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Paper for the House Committee on 12 June 2009

**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 8 May 2009, members formed a subcommittee to study the nine items of subsidiary legislation relating to consular matters gazetted on 30 April 2009, and tabled in Council on 6 May 2009.
3. Under the chairmanship of Hon James TO, the Subcommittee has held two meetings with the Administration. The membership list of the Subcommittee is in the **Appendix**.

The subsidiary legislation

4. The nine items of subsidiary legislation studied by the Subcommittee are -
 - (a) Consular Relations (Additional Privileges and Immunities) (India) Order (in respect of the Consular Convention between the People's Republic of China (PRC) and India) (L.N.73);
 - (b) Administration of Estates by Consular Officers Ordinance (Variation of Schedule: India) Order (in respect of the Consular Convention between PRC and India) (L.N. 74);

- (c) Consular Conventions (Application of Section 3) (India) Order (in respect of the Consular Convention between PRC and India) (L.N. 75);
- (d) Consular Relations (Additional Privileges and Immunities) (Italy) Order (in respect of the Consular Agreement between PRC and Italy) (L.N.76);
- (e) Administration of Estates by Consular Officers Ordinance (Variation of Schedule: New Zealand) Order (in respect of the Consular Agreement between PRC and New Zealand) (L.N. 77);
- (f) Consular Conventions (Application of Section 3) (New Zealand) Order (in respect of the Consular Agreement between PRC and New Zealand) (L.N. 78);
- (g) Consular Relations (Additional Privileges and Immunities) (Russia) Order (in respect of the Consular Convention between PRC and the Russian Federation) (L.N.79);
- (h) Administration of Estates by Consular Officers Ordinance (Variation of Schedule: Russia) Order (in respect of the Consular Convention between PRC and the Russian Federation) (L.N. 80);
and
- (i) Consular Conventions (Application of Section 3) (Russia) Order (in respect of the Consular Convention between PRC and the Russian Federation) (L.N. 81).

5. The scrutiny period of the nine items of subsidiary legislation has been extended from 3 June 2009 to 24 June 2009 by resolution of the Council. The Order will come into operation on 17 July 2009.

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.

7. The conferment of privileges and immunities (Ps&Is) 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 in the receiving State;
- (b) furthering the development of commercial, economic, cultural, scientific relations between the sending and receiving States; and
- (c) rendering necessary assistance of various sorts to the nationals of the sending State.

International convention on consular privileges and immunities and bilateral consular agreements

8. 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 Ps&Is. The major types of Ps&Is stipulated under the VCCR include -

- (a) inviolability of consular premises, archives and documents;
- (b) personal inviolability of consular officers, except in case of a grave crime;
- (c) immunity of consular officers and consular employees from jurisdiction in respect of acts performed in the exercise of consular functions;
- (d) exemption from liability to give evidence concerning matters connected with the exercise of consular functions; and
- (e) exemption from dues and taxes, customs duties and inspection, personal services and contributions.

9. In line with the common law practice, those provisions in 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 Hong Kong Special Administrative Region (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 Ps&Is in the HKSAR.

10. Article 73 of the VCCR provides that nothing in the VCCR shall preclude States from concluding international agreements confirming, supplementing, extending or amplifying the provisions of the VCCR. The PRC has concluded with nine foreign States bilateral consular agreements which are applicable to the HKSAR. In line with the common law practice,

provisions of bilateral agreements applicable to the HKSAR which affect private rights and obligations or require exceptions to be made to the existing laws of the HKSAR would also be underpinned by local legislation setting out the relevant provisions of these bilateral agreements expressly and specifically.

Deliberations of the Subcommittee

11. The Subcommittee notes that the Orders relating to the additional consular functions conferred on the consular post of Canada were enacted in November 2003, and the Orders to give effect to the bilateral agreements made between PRC with the United Kingdom, United States of America, Australia and Vietnam which accord to the consular posts and personnel of these states additional Ps&Is and/or functions in relation to the administration of estates in the HKSAR were enacted in July 2005. At members' request, the Administration has provided a comparison of Ps&Is under VCCR and the additional consular Ps&Is set out in the Orders listed in paragraph 4 to facilitate scrutiny by the Subcommittee.

Orders to accord consular posts and personnel additional Ps&Is (L.Ns. 73,76 and 79)

12. The Orders in L.Ns. 73, 76 and 79 set out the additional Ps&Is accorded to the consular posts of India, Italy and the Russian Federation. Examples of these additional Ps&Is are -

- (a) in the case of India, no entry to consular premises is allowed under any circumstances without the consent of the head of consular post or his designee. Moreover, the inviolability is extended to cover the residences for certain members of the consular post;
- (b) in the case of India, the means of transport of the consular post and of the consular officers shall be immune from search, arrest and execution;
- (c) personal inviolability is extended to cover certain members of the consular post and their family members;
- (d) in the case of India and Russia, the immunities of consular officers and consular employees from giving evidence are extended to their respective family members;
- (e) in the case of India, the consular premises, their furnishings and property and means of transport of the consular post shall be immune from any form of requisition;

- (f) in the case of India and Russia, in the event of the death of a member of a consular post or a member of his family, the movable property of the deceased shall be exempt from estate duties and all duties concerned; and
- (g) exemption from dues and taxes is extended to consular facilities and means of transport owned, leased or possessed by other lawful means exclusively for official purposes, as well as their acquisition, possession or maintenance.

