

The power to seize anything that is or contains evidence of the commission of such an offence is found in the Independent Commission Against Corruption Ordinance (Cap 204) s 10C(1)(c).

### 17A. Surrender of travel documents

- (1) A magistrate may, on the application ex parte of the Commissioner, by written notice require a person who is the subject of an investigation in respect of an offence reasonably suspected to have been committed by him under this Ordinance to surrender to the Commissioner any travel document in his possession. (Amended 50 of 1987 s 9; 48 of 1996 s 11)
- (2) A notice under subsection (1) shall be served personally on the person to whom it is addressed.
- (3) A person on whom a notice under subsection (1) is served shall comply with such notice forthwith.
- (3A) Subject to subsection (6), a person to whom a notice under subsection (1) is addressed shall not leave Hong Kong, whether or not the notice has been served on him under subsection (2), before the expiry of a period of 6 months from the date of the notice unless-
  - (a) an application made under section 17B(1) for the return of a travel document is granted; or
  - (b) an application made under section 17BA(1) for the return of a travel document is granted; or for permission to leave Hong Kong is granted. (Added 10 of 2005 s 41)
- (4) If a person on whom a notice under subsection (1) has been served fails to comply with the notice forthwith, he may be arrested and taken before a magistrate by a police officer or by a person appointed in that behalf by the Commissioner. (Amended 10 of 2005 s 41)
- (5) Where a person is taken before a magistrate under subsection (4), the magistrate shall, unless such person thereupon complies with the notice under subsection (1) or satisfies the magistrate that he does not possess a travel document, by warrant commit him to prison there to be safely kept-
  - (a) until the expiry of the period of 28 days from the date of his committal to prison as aforesaid; or
  - (b) until such person complies with the notice under subsection (1) and a magistrate, by order in that behalf, orders and directs the Commissioner of Correctional Services to discharge such person from

prison (which order shall be sufficient warrant for the Commissioner of Correctional Services so to do), (Amended L.N. 30 of 1982)

whichever occurs first.

- (5A) Subject to subsection (6), a travel document surrendered to the Commissioner in compliance with a notice under subsection (1) may be detained for a period of 6 months from the date of the notice unless an application made under section 17B(1) for the return of the travel document is granted. (Added 10 of 2005 s 41)
- (6) The period of 6 months referred to in subsections (3A) and (5A) may be extended for a further period of 3 months if a magistrate, on application by the Commissioner, is satisfied that the investigation could not reasonably have been completed before the date of such application and authorizes such extension: (Amended 50 of 1987 s 9; 10 of 2005 s 41) Provided that a magistrate shall not hear an application under this subsection unless reasonable notice of the application has been given by the Commissioner to the person to whom the relevant notice is addressed. (Added 50 of 1987 s 9. Amended 10 of 2005 s 41)
- (6A) All proceedings before a magistrate under this section shall be conducted in chambers. (Added 15 of 1976 s 5)
- (6B) A notice under subsection (1) which has been served in accordance with subsection (2) and complied with shall not thereafter be revoked or withdrawn. (Added 50 of 1987 s 9)
- (7) In this section and in section 17B, 'travel document' (旅行證件) means a passport or other document establishing the identity or nationality of a holder. (Amended 50 of 1987 s 9)  
(Added 56 of 1973 s 3. Amended 9 of 1974 s 10)

#### [17A.01] Magistrate

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

#### [17A.02] Hong Kong

See note [4.01] above.

#### [17A.03] Prison

This is defined by s 3 of the Interpretation and General Clauses Ordinance

police lobbied for the retention of the duty to investigate corruption and argued that previous failures were largely due to the ineffectiveness of the Prevention of Corruption Ordinance, rather than the shortcomings of the ACB. With the commencement of the Prevention of Bribery Ordinance (Cap 201), the police argued, the ACB would be well equipped to deal with corruption. The ACB was given a 3-year trial period to apply the new Ordinance to fight corruption.

Then came the Godber incident. Chief Superintendent Peter Godber was under investigation by ACB for serious corruption offences, but he somehow managed to flee the territory in June 1973. The investigation into someone that senior revealed that corruption was affecting even the top echelons of the police force. But his escape further eroded the confidence in the integrity of the police force and the efficiency of the ACB.

Governor Maclehoze then decided that he must remove from the police the function of investigating into corruption. In his address to the Legislative Council on the opening of the Legislative year 1973-1974, he said:

"After Godber's escape two things quickly became apparent. The first was that suspicion of corruption on a more extensive scale was better-grounded than I had personally realized. The second was that the men responsible for investigating and prosecuting corruption felt that in spite of the new teeth in the Prevention of Bribery Ordinance, they still lacked the legal weapons and to some extent other facilities necessary to get the results they and the public wanted and the situation required. These points have now been substantiated in Sir Alastair Blair-Kerr's report.

This calls for new measures.

...  
We have therefore decided, on the advice of the Executive Council, to set up a separate Anti-Corruption Commission under a civilian Commissioner. My intention is that the latter's independence should be established by his position being apart from the civil service in the same way as that of a judge or, say, the Chairman of the Public Services Commission."<sup>1</sup>

The Government then turned on full speed to legislate the Independent Commission Against Corruption Ordinance (Cap 204) and by January 1974, a Bill was ready for Second Reading and it was passed into law within the same legislative year.

### The Independence of the Commission and the Powers of the Commissioner

The Independent Commission Against Corruption Ordinance (Cap 204) creates a statutory body: s 3. Therefore, one principal function of the ordinance creating the statutory body is to serve as its constitution, defining the scope of its powers, duties, reporting lines and administration. If the

<sup>1</sup> Hong Kong Hansard 1973-1974 pp.17-181

Commission acts outside these clearly defined boundaries, it could be subjected to judicial review on the ground of illegality or *ultra vires*.

The Commissioner, appointed under s 5, is given extensive powers in directing the Commission. For example, he is empowered to appoint officers (s 8(1)), issue standing orders to provide for the running of the Commission (s 11) and authorize any officer to conduct an investigation (s 13). Given this autonomy, the Commission would be in a position to act entirely independent of other departments of the Government. When the Ordinance first came into being, the Commissioner also had the power to sack any officers, as long as he felt it would be in the interests of the Commission to do so; he did not have to consult anyone, nor would the affected officer be given any opportunity to make representations. This is now changed, and the Commissioner must first consult the Advisory Committee on Corruption before terminating the appointment of an officer, and the affected officer can now make representations to the Commissioner: ss 8(2)(a) & (b). Further, an officer terminated under s 8 can appeal to the Chief Executive to reverse the Commissioner's decision: s 8(2)(c).

