

CONSULAR RELATIONS (ADDITIONAL PRIVILEGES AND IMMUNITIES)(INDIA) ORDER

Explanatory Notes

(Made by the Chief Executive in Council under section 4(1) of the Consular Relations Ordinance (Cap. 557))

1. Commencement

This Order comes into operation on 17 July 2009.

2. Interpretation

In this Order –

“Convention” (《條約》) means the Consular Convention between the People’s Republic of China and the Republic of India done at New Delhi on 13 December 1991;

“relevant provisions of the Convention” (《條約》有關條文) means the provisions of paragraphs 1 and 2 of Article 28, Article 29, paragraphs 2, 3 and 4 of Article 31, paragraphs 2, 3 and 4 of Article 34, Articles 35, 36 and 38, Article 40 (except sub-paragraphs (a) and (b) of paragraph 1 and paragraph 3), Article 41, and Article 43 (except paragraph (a)), of the Convention as set out in the Schedule.

The proposed commencement date has taken into account the lead time required to complete the negative vetting process upon gazettal of the Orders.

The Convention has been published in the Gazette (Special Supplement No. 5) and uploaded onto the website of the Department of Justice for public’ information.

3. Additional privileges and immunities

It is declared that the additional privileges and immunities accorded to a consular post of the Republic of India, or to persons connected with the consular post, or to both, under the relevant provisions of the Convention, as read with the provisions of Article 1 (except paragraphs *(b)*, *(i)*, *(k)*, *(m)* and *(n)*), and Articles 42, 44 and 45, of the Convention as set out in the Schedule, have the force of law in Hong Kong.

In line with the established practice under common law, we have included in the Order the provisions of the Convention which affect private rights and obligations or require exceptions to be made to the existing laws of the HKSAR, to reflect that they have the force of law in local legislation.

Provisions which can be implemented by way of administrative arrangements under the existing legal framework or which have already been covered by the Vienna Convention on Consular Relations (VCCR) and set out in the Schedule to the Consular Relations Ordinance (Chapter 557) need not be included in the Order.

SCHEDULE

[ss. 2 & 3]

PROVISIONS OF THE CONVENTION REFERRED TO IN THIS
ORDER

CHAPTER I

DEFINITIONS

Article 1

Definitions

For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) "consular post" means any consulate-general, consulate, vice-consulate, or consular agency;

.....

(c) "head of consular post" means the person charged with the duty of acting in that capacity;

(d) "consular officer" means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;

(e) "member of the administrative and technical staff of the consular post" means any person who performs administrative or technical services at a consular post;

To ascertain the scope of additional privileges and immunities accorded by relevant provisions of the Convention, the relevant provisions must be read with this provision, hence its inclusion in the Order.

As the provisions included in the Order do not contain the following expressions as appeared in Article 1 of the Convention, it is not necessary to include them in the Order:

"(b) consular district"

"(i) member of the private staff"

"(k) consular archives"

"(m) vessel of the sending State"

"(n) aircraft of the sending State"

(f) “member of the service staff” means any person employed in the domestic service of a consular post;

(g) “members of a consular post” means consular officers, administrative and technical staff and service staff of a consular post;

(h) “family members” means the spouse, children and parents who are dependent on a member of a consular post and forming part of the same household;

.....
(j) “consular premises” means buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;

.....
(l) “national of the sending State” means any natural person having the nationality of the sending State, and, when applicable, also any juridical person of the sending State;

[Article 2 to Article 8 (Establishment of a Consular Post and Appointment of its Members)]

These provisions can be implemented either by way of administrative arrangements under the existing legal framework, or have already been covered by the VCCR and set out in the Schedule to Cap. 557.

[Article 9 to Article 24 (Consular Functions)]

These provisions (except Article 17) can be implemented either by way of administrative arrangements under the existing legal framework, or have already been covered by the VCCR and set out in the Schedule to Cap. 557.

Explanatory Notes

[Article 17 (Functions Concerning Estate)]

Article 17 of the Convention confers upon consular officers of the Consulate General of India in Hong Kong additional consular powers relating to the administration of estate of deceased Indian nationals. These additional consular powers are to be given effect in the form of Orders made under the Administration of Estates by Consular Officers Ordinance (Chapter 191) and the Consular Conventions Ordinance (Chapter 267).

