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Statutory Rules 1990 No. 41

44)

Mutual Assistance in Criminal Matters (Spain) Regulations

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulations under the *Mutual Assistance in Criminal Matters Act 1987*.

Dated 17 December 1990.

BILL HAYDEN

Governor-General

By His Excellency's Command,

Michael Duffy
Attorney-General

Citation

1. These Regulations may be cited as the Mutual Assistance in Criminal Matters (Spain) Regulations.

Commencement

2. These Regulations commence on 31 January 1991.

Interpretation

3. In these Regulations:

“the Act” means the *Mutual Assistance in Criminal Matters Act 1987*;

“the Treaty” means the Treaty between Australia and the Kingdom of Spain done at Madrid on 3 July 1989 (being the treaty a copy of the English text of which is set out in the Schedule to these Regulations).

Application of the Act

4. The Act applies in relation to Spain subject to the provisions of the Treaty.

SCHEDULE

Regulation 3

TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN AUSTRALIA AND THE KINGDOM OF SPAIN

AUSTRALIA AND THE KINGDOM OF SPAIN

DESIRING to co-operate in order to facilitate the administration of justice in criminal matters,

HAVE RESOLVED to conclude a Treaty on mutual assistance in the following terms:

ARTICLE 1

SCOPE OF APPLICATION

1. The Contracting States shall, in accordance with this Treaty, grant to each other assistance in investigations or proceedings in respect of offences within the jurisdiction of the judicial authorities of the Requesting State at the time when assistance is requested.
2. Assistance shall also be granted in relation to revenue offences and foreign exchange control offences.
3. Assistance shall not include:
 - (a) the arrest or detention of any person with a view to extradition;
 - (b) the execution in the Requested State of criminal judgments imposed in the Requesting State except to the extent permitted by the law of the Requested State and Article 15 of this Treaty;
 - (c) the transfer of prisoners to serve sentences; and
 - (d) assistance with the investigation or prosecution of purely military offences.
4. Subject to paragraph 5 of this Article, assistance may be given in the interests of justice even if the offence is not punishable under the law of the Requested State.
5. Where the request for assistance seeks the search of private premises or the seizure or securing of property, the request shall be executed only if the offence in respect of which assistance is requested is also an offence under the law of the Requested State.

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SCHEDULE—continued

ARTICLE 2

REFUSAL OF ASSISTANCE

Assistance may be refused:

- (a) if the request relates to political offences or offences connected with political offences in the opinion of the Requested State. The mere allegation of a political reason or motive for the commission of the offence shall not of itself render the offence an offence of a political character. For the purposes of this Treaty the following shall not be considered political offences:
 - (i) an attack against the life of a Head of State or a Head of Government, or a member of his or her family;
 - (ii) an offence against the law relating to genocide; or
 - (iii) any offence specified in an international agreement to which both Contracting States are parties;
- (b) when the request could affect the sovereignty, the security or other essential public interests of the Requested State or for any other reason provided by its law;
- (c) when, in respect of the offence to which the request relates, the person has been finally acquitted or has served the sentence in either of the two States or in a third State; or
- (d) when the purpose of the request is to prosecute a person for reasons of race, religion, nationality, political opinion or sex, or if that person's position may be prejudiced for any of these reasons.

ARTICLE 3

COMPETENT AUTHORITIES AND CENTRAL OFFICE

1. A request for assistance may be made by a person authorised by the law of the Requesting State being a judicial authority, public prosecutor, the Attorney General or his or her delegate.
2. The Contracting State shall each appoint a Central Office to transmit and receive requests for the purpose of this Treaty. Until the relevant Contracting State designates another authority, the Central Office of Australia shall be the Attorney-General's Department, Canberra and the Central Office for Spain shall be the Secretaria General Técnica, Ministry of Justice, Madrid. Where a Contracting State designates another authority for the purposes of this Article, it shall do so through the diplomatic channel.
3. The request for assistance shall be conveyed by the diplomatic channel. Nevertheless, in cases of urgency, the request shall be made through the Central Office and shall be confirmed at the earliest possible opportunity through the diplomatic channel.
4. The Contracting States may entrust their consuls with the execution of procedures permitted by the law of the Requested State.

ARTICLE 4

EXECUTION OF REQUESTS

1. A request shall be executed in accordance with the law of the Requested State and shall be limited to the assistance expressly requested.
2. The Requested State shall promptly inform the Requesting State of a decision of the Requested State not to comply in whole or in part with a request for assistance and the reason for that decision.

SCHEDULE—continued

3. Before refusing to grant a request for assistance, the Requested State shall consider whether assistance may be granted subject to such conditions as it deems necessary. If the Requesting State accepts assistance subject to these conditions, it shall comply with the conditions.