### Power of Arrest and Search

The Commission is established to fight corruption, not to combat other kinds of criminal conduct. Therefore, originally, officers of the Commission could only arrest or detain for further inquiries without warrant persons suspected of having committed offences under the Prevention of Bribery Ordinance (Cap 201) or the Corrupt and Illegal Practices Ordinance (Cap 288). The Commission's officers could not arrest and detain persons suspected of other offences. This power was later extended to cover certain 'connected' offences uncovered by the Commission's officers when they investigated into a corruption case: s 10(2) & (5).

In recent years, the Commission seems to have been active in investigating different forms of commercial fraud cases, which links to corruption are sometimes not apparent. In particular, the Commission is nowadays prosecuting a number of Letters of Credit fraud cases and the usual pretext employed is that they suspect some bankers to have been bribed; yet, relatively few bankers were actually prosecuted in relation to those cases. It is therefore understandable that the public sometimes perceives the ICAC to have partly usurped the functions of the police force.

The Commission's officers derive the power to search premises from s 17 of the Prevention of Bribery Ordinance (Cap 201) and from s 10B of the Independent Commission Against Corruption Ordinance (Cap 204). These provisions give the Commission the necessary power to apply for warrants to enter, search and seize evidence from premises suspected to contain evidence relevant to an ICAC investigation.

### Concluding Remarks

There could be very little doubt that the establishment of the Independent Commission Against Corruption has done the community of Hong Kong

place, by force if necessary, and search the same.'

The effect of s 10B of the ICAC Ordinance (Cap 204) is almost indistinguishable from that of s 17(1) and s 17(1A) of POBO. Section 10B of the ICAC Ordinance (Cap 204) deals with an application for a warrant from a magistrate only, but s 17(1) and s 17(1A) provide both the Court of First Instance and magistrates the power to issue a search warrant: see s 17(4) POBO.

Another difference is that s 17 of POBO is restricted to an investigation into an offence created by POBO and s 10B of the ICAC Ordinance (Cap 204) can be used for any offences referred to in s 10 of the same Ordinance, which includes a number of different offences of fraud and theft.

#### [10B.02] Scope of the power to authorize a search

Section 10B provides the power of a magistrate to authorize an ICAC officer to enter and search premises in relation to an offence specified in s 10. Therefore, if the suspected offence falls outside the ambits of s 10, a magistrate cannot issue a warrant.

In *Ch'ng Poh v Commissioner of the ICAC* [1996] 3 HKC 677, the offence alleged in the information supplied to a magistrate was a s 9 offence under POBO. However, on judicial review, the High Court judge was satisfied that the information could not disclose an offence under POBO. Instead, the offence disclosed would be one of perversion of justice, unconnected with any corruption offences under POBO. Thus, the alleged conduct falls outside the ambits of s 10 of the ICAC Ordinance and consequently, there was no basis for an application under s 10B. The decision of the High Court was confirmed by the Court of Appeal.

#### [10B.03] Misconduct in public office

The common law offence of misconduct in public office is curiously absent from section 10. Therefore, at present, it would be unlawful for the ICAC to apply for a search warrant if the only offence it suspects a suspect to have committed is misconduct in public office.

### 10C. Power of search and seizure

- (1) An officer authorized in that behalf by the Commissioner may –
- (a) search any person if he reasonably suspects that such person is guilty of any of the offences referred to in section 10;
  - (b) search the premises or place in which any person was arrested under section 10, or the premises or place in which a person who evades arrest therein under section 10 was to be arrested, for evidence of any of the offences referred to in that section;

- (c) seize and detain anything which such officer has reason to believe to be or to contain evidence of any of the offences referred to in section 10;
  - (d) (Repealed 45 of 1992 s 2)
- (1A) (Repealed 45 of 1992 s 2)
- (2) A person shall not be searched under subsection (1) except by a person of the same sex.
  - (3) The powers conferred by subsection (1) shall not derogate from the power conferred on any officer by section 17 of the Prevention of Bribery Ordinance (Cap 201) or a warrant issued thereunder.
- (Added 14 of 1976 s 2)

#### [10C.01] Authorization by the Commissioner

It should be noted that s 10B provides a magistrate the power to issue a warrant authorising an ICAC officer to enter and search a premises, while s 10C(1)(c) provides the officer with the power to seize and detain materials believed to be or to contain evidence relating to the offences referred to in s 10. That is to say, the warrant issued does not provide an officer with the power to seize and detain materials, but s 10C provides the Commissioner with the power to authorise seizure and detention of materials.

#### [10C.02] Seizure and detention of materials in conjunction with a warrant authorizing entry and search

If an officer has been authorised to enter and search a premises pursuant to a warrant issued under s 10B of the ICAC Ordinance or s 17 POBO, he would be entitled to seize and detain anything which he has reason to believe to be or to contain evidence of any of the offences referred to in s 10, as long as he has been authorised by the Commissioner to do so: see *Apple Daily v Commissioner of the ICAC* [2000] 1 HKC 295, 314D-G. The power to authorise seizure and detention of materials is independent of, and not pursuant to, the warrants issued under s 10B or s 17 of the POBO.

#### [10C.03] Power to seize and detain extends to materials which may contain evidence

The materials seized and detained are not necessarily evidence. An ICAC officer is not obliged to demonstrate that the materials must be evidence. Instead, he only needs to have reason to believe that the materials are or contain evidence in relation to the suspected offences referred to in s 10. Accordingly, an ICAC officer may seize and detain documents which may assist in determining whether an offence referred to in s 10 has been committed and in determining by whom such an offence has been committed: see *Apple Daily v Commissioner of the ICAC* [2000] 1 HKC 295, 319E-320B.

### 10D. Power to take finger-prints and photographs

- (1) Where a person has been arrested under section 10 or, has

- (3) In this section 'documents' (文件) has the meaning assigned to 'document' in section 2 of the Prevention of Bribery Ordinance (Cap 201).  
(Added 48 of 1996 s 23)  
(Amended 14 of 2003 s 23)

#### [13.01] Enactment history

This section has been amended pursuant s 23 of the Law Amendment and Reform (Miscellaneous Provisions) Ordinance, commencing 9 May 2003.

Section 13 is amended—

- (a) in subsection (1)(b)—  
(i) by repealing 'Crown servant' and substituting 'prescribed officer';  
(ii) by repealing 'Crown or' and substituting 'prescribed officer or'  
(b) in subsection (2)(a), by repealing 'Crown servant' and substituting 'prescribed officer'.

