

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") 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), and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615), 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 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. 0.003

- 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 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".
- 0.011 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 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.

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. 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 the Ordinance. They 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

[DTROP LT.02] Pursuant to section 3 of the Interpretation and General Clauses Ordinance (Cap 1), this 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

[DTROP LT.03] Section 3 of the Interpretation and General Clauses Ordinance (Cap 1) defines the term “property” 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.

Definition of “ordinance”

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

The Drug Trafficking (Recovery of Proceeds) Ordinance was enacted on 1 September [DTROP 1.01] 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.

CAP 455: ORGANIZED AND SERIOUS CRIMES ORDINANCE

INTRODUCTION

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

The Organized and Serious Crimes Ordinance (Cap 455) (hereafter referred to as "the Ordinance") 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 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

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. 0.006

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 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* DCCC 465/2002's judgment, dated 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 <i>L.N. 651 of 1994</i>
The Ordinance, other than sections 2, 25 to 27, 30, 32 to 35 and Schedules 1 and 2	} 28 April 1995 <i>L.N. 157 of 1995</i>

(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.

PART I PRELIMINARY

Section 1: Short title

Ver Date: 30/06/1997

- (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: 10/12/2007

- (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;

"authorised 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 authorised 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 Ordinance (Cap 32);

“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 organisation; or
- (c) is committed by 2 or more persons, involves substantial planning and organisation 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;

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) ("AMLO") came into effect on 1 April 2012. This new 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 implemented mainly through guidelines issued by the Monetary Authority ("MA"), the Securities and Future Commission ("SFC") and the Insurance Authority ("IA"). 0.003

The new AMLO now provides a uniform set of 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. 0.004

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. 0.005

Accordingly, one of the most significant implications of the new AMLO is the implementation of a legislative framework and statutorily codified the FIs' duty of 0.006

customer due diligence 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 new AMLO provides that a FI or a person may now be convicted for criminal offenses *for not* being in compliance with the AMLO and furthermore be liable for corresponding penalties:

- (i) where an FI *knowingly* contravenes a specified provision of the AMLO or where a person *knowingly causes or knowingly permits* the FI to contravenes a specified provision of the AMLO, the maximum penalty can be HK \$1,000,00.00 fine and a 2-year imprisonment; or
- (ii) If a FI contravenes a specified provision of the AMLO with intent to defraud any RA, or a person contravenes a specified provision of the AMLO with intent to defraud an FI or any RA, the maximum penalty can also be HK \$1,000,00.00 fine and but the imprisonment term is increased to 7 years.

0.008 The new AMLO provides that a financial institution 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 new AMLO now imposes a single set of regulatory requirements 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.

0.010 Summary of the highlights of the new AMLO include:

- (i) The new AMLO require FIs to take preventative or mitigating measures commensurate with the nature and scope of the money-laundering or terrorist-financing risks;
- (ii) The AMLO proscribes 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 AMLO 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 AMLO 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 AMLO 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 AMLO makes it a criminal offense if an FI knowingly or with the intent to defraud any RA, contravenes a specified provision in the AMLO. The "*specified provisions*" are listed in Section 5(11) of the AMLO 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 intend to defraud any RA; and
- (vii) The AMLO 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.

Conclusion

The AMLO 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 AMLO. 0.011

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

Long title

Ver Date: 01/04/2012

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.

[Section 1	}	8 July 2011
The Ordinance (except section 1) Enacted by the Legislative Council.	}	1 April 2012]

(Originally 15 of 2011)

COMMENTARY

Overview

[AMLOLT.01] The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (“AMLO”), 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 AMLO 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 AMLO 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.

PART 1 PRELIMINARY

Section 1: Short title

Ver Date: 08/07/2011

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

COMMENTARY

Overview

Section 1 of the Ordinance provides the statutory authority for the commencement and [AMLO 1.01] enactment of this Cap 615 Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance.

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 [AMLO 2.01] listing of terms and expressions used throughout the Ordinance along with all their definitions and meanings as so applied.

Part 2 of Schedule 1 is where the drafters of the AMLO have provided meanings attributable to defined terms. For instance, “authorized institution (認可機構)” has the meaning given 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] AMLO and means 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

[AMLO 2.03] The term “terrorist financing” is defined in section 1 of Part 1 of Schedule 1 to the AMLO 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 AMLO 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 AMLO 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 of the Ordinance was drafted to include that the government also share 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 of the AMLO 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.

Note that in accordance with 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.

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. [AMLO 3.02]

The rationale behind this specific application to the Post Office involves the fact that 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 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 AMLO 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 AMLO. 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 AMLO provides that the duties as prescribed herein Ordinance is binding on the Postmaster General. The term

"Postmaster General" is defined under Schedule 2 of 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] Subsequent 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 AMLO 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, are 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 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 no 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 AMLO.

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: 01/04/2012

long term business (長期業務)

specified provision (指明的條文)

(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 does not apply in relation to the issue by an authorized institution of any multi-purpose card as defined by section 2(1) of the Banking Ordinance (Cap 155) in which the maximum value that can be stored does not exceed \$3000.

(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 \$1000000 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 \$1000000 and to imprisonment for 7 years; or