4. The Requested state shall notify the Requesting State of the results of the request.

ARTICLE 5

TAKING OF EVIDENCE IN THE REQUESTED STATE

1. The Requested State shall, on request, take the evidence of witnesses and experts.

2. If the person summoned does not appear to give evidence, refuses or fails to give evidence, or gives false evidence, the Requested State shall apply the provisions and sanctions of its law.

ARTICLE 6

ATTENDANCE BY REPRESENTATIVES

1. The Requesting State shall be informed of the date and place of the execution of the request if that State so requests.

2. Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting State, the parties to the relevant proceedings in that State, their legal representatives or representatives of that State may, subject to the law of the Requested State, appear and question the person giving that evidence.

ARTICLE 7

PROVISION AND RETURN OF DOCUMENTS AND OBJECTS

1. In response to a request, the Requested State:

- (a) shall send certified copies of the documents unless the requesting State expressly requests the originals; or
- (b) may refuse or postpone the delivery of material or original documents if its law does not permit it, or if the material or documents are required for proceedings within its jurisdiction.

2. Any material or documents which have been provided in response to a request shall be returned as soon as possible unless the Requested State waives their return.

ARTICLE 8

SERVICE OF DOCUMENTS AND DELIVERY OF PROPERTY

1. If the purpose of the request is the service of documents or the delivery of property, the Requested State shall serve the documents or deliver the property.

2. Service or delivery shall be effected in accordance with the law of the Requested State and shall be proved by a receipt signed and dated by the addressee or by a certificate issued by the Central Office or other competent authority. Either of these documents shall be sent to the Requesting State and, if service or delivery cannot be effected, reasons shall be given.

SCHEDULE—continued

ARTICLE 9

APPEARANCE OF PERSONS IN THE REQUESTING STATE

1. The Requesting State may request the assistance of the Requested State in making a person available to appear as a witness or an expert in proceedings in relation to a criminal matter in the Requesting State, unless that person is the person charged, or to assist investigations in relation to a criminal matter in the Requesting State.
2. A request pursuant to paragraph 1 of this Article shall include a statement setting out why the Requesting State considers it is especially necessary that the person appear in that State.
3. The Requested State shall invite the person named in the request to comply with it and shall inform the Requesting State of that person's answer.
4. Any coercive measures or penalties provided under the law of the Requesting State shall not have any effect if the person fails to consent.
5. A request for the appearance of a person in the Requesting State may be refused if it is received less than 45 days before the date for appearance notified in the summons. The Requesting State shall bear this period in mind when it makes the request.
6. The request shall state the per diem, allowances and other amounts which the person summoned is entitled to receive in complying with the request.

ARTICLE 10

APPEARANCE OF PRISONERS IN THE REQUESTING STATE

1. Subject to the provisions of Article 9, insofar as they are applicable, a person who is in custody in the territory of the Requested State may be requested to appear as a witness in proceedings in relation to a criminal matter or requested to assist in investigations in the Requesting State and for these purposes may be transferred temporarily provided that the person is returned to the Requested State within the period specified by that State.
2. Transfer shall not be permitted:
 - (a) if the person in custody does not consent;
 - (b) if that person's presence is required for the purposes of pending criminal proceedings;
 - (c) if the transfer may result in the extension of the person's detention; or
 - (d) if the Requested State opposes the transfer for any other serious reason.
3. The person transferred shall be maintained in custody in the territory of the Requesting State, unless the Requested State permits the person to be set at liberty. Thereafter the person shall be treated as a person referred to in article 9.

ARTICLE 11

SAFE CONDUCT AND IMMUNITY

1. A person who consents to give evidence or assist an investigation in the Requesting State under Articles 9 or 10 shall not whilst in the Requesting State pursuant to a request:
 - (a) be detained, prosecuted or punished in that State for any offence or be subject to any civil suit, to which the person could not be subjected but for his or her presence in that State, in respect of any act or omission which preceded the person's departure from the Requested State; or

SCHEDULE—continued

- (b) without that person's consent, be required to give evidence in any proceeding other than the proceeding to which the request relates.
2. The immunity provided for in the preceding paragraph shall cease when the person remains voluntarily more than 30 days in the territory of the Requesting State after the time when that person's presence is no longer required by that State or having left returns voluntarily.
3. A person appearing in a proceeding in the Requesting State pursuant to a request under Articles 9 or 10 shall not be subject to prosecution based on his or her testimony except that that person shall be subject to the laws of that State in relation to contempt and perjury.

ARTICLE 12

PROVISION OF PUBLIC AND OFFICIAL DOCUMENTS

1. The Requested State shall provide copies of any documents or records that are open to public access as part of a public register or otherwise, or that are available for purchase by the public.
2. The Requested State may in its discretion provide copies of any official documents or records in the same manner and under the same conditions as such documents or records may be provided to its own law enforcement and judicial authorities.