#### [13.02] Requiring any prescribed officer to answer questions concerning the duties of any prescribed officer

The duty imposed on a government employee to answer questions under s 13(1)(b) is limited to questions concerning the scope of duties of specified government officers. It is submitted that insofar as the answers to questions raised may implicate the interrogated government employee, his common law right of silence overrides any duty imposed by s 13.

### 13A. Resisting or obstructing officers

Any person who resists or obstructs an officer in the execution of his duty shall be guilty of an offence and shall be liable on conviction to a fine of \$5000 and to imprisonment for 6 months.

(Added 14 of 1976 s 4. Amended; 51 of 1987 s 7)

#### [13A.01] General note

Section 13A is of similar effect to s 36(b) of the Offences Against the Person Ordinance (Cap 212), which provides that it is an offence to assault, resist or wilfully obstruct any police officer in the due execution of his duty. It is to be noted that insofar as s 36(b) of Cap 212 is concerned, wilfulness is an essential element in the obstructing police officer offence, while s 13A of the ICAC Ordinance provides that it is an offence to merely obstruct an ICAC officer.

#### [13A.02] Resists

The word 'resists' connotes a positive act of repelling and should mean physical resistance short of assault. It is submitted a certain degree of violence is involved in any act of resisting.

#### [13A.03] Obstructs

It was held by Parker LCJ in *Rice v Connolly* [1966] 2 QB 414, 419B, that 'obstruct' under s 51(3) of England's Police Act of 1964 would mean 'the doing of any act which makes it more difficult for the police to carry out their duty.' In the context of England's Police Act of 1964 and the Offences against the Person Ordinance (Cap 212), the word 'obstruct' is qualified by the word 'wilfully', which Lord Parker held to mean intentional and without lawful excuse. It is unclear whether the absence of the word 'wilfully' in s 13A should be interpreted to mean that any intentional obstruction of an ICAC officer in his execution of his duties, regardless of the presence of lawful excuses, constitutes an offence.

There is no common law duty to positively assist an ICAC officer. Therefore, refusal to answer questions posed by an ICAC officer does not constitute an offence of obstructing, unless the statute imposes a duty to answer certain questions: see 13.01 above.

#### [13A.04] In execution of his duty

The duty of an ICAC officer devolves from the statutory duties of the Commissioner under section 12 of the Ordinance.

In order to constitute an offence under s 13A, the officer in question must in fact be acting in execution of his duty. If he is acting outside his authority, the party allegedly obstructing him cannot be committing an offence under s 13A.

### 13B. False reports to officers

Any person who knowingly —

- (a) makes or causes to be made to an officer a false report of the commission of any offence; or  
(b) misleads an officer by giving false information or by making false statements or accusations,

shall be guilty of an offence and shall be liable on conviction to a fine of \$20,000 and to imprisonment for 1 year.

(Added 14 of 1976 s 4. Amended; 51 of 1987 s 8)

#### [13B.01] Knowingly

The gravamen of the offences created by s 13B is the making a false report or the giving false information when one knows that the report and the information is false. It is submitted that the report made or the information given must be false in a material particular. However, if a person suspects an

See also *R v Jennings & Ors* (1993) 98 Cr App R 308, where it was held that if the matter incidentally achieves one of the stated objects, it is not brought within the ambit of preparatory hearing.

### [9.05] Subsection (3): Powers

The powers of the judge under s 9 in respect of preparatory hearings are extensive: see *R v Gunawardena* [1990] 2 All ER 477, 91 Cr App R 55 on the extensive nature of the powers and the need to keep their exercise within the ambit of the section.

- (1) Subject to the provisions of Part III of the Ordinance, make any order he is empowered to make under the Complex Commercial Crimes Ordinance s 9(3)(a). These include the power to:
  - (a) order certain documents be served on the accused and delivered to the court including a statement containing a concise account of the facts and inferences sought to be drawn on which prosecution case is based, copies of statements of all the witnesses the prosecutor intends to call, a list of exhibits and copies of documentary exhibits, statements of law on which the prosecution proposes to rely and any other explanatory documents considered appropriate by judge (s 13(1)(a) – (e)). The judge may order any such document served and delivered to be translated into English or Chinese or both such languages, as he considers appropriate (s 13(10));
  - (b) give directions to the prosecution about the form the explanatory material is to take in order to aid comprehension by jury, and to deliver it to the court and served on accused (s 13(6));
  - (c) order the accused to serve on the prosecution and deliver to the court a notice stating any objection to the prosecution case statement, after the prosecution statement has been served and delivered, on the ground that it does not disclose the prosecution case with sufficient particularity to enable the accused to present a defence (s 14(1)). The judge may order the prosecutor to amend a prosecution case statement from time to time if it appears to him to be appropriate having regard to the notice of objection served and delivered and to any notice of additional evidence served on the accused by the prosecutor (s 14(2));
  - (d) order the accused to serve on the prosecutor and deliver to the court a notice stating any objection to the admissibility at trial of evidence contained in the documents served (s 15(1)). The judge shall determine the admissibility of the evidence objected to (s 15(4));
  - (e) order the accused to serve on the prosecutor and deliver to the court, after all the objections have been dealt with;
    - (i) a written defence response indicating the facts and inferences the defence takes issue with;
    - (ii) a written statement of any propositions of law in reply to any propositions of law stated by the prosecutor; and
    - (iii) copies of all statements of expert witnesses whom he intends to call at trial (s 16(1)(a) – (c));

- (f) order the prosecution to serve on the accused a notice to admit facts and evidence (s 17(1));
  - (g) order the accused to serve on the prosecutor and deliver to the court a notice in reply to the prosecution's notice to admit facts and evidence, including which documents the accused refuses to admit or agree, and to state the grounds for refusal (s 17(2));
  - (h) order witness' testimony at trial may be dispensed with and allow the witness to give his evidence at the preparatory hearing (s 18).
- (2) Determine any question of law or evidence in relation to the case, including admissibility: s 9(3)(b). The judge may under the provisions of that section rule on any objection to any prosecution evidence in accordance with s 15.
  - (3) Prescribe the period within which the accused must give the notice of alibi under s 65D of the Criminal Procedure Ordinance: s 9(3)(c).

The judge also has discretion to decide what steps should be taken and how much of the procedure should be adopted in a particular preparatory hearing.

The judge has no power to order a defendant to serve a copy of his statement on a co-defendant: see *Re Tariq* [1991] 1 All ER 744. The judge's powers relate to the admission of evidence and conduct of the trial, not to the investigation process. There is no judicial power to forbid the prosecution to re-interview witnesses after receiving the defence case statement: *R v Nair; R v Turner* [1993] 4 All ER 513.

## 10. No appeal against or questioning of order for preparatory hearing

An order for the holding of a preparatory hearing made by a judge under section 9(1) shall not be subject to appeal or liable to be questioned in any court.