General issues

13. Members have asked about the classification of consular members for the conferment of different levels of Ps&Is and the definition of "members of a consular post". They have further enquired whether the scope of Ps&Is covers consular members who are nationals and permanent residents of the receiving State.

14. The Administration has advised that there are three classes of consular members as defined in VCCR, viz. consular officers who enjoy the most Ps&Is, members of the administrative and technical staff of the consular post, and members of the service staff. The term "members of a consular post" means consular officers, administrative and technical staff and service staff of a consular post. Under the PRC/India Consular Convention and PRC/Russia Consular Convention, members of the administration 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 Ps&Is provided for in the respective Conventions, except for circumstances under which they are required to give evidence concerning matters connected with the exercise of consular functions, which they are entitled to decline with regard to the law of the sending State.

Inviolability of residences of members of the consular post

15. As the PRC/India Consular Convention extends the inviolability of consular premises to the residences of members of the consular post, members have enquired about the size of these consular members. The Administration has advised that there are about 40 consular members in the Consulate General of India in HKSAR. For the implementation of the Ps&Is accorded by PRC to consular members in Hong Kong, the HKSAR Government requires the heads of consular posts (including the Consulate General of India) to provide, upon installation of their consular officers, the personal particulars of consular staff to the Protocol Division for record purpose.

Means of transport

16. Article 28(2) of the PRC/India Consular Convention provides that the means of transport of the consular post and of consular officers shall be immune from search, arrest or execution. Members consider that the term "the means of transport of the consular post and of consular officers" is too vague and general and can be subject to different interpretation in its application and enforcement. They have requested the Administration to clarify its meaning and coverage, and provide clear guidelines to the enforcement agencies of the HKSAR Government for the implementation of the provision.

17. The Administration has advised that in light of international practice, "the means of transport of the consular post and consular officers" refers to those which are under the lawful possession of the consular post/consular officers concerned. The means of transport could be owned or hired by the consular post/consular officers. The Administration has also advised that when the Convention first came into force in Hong Kong, the bureaux and departments concerned had been advised of the Ps&Is accorded to the Consulate General of India in Hong Kong and its personnel. That said, in response to a Member's advice, it will remind the law enforcement agencies once again of the interpretation of Article 28(2) of the Convention as explained above.

Personal inviolability and immunity from jurisdiction

18. On the extension of the personal inviolability and immunity from jurisdiction conferred upon consular members to their respective family members, members have sought clarification about the definition of "family members" and whether those family members who visit Hong Kong occasionally and their accompanying staff such as body guards, if any, will enjoy the Ps&Is so conferred.

19. The Administration has advised that under the PRC/India Consular Convention and PRC/Russia Consular Convention, the term "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. The respective Conventions also provide that family members of a member of the consular post shall enjoy Ps&Is from the date of their entry into the territory of the receiving State, and this should apply to family members staying for a short visit. The Administration has further advised that the application of Ps&Is to the relevant consular members will be based on the list compiled and provided by the heads of consular posts.

20. Members note that under Article 34 (3) of the PRC/India Consular Convention, 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

except in the case of a grave crime, whereas under Article 35(2), these members shall be immune from criminal, civil and administrative jurisdiction of the receiving State in respect of acts performed in the exercise of consular functions. They have enquired about the definition of "grave crime" and expressed concern that by virtue of these two provisions, a consular member who has committed a grave crime shall not be liable to prosecution if the act was performed in relation to the exercise of consular functions.

21. The Administration has advised that according to section 3(2) of the Consular Relations Ordinance (Cap. 557), "grave crime" shall be construed as meaning any offence punishable (on a first conviction) with imprisonment for a term up to 5 years or with a more severe sentence. The Administration has further advised that according to Article 9 of the PRC/India Consular Convention, a consular officer is to perform, inter alia, functions authorized by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State. The immunities accorded to a consular member under Article 35(2) should apply to consular functions as provided for under the Convention.

22. Members note that under Article 35(3)(b) of the PRC/India Consular Convention, consular members shall not be immune from civil proceedings taken by a third party for damages arising from an accident in the receiving State caused by a vehicle and the liability for compensation so arising. They have however expressed concern that given the Ps&Is enjoyed by consular members, it may be difficult if not impossible to recover the compensation to which the members concerned is liable.

23. The Administration has advised that Article 46 of the PRC/India Consular Convention, as well as Article 55 of VCCR, have provided that without prejudice to their Ps&Is, it is the duty of all persons enjoying such Ps&Is to respect the laws and regulations of the receiving State. In the case of civil claims by a third party arising from a car accident as provided under Article 35(3)(b) of the PRC/India Consular Convention, compensation should be paid by the person concerned in accordance with the law.

