

Consular privileges and immunities: members of the consular post

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P&I of the members of the consular post

1. Protection of consular officers;
2. Personal inviolability;
3. Immunity from jurisdiction;
4. Determination of official functions;
5. Liability to give evidence
6. Exemption from social and civic service;
7. Exemption from taxation and customs inspection;
8. P&I of family members;
9. Beginning and end of consular P&I;
10. Nationals or permanent residents of the receiving state;
11. Waiver of immunities



Protection of consular officers

- Obligation of receiving state to treat consular officers “**with due respect**” and “**take all appropriate steps**” to prevent any attack on their person, freedom or dignity (Art. 40 of the VCCR).
- If the receiving State does not ensure appropriate protection of consular officers, the sending state can take countermeasures which are established in the VCCR (the most radical of which is the termination of consular relations)
- Protection is granted to the consular officers in order to ensure the effective exercise of their functions (functional immunity)



Personal inviolability (VCCR Art. 41) (1)

1. Consular officers **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.**
2. **Except in the case specified in paragraph I of this article, consular officers shall not be committed to prison or be liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.**
3. **If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities.** Nevertheless, the proceedings shall be conducted with the *respect due to him* by reason of his official position and, except in the case specified in paragraph I of this article, in a manner which will *hamper the exercise of consular functions as little as possible*. When, in the circumstances mentioned in **paragraph I of this article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.**



Personal inviolability (VCCR Art. 41) (2)

- In the context of Art 41 of the VCCR, the content of “*grave crime*” is not uniform in all states – in some states the crime is grave, in the others –not; thus no agreement on this issue.
- Under Art 41 of the VCCR “*competent judicial authority*” includes only courts, not other State institutions, e.g. the prosecutors (even if in some states the prosecutors are entitled to issue decisions on arrest or detention on remand)
- Even if the consular officer is caught in the scene of the crime (*in flagrante delicto*) – he/ she cannot be arrested without the decision by the competent judicial authority (the aim of such regulation: to prevent the abuse of the police)

Immunity from jurisdiction (1)

- Immunity is of functional nature (*VCCR preamble*: “not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States”)
- “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.**” (Art.43.1 of the VCCR)



3. Immunity from jurisdiction (2)

- *Exceptions (VCCR Art. 43.2):*

in respect of a **civil action** either:

- (a) arising out of a **contract concluded by a consular officer** or a consular employee **in which he did not contract expressly or impliedly as an agent of the sending State**; or
- (b) by a third party for **damage arising from an accident** in the receiving State caused by a vehicle, vessel or aircraft. (+ VCCR Art.56 *Insurance against third party risks*)

43.2(a): e.g. the landlords providing their property for rent for the consular officers are ensured that the consular officers will comply with their obligations under the contract and will not rely on their immunity



Immunity from jurisdiction (3)

- If due to the road accident, the crime is committed, the issue of the criminal responsibility of the consular officers is solved as follows:
 - on the basis of the provisions of bilateral agreements and the national law of the receiving state;
 - no special agreements, then under Art. 41.1 of the VCCR (the criminal responsibility will depend whether the crime is grave, whether the official functions were exercised)

Consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided in paragraph 3 of Article 44

3. Determination of official functions

The notion of “official functions” (derived from the VCCR Art. 43.1):

- *The act is official when both states (receiving and sending) recognize it as such (Lee)*
- the main arguments are to be by the sending state, the last instance – by the courts of the receiving state.
- *Courts* usually ask the opinion of the ministry for foreign relations and analyze the related documents to determine the aim.
- Official functions should *not* be determined by work hours;
- Intentional and violent crimes should not be attributed to official functions.



Liability to give evidence

Art. 44, para. 3 of the VCCR :

*“Members of a consular post 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. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.”*

The authorities of the receiving State cannot decide whether the evidence is related to exercise of consular functions, official correspondence, documents. Some consular conventions state that in case a dispute about the attribution to the consular activities arises between the sending and receiving State, it is resolved via diplomatic channels.



Liability to give evidence

- All the members of a consular post, including the consular officers, may be called upon to attend as witnesses in the course of judicial or administrative proceedings in order to give evidence if it is not related to their functions. However, if a consular officer should decline to give evidence on the questions *not* related to his functions, no coercive measure or penalty may be applied to him (para. 1 of Art 44 of the VCCR).
- The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing (para. 2 of Art 44 of the VCCR)



Liability to give evidence

- Therefore, rules concerning giving evidence by the consular officers in the VCCR differ from the rules in the VCDR, para. 2 of Art.31 (under para. 2 of Art.31 of the VCDR „A diplomatic agent is not obliged to give evidence as a witness“.)



Exemption from social and civic service

- Reason is the *temporal* nature of functions (but voluntary social payments can be done if they are permitted)
- See *VCCR Art. 48, 52*
- The consular officers, consular employees and their family members are not required to register as foreigners or obtain a relevant permit to live in the receiving state (exception – if a consular employee does not permanently work in the consular post or who has private paid activities in the receiving state)



Exemption from taxation and customs inspection

- Types of taxes and duties are listed in Art. 49 of the VCCR.
- Exceptions when the taxes and duties are paid in Art 49 (exceptions are based on private activity of the members of the consular post in the receiving state)
- *Art. 50.1(b) of the VCCR*: exemption from taxes, customs duties, and related charges on articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment, in accordance with the laws and regulations of the receiving state (e.g. receiving states may limit the period for establishment, quantities of items, establish time for selling property etc.).
- „**Personal baggage** accompanying consular officers and members of their families forming part of their households shall be **exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in sub-paragraph (b) of paragraph I of this Article, or articles the import or export of which is prohibited by the laws** and regulations of the receiving State or which are subject to its quarantine laws and regulations. Such inspection shall be carried out in the presence of the consular officer

Exemption from taxation and customs inspection

- Contrary to consular officers, consular employees enjoy the privileges and exemptions from customs duties specified in paragraph 1 of Art. 50 only in respect of articles imported at the time of first installation“ (para. 2 of Art 50 of the VCCR). Moreover, such a privilege is not applied to the members of their family



Privileges and immunities of family members of the consular officers and of the consular employees

- P&I for the family members are similar to the P&I for the members of consular staff (see Art 46, 48, 49, 50-55, 57 and 71) exception VCCR Art. 41 (**no personal inviolability**)
- P&I may be extended by bilateral agreements (e.g. Personal inviolability can be granted).
- No definition for the “family” : the only criterion in the VCCR is living together with the consular officer or consular employee.
- Work: permitted by the competent authorities, but in such a case no immunity from civil & adm. jurisdiction in the sphere related to work done and no exemption from social security taxation on the revenues.

Beginning and end of consular P&I

See Art. 53 of the VCCR :



Waiver of privileges and immunities (1)

- Waiver is the right of the state, thus only the state, not the members of the consular post can waive of privileges and immunities. Which state institution can waive and in which way, form – regulated under the domestic law of the state.
- The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in articles 41 (i.e. personal inviolability of consular officers), 43 (i.e. immunity from jurisdiction) and 44 (liability to give evidence) (see para. I of Art 45 of the VCCR)



Waiver of privileges and immunities (2)

- Express and in writing or:
- Implied by actions of the consular officer or consular employee by initiating of proceedings (*„The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim“*, see **VCCR Art. 44.3)**
- *„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 measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary“*, see **Art. 45.4 of the VCCR)**