

**For information
on 4 June 2013**

**Bills Committee on
Trust Law (Amendment) Bill 2013**

Administration's Response to Written Submissions by Deputations

PURPOSE

This paper provides the Administration's response to the written submissions made by the Hong Kong Bar Association ("HKBA") (LC Paper No. CB(1)1089/12-13(03)), the Hong Kong Association of Banks ("HKAB") (LC Paper No. CB(1)1089/12-13(05)) and Mr David GUNSON (LC Paper No. CB(1)1089/12-13(02)) in respect of the issues discussed at the meeting on 27 May 2013 –

- (a) abolition of the rule against perpetuities ("RAP");
- (b) statutory anti-*Bartlett v Barclays* clause¹;
- (c) statutory control on trustees' exemption clauses; and
- (d) authorized list of investment.

ABOLITION OF RAP

2. We note from the written submissions Mr Gunson's support for the proposed abolition of RAP, and that HKAB does not object to the proposal. We also note that HKBA, in its earlier response to our public consultation held in 2009, indicated their support for the reform of RAP.

¹ Please refer to the proposal by the Joint Committee on Trust Law Reform set out in paragraphs 3.1 to 3.6 of their submission to the Bills Committee (LegCo Paper No. CB(1)798/12-13(03)) for details. The proposal is to introduce a statutory provision to enhance the effectiveness and enforceability of anti-*Bartlett v Barclays* clauses in the trust deed (which in general seek to limit trustees' obligations in relation to ownership and management of underlying companies of trusts and to consequently relieve trustees from relevant liabilities to beneficiaries).

3. In particular, we note Mr Gunson's view that RAP is redundant given the leasehold land tenure system of Hong Kong and that RAP has led to practical problems. He added that RAP imposes an arbitrary time limit on the existence of trusts but there is no such a limit on companies. He also suggested at the meeting on 27 May 2013 that the abolition of RAP would bring new business to Hong Kong.

4. The Administration's considerations for the proposal to abolish RAP with respect to new trust have been set out in LegCo Paper No. CB(1)869/12-13(02).

STATUTORY ANTI-BARLETT *v* BARCLAYS CLAUSE

5. Under the existing regime, settlors can relieve trustees of certain duties through provisions in the trust deeds. The effect and enforceability of the provision in the trust deed would depend on the drafting of the provision and relevant facts of the case, and ultimately be determined by the court.

6. The proposed statutory provision would have implications for the interest of settlors and beneficiaries as well as trustees. Given that there is no such statutory provision in any major comparable common law jurisdictions and that there was no focused or detailed discussion on the matter in the past, it is prudent and imperative that the implications of such a provision be studied carefully before a policy view is taken to pursue the idea. Therefore it would not be appropriate to adopt it in the current Bill. We would welcome further discussion with the industry and other stakeholders on this idea in future review of the trust law.

STATUTORY CONTROL ON TRUSTEES' EXEMPTION CLAUSES

7. On the question whether there should be a statutory definition of "gross negligence" in the proposed statutory control on trustees' exemption clauses, we would like to point out that the term "gross negligence" has been adopted in a number of ordinances without specific

definition in those ordinances, which would allow the court to construe “gross negligence” in light of the circumstances of each case. We consider it more appropriate not to create a definition of the term in the trust law regime in a piecemeal manner, pending further development of case law. We therefore have not included any definition of “gross negligence” in the Bill.

AUTHORISED LIST OF INVESTMENT

8. As we have explained at the meeting on 27 May 2013, the Second Schedule is default in nature and is subject to the trust instruments. Settlers can provide very wide investment power to trustees and in those cases the Second Schedule would not be applicable. The Second Schedule is intended to provide a benchmark for prudential investments for lay trustees and its retention was supported by most respondents to public consultations. We will keep the list under review in the future.

OTHER TECHNICAL ASPECTS OF THE BILL

9. Our response to other more technical comments on the Bill raised in the submissions is set out at **Annex**.

ADVICE SOUGHT

10. Members are invited to note the content of this paper.

Financial Services and the Treasury Bureau
31 May 2013

**Administration's Response to
Technical Comments in the Submissions from Deputations**

TRUSTEE'S POWER TO INSURE (paragraphs 9 to 11 of HKBA's submission)

HKBA enquired whether section 21 of the Bill should be clarified as to whether a “bare trust” includes a trust in which the trustee has a lien over the trust property for outstanding liability incurred by the trustee in connection with the trust.

2. Section 21(3) provides that a property is held on a bare trust if the beneficiaries are absolutely entitled to the trust property and are of full age and capacity. Whether or not the beneficiaries are absolutely entitled to a trust property over which the trustee has a lien would be a matter of fact to be determined by the court according to relevant common law principles, which would not be altered by the Bill. Our provision is modelled on a similar provision in the United Kingdom Trustee Act 2000 (“UKTA 2000”) which has been in operation for more than a decade and we consider that there is no need to clarify the provision.

APPOINTMENT OF AGENTS (paragraphs 12 to 14 of HKBA's submission)

Section 41B

3. With respect to section 41B of the Bill which provides that “the trustees of a trust may authorize a person...”, HKBA suggested replacing “a person” with “any person”, in line with the provision in the UKTA 2000.

