject to subsection (3), a charge may be imposed by a charging order only on –
  - (a) an interest held by the debtor beneficially –
    - (i) in any asset of a kind mentioned in subsection (2) or
    - (ii) under any trust; or

- (b) an interest held by a person as trustee of a trust (in this paragraph referred to as “the trust”), if the interest is in an asset of a kind mentioned in subsection (2) or is an interest under another trust and –
    - (i) the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust;
    - (ii) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit; or
    - (iii) in a case where there are 2 or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit.
- (2) The assets referred to in subsection (1) are –
- (a) land;
  - (b) securities of any of the following kinds –
    - (i) Government stock;
    - (ii) stock of any body incorporated in Hong Kong;
    - (iii) stock of any body incorporated outside Hong Kong or of any state or territory outside Hong Kong, being stock registered in a register kept at any place within Hong Kong;
    - (iv) units of any unit trust in respect of which a register of the unit holders is kept at any place within Hong Kong; or
  - (c) funds in court.
- (3) In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in subsection (2)(b) or (c), the Court of First Instance may provide for the charge to extend to any interest, dividend or other distribution payable and any bonus issue in respect of the asset.
- (4) In this section –
- “dividend” (Chinese Text Omitted, See Original Source) includes any distribution in respect of any unit of a unit trust;
  - “stock” (Chinese Text Omitted, See Original Source) includes shares, debentures, loan stocks, funds, bonds, notes, any other securities issued by the body concerned, whether or not constituting a charge on the assets of that body and any rights or options to subscribe for or be allotted any of the foregoing; and
  - “unit trust” (Chinese Text Omitted, See Original Source) means any trust established for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under the trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever.

**Charging order in accordance with section 11 of the Ordinance**

Section 11 of the Ordinance allows the application for a charging order made in accordance with these provisions. This charging order is made in respect of property listed in this Schedule 2 to the Ordinance, e.g. land in Hong Kong, Government stock, and securities.

**[DTROP**  
**Sched 2.04]**

**SCHEDULE 3  
CERTIFICATE OF SENTENCE IN RESPECT OF TERM OF  
IMPRISONMENT FIXED UNDER SECTION 8 OF THE DRUG  
TRAFFICKING (RECOVERY OF PROCEEDS) ORDINANCE (CAP.405)**

**Ver Date: 01/07/1997**

Remarks:

Amendments retroactively made - see 25 of 1998 s. 2

To the Commissioner of Correctional Services. Whereas the Court of First Instance/District Court\* -

[sections 8(8) & 31]

- (a) on the ..... day of 19 ..... -
  - (i) sentenced .....(name of defendant) in respect of the drug trafficking offence/offences\*, within the meaning of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405), of .....
  - .....
  - ..... (particulars of offence/offences\*); and
  - \* (ii) imposed a period of imprisonment/detention\* of ..... months/ years\* in respect of that offence/those offences\*; and
- (b) on the ..... day of ..... 19 ..... made a confiscation order under section 3(6)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405) that that defendant pay the amount of \$ .....

This is to certify that on the ..... day of ..... 19 ..... the Court of First Instance/District Court\* made an order under section 8 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405) fixing a term of imprisonment of ..... months/years\* which that person is to serve if any of the amount to be paid under that confiscation order is not paid or recovered on or before the ..... day of ..... 19 .....

Dated this ..... day of 19 .....

Registrar of the High Court/District Court\*.

\* Delete where inapplicable.

Note: Section 8(4) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405) provides that where a person becomes liable to serve a term of imprisonment fixed under section 8 of that Ordinance in respect of a confiscation order and is also liable to serve a term of imprisonment (or detention) in respect of the drug trafficking offence or offences concerned, that first-mentioned term of imprisonment shall not begin to run until after the end of that second-mentioned term of imprisonment (or detention).

(Schedule 3 added 89 of 1995 s. 29. Amended 25 of 1998 s. 2)

**COMMENTARY**

**Enactment history**

This schedule was added pursuant to section 29 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance in 1995 (Ord. No. 89 of 1995). [DTROP Sched 3.01]

It was retroactively amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998 to reflect the re-naming of the High Court (Ord. No. 25 of 1998).

**SCHEDULE 4  
SPECIFIED PROPERTY**

**Ver Date: 30/06/1997**

[sections 24A & 31]

- 1. Money (which term shall include coins and notes in any currency) amounting to not less than \$125,000. (Added 89 of 1995 s. 29)

**COMMENTARY**

**Enactment history**

This schedule was added pursuant to section 29 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance in 1995 (No. 89 of 1995). [DTROP Sched 4.01]

**Specified property**

Schedule 4 of the Ordinance provides that the "specified property" (which includes coins and notes in any currency) must amount to not less than HK\$125,000. Note that Part IVA only applies to cash that is being imported into or exported from Hong Kong. See *Re Webb* [2000] 1 All ER 209. [DTROP Sched 4.02]

**Organized and Serious  
Crimes Ordinance  
(Cap.455)**

<http://www.pbookshop.com>

# CAP.455: ORGANIZED AND SERIOUS CRIMES ORDINANCE

## INTRODUCTION

Hong Kong's main anti-money laundering legislation is contained in three Ordinances: [0.001] the Organized and Serious Crimes Ordinance (Cap.455) ("OSCO"), Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405) ("DTROP"), and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap.615) ("AMLO").

The Organized and Serious Crimes Ordinance (Cap.455) (hereafter referred to as "the Ordinance" or "OSCO") contains provisions in relation to the proceeds of organised crime and specified offences. The money laundering offences in the Ordinance were extended to proceeds of an indictable offence. In addition, new powers were introduced in the Ordinance for the investigation of organised crime and investigation of the proceeds of specified offences. Sections 2, 25 to 27, 30, 32, and schedules 1 and 2 of the Ordinance containing, *inter alia*, the provisions relating to the new money laundering offence and sentencing (section 27) came into operation on 2 December 1994; the remainder came into operation on 28 April 1995. [0.002]

In 1995, the Ordinance was substantially amended to include a new money laundering offence of "dealing", and repealed the former money laundering offence, and section 25A of the Ordinance now imposes an obligation to disclose a person's knowledge or suspicion that property is connected with an indictable offence. These amendments came into operation on 1 September 1995. [0.003]

The provisions under the Ordinance permit the Secretary for Justice to make applications to the Court of First Instance for the restraint of the realisable property of a person arrested for, or charged with, a "specified offence" as defined in that Ordinance, and to make confiscation orders. There are similar provisions under the DTROP in respect of drug trafficking offences. [0.004]

These provisions also empower the Court of First Instance and the District Court to order the confiscation of the realisable property of the defendant upon his being convicted of the relevant offence. The term "realisable property" has a wide ambit, and includes property which has been acquired through lawful means. Two offences of money laundering, one in respect of the dealing with the proceeds of any indictable offence, and the other relating specifically to the proceeds of drug trafficking are provided under this Ordinance and DTROP, respectively. They are independent from the restraint and confiscation provisions. [0.005]

[0.006] These offences are both specified in Schedule 1 to the Ordinance, and are just two among the many other specified offences which may trigger the restraint or confiscation proceedings under that Ordinance. A range of drug trafficking offences are specified also in Schedule 1 to DTROP.

[0.007] The "Organized and Serious Crimes Ordinance (Amendment of Schedule 2) Order 2007" was gazetted on 7 December 2007. This amendment adds to Schedule 2 of the Ordinance further offences now applicable under these provisions. The effect of the amendment is that, in respect of these offences as now listed in Schedule 2, relevant "realisable property" (defined as "proceeds or property derived from those offences") may now be subject to a restraint order, charging order or confiscation order made under the Ordinance.

[0.008] Do note that both this Ordinance and the DTROP share a very similar structure and design concerning the forfeiture of crime proceeds arising from the crimes as governed by these laws. Both ordinances bear the same strict approach and structure whose aim is to recover the ill-gotten gains of those perpetrators of the targeted crimes. See *HKSAR v Lam Hei Kit* (unrep., DCCC 465/2002, 6 July 2005).

**Organized and Serious Crimes Ordinance (Cap.455)**

**Long title**

An Ordinance to create new powers of investigation into organized crimes and certain other offences and into the proceeds of crime of certain offenders; provide for the confiscation of proceeds of crime; make provision in respect of the sentencing of certain offenders; create offences relating to the proceeds of crime or property representing the proceeds of crime; and for ancillary and connected matters.

