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Paper for the House Committee on 10 June 2005

Report of the Subcommittee on Subsidiary Legislation Relating to Consular Matters

Purpose

This paper reports on the deliberations of the Subcommittee on Subsidiary Legislation Relating to Consular Matters.

The Subcommittee

2. At the House Committee meeting on 29 April 2005, members formed a subcommittee to study the seven items of subsidiary legislation relating to consular matters gazetted on 22 April 2005, and tabled in Council on 27 April 2005.
3. Under the chairmanship of Hon Margaret NG, the Subcommittee has held two meetings with the Administration. The membership list of the Subcommittee is in **Appendix**.

The subsidiary legislation

4. The seven items of subsidiary legislation studied by the Subcommittee are -
 - (a) Consular Relations (Additional Privileges and Immunities) (United Kingdom) Order (in respect of the consular agreement between the People's Republic of China (PRC) and the United Kingdom (UK)) (L.N. 51);
 - (b) Consular Relations (Additional Privileges and Immunities) (United States of America) Order (in respect of the consular agreement between the PRC and the United States of America (USA)) (L.N. 52);
 - (c) Administration of Estates by Consular Officers Ordinance (Amendment of Schedule) Order 2005 (in respect of the consular agreement between the PRC and Australia) (L.N. 53);

- (d) Consular Conventions (Application of Section 3) Order 2005 (in respect of the consular agreement between the PRC and Australia) (L.N. 54);
- (e) Consular Relations (Additional Privileges and Immunities) (Vietnam) Order (in respect of the consular convention between the PRC and Vietnam) (L.N. 55);
- (f) Administration of Estates by Consular Officers Ordinance (Amendment of Schedule) (No. 2) Order 2005 (in respect of the consular convention between the PRC and Vietnam) (LN. 56); and
- (g) Consular Conventions (Application of Section 3) (No. 2) Order 2005 (in respect of the consular convention between the PRC and Vietnam) (L.N. 57).

5. The scrutiny period of the seven items of subsidiary legislation has been extended from 25 May 2005 to 15 June 2005 by resolution of the Council. The Orders will come into operation on 11 July 2005.

Background

Underlying principles of grant of consular privileges and immunities

6. The Administration has explained that consular relations are established, on the basis of mutual consent, between sovereign States to facilitate the protection of the rights and interests of their nations and nationals, and to promote friendly relations and cooperation. The conferment of privileges and immunities on consular members is not meant for the personal benefit of individuals, but rather, to ensure the efficient performance of functions by consular members on behalf of the sending State. The major functions of a consular post are –

- (a) protecting the interests of the sending State and of its nationals, both individuals and bodies corporate, in the receiving State;
- (b) furthering the development of commercial, economic, cultural, scientific relations between the States concerned;
- (c) reporting to the sending State conditions and developments in such areas as commercial, economic, cultural and scientific life of the receiving State;
- (d) rendering necessary assistance of various sorts to the nationals of the sending State, especially at times of emergency or occurrence of natural disasters in the receiving State;
- (e) exercising rights of supervision and inspection in respect of vessels and aircrafts and their crews of the sending State entering the ports or

territory of the receiving State, and extending to them necessary assistance; and

- (f) handling miscellaneous administrative affairs relating to passports, visas, notarization, authentication, etc.

International convention on consular privileges and immunities and bilateral consular agreements

7. The Vienna Convention on Consular Relations (VCCR) is a multilateral international convention which codifies the relevant international laws on consular relations, matters relating to the establishment and maintenance of consular posts, and consular privileges and immunities. At present, 166 States are signatories to the VCCR, including the PRC. A total of 56 career consular posts in the Hong Kong Special Administrative Region (HKSAR) and their personnel are enjoying the privileges and immunities accorded to them under the VCCR. The major types of privileges and immunities stipulated under the VCCR include –

- (a) inviolability of consular premises, except in case of fire or other disaster;
- (b) exemption of consular premises and residence of head of consular post from dues and taxes;
- (c) freedom of communication of consular posts;
- (d) personal inviolability of consular officers, except in case of a grave crime;
- (e) immunity of consular officers and employees from jurisdiction in respect of acts performed connected with the exercise of consular functions; and
- (f) exceptions to the liability of members of a consular post to give evidence concerning matters connected with the exercise of their functions.