CHAPTER IV

FACILITIES, PRIVILEGES AND IMMUNITIES

[Article 25 (Facilities for a Consular Post), Article 26 (Acquisition of Consular Premises and Residences) and Article 27 (Use of the National Flag and Emblem)]

These provisions can be implemented either by way of administrative arrangements under the existing legal framework, or have already been covered by the VCCR and set out in the Schedule to Cap. 557.

Article 28

Inviolability of Consular Premises and Residences of Members of the Consular Post

1. Consular premises and the residences of members of a consular post shall be inviolable. The authorities of the receiving State may not enter the consular premises and the residences of members of a consular post without the consent of the head of the consular post or the head of the diplomatic mission of the sending State in the receiving State, or of a person designated by one of them.

Article 31 of the VCCR provides that the authorities of the receiving State shall not enter the consular premises except with the consent of the head of the consular or of his designee. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

Explanatory Notes

Article 28(1) of the Convention provides that the authorities of the receiving State may not, under any circumstances, enter the consular premises without the consent of the head of the consular post or of his designee. The Article also extends the inviolability of consular premises to the residences of members of a consular post.

2. The means of transport of the consular post and of the consular officers shall be immune from search, arrest or execution.

There is no similar provision in the VCCR as Article 28(2) of the Convention.

Article 29

Immunity from Requisition of Consular Premises

The consular premises, their furnishings and the property and means of transport of the consular post shall be immune from any form of requisition.

Article 31(4) of the VCCR provides that the consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If appropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

Article 29 of the Convention provides that the consular premises, their furnishings and the property and means of transport of the consular post shall be immune from any form of requisition under any circumstances.

[Article 30 (Inviolability of the Consular Archives)]

This provision has already been covered by the VCCR and set out in the Schedule to Cap. 557.

Article 31

Freedom of Communication

2. The official correspondence of a consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions. The consular bag shall neither be opened nor detained. All the packages which constitute the consular bag shall bear visible external marks of its character and may contain nothing other than official correspondence, official documents and articles intended exclusively for official use.

3. The consular courier shall only be a national of the sending State, and shall not be a permanent resident of the receiving State. He shall be provided with an official document indicating his status and the number of packages constituting the consular bag. In performing his functions, a consular courier shall be protected by the receiving State and enjoy personal inviolability and shall not be liable to any form of arrest or detention.

4. The sending State, its diplomatic mission and consular post may designate consular couriers ad hoc; in such cases the provisions of paragraph 3 of this Article shall also apply except that the privileges and immunities therein mentioned shall cease to apply when such courier has delivered to the consignee the consular bag in his charge.

*[Article 32 (Consular Fees and Charges)
and Article 33 (Freedom of Movement)]*

Article 35 of the VCCR provides that the official correspondence of the consular post shall be inviolable. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains anything other than consular correspondence, they may request that the bag be opened in their presence by an authorized representative of the sending State.

Article 31 of the Convention provides that the receiving State shall not, under any circumstances, open or detain the consular bag.

These provisions can be implemented either by way of administrative arrangements under the existing legal framework, or have already been covered by the VCCR and set out in the Schedule to Cap. 557.

Article 34

Personal Inviolability of Consular Officers

2. A consular officer shall not be liable to arrest or detention.
3. Members of the administrative and technical staff and members of the service staff of a consular post shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority of the receiving State.
4. Except in the case specified in paragraph 3 of this Article, members of the administrative and technical staff and of the service staff of a consular post shall not be committed to prison or be liable to any other form of restriction on his personal freedom save in execution of a judicial decision of final effect.

Article 41 of the VCCR provides that consular officers shall not be liable to arrest or detention pending trial, except in the case of grave crime and pursuant to a decision by the competent judicial authority.

Article 34 of the Convention provides that consular officers shall not be liable to arrest or detention, which is not limited to the above stipulation as set out in the VCCR. The Article also extends the personal inviolability as provided for under Article 41 of VCCR to members of the administrative and technical staff and members of the service staff of the consular post.

Article 41 of the Convention extends the respective personal inviolability of consular officers, members of the administrative and technical staff and members of the service staff to their respective family members.

Article 35

Immunity from Jurisdiction

1. A consular officer shall enjoy total immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from civil and administrative jurisdiction of the receiving State in respect of acts performed in the exercise of consular functions.
2. Members of the administrative and technical staff or of the service staff of a consular post shall also be immune from criminal, civil and administrative jurisdiction of the receiving State in respect of acts performed in the exercise of consular functions.