(Enacted 1994. Amended 26 of 2002 s. 3)

[Sections 2, 25 to 27, 30, 32 to 35 and Schedules 1 and 2	}	2 December 1994 L.N. 651 of 1994
The Ordinance, other than sections 2, 25 to 27, 30, 32 to 35 and Schedules 1 and 2	}	28 April 1995 L.N. 157 of 1995]

(Originally 82 of 1994)

**COMMENTARY**

**Enactment history**

[OSCO LT.01] The Organized and Serious Crimes Ordinance was enacted on 12 October 1994. Sections 2, 25 to 27, 30, 32 to 35, as well as schedules 1 and 2 came into operation on 2 December 1994. All other sections came into operation on 28 April 1995 or thereafter. The Long Title has not been amended.

The whole ordinance was subjected to a change of format, layout, printing style and other presentational aspects by E.R. 1 of 2017 which came into effect on 15 February 2017.

**PART I  
PRELIMINARY**

**Section 1: Short title**

**Ver Date: 15/02/2017**

- (1) This Ordinance may be cited as the Organized and Serious Crimes Ordinance.
- (2) (Omitted as spent)

**COMMENTARY**

**Enactment history**

The Organized and Serious Crimes Ordinance was enacted on 12 October 1994 and [OSCO 1.01] this section came into operation on 28 April 1995. This section has not been amended.

**Section 2: Interpretation**

**Ver Date: 15/02/2017**

- (1) In this Ordinance, unless the context otherwise requires –
  - “absconded” (Chinese Text Omitted, See Original Source), in relation to a person, includes absconded for any reason whatsoever, and whether or not, before absconding, the person had been –
    - (a) taken into custody; or
    - (b) released on bail;
  - “authorized officer” (Chinese Text Omitted, See Original Source) means –
    - (a) any police officer;
    - (b) any member of the Customs and Excise Service established by section 3 of the Customs and Excise Service Ordinance (Cap.342); and
    - (c) any other person authorized in writing by the Secretary for Justice for the purposes of this Ordinance;
  - “confiscation order” (Chinese Text Omitted, See Original Source) means an order made under section 8(7);
  - “dealing” (Chinese Text Omitted, See Original Source), in relation to property referred to in section 15(1) or 25, includes –
    - (a) receiving or acquiring the property;
    - (b) concealing or disguising the property (whether by concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it or otherwise);
    - (c) disposing of or converting the property;
    - (d) bringing into or removing from Hong Kong the property;



- (e) using the property to borrow money, or as security (whether by way of charge, mortgage or pledge or otherwise);
- “defendant” (Chinese Text Omitted, See Original Source) means a person against whom proceedings have been instituted for a specified offence (whether or not he has been convicted of that offence);
- “insolvency officer” (Chinese Text Omitted, See Original Source) means –
- (a) the Official Receiver; or
  - (b) any person acting as –
    - (i) a trustee (including provisioned trustee), interim trustee or special manager appointed under the Bankruptcy Ordinance (Cap.6) or (Amended 18 of 2005, section 48);
    - (ii) a liquidator, provisional liquidator or special manager appointed under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) (Amended 28 of 2012 ss. 912 & 920);
- “interest” (Chinese Text Omitted, See Original Source), in relation to property, includes right;
- “items subject to legal privilege” (Chinese Text Omitted, See Original Source) means –
- (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
  - (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
  - (c) items enclosed with or referred to in such communications and made –
    - (i) in connection with the giving of legal advice; or
    - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,
 when they are in the possession of a person who is entitled to possession of them,
- but excludes any such communications or items held with the intention of furthering a criminal purpose;
- “material” (Chinese Text Omitted, See Original Source) includes any book, document or other record in any form whatsoever, and any article or substance;
- “organized crime” (Chinese Text Omitted, See Original Source) means a Schedule 1 offence that –
- (a) is connected with the activities of a particular triad society;
  - (b) is related to the activities of 2 or more persons associated together solely or partly for the purpose of committing 2 or more acts, each of which is a Schedule 1 offence and involves substantial planning and organization; or
  - (c) is committed by 2 or more persons, involves substantial planning and organization and involves –

- (i) loss of the life of any person, or a substantial risk of such a loss;
  - (ii) serious bodily or psychological harm to any person, or a substantial risk of such harm; or
  - (iii) serious loss of liberty of any person;
- “premises” (Chinese Text Omitted, See Original Source) includes any place and, in particular, includes –
- (a) any vehicle, vessel, aircraft, hovercraft or offshore structure; and
  - (b) any tent or movable structure;
- “property” (Chinese Text Omitted, See Original Source) includes both movable and immovable property within the meaning of section 3 of the Interpretation and General Clauses Ordinance (Cap.1).
- “Registrar” (Chinese Text Omitted, See Original Source) means the Registrar of the High Court;
- “reward” (Chinese Text Omitted, See Original Source) includes a pecuniary advantage;
- “Schedule 1 offence” (Chinese Text Omitted, See Original Source) means –
- (a) any of the offences specified in Schedule 1;
  - (b) conspiracy to commit any of those offences;
  - (c) inciting another to commit any of those offences;
  - (d) attempting to commit any of those offences;
  - (e) aiding, abetting, counselling or procuring the commission of any of those offences;
- “society” has the same meaning as in section 2(1) of the Societies Ordinance (Cap.151);
- “specified offence” (Chinese Text Omitted, See Original Source) means –
- (a) any of the offences specified in Schedule 1 or Schedule 2;
  - (b) conspiracy to commit any of those offences;
  - (c) inciting another to commit any of those offences;
  - (d) attempting to commit any of those offences;
  - (e) aiding, abetting, counselling or procuring the commission of any of those offences.
- “triad society” (Chinese Text Omitted, See Original Source) includes any society which –
- (a) uses any ritual commonly used by triad societies, any ritual closely resembling any such ritual or any part of any such ritual; or
  - (b) adopts or makes use of any triad title or nomenclature;
- (2) For the purpose of the definition of “organized crime” (Chinese Text Omitted, See Original Source) in subsection (1) –
- (a) a conspiracy to commit a Schedule 1 offence involves a matter referred to in paragraph (c)(i) to (iii) of that definition if the pursuit of the agreed course of conduct would at some stage involve that matter;
  - (b) an attempt or incitement to commit a Schedule 1 offence involves a matter referred to in paragraph (c)(i) to (iii) of that definition if what the person attempting or inciting the commission had in view would involve that matter.

(3) The expressions listed in the left-hand column below are respectively defined or (as the case may be) fall to be construed in accordance with the provisions of this Ordinance listed in the right-hand column in relation to those expressions.

Expression	Relevant provision
Charging order (Chinese Text Omitted, See Original Source)	Section 16(2)
Gift caught by this Ordinance (Chinese Text Omitted, See Original Source)	Section 12(9)
Making a gift (Chinese Text Omitted, See Original Source)	Section 12(10)
Realisable property (Chinese Text Omitted, See Original Source)	Section 12(1)
Restraint order (Chinese Text Omitted, See Original Source)	Section 15(1)
Value of gift, payment or reward (Chinese Text Omitted, See Original Source)	Section 12
Value of property (Chinese Text Omitted, See Original Source)	Section 12(4)

(4) This Ordinance applies to property whether it is situated in Hong Kong or elsewhere.

(5) References in this Ordinance (except in sections 25 and 25A) to offences or organized crimes include a reference to offences or organized crimes committed before the commencement of this Ordinance; but nothing in this Ordinance imposes any duty or confers any power on any court in or in connection with proceedings against a person for an offence instituted before the commencement of this Ordinance.

(6) For the purposes of this Ordinance –

- (a) a person's proceeds of an offence are –
  - (i) any payments or other rewards received by him at any time (whether before or after 2 December 1994) in connection with the commission of that offence;
  - (ii) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and
  - (iii) any pecuniary advantage obtained in connection with the commission of that offence;
- (b) the value of the person's proceeds of that offence is the aggregate of the values of –
  - (i) the payments or other rewards;
  - (ii) that property; and
  - (iii) that pecuniary advantage.

(7) For the purposes of this Ordinance –

- (a) a person's proceeds of organized crime are –
  - (i) any payments or other rewards received by him at any time (whether before or after 2 December 1994) in connection with the commission of one or more organized crimes;
  - (ii) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and
  - (iii) any pecuniary advantage obtained in connection with the commission of one or more organized crimes;
- (b) the value of the person's proceeds of organized crime is the aggregate of the values of –
  - (i) the payments or other rewards;
  - (ii) that property; and
  - (iii) that pecuniary advantage.