(Enacted 1988)

### [10.01] Enactment history

This section was enacted on 8 July 1988.

### [10.02] England

There is no directly corresponding section in the English Criminal Justice Act 1987. Section 9(11) of the 1987 Act does not relate to the order for the holding of a preparatory hearing.

### [10.03] General note

There is no appeal from a judge's decision to hold a preparatory hearing. The words 'or liable to be questioned in any court' exclude also the possibility of judicial review, unlike in s 5 above. It should be borne in mind that the order made under s 9 is an exercise of judicial discretion, and this makes explicit the

- (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.  
(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)
- [Cf. 1986 c. 32 s 38 U.K.]

#### [2.01] Enactment history

The definitions of 'absconded' and 'dealing' and subss (12A) and (12B) were added pursuant to s 2 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995), commencing 1 September 1995. The definition of 'drug trafficking', and the Chinese term for 'Registrar', ie (司法常務官) were substituted pursuant to s 2 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995), commencing 1 September 1995. The original definition of 'drug trafficking' defined the term to mean doing or being concerned in, whether in Hong Kong or elsewhere, any act constituting: (a) an offence specified in Schedule 1 (other than an offence under section 25; or (b) an offence punishable under a corresponding law, and includes entering into or being otherwise concerned in, whether in Hong Kong or elsewhere, an arrangement whereby: (i) the retention or control by or on behalf of another person's proceeds of drug

trafficking is facilitated; or (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at that other person's disposal or are used for that other person's benefit to acquire property by way of investment.

#### [2.02] Amendments

In subsection (12)(d), "Her Majesty's" was substituted with "the Chief Executive's" pursuant to s 3 of the Adaptation of Laws (No 5) Ordinance 1999 (15 of 1999), commencing 1 July 1997.

Subsections (11)(aa), (14) and (15) were added pursuant to s 2 of the Drug Trafficking and Organized Crimes (Amendment) Ordinance 2002 (26 of 2002), commencing 1 January 2003.

#### [2.03] England

The Drug Trafficking Act 1994 provides similar definitions to some of the terms that are defined in this section of the Ordinance. For 'drug trafficking' and 'drug trafficking offence', see s 1(1)-(3) of the Act; for 'corresponding law', see s 1(4) of the Act; for 'confiscation order', see s 2(9) of the Act; for 'property', see s 62 of the Act; for 'interest', see s 62(3) of the Act; for 'defendant', see s 63(1) of the Act. Cf ss 41(2)-(3), (5)-(8), 55(10), 59(13), 64, 65(2)-(4), Sch1 paras 1 and 6 of the Act.

#### [2.04] Secretary for Justice

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Secretary for Justice of the Hong Kong Special Administrative Region.

'Attorney General' was substituted with 'Secretary for Justice' pursuant to the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997), commencing 1 July 1997.

#### [2.05] Hong Kong

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Hong Kong Special Administrative Region.

#### [2.06] Subsection (1): Police officer

This term is not defined in this Ordinance. However, s 2 of the Police Force Ordinance (Cap 232) defines 'police officer' to include any member of the police force, see the Interpretation and General Clauses Ordinance (Cap 1) s 3.

#### [2.07] Subsection (1): High Court

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the High Court of the Hong Kong Special Administrative Region established by section 3 of the High Court Ordinance (Cap 4).

'Supreme Court' was substituted with 'High Court' pursuant to s 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance 1998 (25 of 1998), commencing 1 July 1997.

2(1) above (and note s 2(3), (7)-(10) above).

**[6.09] Section 11 Organized and Serious Crimes Ordinance (Cap 455)**

Please see also [11.01] - [11.06] of Organised Serious Crimes Ordinance (Cap 455).

**6A. Interest on amounts to be recovered under confiscation orders**

- (1) The amount to be recovered under a confiscation order shall be treated as a judgment debt for the purposes of—
- (a) where the order was made by the Court of First Instance section 49 of the High Court Ordinance (Cap 4);  
(Amended 25 of 1998 s 2)
  - (b) where the order was made by the District Court, section 50 of the District Court Ordinance (Cap 336), and, for those purposes, the date of the confiscation order shall be treated as the date of the judgment debt.
- (2) Where by virtue of subsection (1) any interest accrues on the amount to be recovered under a confiscation order, the defendant shall be liable to pay that interest and the amount of the interest shall for the purposes of enforcement be treated as part of the amount to be recovered from him under the confiscation order.  
(Added 89 of 1995 s 7)

**[6A.01] General Note**

Please see [11A.01] - [11A.08] of Organized Serious Crimes Ordinance (Cap 455).

**7. Definition of principal terms used**

- (1) In this Ordinance, 'realisable property' (可現變財產) means, subject to subsection (2)—
- (a) any property held by the defendant;  
(Amended 89 of 1995 s 8)
  - (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Ordinance; and  
(Amended 89 of 1995 s 8)

- (c) any property that is subject to the effective control of the defendant.  
(Added 89 of 1995 s 8)
- (2) Property is not realisable property if—
- (a) an order under section 102 or 103 of the Criminal Procedure Ordinance (Cap 221); or
  - (b) an order under section 38F or 56 of the Dangerous Drugs Ordinance (Cap 134),  
is in force in respect of the property.
- (3) For the purposes of this Ordinance the amount that might be realised at the time a confiscation order is made against the defendant is—  
(Amended 89 of 1995 s 8)
- (a) the total of the values at that time of all the realisable property held by the defendant, less
  - (b) where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations,  
together with the total of the values at that time of all gifts caught by this Ordinance.
- (4) Subject to the following subsections, for the purposes of this Ordinance the value of property (other than cash) in relation to any person holding the property—
- (a) where any other person holds an interest in the property, is—
    - (i) the market value of the first mentioned person's beneficial interest in the property, less
    - (ii) the amount required to discharge any incumbrance (other than a charging order) on that interest; and
  - (b) in any other case, is its market value.
- (5) Subject to subsection (10), references in this Ordinance to the value at any time (referred to in subsection (6) as 'the material time' (關鍵時間)) of a gift caught by this Ordinance or of any payment or reward are references to—
- (a) the value of the gift, payment or reward to the recipient when he received it adjusted to take account of subsequent changes in the value of money; or
  - (b) where subsection (6) applies, the value there mentioned, whichever is the greater.
- (6) Subject to subsection (10), if at the material time the recipient holds—
- (a) the property which he received (not being cash); or

- (8) In subsection (7), 'data equipment' (數據設備) means any equipment which—
- automatically processes information;
  - automatically records or stores information;
  - can be used to cause information to be automatically recorded, stored or otherwise processed on other equipment (wherever situated);
  - can be used to retrieve information, whether the information is recorded or stored in the equipment itself or in other equipment (wherever situated).
- (9) An order under subsection (2)—
- shall not confer any right to production of, or access to, items subject to legal privilege;
  - shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise; and
  - may be made in relation to material in the possession of a public body as defined in section 23.
- [Cf. 1986 c. 32 s 27 U.K.]

