

LegCo Panel on Administration of Justice and Legal Services

**Subsidiary Legislation relating to
Privileges and Immunities Conferred on Consular Posts**

PURPOSE

This paper briefs the Panel on Administration of Justice and Legal Services on –

- (a) the grant of privileges and immunities in the context of the establishment of consular relations between sovereign States; and
- (b) the Administration's programme of preparing subsidiary legislation relating to the privileges and immunities conferred by the Central People's Government (CPG) on the consular posts and their personnel of Australia, the United Kingdom, the United States of America and Vietnam in the Hong Kong Special Administrative Region (HKSAR).

BACKGROUND

Consular Relations

2. 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. It is a common and well-established practice that the receiving State accords to the consular post and personnel of the sending State privileges and immunities not made available to ordinary residents or visitors in the receiving State. As every State is both a sending and a receiving State, these privileges and immunities are granted on a reciprocal basis, meaning that 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.

3. 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 include –

- (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.

4. Consular members could not effectively carry out these functions if their acts or words in their consular districts would readily render them liable to prosecution, arrest or detention. Hence, the grant of privileges and immunities is the pre-requisite for the establishment of consular relations between sovereign States.

International Conventions and Bilateral Agreements

5. The 1963 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. Article 73 of the VCCR provides that nothing in the Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions of the VCCR. Hence, a State may conclude bilateral international agreements with other States regarding the establishment of or facilitation for consular posts to deal with matters not covered in the VCCR, including the grant of consular privileges and immunities and functions exceeding those provided for in the VCCR.

SITUATION IN HONG KONG

Privileges and Immunities for Consular Posts

6. At present, a total of 56 career consular posts are established in the HKSAR. These consular posts and their personnel enjoy the privileges and immunities accorded to them under the VCCR, to which the People's Republic of China (PRC) acceded in 1979. The major types of privileges and immunities include –

- (a) Inviolability of consular premises;
- (b) Exemption of premises/residence from taxes;
- (c) Freedom of communication of consular posts;
- (d) Personal inviolability of consular officers;
- (e) Immunity of consular officers and employees from jurisdiction in respect of acts performed in the exercise of consular functions; and
- (f) Exceptions to the liability of members of a consular post to give evidence.

7. In line with the established practice under common law, those provisions of the VCCR, which affect private rights and obligations or require exceptions to be 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).

Bilateral Agreements Signed by CPG and Applicable to HKSAR

8. Aside from the VCCR, the CPG has so far applied to the HKSAR eight bilateral agreements with separate sovereign States, providing for matters not covered in the VCCR, including, inter alia, additional privileges and immunities which are broadly comparable to those provided for diplomatic agents in the Vienna Convention on Diplomatic Relations (VCDR). Members may wish to refer to the explanatory note at **Annex A** which highlights several such additional privileges and immunities by way of comparing the privileges and immunities provided for in the VCCR and VCDR.

9. Some of these bilateral agreements also accord to the consular posts concerned the additional functions relating to the administration of the estates of their deceased nationals which are not provided for in the VCCR. 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.

10. On the basis of the principle of reciprocity, the above additional privileges and immunities apply also to the PRC's consular posts and personnel in the States concerned.

11. We have published the full texts of these international agreements in Special Supplement No. 5 to the Gazette for the information of the general public. We have also uploaded the agreements on the website of the Department of Justice for ready reference of interested parties. A list of these international agreements is at **Annex B**.

LEGISLATIVE PROPOSALS

12. At present, the relevant provisions of these international agreements concerning additional privileges and immunities are given legal effect in the HKSAR generally by the Regulations of the People's Republic of China concerning Consular Privileges and Immunities, which is a piece of national law applicable to the HKSAR by promulgation under Article 18 of the Basic Law. In line with the established practice under common law, provisions of international agreements applicable to the HKSAR will be underpinned by way of local legislation, should they affect private rights and obligations or require exceptions to be made to the existing laws of the HKSAR.