ARTICLE 13

PROVISION OF CRIMINAL RECORDS AND DETAILS OF PRISON SENTENCES

1. When either of the Contracting States requests the other to provide the criminal record of a person, that State shall state the reason for the request. The criminal record shall be provided if this is not prohibited by the law of the Requested State.
2. The Contracting States shall, as far as possible, notify each other of any penalties of imprisonment imposed on the nationals of the other State.

ARTICLE 14

SEARCH AND SEIZURE

The Requested State shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting State provided the request contains information that would justify such action under the law of the Requested State.

ARTICLE 15

PROCEEDS OF CRIME

1. Upon request, the Requested State shall endeavour to locate any property or assets of a person against whom a forfeiture or confiscation order, pecuniary penalty order, fine in lieu of such order, or any other order having a similar effect, has been made or may be made by a court in the Requesting State in relation to a conviction for criminal conduct.
2. The Requesting State shall observe any conditions imposed by the Requested State in relation to any seized property which is delivered to the Requesting State.
3. Where pursuant to paragraph 1, property or assets are located, the Requested State may assist with or initiate such proceedings as are permitted by its law to

SCHEDULE—continued

prevent any dealing in, transfer or disposal thereof, pending a final determination in respect of that property or those assets in any proceedings before a court of the Requesting or Requested State.

4. The Requested State shall give effect to the extent possible under its domestic law to an order mentioned in paragraph 1 made by a court of the Requesting State or may initiate proceedings in relation to the property or assets found in the Requested State.
5. In the application of this Article the rights of bona fide third parties shall be respected.
6. This Article also applies to property used in the commission of the offence.

ARTICLE 16

CONFIDENTIALITY

1. The Requested State shall, if so requested, keep the application for assistance, the contents of a request and its supporting documents, and the fact of granting or refusing such assistance, confidential. If the request cannot be executed without breaching confidentiality, the Requested State shall so inform the Requesting State which shall then determine whether the request should be executed without such confidentiality.
2. The Requesting State shall, if so requested, keep confidential evidence and information provided by the Requested State, except to the extent that the evidence and information is needed for the investigation and proceeding described in the request.
3. The Requesting State shall not use evidence obtained for purposes other than those stated in a request without the prior consent of the Requested State.

ARTICLE 17

CONTENTS OF REQUESTS

1. The request for assistance shall contain the following:
 - (a) the name of the competent authority from which the request emanates;
 - (b) except in case of a request for service of documents or the delivery of property, a description of the nature of the criminal matter including a statement setting out the relevant facts and law;
 - (c) to the extent possible, the identity, nationality and location of the person or persons who are the subject of the investigation or proceeding;
 - (d) an exact description of the assistance requested and any information considered useful for facilitating the effective fulfilment of the request;
 - (e) details of any particular procedure or requirement that the Requesting State wishes to be followed; and
 - (f) the requirements, if any, of confidentiality and the reasons therefor.
2. Requests and supporting documents shall be transmitted in the language of the Requesting State.

ARTICLE 18

AUTHENTICATION

Where authentication is requested, any material or document is authenticated for the purposes of this Treaty if:

- (a) it purports to be signed or certified by a judge, magistrate or officer in or of the sending State; and

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SCHEDULE—continued

- (b) it purports to be authenticated by an official or public seal of the sending State.

ARTICLE 19

REPRESENTATION

The Requested State shall represent the Requesting State in the execution of any requests arising under this Treaty.

ARTICLE 20

EXPENSES

The Requested State shall meet the cost of fulfilling the request for assistance except that the Requesting State shall bear:

- (a) the expenses associated with conveying any person to or from the territory of the Requested State, and any fees, allowances or expenses payable to that person whilst in the Requesting State pursuant to a request under Articles 9 or 10;
- (b) the expenses associated with conveying custodial or escorting officers; and
- (c) where required by the Requested State, exceptional expenses in fulfilling the request.

ARTICLE 21

PRESERVATION OF OTHER TREATIES AND ARRANGEMENTS

This Treaty shall not derogate from obligations subsisting between the Contracting States, whether pursuant to other treaties or arrangements or otherwise, nor prevent the Contracting States providing assistance to each other pursuant to other treaties or arrangements.

ARTICLE 22

ENTRY INTO FORCE AND TERMINATION

1. This Treaty shall enter into force on the last day of the month following the month in which the Contracting States have notified each other in writing through the diplomatic channel that their respective requirements for entry into force have been complied with.
2. Either Contracting State may terminate this Treaty by notice in writing at any time and it shall cease to be in force on the last day of the third month following the month in which notice is given.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed this Treaty.

DONE at Madrid on the third day of July, One thousand nine hundred and eighty-nine, in the English and Spanish languages, both texts being equally authentic.

FOR AUSTRALIA

Michael Carter Tate
Minister for Justice

FOR THE KINGDOM OF SPAIN

Enrique Múgica Herzog
Ministro de Justicia

NOTE

1. Notified in the *Commonwealth of Australia Gazette* on

L 1990. 21 December/