#### [20.01] Enactment history

Subsections (2), (4)(c)(ii), (5) and (7) were substituted pursuant to s 18 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995), commencing 1 September 1995.

#### [20.02] England

The wording of this section is to the same effect as s 55 of the Drug Trafficking Act 1994, except that subs (2)(b), (2A), (4)(c)(ii)(B) and the definition of 'data equipment' in subs (8) of the Ordinance do not have equivalent provisions in the English Act. The word 'constable' in the Act has been replaced by the word 'authorized officer' in the Ordinance, and the application in the Act is made to a circuit judge as opposed to a court as specified in the Ordinance.

#### [20.03] General note

The amendments in subs (2)(b), (2A) and (4)(c)(ii)(B) widen the power of the court to make an order that a person likely to come into possession of control of certain material shall, if he comes into such possession or control, produce the material to an authorised office. Section 2A restricts the operation of the order and provides that no such order shall have effect for more than 3 months although further orders may be made against the person concerned provided the conditions set out in subs (4) are fulfilled.

This section and s 21 below, have been held not to be inconsistent with the Hong Kong Bill of Rights Ordinance (Cap 383) art 14, as both sections satisfy the requirements propounded by Dickson J in *Hunter et al v Southam Inc*

(1984) 11 DLR (4th) 641 namely: (a) a requirement that the search warrant or other authorisation be in advance of the search; (b) a requirement that the warrant be issued by a person capable of acting judicially, that is, someone not involved in the investigation; and (c) a requirement that the warrant be issued only after it has been established upon oath that reasonable and probable grounds existed to believe that an offence had been committed and evidence was to be found in the place to be searched. See *Re Drug Trafficking (Recovery of Proceeds) Ordinance* (MP 974/91 & 975/91, unreported) per HH Judge P Cheun; *Hong Kong & Shanghai Banking Corp Ltd & Ors* [1992] HKDCLR 37 per HH Judge P Cheung.

#### [20.04] Subsection (1): Investigation into drug trafficking

As to the treatment of an investigation into drug trafficking and of material produced under an order under subs (2), see s 22(1) below.

A customs officer may apply under this section for an order for the production of material solely or partly for the purpose of assisting an investigation by a law enforcement agency of another party to the 1961 Single Convention on Narcotic Drugs (Cmnd 7466) into drug trafficking (*R v Crown Court at Southwark, ex p Customs and Excise Commissioners* [1989] 3 All ER 673, [1989] 3 WLR 1054).

#### [20.05] Court

As to meaning, see [2.22] above.

#### [20.06] Subsection (2): Make an order

See the first paragraph of [20.04] above.

The order must be made in the simple terms set out in subs (2) and cannot impose a condition that documents produced pursuant to the order should not without the leave of the court be removed from the jurisdiction or shown to any foreign law enforcement agency (*R v Crown Court at Southwark, ex p Customs and Excise Commissioners* [1989] 3 All ER 673, [1989] 3 WLR 1054).

#### [20.07] Subsection (4): Reasonable grounds for suspecting

As to meaning, see [9.10] above.

#### [20.08] Reasonable grounds for believing

As to meaning, see [9.10] above.

#### [20.09] Benefited from drug trafficking

As to meaning, see [4.09] above. See also, [3.17] above, as to the determination of whether a person has benefited from drug trafficking.

#### [20.10] Public interest

In respect of the similar expression 'national interest', it was suggested by Mackinnon J in *Consett Iron Co Ltd v Clavering Trustees* (1934) unreported, revsd [1935] 2 KB 42(CA), that it may be considered as something which is



- (b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.  
(Replaced 89 of 1995 s 21)

#### [25.01] Enactment history

This section was substituted pursuant to s 21 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995), commencing 1 September 1995.

#### [25.02] General note

The section makes it an offence for a person to deal with any property, knowing or having reasonable grounds to believe that it in whole or part, directly or indirectly, represents any persons proceeds of drug trafficking. Section 25(2) provides a defence to a charge of committing that offence.

The previous version of this section has been held not to contravene the Hong Kong Bill of Rights Ordinance (Cap 383) Art 11.

It would be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken the steps necessary to ensure that he did not have the knowledge or suspicion referred to in this section. In the context of the war against drug trafficking, for a defendant to bear that onus under s 25(4), was manifestly reasonable and did not offend art 11(1): see *A-G of Hong Kong v Lee Kwong Kut & Lo Chak Man & Anor* [1993] 2 HKCLR 186; [1993] AC 951(PC) (Lord Keith of Kinkel, Lord Lane, Lord Bridge of Harwich, Lord Brone-Wilkinson and Lord Woolf.)

#### [25.03] Offence

As to meaning, see [2.13] above.

#### [25.04] Subsection (1): Reasonable grounds to believe

Having 'reasonable grounds to believe' involves subjective and objective elements. Objectively, it requires proof that there are grounds that a common-sense, right-thinking member of the community would consider sufficient to lead a person to believe that a person being assisted was a drug trafficker or had benefited therefrom. Subjectively, it has to be proved that these grounds were known to the defendant. It is unnecessary to prove that a reasonable man would have held such a belief or that the defendants themselves held an actual belief. See *HKSAR v Shing Siu Ming* [1999] 2 HKC 818 (CA); *Seng Yuet Fong v HKSAR* [1999] 2 HKC 833(CFA). A recent attempt to argue that the *mens rea* should be reinterpreted to include an element of subjective belief that the property was proceeds of crime was rejected by the Court of Appeal in *HKSAR v Ma Zhujiang* [2007] HKCU 1430(CA).

In *Oei Hengky Wiryo v HKSAR (No 2)* [2007] 1 HKLRD 568, the Court of Final Appeal affirmed the Appeal Committee's decision in *HKSAR v Wong Ping Shui & Anor* (2001) 4 HKCFAR 29 and held that the wording of this provision in the Organized and Serious Crimes Ordinance does not require the

prosecution to prove that the property was in fact the proceeds of an indictable offence. It is sufficient to prove that the defendant had reasonable grounds to believe that it was. Distinguishing the Hong Kong offence from the one in the United Kingdom, the Court held that it was not appropriate to follow the House of Lords' decision in *R v Montila & Ors* [2004] 1 WLR 3141.

