

Consular Protection for Foreign Businesses in Asia: Rights and Challenges

Doing business in the dynamic economies of Asia is critical for companies of all shapes and sizes. This looks set to increase as economies open up to greater trade and investment as a result of new trade deals. However, serious challenges can arise if foreign staff run into difficulties with the local legal system, especially if they are arrested or detained. These issues can arise either during a fleeting business trip of only a few days, or during more extended stays. Here Lexbridge looks at the international legal regime for providing consular assistance in these situations, and some important cases that have arisen in recent times in Asia.

Applicable International Legal Framework

Under the Vienna Convention on Consular Relations the arrest of a foreign national must be reported to the relevant diplomatic mission that represents that national in the foreign country. It is important to remember that a country may not have diplomatic representation in every other country, and in some countries consular support may be provided by a partner government. Once such a report has been made, consular officials can put in place arrangements for a visit to check on the welfare of the detained person. Subject to the outcome of that visit, certain representations may be made including the provision of medical care and assistance, and access to a lawyer. The Vienna Convention has 180 States parties, and the processes provided for under the Convention are generally well respected, as there is a mutual interest amongst States to uphold its provisions.

Various states have sought in recent decades to bring clarity to the assistance that it can provide to their citizens, including business people who are detained whilst overseas. In the case of

Australia, the Department of Foreign Affairs and Trade's Consular Services Charter outlines the extent of the assistance that can be provided by a consular official. While legal advice, for example, cannot be given, details of local lawyers and interpreters can be provided. DFAT also makes clear that it will not intervene in another country's court proceedings or legal matters including employment disputes, commercial disputes, and criminal cases. Subject to meeting Australian government criteria, legal aid can be provided to Australians subject to foreign legal proceedings and who need to engage foreign lawyers.

Some countries have supplemented the Vienna Convention with bilateral consular agreements. China, for example, has up to 40 of these bilateral agreements with countries including Australia, Canada, Germany, India, Japan, Mexico, and the US. A feature of these agreements is a degree of precision around notification following detention and arrest of a citizen, and procedures during a trial. These agreements operate on a reciprocal basis for Chinese nationals who may be detained in the other countries.

Recent Cases

There have been a number of cases in Asia in recent years where foreign staff have been detained or arrested by local authorities. By way of example, Australians and Australian companies have in recent years been the subject of high-profile legal proceedings arising from their business activities in countries such as Cambodia and China. The arrest and conviction in China of Australian businessmen such as Stern Hu (convicted of stealing commercial secrets and bribery in 2009 and sentenced to 10 years imprisonment), Matthew Ng (convicted of bribery and embezzlement in 2012 and sentenced to 11 years imprisonment), and the 2016 arrest in China of Australian employees of Crown Casino placed a spotlight on these issues. There have also been cases involving Canadian, Swedish, Turkish, UK and US nationals in China.

A feature of a number of the consular cases that have arisen with foreign businesses people in Asia is that they may hold nationality of the visited country, as well as nationality of another country, but enter on the passport of the visited country. This can lead to complex issues. For example, in China dual nationality is not widely recognised, especially for individuals born in China who have acquired another nationality. China's bilateral consular agreements will often make clear that dual nationality is not recognised which can affect the availability of consular assistance. Similarly, the DFAT Consular Services Charter recognises the challenges these cases raise, providing that "If you're a dual national, we will only be able to assist you in your country of other nationality in exceptional circumstances."

Key Lessons

These cases illustrate the importance of foreign business being fully aware of the local legal system in which they operate. It should not be assumed that the law at home is the same as the law in the foreign country. Further, business practices deemed to be acceptable and consistent with local law in one country, may not be acceptable in another country and may even result in criminal prosecutions.

Care also needs to be taken by dual national business travellers to ensure they travel on their home-country passports wherever they may be doing business around the world. While many governments have a commendable track record of providing consular assistance to their nationals caught up in legal proceedings while overseas, there needs to be an awareness that there are clear limits on the extent of the assistance that governments can provide.

Finally, it is important to know how to respond quickly and effectively should a staff member be detained or arrested to ensure their rights are fully exercised under the Vienna Convention on Consular Relations and other agreements.

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**For further inquiries, please contact Lexbridge Lawyers on +61 (2) 6198 3392
or send an email to enquiries@lexbridgelawyers.com**