8. Those provisions in the VCCR, which affect private rights and obligations or require exceptions to the made to the existing laws, have already been specifically set out in the laws of the HKSAR by way of the Consular Relations Ordinance (Cap.557). The Ordinance was passed in 2000 to provide a flexible legislative framework to underpin the implementation of consular privileges and immunities in the HKSAR.

9. Article 73 of the VCCR provides that nothing in the VCCR shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions of the VCCR. The PRC has concluded with eight foreign States bilateral consular agreements which are applicable to the HKSAR.

Deliberations of the Subcommittee

General issues

10. The Subcommittee notes that the Orders relating to the additional consular functions conferred on the consular post of Canada were enacted in November 2003. The seven Orders in the present legislative exercise give effect to the bilateral agreements made between the PRC with the UK, USA, Australia and Vietnam which accord to the consular posts and personnel of these states additional privileges and immunities and/or functions in relation to the administration of estates in the HKSAR. Orders to implement other bilateral consular agreements would be submitted in batches, as soon as the drafting and consultation with the signatories of the agreements had been completed.

11. At members' request, the Administration has provided a comparison of the relevant provisions in the VCCR with those set out in the Orders to facilitate scrutiny of the Subcommittee.

12. Members have asked the Administration to explain the legal effect of the bilateral agreements before enactment of local legislation. The Administration has explained that the relevant provisions of the bilateral agreements had been given legal effect in the HKSAR by way of the Regulations of the People's Republic of China Concerning Consular Privileges and Immunities, which are national laws applied to the HKSAR by promulgation under Article 18 of the Basic Law. In line with the established practice under common law, provisions of bilateral agreements will be further underpinned by Orders made under local legislation, should they provide for additional privileges and immunities that affect private rights and obligations or require exceptions to be made to the existing laws of the HKSAR.

13. Members have sought clarification about the definition of certain expressions in the Orders. The Administration has explained that under Article 1 of the VCCR, "members of consular staff" means "consular officers, consular employees and members of the service staff". The VCCR does not define the term "member of the family" but under the VCCR, some privileges and immunities of consular officers and/or employees are extended to "members of their families forming part of their households". The term "member of the family" in the PRC/Vietnam Consular Convention is defined to mean "the spouse of a member of the consular post and their minor children who live with them in the same household". In response to members' request, the Administration has provided the number of consular officers, consular employees and their family members of the consular posts of the UK, the USA, Australia and Vietnam in the HKSAR for reference of the Subcommittee.

14. Members have asked whether a limit could be imposed on the size of the consular staff by the receiving State. The Administration has advised that under Article 20 of the VCCR, in the absence of an express agreement as to the size of the consular staff, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the consular district and the needs of the particular consular post. As far as the PRC's agreements with the UK, the USA, Australia and Vietnam are concerned, no limit has been imposed on the size of consular staff of the four countries.

15. A member considers that caution should be exercised in concluding bilateral agreements on the grant of additional privileges and immunities to consular posts of foreign States. He has requested the HKSAR Government to reflect his view to the Central People's Government.

Consular Relations (Additional Privileges and Immunities) (United Kingdom) Order (L.N. 51)

Consular Relations (Additional Privileges and Immunities) (United States of America) Order (L.N. 52)

Consular Relations (Additional Privileges and Immunities) (Vietnam) Order (L.N. 55)

16. The Orders in L.Ns. 51, 52 and 55 set out the additional privileges and immunities accorded to the consular posts of the UK, the USA and Vietnam. Major examples of these additional privileges and immunities are –

- (a) no entry to consular premises and residences is allowed under any circumstances without consent of the head of the consular post or his designated person. Moreover, the inviolability of consular premises under the VCCR is extended to cover the residences of consular officers;
- (b) exemption from dues and taxes accorded to the residence of the head of consular post under the VCCR is extended to that of consular officers;
- (c) the official correspondence of some consular posts may not be opened or detained under any circumstances;
- (d) consular members and their family members are given greater protection from arrest or detention;
- (e) consular members and their family members are given greater protection from prosecution; and
- (f) the immunities of consular officers and employees from giving evidence under the VCCR are extended to their respective family members.

17. As the PRC's bilateral consular agreements with the UK, the USA and Vietnam extend the inviolability of consular premises to the residences of consular officers, members have enquired about the meaning of "residences of consular officers", and what action will be taken if a consular officer's residence is different from the residence on the official record.