#### [25.05] Subsection (1): Proceeds of drug trafficking

As to meaning, see [2.14] above.

#### [25.06] Subsection (2): It is a defence to prove

As to meaning, see [24.05] above.

#### [25.07] Act

As to meaning, see [2.12] above.

#### [25.08] Contravention

'Contravene' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include, in relation to any requirement or condition prescribed in any Ordinance or in any grant, permit, licence, lease or authority granted under or by virtue of any Ordinance, includes failure to comply with that requirement or condition.

#### [25.09] Reasonable excuse

As to meaning, see [24.07] above.

#### [25.10] Subsection (3): Summary conviction

As to meaning, see [21.07] above.

#### [25.11] Definitions

For 'authorised' and 'drug trafficking', see s 2(1) above; for 'proceeds' of 'drug trafficking', see s 4(1)(a) above.

### 25A. Disclosure of knowledge or suspicion that property represents proceeds, etc of drug trafficking

- (1) Where a person knows or suspects that any property—
- in whole or in part directly or indirectly represents any person's proceeds of;
  - was used in connection with; or
  - is intended to be used in connection with,
- drug trafficking, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.
- (2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1)

- (a) direct in relation to a country, territory or place outside Hong Kong designated by the order ('a designated country') that this Ordinance as modified in the order shall apply to external confiscation orders and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there;  
(Amended 15 of 1999 s 3, 26 of 2002 s 2)
- (b) make—
- (i) such provision in connection with the taking of action in the designated country with a view to satisfying a confiscation order; and
  - (ii) such provision as to evidence or proof of any matter for the purposes of this section and section 29; and
  - (iii) such incidental, consequential and transitional provision, as appears to him to be expedient; and
- (c) without prejudice to the generality of this subsection, direct that in such circumstances as may be specified proceeds arising out of action taken in the designated country with a view to satisfying a confiscation order and which are retained there shall nevertheless be treated as reducing the amount payable under the order to such extent as may be specified.
- (2) An order under this section may make different provision for different cases or classes of case.
- (3) The power to make an order under this section includes power to modify this Ordinance in such a way as to confer power on a person to exercise a discretion.
- (3A) An order under this section shall not operate, or be construed, to prevent a designated country from making a request under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525), including a request under section 27 of that Ordinance.  
(Added 87 of 1997 s 36)
- (4) In this section and section 29—
- 'external confiscation order' (外地沒收令) means an order made by a court in a designated country for the purpose of—
- (a) recovering (including forfeiting and confiscating)—
    - (i) payments or other rewards received in connection with drug trafficking or their value;

- (ii) property derived or realised, directly or indirectly, from payments or other rewards received in connection with drug trafficking or the value of such property; or
  - (iii) property used or intended to be used in connection with drug trafficking or the value of such property; or
- (b) depriving a person of a pecuniary advantage obtained in connection with drug trafficking, and whether the proceedings which gave rise to that order are criminal or civil in nature, and whether those proceedings are in the form of proceedings against a person or property;  
(Replaced 87 of 1997 s 36)

'modifications' (修改) includes additions, alterations and omissions.

[Cf. 1986 c. 32 s 26 U.K.]

#### [28.01] Enactment history

The definition of 'external confiscation order' was substituted pursuant to s 25 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995), commencing 1 September 1995.

#### [28.02] Amendments

In subsection (1), 'Governor in Council' was substituted with 'Chief Executive in Council' pursuant to s 3 of the Adaptation of Laws (No 5) Ordinance 1999 (15 of 1999), commencing 1 July 1997.

In subsection (1)(a), 'country or territory' was substituted with 'country, territory or place' pursuant to s 3 of the Adaptation of Laws (No 5) Ordinance 1999 (15 of 1999), commencing 1 July 1997.

Subsection (3A) was added pursuant to the Mutual Legal Assistance in Criminal Matters Ordinance 1997 (87 of 1997).

In subsection (4), the definition of 'external confiscation order' was substituted pursuant to the Mutual Legal Assistance in Criminal Matters Ordinance 1997 (87 of 1997).

#### [28.03] England

The wording of this section is to the same effect as s 39 of the Drug Trafficking Act 1994, except that whereas the Ordinance states that 'The Governor in Council may, with the approval of the Legislative Council, by order ...', the Act states that 'Her Majesty may by Order in Council ...'.

#### [28.04] General note

In addition to an order made in a designated country for the purpose of

## SCHEDULE 1

[sections 2 &amp; 3]

## DRUG TRAFFICKING OFFENCES

(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)

**[S1.01] Enactment history**

Offences under ss 4A and 40(1)(c) of the Dangerous Drugs Ordinance (Cap 134), and an offence under section 25 of the Ordinance were added to the list of drug trafficking offences in Sch 1 pursuant to s 28 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995), commencing 1 September 1995.

**[S1.02] General note**

Pursuant to s 2 of the Drug Trafficking and Organized Crimes (Amendment) Ordinance 2002 (26 of 2002), Sch 1 is referred to in s 2 as well as in s 3 of the Ordinance.

**[S1.03] Offence**

As to meaning, see [2.13] above.

**[S1.04] Definitions**

For 'dealing', see s 2(1) above.

## SCHEDULE 2

## ASSETS ON WHICH A CHARGING ORDER MAY BE IMPOSED

## 1. Land in Hong Kong.

- Securities of any of the following kinds—
  - Government stock;
  - stock of any body incorporated in Hong Kong;
  - 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;
  - units of any unit trust in respect of which a register of the unit holders is kept at any place within Hong Kong.
- In this Schedule
  - the terms 'Government stock' (政府證券) and 'land' (土地) have the same meaning as in section 2 of the High Court Ordinance (Cap 4); (Amended 25 of 1998 s 2)
  - the terms 'stock' (股份) and 'unit trust' (單位信託基金) have the same meaning as in section 20A of that Ordinance.

**[S2.01] Hong Kong**

As to meaning, see [2.05] above.

**[S2.02] High Court Ordinance**

As to meaning, see [2.07] above.

**[S2.03] Government stock**

This is defined in s 2 of the High Court Ordinance (Cap 4) to mean any stock issued by the Government or any funds of or annuity granted by the Government.

**[S2.04] Land**

This is defined in s 2 of the High Court Ordinance (Cap 4) to include: (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.