(8) For the purposes of this Ordinance, a person who has at any time (whether before or after the commencement of this Ordinance) received any payment or other reward in connection with the commission of an offence or an organized crime has benefited from that offence or organized crime, as the case may be.

(9) References in this Ordinance to property received in connection with the commission of an offence or organized crime include a reference to property received both in that connection and in some other connection.

(10) Subsections (11) to (17) shall have effect for the interpretation of this Ordinance.

(11) Property is held by any person if he holds any interest in it.

(12) References to property held by a person include a reference to property vested in his trustee in bankruptcy or in a liquidator.

(13) References to an interest held by a person beneficially in property include, where the property is vested in his trustee in bankruptcy or in a liquidator, a reference to an interest which would be held by him beneficially if the property were not so vested.

(14) Property is transferred by one person to another if the first person transfers or grants to the other any interest in the property.

(15) Proceedings for an offence are instituted –

- (a) when a magistrate issues a warrant or summons under section 72 of the Magistrates Ordinance (Cap.227) in respect of the offence;
- (aa) when a person has been arrested for the offence and released on bail or has refused bail;
- (b) when a person is charged with the offence after being taken into custody without a warrant; or
- (c) when an indictment is preferred by the direction or with the consent of a judge under section 24A(1)(b) of the Criminal Procedure Ordinance (Cap.221),

and where the application of this subsection would result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times.

- (16) Proceedings for an offence are concluded on the occurrence of one of the following events –
- (a) the discontinuance of the proceedings whether by entry of a *nolle prosequi* or otherwise;
  - (b) an order or verdict acquitting the defendant, not being an order or verdict which is subject to appeal or review within the meaning of subsection (17);
  - (c) the quashing of his conviction for the offence except where, under section 83E of the Criminal Procedure Ordinance (Cap.221), an order is made that he be retried;
  - (d) the grant of the Chief Executive's pardon in respect of the conviction for the offence;
  - (e) the court or magistrate sentencing or otherwise dealing with him in respect of his conviction for the offence where the Secretary for Justice either does not apply for a confiscation order, or applies for a confiscation order and the order is not made; or
  - (f) the satisfaction of a confiscation order made in the proceedings (whether by payment of the amount due under the order or by the defendant serving imprisonment in default).
- (16A) An application for a confiscation order made in respect of a defendant where section 8(1)(a)(ii) or (7A) is applicable is concluded –
- (a) if the Court of First Instance or the District Court decides not to make such an order, when it makes that decision; or
  - (b) if such an order is made as a result of that application, when the order is satisfied.
- (16B) An application under section 20(1A) in respect of a confiscation order made against a defendant is concluded –
- (a) if the Court of First Instance decides not to vary that order, when it makes that decision; or
  - (b) if the Court of First Instance varies that order as a result of that application, when the order is satisfied.
- (17) An order or verdict (including an order or verdict of acquittal) is subject to appeal or review so long as an appeal, further appeal or review is pending against the order or verdict; and for this purpose an appeal, further appeal or review shall be treated as pending (where one is competent but has not been instituted) until –
- (a) (Repealed 79 of 1995 section 50)
  - (b) the expiration of the time prescribed for instituting the appeal, further appeal or review.
- (18) Subject to subsection (19), nothing in this Ordinance shall require the disclosure of any items subject to legal privilege.
- (19) Subsection (18) shall not prejudice the operation of sections 3, 4 and 5.

## COMMENTARY

**Enactment history**

This section was originally enacted on 12 October 1994 and came into operation on 2 December 1994 [OSCO 2.01].

Subsection 2(1) was subsequently amended pursuant to section 2 of the Organized and Serious Crimes (Amendment) Ordinance 1995 (Ord. No. 90 of 1995).

In 1997, the definition of the term "authorized officer" was amended, whereby the term "Attorney General" was replaced by the term "Secretary for Justice" pursuant to the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997).

Subsection 2(1) was also amended by section 48 of the Bankruptcy (Amendment) Ordinance in 2005 (Ord. No. 18 of 2005).

Subsection 2(1) was further amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998, reflecting the re-naming of the High Court (Ord. No. 25 of 1998).

Subsections 2(3) and 2(5) were amended pursuant to section 2 of the Organized and Serious Crimes (Amendment) Ordinance 1995 (Ord. No. 90 of 1995).

Subsections 2(6) and 2(7) were replaced pursuant to section 36 of the Mutual Legal Assistance in Criminal Matters Ordinance in 1997 (Ord. No. 87 of 1997).

Subsection 2(16) was amended by section 3 of the Adaptation of Laws (No. 3) Ordinance in 1999 (Ord. No. 13 of 1999), whereby the term "Her Majesty" was replaced by the term "Chief Executive".

Subsection 2(16) was amended in 1997 pursuant to the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997), to reflect the establishment of the post of "Secretary for Justice".

Subsections 2(16A) and 2(16B) were amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998, reflecting the re-naming of the High Court (Ord. No. 25 of 1998); and added to by section 2 of the Organized and Serious Crimes (Amendment) Ordinance 1995 (Ord. No. 90 of 1995).

Subsection 2(17)(a) was repealed pursuant to section 50 of the Hong Kong Court of Final Appeal Ordinance (Ord. No. 79 of 1995).

Subsections 2(18) and 2(19) were added pursuant to section 3 of the Drug Trafficking and Organized Crimes (Amendment) Ordinance in 2002 (Ord. No. 26 of 2002).

Subsection 2(1) was further amended pursuant to paragraph 2 of Schedule 9 to the Companies Ordinance (Cap.622) in 2014 (Ord. No. 28 of 2012).

**Similarity of definition of terms**

[OSCO 2.02] The definitions used in the Ordinance are substantially the same as those used in the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405). For recurring terms, including “Hong Kong”, “Act”, “Document”, “Registrar of the High Court”, “Court”, “Liquidator”, “Magistrate”, “Judge”, “Chief Executive”, “Secretary for Justice”, “Court of First Instance” and “District Court”, see DTROP [2.04] to DTROP [2.15].

**Definition of “absconded” under the Ordinance**

[OSCO 2.03] The court must be satisfied that the person absconded and that not less than six months have elapsed beginning with the date, which in the Court’s opinion, is the date on which the person absconded.

**Definition of “items subject to legal privilege” under the Ordinance**

[OSCO 2.04] The 2002 amendments to both Ordinances (Drug Trafficking and Organized Crimes (Amendment) Ordinance 2002) clarified that neither Ordinance required the disclosure of any items subject to legal privilege. This is prescribed in subsection 2(18) of this Ordinance and in section 2(14) of the DTROP.

These amendments do not have retrospective effect. See *Pang Yiu Hung Robert v Commissioner of Police* [2002] HKEC 1482 for the position before the amendments. See also *Pang Yiu Hung Robert and Re Messrs Ip & Willis* [1990] HKLR 154 for the types of documents that may or may not be covered by legal privilege when powers of investigation are being executed.

The definition of “items subject to legal privilege” is the same in both this Ordinance and DTROP as both provisions set out the common law definition of legal professional privilege as held in *R v Central Criminal Court, ex p Francis and Francis* [1989] 1 AC 346. The House of Lords also held that “items held with the intention of furthering a criminal purpose” cover documents which were held innocently by a solicitor but intended by the solicitor’s client or even a third party to be used to further a criminal purpose. Such documents are not protected from disclosure.

Where there is doubt as to whether documents seized by the police under powers of search are privileged, the court may look at the document itself to decide if the claim to privilege is well founded. See *Shun Tak Holdings v Commissioner of Police* [1995] 1 HKCLR 48.

Order 116, rules 7 and 8 of the Rules of the High Court (Cap.4A) sets out the procedure for making claims of legal privilege in relation to orders under sections 3 to 5 of this Ordinance.

**Definition of “organized crime” under the Ordinance**

[OSCO 2.05] Note that an “organized crime” must be that of an offence as specified in schedule 1 of the Ordinance. The offence of conspiracy to defraud is specified in schedule 2 only, and thus it cannot constitute an “organized crime” for the purpose of enhancing sentence under later sections 27(4), 27(7) and 27(11) of the Ordinance. See *HKSAR v Lau Wing Chi* (unrep., CACC 29/2003, 20 January 2004).

**Definition of the “proceeds of the crime” under section 2(6) of the Ordinance**

The legislative intent behind a regime of confiscation of ill-gotten gains from criminal acts is captured in Lord Bingham’s comment in *R v May* [2008] 1 AC 1028 which was endorsed by the Court of Final Appeal in *HKSAR v Li Kwok Cheung George* (2014) 17 HKCFAR 319:

“The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provided for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant’s net profit after deduction of expenses or any amounts payable to co-conspirators.”