24. In relation to Article 33 of the PRC/Russia Convention, which specifies that the receiving State shall treat consular officers with due respect and shall take appropriate measures to prevent any attack on their personal freedom and dignity, a member has expressed dissatisfaction about the excessive measures such as unnecessary streets closure and diversion of traffics taken by the Administration in fending off demonstrators whose shouting and slogans were perceived as an attack on the dignity of the visiting state leaders on several occasions. The member has requested the Administration to provide a written confirmation on the circumstances under which the measures referred to under Article 33 will be taken.

25. The Administration has advised that the term "dignity" as appeared in Article 33 should be understood in the context of the entire Article. In general, Article 33 requires the receiving State to take appropriate measures in circumstances including the prevention of any action imposed by anyone upon consular officers that would amount to direct coercion. The Administration has also advised that the term "dignity" is not a new concept and is also used in various parts of VCCR, including Article 31(3) (inviolability of the consular premises) and Article 40 (protection of consular officers) therein.

Inviolability of the consular archives

26. Referring to Article 29 of the PRC/Russia Consular Convention, members have queried whether consular correspondence received by a person will be covered by inviolability of consular archives, and requested the Administration to clarify the ownership of consular archives. In response, the Administration has advised that the provision for inviolability of consular archives in Article 29 of the Russia/PRC Consular Convention applies to the archives of the consular post only.

Orders to accord consular posts and personnel additional functions in relation to the administration of estates (L.Ns. 74, 75, 77, 78, 80 and 81)

27. The six Orders set out the additional functions that may be performed by the consular officers of India, New Zealand and the Russian Federation as provided for in the relevant bilateral agreements relating to the administration of estates. Specifically, consular officers of these States are entitled to-

- (a) protect and preserve 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.

28. L.Ns. 74, 77 and 80 are made under the Administration of Estates by Consular Officers Ordinance (Cap.191) to add India, New Zealand and the Russia Federation to the Schedule of Cap.191. L.Ns. 75, 78 and 81 are made under the Consular Conventions Ordinance (Cap. 267) to direct that section 3 of Cap. 267 shall apply to the three states.

29. Members note that the Administration has revised the drafting practice, by virtue of which L.Ns.74, 77 and 80 were made by the Chief Executive (CE) instead of the Chief Secretary for Administration (CS) as appeared to be required in section 3 of Cap.191, and the present form of Legal Notices is

different from that of previous orders under Cap.191 (viz. L.Ns. 53 and 56 of 2005). They have asked the Administration to clarify whether the revised practice will affect the validity of the Orders concerned.

30. In response, the Administration has explained that under section 3 of Cap.191, CE may by order notified in the Gazette under the hand of CS vary the Schedule to Cap.191. The empowering mechanism involves two steps: an order to be made by CE to vary the Schedule and a notice by CS of the order. In L.Ns. 53 and 56 of 2005, the two-step mechanism was completed in one instrument, and it would be a drafting improvement if there are two instruments for carrying out the empowering mechanism under section 3 of Cap. 191, viz. L.Ns.74, 77 and 80 of 2009 are orders made by the CE to vary the Schedule to Cap. 191 and notices of those orders were given by CS under G.N. 2595, 2596 and 2597. The Administration has further advised that the proposed practice has no implication on the validity of L.Ns. 53 and 56 of 2005.

31. Members in general hold no strong view or have no objection to the Administration's proposal. The Legal Adviser to the Subcommittee considers that although section 3 may be subject to different interpretation, the validity of the LNs. should not be affected. Subsequent to the Subcommittee's meeting on 5 June 2009, a member has also expressed her view on the Administration's latest practice. As the member understands, CE is empowered under section 3 of Cap. 191 to make the order, which has to be gazetted. CE may delegate the notification to CS, but this delegation is not compulsory. The net effect of the section is that only one instrument is required, and that instrument bears on its face that CE has made the order, and the instrument may be signed by either CE or CS. In other words, each of the L.Ns. is effective and none of the G.Ns. is required. The Administration has taken note of members' comments.

32. As regards the Chinese text of section 3 of Cap.191, members note that it is inconsistent with the English text and at members' request, the Administration undertakes to amend the relevant text.

Recommendation

33. The Subcommittee supports the nine items of subsidiary legislation.

Advice sought

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

Council Business Division 2
Legislative Council Secretariat
11 June 2009

**Subcommittee on
Subsidiary Legislation Relating to Consular Matters**

Membership list

Chairman Hon James TO Kun-sun

Members Dr Hon Margaret NG

 Hon LAU Kong-wah, JP

 Dr Hon Priscilla LEUNG Mei-fun

(Total : 4 Members)

Clerk Ms Betty FONG

Legal Adviser Ms Clara TAM

Date 22 May 2009