**[S2.05] Stock**

This is defined in s 20A of the High Court Ordinance (Cap 4) to include shares, debentures, loan stocks, funds, bonds, notes, any other securities issued by the body concerned, whether or not constituting a charge on the

- (2) For the purposes of this Ordinance, a charging order is an order made under this section imposing on any such realisable property as may be specified in the order a charge for securing the payment of money to the Government.
- (3) A charging order-
- may be made only on an application by or on behalf of the government of a designated country or, in a case where an external confiscation order has been registered under section 29 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), by a receiver appointed under section 12 or the Secretary for Justice; (*L.N. 247 of 1993; L.N. 362 of 1997*)
  - may be made on an ex parte application to a judge in chambers;
  - may, notwithstanding anything in Order 11 of the Rules of the High Court (Cap 4 sub. leg. A), provide for service on, or the provision of notice to, persons affected by the order in such manner as the Court of First Instance may direct; and
  - may be made subject to such conditions as the Court of First Instance thinks fit and, without prejudice to the generality of this paragraph, such conditions as it thinks fit as to the time when the charge is to become effective. (*25 of 1998 s. 2*)
- (4) Subject to subsection (6), a charge may be imposed by a charging order only on-
- any interest in realisable property, being an interest held beneficially by the defendant or by a person to whom the defendant has directly or indirectly made a gift caught by this Ordinance-
    - in any asset of a kind specified in Schedule 2; or
    - under any trust; or
  - any interest in realisable property held by a person as trustee of a trust if the interest is in such an asset or is an interest under another trust and a charge may by virtue of paragraph (a) be imposed by a charging order on the whole beneficial interest under the first mentioned trust.
- (5) In any case where a charge is imposed by a charging order on any interest in an asset of a kind specified in Schedule 2, the Court of First Instance may provide for the charge to extend to any interest, divided or other distribution payable and any bonus issue in respect of the asset. (*25 of 1998 s. 2*)
- (6) The Court of First Instance may make an order discharging or varying the charging order and shall make an order discharging the charging order if the proceedings in the designated country or territory are concluded or the amount payment of which is secured by the charge is paid into the Court of First Instance. (*25 of 1998 s. 2*)
- (7) An application for the discharge or variation of a charging order may be made by any person affected by it.

- (8) Subject to the provisions of this Ordinance, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same manner as an equitable charge created by the person holding the beneficial interest or, as the case may be, the trustee, by writing under his hand.
- (9) An authorized officer may, by notice in writing served on a person who holds any realisable property the subject of a charging order, require the person to deliver to the authorized officer, to the extent that it is practicable to do so, documents, or copies of documents, or any other information (in whatever form), in his possession or control which may assist the authorized officer to determine the value of the property. (*26 of 2002 s. 4*)
- (10) A person who receives a notice under subsection (9) shall, as soon as is practicable after receipt of the notice, comply with the notice to the extent that it is practicable to do so taking into account the nature of the realisable property the subject of the charging order concerned. (*26 of 2002 s. 4*)
- (11) A disclosure made in order to comply with a requirement under subsection (9)-
- shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;
  - shall not render the person who made it liable in damages for any loss arising out of-
    - the disclosure;
    - any act done or omitted to be done in relation to the property concerned in consequence of the disclosure. (*26 of 2002 s. 4*)
- (12) Any person who contravenes subsection (10) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 1 year. (*26 of 2002 s. 4*)
- (13) A person who knowingly deals in any realisable property in contravention of a charging order commits an offence. (*26 of 2002 s. 4*)
- (14) A person who commits an offence under subsection (13) is liable-
- on conviction upon indictment to a fine of \$500000 or to the value of the realisable property the subject of the charging order concerned which has been dealt with in contravention of that order, whichever is the greater, and to imprisonment for 5 years; or
  - on summary conviction to a fine of \$250000 and to imprisonment for 2 years. (*26 of 2002 s. 4*)

#### 11A. Applications for restraint and charging orders

- (1) Order 115 of the Rules of the High Court (Cap 4 sub. leg. A) shall apply to applications made under this Ordinance subject to the

30A(9) of the Bankruptcy Ordinance (Cap 6). (87 of 1997 ss 1(2) & 36)

- (3) Nothing in the Bankruptcy Ordinance (Cap 6) shall be taken as restricting, or enabling the restriction of, the exercise of the powers conferred on the Court of First Instance by sections 10 to 13. (25 of 1998 s. 2)
- (4) Subsection (2) does not affect the enforcement of a charging order-
- made before the order adjudging the person bankrupt; or
  - on property which was subject to a restraint order when the order adjudging him bankrupt was made.
- (5) Where, in the case of a debtor, an interim receiver stands appointed under section 13 of the Bankruptcy Ordinance (Cap 6) and any property of the debtor is subject to a restraint order, the powers conferred on the interim receiver by virtue of that Ordinance do not apply to property for the time being subject to the restraint order.
- (6) Where a person is adjudged bankrupt and has directly or indirectly made a gift caught by this Ordinance-
- a court shall not make an order under-
    - section 49 or 50 of the Bankruptcy Ordinance (Cap 6); or (87 of 1997 ss 1(2) & 36)
    - section 60 of the Conveyancing and Property Ordinance (Cap 219), in respect of the making of the gift at any time when property of the person to whom the gift was made is subject to a restraint order or charging order; and
  - any order made under any of those sections after the discharge of the restraint order or charging order shall take into account any realization under this Ordinance of property held by the person to whom the gift was made.

#### 17. Winding up of company holding realisable property

- (1) Where realisable property is held by a company and an order for the winding up of the company has been made or a resolution has been passed by the company for the voluntary winding up, the functions of the liquidator (or any provisional liquidator) shall not be exercisable in relation to-
- property for the time being subject to a restraint order made before the relevant time; and
  - any proceeds of property realised by virtue of section 10(7) or 12(5) or (6) for the time being in the hands of a receiver appointed under section 10 or 12.
- (2) Where, in the case of a company, such an order has been made or such a resolution has been passed, the powers conferred on the Court of First Instance by sections 10 to 13 shall not be exercised in relation to any realisable property held by the company in relation to which the functions of the liquidator are exercisable-

- so as to inhibit him from exercising those functions for the purpose of distributing any property held by the company to the company's creditors; or
  - so as to prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.
- (3) Nothing in the Companies Ordinance (Cap 32) shall be taken as restricting, or enabling the restriction of, the exercise of the powers conferred on the Court of First Instance by sections 10 to 13.
- (3A) Subsection (3) shall apply to any proceedings relating to an appeal, further appeal or review against any exercise of the powers referred to in that subsection as if the court hearing the appeal, further appeal or review, as the case may be, were the Court of First Instance. (89 of 1995 s. 33)
- (4) Subsection (2) does not affect the enforcement of a charging order made before the relevant time or on property which was subject to a restraint order at the relevant time.
- (5) In this section-

"company" (公司) means any company which may be wound up under the Companies Ordinance (Cap 32); and