13. In this regard, the Consular Relations Ordinance (Cap 557) was enacted in 2000 to provide a more flexible framework for underpinning the relevant international agreements signed by the CPG. In addition, the Administration of Estates by Consular Officers Ordinance (Cap 191) and the Consular Conventions Ordinance (Cap 267) provide a framework for giving effect to certain additional consular functions relating to administration of estates by consular officers in the HKSAR, as may be agreed between the CPG and the foreign State concerned.

14. With the legislative framework in place, we have embarked on a programme of preparing the necessary subsidiary legislation in the form of Orders to underpin the relevant provisions in these international agreements. The Orders relating to the additional consular functions conferred on the consular post of Canada in the HKSAR were enacted in October 2003.

15. The CPG's bilateral consular agreements with the United Kingdom, the United States of America and Vietnam accord to their respective consular posts and personnel additional privileges and immunities which are broadly comparable to those provided for diplomatic agents in the VCDR. The CPG's agreements with Australia and Vietnam accord to their consular posts additional consular functions relating to the administration of estates of their deceased nationals. We shall shortly submit to the Legislative Council the Orders relating to the privileges and immunities conferred on the consular posts of these countries. The Orders for the remaining agreements will be submitted in batches, as soon as the drafting and consultation with the signatories of the agreements have been completed.

Administration Wing
Chief Secretary for Administration's Office
February 2005

Comparison of Privileges and Immunities under Vienna Convention on Consular Relations (VCCR) and Vienna Convention on Diplomatic Relations (VCDR)

(The note highlights several important aspects of the different levels of privileges and immunities between the VCCR and VCDR. It only serves as a rough reference and does not purport to set out the differences between consular and diplomatic privileges and immunities in a comprehensive and exhaustive manner. In every individual case, the full text of the VCCR, the VCDR and other applicable legal instruments must be referred to and applied to the facts of the particular case.)

<u>Relating to a Consular Post/Diplomatic Mission</u>		
	VCCR	VCDR
A. Inviolability of premises/ residences	<ul style="list-style-type: none"> • Consular premises shall be inviolable. No entry without consent of head of consular post. Consent may be assumed in case of fire or other disaster. • Consular premises, property and means of transport shall be immune from requisition for purposes of national defence or public utility. If expropriation is necessary, prompt, adequate and effective compensation shall be paid. (Art. 31 of VCCR) 	<ul style="list-style-type: none"> • Mission's premises shall be inviolable. No entry without consent of head of mission. • Mission's premises, property and means of transport shall be immune from search, requisition, attachment or execution. (Art. 22 of VCDR) • Diplomatic agent's residence shall be inviolable. (Art. 30 of VCDR)
B. Exemption of premises/ residence from taxation	<ul style="list-style-type: none"> • Consular premises and the residence of the head of consular post shall be exempt from dues and taxes. (Art. 32 of VCCR) 	<ul style="list-style-type: none"> • The premises of the mission shall be exempt from dues and taxes. (Art. 23 of VCDR) • Diplomatic agent's private immovable property shall be exempt from dues and taxes if he holds it on behalf of the sending State for the purposes of the mission. (Art. 34 of VCDR)
C. Freedom of communication	<ul style="list-style-type: none"> • Official correspondences shall be inviolable. Consular bags may be opened or detained only in exceptional circumstances and in the presence of a representative of sending State. (Art. 35 of VCCR) 	<ul style="list-style-type: none"> • Official correspondences shall be inviolable. Diplomatic bags shall not be opened or detained. (Art. 27 of VCDR)