Article 43(1) of the VCCR provides that consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

Article 35(1) of the Convention provides that consular officers' immunities from criminal, civil and administrative jurisdiction are not limited to the above stipulation as set out in the VCCR.

Article 35(2) of the Convention extends consular employees' immunities from jurisdiction as set out in the VCCR to members of the service staff of the consular post.

Article 41 of the Convention also extends the respective immunities conferred upon consular officers, members of the administrative and technical staff and members of the service staff under Article 35 to their respective family members.

Explanatory Notes

3. The provisions of paragraphs 1 and 2 of this Article shall not apply to the following civil proceedings:

(a) arising out of a contract concluded by a member of the consular post in which he did not contract expressly or impliedly as an agent of the sending State;

(b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft;

(c) concerning private immovable property in the receiving State, unless a member of the consular post is holding it in the capacity of representative of the sending State and for the purposes of the consular post;

(d) relating to succession in which a member of the consular post is involved as executor, administrator, heir or legatee as a private person;

(e) arising out of any professional or commercial activities in the receiving State by a member of the consular post outside his official functions.

These provisions are similar to the exceptions set out in Article 43(2) of the VCCR.

These provisions are not covered by Article 43(2) of the VCCR.

4. The receiving State shall not take measures of execution against a consular officer except in cases referred to in paragraph 3 of this Article. In the event of taking such measures, the inviolability of the person and residence of the consular officer shall not be impaired.

There is no similar provision in the VCCR as Article 35(4) of the Convention.

Article 36

Liability to Give Evidence

1. A consular officer is under no obligation to give evidence as a witness. The receiving State shall not apply coercive measures or penalty to a consular officer if he should decline to give evidence.
2. A member of the administrative and technical staff or of the service staff of the consular post may be called upon to give evidence in the course of judicial or administrative proceedings of the receiving State. He shall not, except in the cases referred to in paragraph 3 of this Article, decline to give evidence. However, under no circumstances should coercive measures be applied to him.
3. A member of the administrative and technical staff or of the service staff of the consular post is under no obligation to give evidence concerning matters connected with the exercise of his functions or to produce any official correspondence or documents relating thereto. He is entitled to decline to give evidence as expert witness with regard to the law of the sending State.
4. The competent authorities of the receiving State requiring the evidence of a member of the administrative and technical staff or of the service staff of the consular post shall avoid interference with the performance of his functions. They may, when possible, take such evidence at his residence or at the consular premises or accept a statement from him in writing.

Article 44 of the VCCR provides that if a consular officer should decline to give evidence, no coercive measure or penalty may be applied to him. Moreover, consular officers, consular employees and members of the service staff are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto.

Article 36(1) of the Convention provides that a consular officer is under no obligation to give evidence as a witness.

Article 36(2) of the Convention provides that under no circumstances should coercive measures be applied to a member of the administrative and technical staff or of the service staff of the consular post.

Article 41 of the Convention extends the respective immunities conferred upon consular officers, members of the administrative and technical staff and members of the service staff under Article 36 to their respective family members.

Explanatory Notes

[Article 37 (Exemption from Services and Obligations)]

This provision can be implemented either by way of administrative arrangements under the existing legal framework, or has already been covered by the VCCR and set out in the Schedule to Cap. 557.

Article 38

Exemption of Properties from Taxation

1. The receiving State shall exempt the following from all dues and taxes:

(a) consular premises and residences of the members of a consular post acquired in the name of the sending State or its representative and transactions or instruments related thereto;

(b) consular facilities and means of transport acquired exclusively for official purposes as well as their acquisition, possession or maintenance.

2. The provisions of paragraph 1 of this Article shall not apply in respect of:

(a) charges levied for specific services;

(b) dues and taxes collectable under the laws and regulations of the receiving State from a person who concludes a contract with the sending State or its representative.

[Article 39 (Exemption of Members of the Consular Post from Taxation)]

Article 32 of the VCCR provides that consular premises and the residence of the career head of consular post shall be exempt from dues and taxes.

Article 38(1) of the Convention extends the privileges and immunities to the residences of the members of the consular post, consular facilities and means of transport acquired exclusively for official purposes.

This provision has already been covered by the VCCR and set out in the Schedule to Cap. 557.