The Court of Final Appeal in *Li Kwok Cheung George* clarified the scope of “proceeds” in subsection 2(6)(a) of the Ordinance. The Court considered that subsection 2(6)(a) requires more than “just some general, unspecified connection between the payment and the offence”. The phrase “payments or other rewards” makes it clear that the contemplated payment must be in the nature of a reward received in connection with commission of the relevant offence which in this Ordinance means drug trafficking. A relationship of reward linking the payment and the commission of the offence must therefore exist before the payment qualifies as “proceeds”. The Court further explained that for a payment to have this character, it has, for instance, to be a recompense or return or remuneration or incentive for or in connection with the commission of the relevant offence. It follows that the payment must derive from or be generated by, or be received on account of, commission of the offence. On the other hand, “clean money” which is not paid or received in the nature of a reward in connection with the commission of the relevant offence does not qualify as “proceeds”. This conforms to the purpose of the legislative scheme to deprive drug traffickers and other offenders of their ill-gotten gains.

As a result, the earlier judgment of the Court of Appeal in *R v Lo Chak Man* [1996] HKCA 445 which followed the English Court of Appeal approach in *R v Gertrude Osei* (1988) 10 Cr App R (S) 289 to say that “payment” meant “any payment” including a payment which is not in the nature of a reward but “which may be in some other way in connection with” the relevant offence was effectively overruled. The Court of Final Appeal held clearly that this approach of “uncoupling” payment from reward or benefit should not be adopted in Hong Kong. In fact, the *Osei* approach was considered by the House of Lords in *R v May* [2008] 1 AC 1028, and by the UK Supreme Court in some other cases, to be problematical.

The Court of Final Appeal also opined that the adoption of a wide interpretation of “proceeds” would make money laundering an offence of great and uncertain width, in that payments would constitute the offence so long as receipt of the payment and reasonable grounds to believe that such payment has an undefined and uncertain “connection” with a drug trafficking offence are proven by the Prosecution. For instance, an onerous duty

of due diligence would be imposed on innocent lenders fearful of missing what might turn out to be clues about intended criminal conduct that would sufficiently constitute reasonable grounds to believe that the money was intended to be used "in connection with" drug trafficking.

In computing the value of the defendant's proceeds of an offence, the court is required to take account of gross receipts rather than net profits after deduction of expenses or any amounts payable to co-conspirators. See *HKSAR v Li Kwok Cheung George* (2014) 17 HKCFAR 319. See also *HKSAR v Lin Kei Tat* [2016] 1 HKLRD 471; *R v May* [2008] 1 AC 1028.

Specifically, the Court of Appeal in *Lin Kei Tat* said:

"We consider that the definition of "proceeds of an offence" provided in the Ordinance is clear and specific. According to this definition, "any payments received in connection with the commission of that offence" is different from the "profit" made in connection with the commission of that offence. Any profit made in connection with the commission of an offence is certainly "proceeds of an offence", but "proceeds of an offence" does not consist solely of "profit"; it also encompasses "any payments or other rewards received". When it comes to consider "benefited", "proceeds" and "other rewards" mentioned in the Ordinance, the court must go by the basic definition of "proceeds of an offence". In the light of the foregoing analysis, "benefited", "proceeds" and "rewards" all refer to the payments or other pecuniary advantage obtained in connection with the commission of the relevant offence and are not confined to "profit".

The court is also not limited to the amount claimed by the prosecution. See *R v Simbison* [1998] 2 Cr App R (S) 111.

Note that the Ordinance has retroactive effect as a person's proceeds of a specified offence include payments in connection with the offence received prior to the commencement of this Ordinance as prescribed under subsection 2(6) of the Ordinance.

## PART II POWERS OF INVESTIGATION

### Section 3: Requirement to furnish information or produce material

Ver Date: 15/02/2017

Remarks:

Amendments retroactively made – see 25 of 1998 s.2

(1) The Secretary for Justice may, for the purpose of an investigation into an organized crime, make an *ex parte* application to the Court of First Instance for an order under subsection (2) in relation to a particular person or to persons of a particular description.

(2) The Court of First Instance may, if on such an application it is satisfied that the conditions in subsection (4)(a), (b) and (d) or subsection (4)(a), (c) and (d) are fulfilled, make an order complying with subsection (3) in respect of the particular person, or persons of the particular description, to whom the application relates. (Amended 25 of 1998 s.2)

(3) An order under subsection (2) shall –

- (a) give particulars of the organized crime under investigation;
- (b) identify the particular person, or state the particular description of persons, in respect of whom the order is made;
- (c) authorise the Secretary for Justice to require the person or persons in respect of whom the order is made –
  - (i) to answer questions or otherwise furnish information with respect to any matter that reasonably appears to an authorised officer to be relevant to the investigation; or
  - (ii) to produce any material that reasonably appears to the Secretary for Justice to relate to any matter relevant to the investigation, or any material of a class that reasonably appears to him so to relate, or both; and (Amended LN 362 of 1997)

(d) contain such other terms (if any) as the Court of First Instance considers appropriate in the public interest, but nothing in this paragraph shall be construed as authorising the court to order the detention of any person in custody without that person's consent. (Amended 25 of 1998 s.2)

(4) The conditions referred to in subsection (2) are –

- (a) that there are reasonable grounds for suspecting that the organized crime under investigation has been committed;
- (b) where the application relates to a particular person, that there are reasonable grounds for suspecting that the person has information, or is in possession of material, likely to be relevant to the investigation;
- (c) where the application relates to persons of a particular description, that –
  - (i) there are reasonable grounds for suspecting that some or all persons of that description have such information or are in possession of such material; and
  - (ii) the organized crime could not effectively be investigated if the application was required to relate to a particular person, whether because of the urgency of the investigation, the need to keep the investigation confidential or the difficulty in identifying a particular person who has relevant information or material; (Amended 90 of 1995 s. 3)
- (d) that there are reasonable grounds for believing that it is in the public interest, having regard –
  - (i) to the seriousness of the organized crime under investigation;
  - (ii) to whether or not the organized crime could be effectively investigated if an order under subsection (2) is not made;

- (iii) to the benefit likely to accrue to the investigation if the information is disclosed or the material obtained; and
- (iv) to the circumstances under which the person or persons may have acquired, or may hold, the information or material (including any obligation of confidentiality in respect of the information or material and any family relationship with a person to whom the information or material relates),

that an order under subsection (2) should be made in respect of that person or those persons.

(5) Where an order under subsection (2) authorises the Secretary for Justice to require a person to answer questions or otherwise furnish information with respect to any matter that reasonably appears to an authorised officer to be relevant to an investigation, the Secretary for Justice may by one, or more than one, notice in writing served on that person require him to attend before an authorised officer at a specified time and place, or at specified times and places, and answer questions or otherwise furnish information with respect to any matter that reasonably appears to the authorised officer to be relevant to the investigation. (Amended LN 362 of 1997)

(6) Where an order under subsection (2) authorises the Secretary for Justice to require a person to produce any material that reasonably appears to the Secretary for Justice to relate to any matter relevant to an investigation, or any material of a class that reasonably appears to him so to relate, the Secretary for Justice may by one, or more than one, notice in writing served on that person require him to produce at a specified time and place, or at specified times and places, any specified material that reasonably appears to him so to relate or any material of a specified class that reasonably appears to him so to relate. (Amended LN 362 of 1997)

(7) A notice in writing imposing a requirement on a person under subsection (5) or (6) shall –

- (a) state that a court order has been made under this section and include –
  - (i) the date of the order;
  - (ii) the particulars of the organized crime under investigation;
  - (iii) where the order is made in respect of that particular person, a statement to that effect;
  - (iv) where the order is made in respect of persons of a particular description and that person is of that particular description, a statement to that effect;
  - (v) a statement of the authorisation given to the Secretary for Justice by the order; and (Amended LN 362 of 1997)
  - (vi) a statement of any other terms of the order relevant to that person;
- (b) have annexed to it a copy of the order made under this section, but there may be excluded from such copy –
  - (i) any reference in the order to a particular person other than that person, or to persons of a particular description not including that person; and

- (ii) any details in the order that relate only to such particular person or persons of a particular description; and
- (c) be substantially in the form specified in Schedule 4 in relation to such notice and in addition shall set out or have annexed to it subsections (8) to (10) and section 7.