18. The Administration has advised that the term "residences of consular officers" is not defined in the VCCR. To implement the privileges and immunities accorded by PRC to consular officers in Hong Kong, the HKSAR Government requires the heads of consular officers to provide, upon installation of their consular officers, the personal particulars of these officers to the Protocol Division for record purpose. These personal particulars include the residential addresses of consular officers. The Protocol Division, in compiling a record of the residences of consular officers,

requests the consular posts concerned to provide documentary proof (e.g. whether the deed or tenancy agreement of the residence is held or entered into in the name of the sending State or a representative of the sending State as the owner or lessee) for verification. In case a consular officer's residential address is different from that on the Government's record, the Protocol Division will approach the head of the consular post concerned or his designee for verification.

19. Members have expressed concern whether a consular officer's residence is inviolable if the consular officer has failed to make a timely report on the change of his residential address to the head of the consular post concerned, resulting in a discrepancy between his actual residential address and the one on the official record. Members are of the view that whether a residence is regarded as the residence of a consular officer is a matter of fact, irrespective of whether the consular officer's residential address is on the official record. The Administration concurs with the view of members.

20. Members have also expressed concern whether the authorities of the receiving State could enter the consular premises and residences in cases of emergency, if the consent of the head of the consular post or his designee cannot be obtained in time. The Administration has advised that under Article 31 of the VCCR, the consent of the head of the consular post may be assumed in case of fire or other disaster requiring prompt protective action. As to those consular premises and residences which are inviolable under any circumstances without the consent of the head of the consular post or his designee, law enforcement agencies may, if and when necessary, seek the assistance of the Protocol Division which maintains a database and contact numbers of representatives of consular posts.

21. In response to members' request, the Administration has agreed to provide for reference of the Subcommittee the internal guidelines governing the actions to be taken by law enforcement agencies of Hong Kong under special or emergency circumstances which necessitate entry into consular premises or residences.

22. Members have sought clarification on the basis for providing additional privileges and immunities to family members of consular members, such as greater protection from arrest, detention or prosecution.

23. The Administration has advised that the conferment of different levels of privileges and immunities to certain consular posts are matters of foreign affairs under the purview of the Central People's Government. The conferment of privileges and immunities on consular members is not meant for the personal benefit of individuals, but rather, to ensure the efficient performance of functions by consular personnel of the sending State. The Administration has further explained that as every State is both a sending and a receiving State, the privileges and immunities are granted on a reciprocal basis, meaning a State's own consular personnel abroad enjoy the same level of privileges and immunities as those enjoyed by the consular personnel of the sending State.

Administration of Estates by Consular Officers Ordinance (Amendment of Schedule)
Order 2005 (L.N. 53)

Consular Conventions (Application of Section 3) Order 2005 (L.N. 54)

Administration of Estates by Consular Officers Ordinance (Amendment of Schedule)
(No. 2) Order 2005 (LN. 56)

Consular Conventions (Application of Section 3) (No. 2) Order 2005 (L.N. 57)

24. The Orders in L.Ns. 53, 54, 56 and 57 set out the additional functions that may be performed by the Australian and Vietnamese consular officers as provided for in the relevant bilateral agreements i.e. to administer the deceased national's estates and to deal with estates which their nationals have a right to inherit in the HKSAR under specified circumstances. Specifically, consular officers of these States are entitled to –

- (a) protect and conserve the estates left in the HKSAR by deceased nationals of these States;
- (b) safeguard the interests of their nationals who have a right to property left in the HKSAR by a deceased; and
- (c) receive for transmission to their nationals money or property in the HKSAR to which they are entitled as a consequence of the death of another person.

25. The Subcommittee has noted that Article 5(g) of the VCCR provides for the safeguarding of the interests of nationals of the sending State in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State. However, VCCR does not specify detailed provisions for matters relating to the administration of their nationals' estates in the receiving States.

Recommendation

26. The Subcommittee supports the seven items of subsidiary legislation.

Advice sought

27. Members are invited to note the deliberations of the Subcommittee.

Subcommittee on Subsidiary Legislation Relating to Consular Matters

Membership list

Chairman	Hon Margaret NG
Members	Hon James TO Kun-sun Hon LI Kwok-ying, MH (Total : 3 Members)
Clerk	Mrs Percy MA
Legal Adviser	Miss Kitty CHENG
Date	12 May 2005