Article 40

Exemption from Customs Duties and Inspection

1. The receiving State shall, in accordance with its laws and regulations, permit entry and exit of and grant exemption from all customs duties other than charges, for storage, cartage and similar services, on:

.....
(c) articles imported at the time of first installation for the personal use of a member of the administrative and technical staff of the consular post, including household articles intended for his establishment.

2. Articles referred to in sub-paragraphs ... (c) of paragraph 1 of this Article shall not exceed the quantities necessary for direct use by the person concerned.

Article 50 of the VCCR provides for the right of exemption from customs duties of a consular employee at the time of first installation.

Article 41 of the Convention extends the right of exemption from customs duties conferred on a member of the administrative and technical staff of the consular post at the time of first installation under Article 40 to his family members.

Article 41

Privileges and Immunities of Family Members

Family members of a consular officer and family members of a member of the administrative and technical staff of the consular post ... shall enjoy respectively the privileges and immunities to which the consular officer and the member of the administrative and technical staff are respectively entitled under the provisions of this Convention. Family members of a member of the service staff of the consular post shall enjoy the privileges and immunities to which the member of the service staff is entitled under this Convention, except those who are nationals or permanent

The VCCR does not have a separate provision to stipulate that the privileges and immunities enjoyed by family members of consular officers and consular employees shall be the same as those enjoyed by the consular officers and consular employees respectively.

Article 41 of the Convention extends the respective privileges and immunities enjoyed by consular officers and members of the administrative and technical staff of the consular post to their

residents of the receiving State, or who carry on any private gainful occupation in the receiving State.

respective family members. The Article also stipulates that family members of a member of the service staff of the consular post, with certain exceptions, shall enjoy the privileges and immunities to which the member of the service staff is entitled under the Convention.

Article 42

Persons who shall not Enjoy Privileges and Immunities

1. Members of the administrative and technical staff or of the service staff of the consular post who are nationals or permanent residents of the receiving State shall not enjoy the privileges and immunities provided for in this Convention, subject to the provisions of paragraph 3 of Article 36 of this Convention.

To ascertain the scope of additional privileges and immunities accorded by the relevant provisions of the Convention, the relevant provisions must be read with this provision, hence its inclusion in the Order.

2. Family members of the persons mentioned in paragraph 1 of this Article shall not enjoy the privileges and immunities provided for in this Convention.

Article 43

Estate of Member of the Consular Post

In the event of the death of a member of a consular post or a member of his family, the receiving State shall:

.....
(b) exempt the movable property of the deceased from estate duties and all duties concerned.

Article 51(b) of the VCCR provides that in the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving State shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

Article 43(b) of the Convention provides that the receiving State shall exempt the movable property of the deceased from estate duties and all duties concerned, which is not limited to the above stipulation as set out in the VCCR.

Article 44

Beginning and End of Privileges and Immunities

1. Every member of the consular post shall enjoy the privileges and immunities provided in this Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.

To ascertain the scope of the additional privileges and immunities accorded by the relevant provisions of the Convention, the relevant provisions must be read with this provision, hence its inclusion in the Order.

2. Family members of a member of the consular post shall enjoy the privileges and immunities provided for in this Convention from the date from which he enjoys privileges and immunities, or from the date of their entry into the territory of the receiving State or from the date of their becoming such family members in the case of their entry or becoming such family members after the date from which he enjoys privileges and immunities.

3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of his family members shall cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so. The privileges and immunities of the family members of a member of the consular post shall come to an end when they cease to be the said family members. However, if such persons intend to leave the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. In the event of the death of a member of the consular post, his family members shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period in which to do so.

Article 45

Waiver of Privileges and Immunities

1. The sending State may waive any of the privileges and immunities enjoyed by the persons concerned under Articles 35 and 36 of this Convention. The waiver shall in all cases be explicit and shall be communicated to the receiving State in writing.

2. The initiation of proceedings by a person in a matter where he might enjoy immunity from jurisdiction under this Convention shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

3. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the execution of judicial decision. In respect of such execution, a separate waiver of immunity in writing shall be necessary.

[Article 46 to Article 48 (General Provisions)]

To ascertain the scope of the additional privileges and immunities accorded by the relevant provisions of the Convention, the relevant provisions must be read with this provision, hence its inclusion in the Order.

These provisions can be implemented either by way of administrative arrangements under the existing legal framework, or have already been covered by the VCCR and set out in the Schedule to Cap. 557.