4. Our drafting counsel noted that the sections on appointment of agents in UKTA 2000 use “any person” and “a person” rather

inconsistently. She advised that “a person” would convey exactly the same meaning as “any person” in this context. This is accentuated by the Chinese equivalent which rendered the expression as "任何人".

Section 41O(1)(b) and (2)(b)

5. HKBA enquired if the drafting of section 41O of the Bill should be clarified as to whether a trustee who failed to conduct a review at all would be liable for any act or omission of an agent, nominee, custodian or delegate (collectively called “representative” thereafter in this note).

6. The prerequisite to invoking section 41O to exculpate a trustee from liability is that the trustee must have discharged the statutory duty of care when, inter alia, carrying out the duties to review under section 41M or 41N of the Bill. Sections 41M(1) and 41N(1) have made it incumbent on the trustee to keep under review the arrangements under which the representative acts. As such, if the trustee disregards his duty to conduct review, the trustee would be unable to invoke section 41O to absolve himself of liability caused by the acts or defaults of the representative. Our provision is modelled on a similar provision in the United Kingdom Trustee Act 2000 (“UKTA 2000”) and we consider that there is no need to clarify the provision.

TRUSTEES’ REMUNERATION (paragraphs 17 to 18 of HKBA’s submission)

7. HKBA enquired if the drafting of sections 41S and 41T of the Bill should be clarified as to –

- (a) whether the payment/remuneration can be received by the trustee’s firm; and
- (b) whether the payment/remuneration covers fees for services rendered by the trustee through the firm.

8. Sections 41S and 41T entitle a trustee acting in a professional capacity to receive remuneration under specific circumstances. Both sections deal with trustee’s entitlement to remuneration, but the manner

of payment to a trustee is not circumscribed by the provisions. *Lewin on Trusts* states that it is implicit that the trustee's firm is entitled to receive payment/remuneration for services which come within the provisions. We are unsure about the meaning of the phrase "services rendered by the trustee *through* the firm". Trustees, as well as agents hired by them, are entitled to remuneration for services they have rendered under section 41S(3) or 41T(3) (for trustees) and section 41V (for agents) respectively. Our provision is modelled on a similar provision in the United Kingdom Trustee Act 2000 ("UKTA 2000") and we consider that there is no need to clarify the provision.

TRUSTEES' EXPENSES (paragraphs 19 to 21 of HKBA's submission)

9. HKBA enquired if section 41U of the Bill would abolish two limitations under the general law as mentioned in paragraph 20 of its submission and whether it would reverse the traditional rules enunciated in *Carver v Duncan*².

10. Section 41U codifies the common law position and provides for the general entitlement of a trustee to reimbursement of the expenses incurred in connection with the trust out of the trust funds. For the limitations mentioned by HKBA and the apportionment between income and capital, the common law should apply. Section 41U does not intend to displace the general law positions mentioned by HKBA. Indeed, according to *Lewin on Trusts* and *Thomas and Hudson: Law of Trusts*, the relevant UK provision was not intended to alter these rules. As such, trustees would still be subject to such common law principles relating to income and capital when reimbursing their expenses out of the trust funds. The UK Law Reform Commission has also taken the view that the law on classification of trust expenses is both acceptable in principle and sufficiently clear and thus made no recommendation for reform in 2004. Our provision is modelled on a similar provision in the United Kingdom Trustee Act 2000 ("UKTA 2000") and we consider that there is no need to clarify the provision.

² [1985] AC 1082 at 1120: "The general rule is that income must bear all ordinary outgoings of a recurrent nature... Capital must bear all costs, charges, and expenses incurred for the benefit of the whole estate."

ANTI-FORCED HEIRSHIP PROVISION (paragraph (d) of HKAB's submission)

11. Regarding the anti-forced heirship provision in section 41Y of the Bill, HKAB suggested that the protection afforded by the section should be available to all trusts governed by Hong Kong law irrespective of the residence or central management and control of trustees. It further proposed that the protection should also be extended to the transfer of immovable property.

12. The objective of the provision is to enhance Hong Kong's attractiveness as a domicile for trusts. There is a similar residency requirement in the equivalent Singaporean provision. We consider it necessary for ensuring that trustees based in Hong Kong, rather than other trustees, would benefit from the proposal.

13. It is generally accepted that in both civil and common law jurisdictions, issues relating to immovables are governed by the law where they are situated. Thus, if the immovable trust property is situated outside Hong Kong, the foreign jurisdiction will be the court of the forum and the Hong Kong provision will have no effect. Additionally, the equivalent Singaporean provision also focuses on movable property only.

AMENDMENTS TO ENDURING POWER OF ATTORNEY ORDINANCE ("EPAO") (paragraph (d) of HKAB's submission)

14. HKAB suggested retaining section 8(3)(a) of the EPAO because the EPAO addresses a particular situation, i.e. the ability for an individual to appoint an attorney which would have effect after the individual has become mentally incapacitated.

15. There are already mechanisms in the existing TO to deal with situations where a trustee has become mentally incapacitated. For example, other trustees may invoke the existing section 37 of the TO on replacing trustees unfit to act or incapable of acting. In this Bill, beneficiaries may use the proposed court-free mechanism in section 40B to replace a mentally incapacitated trustee under certain circumstances.

Repealing section 8(3)(a) of the EPAO will ensure that delegation of trust is solely governed by TO and thus ensure consistency.

Financial Services and the Treasury Bureau
31 May 2013