"the relevant time" (有關時間) means-

- where no order for the winding up of the company has been made, the time of the passing of the resolution for voluntary winding up;
- where such an order has been made and, before the presentation of the petition for the winding up of the company by the Court of First Instance, such a resolution had been passed by the company, the time of the passing of the resolution; and
- in any other case where such an order has been made, the time of the making of the order. (25 of 1998 s. 2)

#### 18. Insolvency officers dealing with property subject to restraint order

- (1) Without prejudice to the generality of any provision contained in the Bankruptcy Ordinance (Cap 6), the Companies Ordinance (Cap 32) or any other Ordinance, where-
- any insolvency officer seizes or disposes of any property in relation to which his functions are not exercisable because it is for the time being subject to a restraint order; and
  - at the time of the seizure or disposal he believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of an order of a court or otherwise) to seize or dispose of that property,

- (2) (Omitted as spent)  
(Enacted 1994)

## 2. Interpretation

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

‘absconded’ (潛逃), 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 90 of 1995 s 2)

‘authorized officer’ (獲授權人) 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’ (沒收令) means an order made under section 8(7);

‘dealing’ (處理), 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);

(Added 90 of 1995 s 2)

‘defendant’ (被告人) 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’ (債務處理人) means—

- (a) the Official Receiver; or  
(b) any person acting as—  
(i) a trustee (including provisional trustee), interim trustee or special manager appointed under the Bankruptcy Ordinance (Cap. 6); or  
(ii) a liquidator, provisional liquidator or special manager appointed under the Companies Ordinance (Cap. 32);  
(Amended 18 of 2005 s 48)

‘interest’ (權益), in relation to property, includes right;

‘items subject to legal privilege’ (享有法律特權的品目) 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’ (物料) includes any book, document or other record in any form whatsoever, and any article or substance;

‘organized crime’ (有組織罪行) means a Schedule 1 offence that—

- (a) is connected with the activities of a particular triad society;

Subsection (15)(aa) was added pursuant to s 3 of the Drug Trafficking and Organized Crimes (Amendment) Ordinance (26 of 2002), commencing 1 January 2003.

Subsection (16)(d) was amended pursuant to s 3 of the Adaptation of Laws (No 3) Ordinance (13 of 1999), commencing 1 July 1997, by repealing "Her Majesty's pardon in respect of his conviction" and substituting "the Chief Executive's pardon in respect of the conviction".

Subsection (16)(e) was amended in that the title 'Attorney General' was changed to 'Secretary for Justice' under s 3 of the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997) which came into operation on 1 July 1997.

Both subss (16A) and (16B) were added pursuant to s 2 of the Organized and Serious Crimes (Amendment) Ordinance (90 of 1995), commencing 1 September 1995.

Pursuant to s 50 of the Hong Kong Court of Final Appeal Ordinance (79 of 1995), commencing 1 July 1997, subss (17)(a) was repealed whereas subs (17)(b) was amended by repealing 'in any other case,'.

Both subss (18) and (19) were added pursuant to s 3 of the Drug Trafficking and Organized Crimes (Amendment) Ordinance (26 of 2002), commencing 1 January 2003.

By virtue of section 48 of the Bankruptcy (Amendment) Ordinance 2005, section 2(1) paragraph (b)(i), the definition of 'insolvency officer' repeals 'receiver, interim receiver, special manager or trustee' and substitute 'trustee (including provisional trustee), interim trustee or special manager'.

#### [2.02] England

Cf s 38 of the Drug Trafficking Offences Act 1986 c 32 [Eng].

#### [2.03] Absconded

'Absconded' means having left a jurisdiction to avoid arrest or prosecution. See *Hong Kong Legal Dictionary*, LexisNexis Butterworths, p 4. Cf s 2 of Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405).

#### [2.04] Definition of 'absconded': Taken into custody

'Taken into custody' means having physical holding of, or control over, a thing without a right or claim to exclusiveness which is necessary to constitute possession. See *Hong Kong Legal Dictionary*, LexisNexis Butterworths, p 250.

#### [2.05] Definition of 'absconded': Released on bail

'Bail' means the right to be released from custody granted to a person charged with an offence, on condition that he or she undertakes to return to the court at some specified time, and comply with any other conditions that the court may impose: Criminal Procedure Ordinance (Cap 221) s 9D(1). See *Hong Kong Legal Dictionary* LexisNexis Butterworths, p 80.

#### [2.06] Definition of 'authorized officer': Customs and Excise Service

'Customs and Excise Service' means the service established by s 3 of the Customs and Excise Service Ordinance (Cap 342): see s 2 of Cap 342.

#### [2.07] Definition of 'authorized officer': Secretary for Justice

Under s 3 of the Interpretation and General Clauses Ordinance (Cap 1), 'Secretary for Justice' means the Secretary for Justice of the Hong Kong Special Administrative Region.

#### [2.08] Confiscation order

There is a statutory definition for 'confiscation order' in this Ordinance which, in the context of this Ordinance, means an order made under s 8(7).

If a confiscation order is made pursuant to this Ordinance, it is a monetary penalty levied by the court against the offender. It is based on the proceeds derived by him from any specified offence or, if that offence is an organized crime, from all organized crime he has committed. See Cross & Cheung, *Sentencing in Hong Kong* (4th Ed, LexisNexis Butterworths, 2003) Ch 11 p 113.

Cf s 2 of Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405).

#### [2.09] Dealing

'Dealing' covers a broad range of activities including receiving or acquiring the property, concealing or disguising the property, disposing of or converting the property, using the property as security, or bringing into or removing from Hong Kong the property: s 2(1). See DG Saw, SC, DDPP, 'Interdicting Tainted Wealth – The Perspective from Hong Kong' published in *Journal of Money Laundering Control*, Henry Stewart Publications, Vol 7 No 3, Winter 2004, at p 276.

In *Lok Kar Win Kevin v HKSAR* [1999] 4 HKC 796, the Court of Final Appeal held that the definition of 'dealing' in the Organized and Serious Crimes Ordinance makes it clear that a person deals in terms of s 25 whether the property represented the proceeds of his own crime or someone else's.

See also 律政司司長 訴 王力強(HCMA1332007, 11 June 2007, unreported) (Chinese judgment).

A person will commit an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property: s 25 of this Ordinance. Cf Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) ss 2, 25.

#### [2.10] Definition of 'dealing': Acquiring the property

'Acquiring the property' means obtaining ownership of, an interest in, or the benefit of, the property. See *Hong Kong Legal Dictionary* LexisNexis Butterworths, p 15.

#### [2.11] Definition of 'dealing': Disguising the property

'Disguising the property' means concealing the property. See *Hong Kong*