

**Subcommittee Meeting on the Mutual Legal Assistance
in Criminal Matters (Italy, South Korea and Switzerland) Orders**

At the Subcommittee meeting on 18 November 1999, we undertook to provide further clarifications on the Switzerland Order and the Korea Order. They are set out below:

HKSAR/Switzerland MLA Agreement

2. Article 15 of the Switzerland/HKSAR Agreement is similar to Article 22 of the European Convention on Mutual Assistance in Criminal Matters. That Article so far as relevant reads –

Each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter party entered in the juridical records. Ministries of Justice shall communicate such information to one another at least once a year.

3. As indicated in the Article-by-Article comparison Article 15 of the Switzerland/HKSAR Agreement will facilitate the provision of consular assistance. It is accordingly relevant to examine the Consular Agreements which are applicable to the HKSAR. Article 36 of the multilateral Vienna Convention on Consular Relations [VCCR] provides as follows –

'1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.

Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;'

Generally speaking the bilateral Agreements which are applicable to Hong Kong SAR simply adopt specific provisions in the Vienna Convention on Consular Relations. The Agreements with the United States of America, Canada and the United Kingdom however have provisions which differ from Article 36 of the VCCR in that such notifications do not require the consent of the person concerned. Article 8(1) of the Canadian Agreement reads –

'If a national of the sending State is detained, arrested or deprived of freedom by any other means in the consular district by the competent authorities of the receiving State, the said authorities shall notify the consular post of the matter without delay from the date of the detention, arrest or deprivation of freedom.'

4. The following should be noted in relation to the negotiation of Article 36 of the VCCR. The original International Law Convention draft provided for an unqualified obligation to inform of the detention etc. of nationals. Some States considered that there should be a requirement for the individual to consent because –

- he might not wish the fact of his detention to be known;
- informing in all cases would be an administrative burden; and
- informing without consent would offend the privacy laws of some States.

The counter arguments were that –

- consuls could not exercise their functions unless they were informed of all arrests etc.,
- disputes could arise as to whether the individual had consented; and
- there had been cases where individuals who would have required a consular assistance were never informed that it was available.

A compromise was eventually reached and consent was introduced together with a requirement that the person be informed without delay of his rights to have his consular post informed of his detention.

5. It is clear therefore that when the VCCR was negotiated there was no international unanimity that consent be a pre-requisite to informing a consular post of the detention of one of its nationals.

6. It is also relevant to note that the VCCR and the three Consular Agreements with the US, Canada and the UK applicable to the HKSAR all provide for notifications to the consular posts of any form of detention. In contrast, the European Convention and Article 15 only require consular posts to be informed of sentences of imprisonment.

HKSAR/Korea MLA Agreement

7. The Article-by-Article comparison states that paragraph 1 of Article 4 of the HKSAR/Korea MLA Agreement is substantially the same as Article IV of the model Agreement. The reference to paragraph 1 only should not have been included. Article 4 of the HKSAR/Korea Agreement, in its entirety, is substantially the same as Article 4 of the model Agreement.