(8) An authorised officer may photograph or make copies of any material produced in compliance with a requirement under this section.

(9) A person shall not under this section be required to furnish any information or produce any material relating to items subject to legal privilege, except that a lawyer may be required to furnish the name and address of his client.

(10) An order under subsection (2), and a notice in writing imposing a requirement under subsection (5) or (6), may be made in relation to information held by, and material in the possession of, a public body as defined in section 28.

(11) A person is not excused from furnishing information or producing any material required under this section on the ground that to do so –

- (a) might tend to incriminate him; or
- (b) would breach an obligation as to secrecy or another restriction upon the disclosure of information or material imposed by statute or otherwise.

(12) A statement by a person in response to a requirement imposed by virtue of this section may not be used against him in criminal proceedings against him except as follows –

- (a) in evidence in proceedings under subsection (14) or section 36 of the Crimes Ordinance (Cap.200); or
- (b) for the purpose of impeaching his credibility in proceedings in respect of any offence where in giving evidence he makes a statement inconsistent with it.

(13) Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section commits an offence and is liable to a fine at level 6 and to imprisonment for 1 year.

(14) Any person who, in purported compliance with a requirement under this section –

- (a) makes a statement that he knows to be false or misleading in a material particular; or
- (b) recklessly makes a statement that is false or misleading in a material particular,

commits an offence and is liable –

- (i) on conviction upon indictment to a fine of \$500,000 and to imprisonment for 3 years; or
- (ii) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(15) Where an order under subsection (2) has been made the Secretary for Justice, or a person authorized in writing by the Secretary for Justice for the purpose of this

subsection, may, after satisfying any conditions that may be prescribed by rules of court in this respect, obtain a copy of the order; but subject to the foregoing part of this subsection and to subsection (7)(b), no person is entitled to obtain a copy of the order or any part of the order. (Amended LN 362 of 1997)

(16) Where a requirement imposed on a person under this section relates to material which consists of information recorded otherwise than in legible form –

- (a) the requirement shall have effect as a requirement to produce the material in a form in which it can be taken away;
- (b) an authorized officer may by notice in writing served on the person require the person to produce at a specified time and place, or at specified times and places, the material in a form in which it is visible and legible and can be taken away, and may by like notice release the person from any obligation under the requirement to produce the material in the form in which it is recorded.

(17) An application for the discharge or variation of an order made under this section may be made by any person on whom a requirement is imposed under the order.

(18) Rules of court –

- (a) shall provide for applications by any person on whom a requirement is imposed under an order made under this section for the discharge or variation of such order;
- (b) may provide for –
  - (i) proceedings relating to orders under this section;
  - (ii) conditions that must be satisfied before a person (including the Secretary for Justice) referred to in subsection (15) may obtain a copy of such order. (Amended 90 of 1995 s. 3; L.N. 362 of 1997)

(19) The Secretary for Security shall prepare a code of practice in connection with –

- (a) the exercise of any of the powers conferred; and
  - (b) the discharge of any of the duties imposed,
- by this section, and any such code shall be laid before the Legislative Council and shall not be promulgated until the code has been approved by the Legislative Council.

(Enacted 1994)

## COMMENTARY

### Enactment history

[OSCO 3.01] This section was originally enacted on 12 October 1994 and came into operation on 28 April 1995.

Subsection 3(1) was amended in 1997, whereby the term “Attorney General” was replaced by the term “Secretary for Justice” pursuant to the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997).

Subsection 3(1) was further and retroactively amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998, reflecting the re-naming of the High Court (Ord. No. 25 of 1998).

Subsection 3(2) was retroactively amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998, reflecting the re-naming of the High Court (Ord. No. 25 of 1998).

Subsection 3(3) was amended pursuant to the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997), and also retroactively amended by section 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance in 1998, reflecting the re-naming of the High Court (Ord. No. 25 of 1998).

Subsection 3(4) was amended pursuant to section 3 of the Organized and Serious Crimes (Amendment) Ordinance 1995 (Ord. No. 90 of 1995).

Subsections 3(5), 3(6), 3(7) and 3(15) were amended in 1997, whereby the term “Attorney General” was replaced by the term “Secretary for Justice” pursuant to the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997).

Subsection 3(18) was amended pursuant to section 3 of the Organized and Serious Crimes (Amendment) Ordinance 1995 (Ord. No. 90 of 1995), and further amended by the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997), whereby the term “Attorney General” was replaced by the term “Secretary for Justice”.

### Application of Order 116 of the Rules of the High Court to this section 3 of the Ordinance

Order 116 of the Rules of the High Court (Cap.4A) sets out the procedures in relation [OSCO 3.02] to applications for and discharge of section 3 orders.

### Definition of “person” under the Ordinance

Regarding subsection 3(3)(b) of the Ordinance, “person” includes a suspect, even after [OSCO 3.03] he has been charged. See *R v Director of the Serious Fraud Office, ex p Smith* [1993] AC 1.

### Definition of “particular description of persons” under the Ordinance

The phrase “particular description of persons” permits a section 3 order to be [OSCO 3.04] made against a large number of persons, whose individual identities cannot, in the circumstances, be ascertained.

### Definition of “furnish information with respect to any matter” under subsection 3(3)(c)(i) of the Ordinance

In subsection 3(3)(c)(i) of the Ordinance, to “furnish information with respect to any [OSCO 3.05] matter” permits the authorised officer to determine the relevance of the information sought and recognises that the scope of the investigation may widen as a result of the questioning of the person.

Note that under section 3, the Secretary for Justice can require a person to “answer questions or otherwise furnish information” which is different from a production

# CAP.615: ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING (FINANCIAL INSTITUTIONS) ORDINANCE

## INTRODUCTION

Hong Kong's Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap.615) (the "Ordinance" or "AMLO") came into effect on 1 April 2012. This legislation imposed a uniform customer due diligence ("CDD") requirement for all financial institutions in the banking, securities, insurance, remittance, and money changing sectors. [0.001]

Hong Kong enacted the AMLO in response to the studies and feedback from the Financial Action Task Force ("FATF"), the global body that sets the standards and regulations for both anti-money laundering and counter-terrorist financing. The FATF looked at and reviewed Hong Kong's anti-money laundering rules and thereafter advised Hong Kong to improve these rules by: (i) codifying customer due diligence and record-keeping requirements into the new AMLO statute; and (ii) criminalising the *intentional* breach of the CDD rules. [0.002]

Previously, the requirements on CDD and record keeping by financial institutions were set out mainly through guidelines issued by the Monetary Authority ("MA"); the Securities and Future Commission ("SFC"); and the Insurance Authority ("IA"). Remittance agents and money changers were subject to regulations and registration requirements implemented by the police under the Organized and Serious Crimes Ordinance (Cap.455). [0.003]

The AMLO now provides a uniform set of CDD and record keeping requirements applicable to all *financial institutions* in the banking, securities, insurance and remittance and money changing sectors (collectively known as "FIs"). Note that FIs under the AMLO include authorised institutions, licensed corporations, authorised insurers, appointed insurance agents, authorised insurance agents, licensed money service operators, and the Postmaster General. Now a stored value facility ("SVF") licensee is also included as a FI under Schedule 1 to the Ordinance. [0.004]



[0.005] In addition, the four *relevant authorities* (MA, SFC, IA and the Customs and Excise Department) (collectively known as “RAs”), in consultation with the Financial Services and Treasury Bureau, jointly drafted a set of guidelines applicable to all these FIs. Individual RAs also added supplementary or sector specific guidance that is necessary or appropriate for their respective sectors.

The existing versions of the guidelines are the following:

- (1) The Monetary Authority’s “Guideline on Anti-Money Laundering and Counter-Terrorist Financing (For Authorized Institutions)”, March 2015. (the “MA Guidelines”);
- (2) The Securities and Futures Commission’s “Guideline on Anti-Money Laundering and Counter-Terrorist Financing”, April 2015. It is for guidance to licensed corporations. (the “SFC Guidelines”); and
- (3) The Insurance Authority’s “Guideline on Anti-Money Laundering and Counter-Terrorist Financing (For authorized insurers, reinsurers, appointed insurance agents and authorized insurance brokers carrying on or advising on long term business)”, March 2015. (the “IA Guidelines”)

*Note that the above Guidelines are provided as part of our exclusive ProView eBook exclusive content.*

[0.006] Accordingly, one of the most significant implications of the Ordinance is the implementation of a legislative framework and statutory codification of the FIs’ duty of CDD and record keeping requirements in order to create this statutory obligation for all FIs to combat money laundering and terrorist financing.