<u>Relating to Consular /Diplomatic Personnel</u>		
	VCCR	VCDR
D. Personal inviolability	<ul style="list-style-type: none"> • Consular officers¹ shall not be liable to arrest or detention pending trial, except in case of grave crime and pursuant to a decision by the competent judicial authority. • Consular officers shall not be committed to prison, etc, save in execution of a judicial decision of final effect. (Art. 41 of VCCR) 	<ul style="list-style-type: none"> • The person of a diplomatic agent² shall be inviolable and not be liable to arrest or detention. (Art. 29 of VCDR) • Applicable to family members³ of a diplomatic agent. • Applicable to administrative/technical staff and their family members³. (Art. 37 of VCDR)
E. Immunity from jurisdiction	<ul style="list-style-type: none"> • Consular officers shall not be amenable to the jurisdiction of the judicial and administrative authorities in respect of acts performed in the exercise of consular functions, except for certain civil actions (e.g. claim by a third party for damage arising from an accident). • Applicable to consular employees⁴. (Art. 43 of VCCR) 	<ul style="list-style-type: none"> • Diplomatic agents shall enjoy immunity from criminal jurisdiction. • Diplomatic agents shall enjoy immunity from civil and administrative jurisdiction, except under certain specified circumstances (e.g. actions relating to succession under specified conditions, professional/commercial activity conducted outside official functions, etc). • No measures of execution may be taken in respect of a diplomatic agent except in specified cases and provided that inviolability of person or residence shall not be infringed. (Art. 31 of VCDR) • Applicable to family members of a diplomatic agent. • Applicable to administrative/technical staff to the extent that immunity from civil and administrative jurisdiction shall not extend to acts performed outside the course of their duties. (Art. 37 of VCDR)

¹ “Consular officer” means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions.

² “Diplomatic agent” is the head of the diplomatic mission or a member of the staff of the mission having diplomatic rank.

³ “Family members” mean the spouse and under-age children forming part of the household of a diplomatic agent or the administrative/technical staff concerned.

⁴ “Consular employee” means any person employed in the administrative or technical service of a consular post.

	VCCR	VCDR
F. Exceptions to the liability to give evidence	<ul style="list-style-type: none"> • When being called upon to attend as witness in judicial or administrative proceedings, consular officers may decline to give evidence. If they decline to do so, no coercive measure or penalty may be applied to them. • Members of a consular post⁵ are under no obligation to give evidence or produce official correspondence and documents concerning matters connected with or relating to the exercise of their functions. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State. (Art. 44 of VCCR) 	<ul style="list-style-type: none"> • Diplomatic agents are not obliged to give evidence as a witness. (Art. 31 of VCDR) • Applicable to family members³ of a diplomatic agent. • Applicable to administrative/technical staff and their family members. (Art. 37 of VCDR)

⁵ “Members of a consular post” means consular officers, consular employees and members of the service staff.

Annex B

List of the International Agreements between CPG and Foreign States Relating to Privileges and Immunities Conferred on Consular Posts

	Date of Application to the HKSAR
1. Agreement Constituted by Exchange of Notes Between the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Establishment of a British Consulate-General in the Hong Kong Special Administrative Region of the People's Republic of China	1 Jul 1997
2. Agreement Between the Government of the People's Republic of China and the Government of the United States of America Regarding the Maintenance of the United States Consulate-General in the Hong Kong Special Administrative Region	1 Jul 1997
3. Agreement Constituted by Exchange of Notes Between the Government of the People's Republic of China and the Government of the Republic of Italy Regarding the Maintenance of the Italian Consulate General in the Hong Kong Special Administrative Region	1 Jul 1997
4. Consular Agreement Between the Government of the People's Republic of China and the Government of Canada	11 Mar 1999
5. Consular Convention Between the Socialist Republic of Vietnam and the People's Republic of China	26 Jul 2000
6. Agreement on Consular Relations Between the People's Republic of China and Australia	15 Sept 2000
7. Agreement Constituted by Exchange of Notes Between the Government of the People's Republic of China and the Government of the Republic of India on Matters Concerning the Consular Convention Between the People's Republic of China and the Republic of India	28 Jul 2001
8. Consular Convention between the People's Republic of China and the Russian Federation	23 October 2003