[0.007] The other significant implication of the Ordinance provides that a FI or a person may now be convicted for criminal offenses for *not* being in compliance with the Ordinance and furthermore be liable for corresponding penalties:

- (i) where an FI *knowingly* contravenes a specified provision of the Ordinance or where a person *knowingly causes or knowingly permits* the FI to contravenes a specified provision of the Ordinance, the maximum penalty can be HK \$1,000,000 fine and a 2-year imprisonment; or
- (ii) Where a FI contravenes a specified provision of the Ordinance with intent to defraud any RA, or a person contravenes a specified provision of the Ordinance with intent to defraud an FI or any RA, the maximum penalty can also be HK \$1,000,000 fine but the imprisonment term is increased to 7 years under ss.5(5) and 5(6) of the Ordinance.

[0.008] The Ordinance provides that a FI commits an offence if it contravenes the statutory obligations *knowingly or with an intent to defraud*, and persons who are concerned in the management of a financial institution and persons who are employees of or are employed to work for a financial institution will be criminally liable if they *knowingly or with an intent to defraud* cause or permit the financial institution to contravene the requirements.

#### Key Provisions of the AMLO

[0.009] The Ordinance imposes a single set of regulatory requirements (in particular CDD and record keeping requirements in Part 2 of and Schedule 2 to the Ordinance) on all FIs

as defined by the Ordinance here in Hong Kong. All FIs are now required to perform more due diligence on a customer’s background, duty to keep records of all financial transactions and have procedures in place to make sure all staff report suspicious activity and cases to the relevant law-enforcement authorities.

Summary of the highlights of the Ordinance and the proposed amendments include: [0.010]

- (i) The Ordinance requires FIs to take preventative or mitigating measures commensurate with the nature and scope of the money-laundering or terrorist-financing risks;
- (ii) The Ordinance prescribes extensive CDD measures, which must be undertaken prior to establishing any business relationship or conducting with, or conducting occasional transactions for customers. When carrying out CDD, FIs are expected to take reasonable measures to identify and verify the customer, any beneficial owner of the customer (including in the case of a legal person or trust) or persons purporting to act on behalf of the customer, and obtain information on the purpose and intended nature of the business relationship with the FI. Note that FIs are allowed to rely on an intermediary to perform any part of the CDD measures, subject to certain conditions. However, the FI remains ultimately responsible for compliance with the AMLO. But with effect from 1 April 2015, the Ordinance will not recognise certain categories of Hong Kong-qualified intermediaries (such as solicitors and accountants) as being eligible to perform this function on behalf of FIs;
- (iii) The Ordinance prescribes a constant duty on FIs to continuously monitor business relationships with customers to ensure CDD documents and information are up-to-date and relevant, and that customers’ activities are consistent with the nature of their business and risk profile, as determined by the FI. This may involve conducting further CDD if the basis of the business relationship changes significantly, and undertaking more frequent and intensive monitoring for customers that pose a higher risk;
- (iv) Where an FI knows or suspects that property represents the proceeds of a crime or terrorist property, the FI must disclose this to the relevant law enforcement authority as soon as it is reasonably to do so;
- (v) The Ordinance requires FIs to retain documents relating to customer identity and other CDD measures for six years after the end of the business relationship. In addition, those documents and records that were obtained in connection with the transaction(s) should be kept for six years after the transaction completes, regardless of whether the business relationship itself has ended. The FI remains ultimately responsible for complying with the record keeping requirements, even if the relevant customer identification and verification documents are held by an intermediary;
- (vi) As previously examined, the Ordinance makes it a criminal offense if an FI knowingly or with the intent to defraud any RA, contravenes a specified provision in the Ordinance. The “*specified provisions*” are listed in section 5(11) of the Ordinance and comprises of CDD and record keeping requirements. The FI is liable to a maximum term of imprisonment of 2 years and a fine of HK\$1 million upon conviction if it knowingly contravenes a specified provision and is liable to a maximum term of imprisonment of 7 years and a fine of HK\$1 million upon conviction if it contravenes a specified provision with the intent to defraud any RA;

- (vii) The Ordinance extends liability to any person who is an employee of an FI or is employed to work for an FI or is concerned with the management of an FI who causes or permits the FI to contravene a specified provision will also be subject to the same penalties as previously referred to above; and
- (viii) The Ordinance also confers powers to supervise compliance with the requirements in the Ordinance on the RAs accompanied with offences of non-compliance.

#### Consultations on Legislative Proposals to Enhance Anti-Money Laundering and Counter-Financing Regulation in Hong Kong

- [0.011] The Financial Services and the Treasury Bureau (“FSTB”) conducted two consultation exercises from 6 January to 5 March 2017 on legislative proposals to enhance anti-money laundering and counter-terrorist financing regulation in Hong Kong. The consultation focused on two main areas: (1) the amendment of the Companies Ordinance (Cap.622) to require companies incorporated in Hong Kong to maintain beneficial ownership information; and (2) the amendment of the AMLO to prescribe the statutory CDD and record-keeping requirements to designated non-financial businesses and professions (“DNFBPs”) such as solicitors, accountants, real estate agents and trust and company service providers when they engage in specified transactions.

The conclusions were published in April 2017. The FSTB aimed to introduce two amendment bills based on those conclusions into the Legislative Council by the end of July 2017.

#### An overview of the consultation conclusions relating to the AMLO

##### [0.012] Scope of the AMLO

- (1) There is a general consensus on the proposed extension of the AMLO to cover the DNFBPs such that they will be subject to the CDD and record-keeping requirements in Schedule 2 to the AMLO when they engage in specified transactions including real estate transactions; management of client money, securities or other assets; management of bank, savings or securities accounts; company formation and management; and buying and selling of business entities.
- (2) “Solicitors” refers only to sole practitioners, partners or employed professionals within professional firms, but not “in-house” lawyers that are employees of institutions or businesses. Moreover, the Law Society’s Practice Direction P is considered inadequate as they are merely guidelines without legal force.
- (3) Despite the unique risk profile of the real estate sector in Hong Kong, the difficulty in conducting CDD measures for property transactions and the existing regulatory regime under the Estate Agents Authority, estate agents should be subject to CDD and record-keeping measures when they are involved in transactions for their clients concerning the buying and selling of real estates.

##### Risk-sensitive approach

- (4) A risk-sensitive approach should be adopted, that is, the extent of CDD measures to be undertaken should depend on the types of customers, business relationships or transactions and the associated risks. That means customary CDD to

be conducted in normal circumstances, simplified CDD for low-risk cases and enhanced CDD for high-risk situations.

- (5) Acknowledging the varying capacity or expertise to follow the risk-sensitive approach of the DNFBPs, a provision would be added to allow regulatory authorities to issue sector-specific guidelines for implementing the AMLO Schedule 2 requirements.

##### Record-keeping requirement

- (6) The DNFBPs should be subject to the existing record-keeping requirements in the AMLO. Identification data, account files, business correspondence and records of transactions should be maintained for a period of six years.

##### Regulatory authorities

- (7) The FSTB proposed to leverage on the existing regulatory regimes applicable to solicitors, accountants and estate agents respectively under the Legal Practitioners Ordinance (Cap.159), the Professional Accountants Ordinance (Cap.50) and the Estate Agents Ordinance (Cap.511) to enforce the statutory CDD and record-keeping requirements.
- (8) The Law Society (“LS”), the Hong Kong Institute of Certified Public Accountants (“HKICPA”) and the Estate Agents Authority (“EAA”) will take on statutory oversight for monitoring and ensuring compliance with the AMLO requirements.
- (9) Inspection and search powers will not be granted to the LS, HKICPA or the EAA.
- (10) The LS, the HKICPA and the EAA should continue to rely on the applicable disciplinary measures under their respective legislation to handle non-compliance. No further criminal sanction is necessary.

##### Licensing regime for the trust and company service providers

- (11) On the other hand, the Companies Registry would be made the licensing and regulatory authority for trust and company service providers.
- (12) Any person providing trust or company services as a business will be required to obtain a licence from the Companies Registry subject to the applicant and its directors/partners/ultimate owners (where applicable) meeting a fit-and-proper test. These service providers will also be subject to the AMLO Schedule 2 requirements.
- (13) It would be a criminal offence for any person or corporation to provide trust or company services as a business without a licence.
- (14) However, non-compliance of CDD and record-keeping requirements under the AMLO will not attract criminal liability but only supervisory sanctions.
- (15) Part 6 of the AMLO should be expanded to cover appeals against future decisions made by the Registrar of Companies in implementing the licensing and disciplinary regime for the trust and company service providers.

#### Combating Trade-based Money Laundering

As examined above, the amendments set out proposals to: (i) enhance the transparency of beneficial ownership of Hong Kong companies; and (ii) to extend the customer due diligence and relevant record-keeping requirements to designated non-financial

businesses and professions. In addition, both the Hong Kong Association of Banks (“HKAB”) with input from the Hong Kong Monetary Authority (“HKMA”) have also developed guidelines to combat trade-based money laundering.

*This Guidance Paper on Combating Trade-based Money Laundering is provided as part of our exclusive ProView eBook exclusive content.*

The rationale behind this is that since trade is an important part of the Hong Kong economy, its role as an international financial centre, and confidence in the integrity of the banking sector may be adversely affected if authorised institutions (“AI”) do not have appropriate systems and controls to manage various risks which may arise in the provision of financial services to support this important aspect of the Hong Kong economy.

The definition of “trade-based money laundering” was broadened to now mean:

“[Trade-based money laundering] and terrorist financing (TBML/FT) refer to the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their illegal origin or finance their activities.”

Authorised institutions that are involved in the trade industry must now also establish and maintain adequate and appropriate risk-based controls to address trade-based money laundering risks, which are an essential element of AIs’ trade-related activities. Specifically, section 19(3) of Schedule 2 of the AMLO requires AIs to establish and maintain effective procedures not inconsistent with the AMLO for the purposes of carrying out key duties under Schedule 2 to the AMLO, in respect of each kind of customer, business relationship, product and transaction. This is specifically required under sections 3–5, 9, 10, and 15 of this Schedule 2.

Accordingly, AIs should develop written policies and procedures to assess and mitigate money laundering risks arising from their trade-related customers and activities. Customer due diligence duties require that AIs have trade controls that clearly set out the scope and use of appropriate information collected to facilitate the assessment and identification of possible anomalies regarding the appropriation of certain funds. Key customer information related to trade-based activities include but is not limited to the customer’s: (i) business nature (such as major products, jurisdictions and markets); (ii) delivery/transportation mode for goods or services; (iii) major suppliers and buyers; (iv) products and services to be utilised from the AI; (v) anticipated account activities; (vi) anticipated major methods and terms of payment and settlement; (vii) internal customer risk assessment ratings by the AI; (viii) any previous suspicious transaction reports filed with relevant authorities (to the extent possible bearing in mind legal and regulatory constraints, including the need to avoid the risk of tipping-off); (ix) any other information from the relationship manager or other relevant staff, etc.

Authorised institutions must adopt a risk-based approach to the above CDD requirements. This should take into account the four overarching risk factors of:

(i) country; (ii) customer; (iii) product/service; and (iv) delivery/distribution channel. AIs must provide the appropriate tools and training to its staff to enable them to properly conduct trade-related risk assessments.

In the end, AIs need to ensure proper documentation and record keeping of both the initial CDD assessment as well as continued updating of required and necessary information and explanations. In addition, AIs are required by the HKMA to maintain a database of names, particulars of terrorist suspects, and designated parties if the trade company is based in a high-risk jurisdiction. AIs must ensure that its designated parties database and sanctioned jurisdictions list are updated in a timely manner so that all activities are diligently monitored.

#### Conclusion

The Ordinance imposes a statutory obligation on all financial institutions here in Hong Kong to conduct proper customer due diligence investigations and monitoring on all their customers and to keep records on both the customers themselves and the transactions for a specified time period. Any non-compliance will certainly result in supervisory and criminal sanctions on the offending FI in accordance to the penalties as listed and prescribed in the Ordinance. [0.014]

### Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap.615)

Long title

Ver Date: 02/08/2012

An Ordinance to provide for the imposition of requirements relating to customer due diligence and record-keeping on specified financial institutions; to provide for the powers of the relevant authorities to supervise compliance with those requirements and other requirements under this Ordinance; to provide for the regulation of the operation of a money service and the licensing of money service operators; to establish a review tribunal to review certain decisions made by the relevant authorities under this Ordinance; and to provide for incidental and related matters.

(Enacting provision omitted – E.R. 2 of 2012)

(Originally 15 of 2011)

#### COMMENTARY

##### Overview

The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) [AMLO LT.01] Ordinance (the “Ordinance”), which came into effect on 1 April 2012, is the primary legislation in Hong Kong implementing the Financial Action Task Force (“FATF”) Recommendations from February 2012.

The overarching purpose is to combat terrorist finance. The main way the Ordinance tackles this challenge is by imposing requirements on financial institutions ("FIs") as to customer due diligence ("CDD") and record keeping.

According to the Joint Financial Intelligence Unit ("JIFU"), one of the purposes of the Ordinance is to ensure: "[B]etter alignment of the financial sector with prevailing international standards."

There are three common stages in the laundering of money, and they frequently involve numerous transactions. An FI must now be on constant alert to any such sign for potential criminal activities. These stages include:

- (i) Placement - the physical disposal of cash proceeds derived from illegal activities;
- (ii) Layering - separating illicit proceeds from their source by creating complex layers of financial transactions designed to disguise the source of the money, subvert the audit trail and provide anonymity; and
- (iii) Integration - creating the impression of apparent legitimacy to criminally derived wealth. In situations where the layering process succeeds, integration schemes effectively return the laundered proceeds back into the general financial system and the proceeds appear to be the result of, or connected to, legitimate business activities.

See para 1.10 of the Securities and Futures Commission's "Guideline on Anti-Money Laundering and Counter-Terrorist Financing", April 2015.

Note that the Ordinance was subjected to a change of format, layout, printing style and other presentational aspects by E.R. 2 of 2012 which came into effect on 2 August 2012.

## PART 1 PRELIMINARY

### Section 1: Short title

Ver Date: 02/08/2012

(1) This Ordinance may be cited as the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance.

(2)-(4) (omitted as spent - E.R. 2 of 2012)

### COMMENTARY

#### Overview

[AMLO 1.01] The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance came into effect on 1 April 2012. This section has not been amended since. Subsections 1(2) to 1(4) were omitted as spent pursuant to the Second Editorial Records of 2012 after the Ordinance came into effect.

## Section 2: Interpretation

Ver Date: 01/04/2012

(1) Schedule 1 contains interpretation provisions that apply to this Ordinance in accordance with their terms.

(2) The Secretary for Financial Services and the Treasury may, by notice published in the Gazette, amend Part 2 of Schedule 1.

### COMMENTARY

#### Overview

Section 2 of the Ordinance refers to Schedule 1 of the Ordinance which provides a list [AMLO 2.01] of terms and expressions used throughout the Ordinance along with all their definitions and meanings as so applied. Some other terms are specifically defined for various parts in the Ordinance in other sections contained in the relevant part.

Part 2 of Schedule 1 provides meanings attributable to defined terms in other ordinances or elsewhere in this Ordinance. For instance, "authorized institution (認可機構)" is defined by section 2(1) of the Banking Ordinance (Cap.155) and "Insurance Authority (保險業監督)" means the Insurance Authority appointed under section 4 of the Insurance Companies Ordinance (Cap.41).

Therefore, the drafters have allowed these prescribed meanings to be amended by notice to take into account changing meanings given to defined terms as and when the market dictates.

#### Defining "money laundering" under the Ordinance

The term "money laundering" is defined in section 1 of Part 1 of Schedule 1 to the [AMLO 2.02] Ordinance to mean:

"an act intended to have the effect of making any property:

- (a) that is the proceeds obtained from the commission of an indictable offence under the laws of Hong Kong, or of any conduct which if it had occurred in Hong Kong would constitute an indictable offence under the laws of Hong Kong; or
- (b) that in whole or in part, directly or indirectly, represents such proceeds, not to appear to be or so represent such proceeds."

#### Defining "terrorist financing" under the Ordinance

The term "terrorist financing" is defined in section 1 of Part 1 of Schedule 1 to the [AMLO 2.03] Ordinance and means:

- (a) the provision or collection, by any means, directly or indirectly, of any property -
  - (i) with the intention that the property be used; or
  - (ii) knowing that the property will be used,

- in whole or in part, to commit one or more terrorist acts (whether or not the property is actually so used); or
- (b) the making available of any property or financial (or related) services, by any means, directly or indirectly, to or for the benefit of a person knowing that, or being reckless as to whether, the person is a terrorist or terrorist associate; or
  - (c) the collection of property or solicitation of financial (or related) services, by any means, directly or indirectly, for the benefit of a person knowing that, or being reckless as to whether, the person is a terrorist or terrorist associate.

#### Practical applications of the Ordinance

[AMLO 2.04] The Ordinance takes into account the real world implications that both terrorists and terrorist organizations require financial support in order to achieve their aims. There is often a need for them to obscure or disguise links between them and their funding sources. It follows then that terrorist groups must similarly find ways to launder funds, regardless of whether the funds are from a legitimate or illegitimate source, in order to be able to use them without attracting the attention of the authorities. Accordingly, these provisions of the Ordinance were crafted to expose such potential threats and prevent the negative impacts such money laundering may have on the industry as well as the world in the grand scheme of things.

#### Section 3: Application to Government

Ver Date: 01/04/2012

This Ordinance applies to the Government, except as otherwise expressly provided.

#### COMMENTARY

##### Overview

[AMLO 3.01] The Financial Action Task Force ("FATF") guidelines were primarily directed to countries. The drafters of the Ordinance, however, knew that the Government is seldom the frontline operators in the financial world. Regulations and illegal transactions monitoring were typically left to the financial institutions ("FIs") including: private sector banks; insurance companies; credit card companies; etc.

See for example Section A(1) of FATF Recommendations, Feb 2012, which stated that:

*"Countries should require financial institutions and designated non-financial businesses and professions (DNFBPs) to identify, assess and take effective action to mitigate their money laundering and terrorist financing risks."*

As such, section 3 was drafted to include that the government also shares in this duty of due diligence and monitoring to ensure that illegal monetary transactions will be properly identified and reported to the relevant legal authorities. The drafters specifically had the Post Office and Postmaster General in mind when putting together this provision of the Ordinance. The legal effect of this section 3 is that the Government will be

bound in respect of the remittance service as operated by the Postmaster General. The Government would otherwise not be bound by this Ordinance as section 66 of the Interpretation and General Clauses Ordinance (Cap.1) provides that no legislation shall be binding on the State *unless* it is expressly provided in the legislation or unless it appears by necessary implication that the State is bound.

However, the power of the relevant authorities to impose a pecuniary penalty under later section 21(2)(c) or to order a payment of daily pecuniary penalty under that section 21(4) of the Ordinance is not exercisable in relation to the Government according to that section 21(9).

#### Application to the Postmaster General

The main thrust of section 3 is that it provides this Ordinance's duty of customer due diligence and proper monitoring will apply to the remittance service operated by the Post Office and supervised by the Postmaster General. Note that in accordance with previous section 2 of the Post Office Ordinance (Cap.98), the "Postmaster General" will be defined for the purpose of this Ordinance to include: (i) the Postmaster General of Hong Kong; (ii) the deputy postmaster general; and (iii) every assistant postmaster general.

The rationale behind this specific application to the Post Office involves the fact that it is a Government department operating as a Trading Fund. As set out in Schedule 1 to the subsidiary legislation on the Post Office Trading Fund (Cap.430E), the Post Office may provide remittance services. The Post Office is not subject to the registration and other related requirements applicable to remittance agents under the Organized and Serious Crimes Ordinance (Cap.455) ("OSCO"). The Post Office provides mainly two types of remittance services: (i) electronic remittance; and (ii) money order to members of the public. In the mutual evaluation report on Hong Kong published in 2008, FATF highlighted that the Post Office which offers remittance services is "subject to relatively limited anti-money laundering obligations and oversight" and recommended Hong Kong to undertake a formal assessment "to determine whether there is any justification for excluding [the Post Office] from the customer due diligence requirements".

Pursuant to FATF's comments, the drafters of the Ordinance conducted an assessment on the remittance services operated by the Post Office and concluded that it was subject to comparable money laundering/terrorist financing risks as its commercial counterparts. As such, the drafters included into the Ordinance the anti-money laundering requirements as extended to the Post Office in order to fulfill the FATF's requirement.

There is simply no other Governmental department except for the Post Office that engages in any of the activities subject to requirements under the Ordinance. As such, for clarity sake, section 3 of the Ordinance provides that the provisions herein should apply to the Government only in relation to the remittance services provided by the Post Office.

But given that the Post Office is not a legal entity, the Ordinance provides that the duties as prescribed herein Ordinance is binding on the Postmaster General. The term "Postmaster General" is defined under Part 2 of Schedule 1 to the Ordinance to include

the Postmaster General, deputy postmaster general and assistant postmaster general, which is in line with the interpretation under the Post Office Ordinance (Cap.98).

#### Postmaster General excepted from the sanctions prescribed in section 21 and Schedule 2 of the Ordinance

[AMLO 3.03] Later section 21 of the Ordinance empowers the relevant authority to impose supervisory sanctions, namely public reprimand, order for remedial actions and supervisory fines on financial institutions for breaches of the Ordinance's requirements and duties as imposed and set out in Schedule 2 of the Ordinance.

However, the Postmaster General is exempt and excluded from the sanctions as so imposed and applied by the provisions of section 21 and Schedule 2 of the Ordinance. The drafters of the Ordinance rationalized that while the supervisory sanctions of public reprimand and order for remedial action as stated in section 21 of the Ordinance would apply to the Postmaster General, *it was not appropriate* to subject individual civil servants to personal supervisory fines and daily pecuniary penalty when they carry out their duties in good faith. As the Postmaster General and staff of the Post Office are already subject to disciplinary mechanisms applicable to government employees, breaches and non-compliance committed by the Postmaster General and staff of the Post Office will be dealt with through the established mechanism as appropriate. In addition, the Postmaster General, as civil servants, is already subject to integrity checking and disciplinary mechanism such that their "fitness and properness" should generally not be called into question.

#### Section 4: Immunity

Ver Date: 01/04/2012

(1) A relevant authority or any other person does not incur any civil liability for anything done or omitted to be done by the relevant authority or the person in good faith in the performance or purported performance of a function conferred or imposed on the relevant authority by or under this Ordinance.

(2) The protection conferred by subsection (1) does not affect any liability of the Government for the thing done or omitted to be done by a public officer in the performance or purported performance of the relevant function.

#### COMMENTARY

##### Overview

[AMLO 4.01] Section 4 of the Ordinance provides immunity from civil liabilities for act done in good faith by a person or relevant authority, either imposed or of their own volition under the Ordinance.

It is submitted that this immunity could provide the legal basis for immunity in the following situation:

*Bank A suspects that company B may be involved in money laundering. Bank A suspects, but has not sought a decision from a court of law. Bank A makes a report to the Joint Financial*

*Intelligence Unit ("JIFU") in the correct form. According to this sub-section, Bank A will be immune from civil liability in an action brought against Bank A by Company B in the event that Company suffers some loss.*

The purpose of this provision is to give institutions and people the freedom to report if they merely suspect that an illegal transaction may be occurring. This is distinct from waiting for concrete or hard evidence, which may never in fact be gathered, and the suspected proceeds of crime may in fact have already been dissipated.

Essentially, the spirit of the section is to provide immunity for reports based on a hunch.

This provision preserves liability on public officials under the Ordinance.

Therefore, the immunity seeks to provide immunity to private sector actors only.

## PART 2

### RELATING TO CUSTOMER DUE DILLIGENCE AND RECORD-KEEPING

#### Section 5: Schedule 2 has effect with respect to financial institutions

Ver Date: 13/11/2016

- (1) Subject to subsections (2), (3) and (4), Schedule 2 has effect with respect to financial institutions.
- (2) Schedule 2 has effect with respect to an authorized insurer only in relation to long term business carried on by the insurer.
- (3) Schedule 2 has effect with respect to an appointed insurance agent or authorized insurance broker only in relation to any transaction carried out by the appointed insurance agent or authorized insurance broker involving a contract of insurance described in column 3 of Part 2 of the First Schedule to the Insurance Companies Ordinance (Cap.41).
- (4) Schedule 2 applies in relation to the issue of a stored value facility within the meaning of the Payment Systems and Stored Value Facilities Ordinance (Cap.584) by an SVF licensee or a bank only if- (Amended 18 of 2015 s.68)
  - (a) the maximum value that can be stored on the facility exceeds \$3,000; and
  - (b) the facility is in form of a physical device provided by the issuer to the user and the value is stored on the device. (Amended 18 of 2015 s.68)
- (5) If a financial institution knowingly contravenes a specified provision, the financial institution commits an offence and is liable –
  - (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.
- (6) If a financial institution, with intent to defraud any relevant authority, contravenes a specified provision, the financial institution commits an offence and is liable –
  - (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 7 years; or