

立法會
Legislative Council

LC Paper No. CB(1)870/12-13
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/12/2

Bills Committee on Trust Law (Amendment) Bill 2013

**Minutes of the second meeting held on
Tuesday, 19 March 2013, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex**

Members present : Hon NG Leung-sing, SBS, JP (Chairman)
Hon Kenneth LEUNG (Deputy Chairman)
Hon James TO Kun-sun
Hon Abraham SHEK Lai-him, SBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Starry LEE Wai-king, JP
Hon CHAN Kin-por, BBS, JP
Hon Paul TSE Wai-chun, JP
Hon Dennis KWOK

Members absent : Hon Albert HO Chun-yan
Hon Cyd HO Sau-lan
Hon Martin LIAO Cheung-kong, JP

Public officers attending : **Agenda item II**
Mr Patrick HO, JP
Deputy Secretary for Financial Services and the
Treasury (Financial Services) 3

Mr Arsene YIU
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services) 6

Ms Phyllis POON
Senior Government Counsel
Department of Justice

Miss Emma WONG
Senior Government Counsel
Department of Justice

Clerk in attendance : Ms Sharon CHUNG
Chief Council Secretary (1)6

Staff in attendance : Miss Winnie LO
Assistant Legal Adviser 7

Mr Anthony CHU
Senior Council Secretary (1)6

Ms Christina SHIU
Legislative Assistant (1)6

Action

I Confirmation of minutes
(LC Paper No. CB(1)701/12-13 -- Minutes of meeting on
1 March 2013)

The minutes of the meeting held on 1 March 2013 were confirmed.

II Meeting with the Administration
(LC Paper No. CB(3)357/12-13 -- The Bill
LC Paper No. CB(1)700/12-13(01) -- Marked-up copy of the Bill
prepared by the Legal Service
Division
(*Restricted to members*)
File Ref.: G4/55/5C -- Legislative Council Brief

Action

LC Paper No. LS26/12-13 -- Legal Service Division Report
LC Paper No. CB(1)700/12-13(02) -- Paper on Trust Law
(Amendment) Bill 2013
prepared by the Legislative
Council Secretariat
(background brief))

2. With the aid of a powerpoint presentation, Deputy Secretary for Financial Services and the Treasury (Financial Services) 3 and Principal Assistant Secretary for Financial Services and the Treasury (Financial Services) 6 introduced the objectives of the Trust Law (Amendment) Bill 2013 ("the Bill") and the major legislative proposals therein.

(Post-meeting note: A soft copy of the powerpoint presentation materials (LC Paper No. CB(1)748/12-13(01)) was circulated to members by email on 20 March 2013.)

3. The Bills Committee deliberated (Index of proceedings attached at the **Appendix**).

4. Given that the rule against perpetuities ("RAP") for trusts was retained in other common law jurisdictions, such as the United Kingdom, for the purpose of ensuring that assets, especially land, would not be tied up in trust longer than desirable, members expressed concerns about the implication, after the abolition of RAP in Hong Kong, for trusts governed by the laws of Hong Kong but holding assets in other common law jurisdictions. The Administration was requested to provide information on how the perpetuity of such trusts would be affected by the abolition of RAP.

(*Post-meeting note:* The supplementary information provided by the Administration was issued to members on 3 April 2013 vide LC Paper No. CB(1)800/12-13(02).)

III Any other business

5. The Chairman reminded members that the next meeting of the Bills Committee would be held on Tuesday, 9 April 2013 at 10:45 am.

Action

6. Members noted the meeting schedule for the Bills Committee from April to June 2013 as follows:

<u>Date</u>	<u>Time</u>
9 April 2013 (Tuesday)	10:45 am - 12:45 pm
22 April 2013 (Monday)	10:45 am - 12:45 pm
7 May 2013 (Tuesday)	4:30 pm - 6:30 pm
21 May 2013 (Tuesday)	2:30 pm - 4:30 pm
4 June 2013 (Tuesday)	4:30 pm - 6:30 pm
13 June 2013 (Thursday)	2:30 pm - 4:30 pm

7. The Chairman said that relevant organizations had been invited to give written submissions on the Bill and an invitation for written submissions had also been posted on the website of the Legislative Council. The deadline for sending submissions to the Bills Committee was 28 March 2013. Members might discuss whether a public hearing should be held for deputations to make oral presentations of views to the Bills Committee after perusing the submissions.

8. There being no other business, the meeting ended at 6:16 pm.

Council Business Division 1
Legislative Council Secretariat
18 April 2013

Bills Committee on Trust Law (Amendment) Bill 2013

**Proceedings of the second meeting
on Tuesday, 19 March 2013, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
000248 - 000356	Chairman	Confirmation of minutes of meeting on 1 March 2013 (LC Paper No. CB(1)720/12-13)	
000357 - 003232	Administration	Briefing on the objectives of the Trust Law (Amendment) Bill 2013 ("the Bill") and the major legislative proposals therein	
003233 - 004336	Mr Ronny TONG Administration	<p>Mr Ronny TONG enquired --</p> <ul style="list-style-type: none"> (a) whether the Bill would apply to trusts set up in places other than Hong Kong; (b) whether any distinctions were made in the proposals between trustees acting in a professional capacity and lay trustees; (c) whether the codification of common law positions in the Bill would increase or reduce the trustee's legal liabilities; (d) about the liability of trustees for breach of trust other than fraud, willful misconduct and gross negligence; and (e) whether the provisions in the trust instruments of some family trusts which had imposed restrictions on the appointment of trustees could override the proposed beneficiaries' rights to appoint and retire trustees. <p>The Administration explained that --</p> <ul style="list-style-type: none"> (a) the proposals in the Bill would be applicable to all trusts which were governed by the laws of Hong Kong; if it was not clear in a trust instrument whether the trust was so governed, the case would be determined by reference to the relevant 	

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		<p>circumstances; such a determination would be beyond the scope of the Trustee Ordinance (Cap. 29);</p> <p>(b) the proposals had taken into account the difference between trustees acting in a professional capacity and lay trustees; for instance, the statutory duty of care to be imposed would be higher where the trustee was acting in the course of a business or profession, and the provisions in the Bill in respect of statutory control on exemption clause and the entitlement to remuneration would only be applicable to trustees acting in a professional capacity;</p> <p>(c) the standard for trustees' duty of care under the Bill was largely consistent with that established by common law; in particular, it was noted that trustees acting in a professional capacity had been held in English court cases to have a higher duty of care and this was reflected in the proposed statutory duty of care in the Bill;</p> <p>(d) the proposed statutory control of trustees' exemption clause sought to better protect the interests of settlors and beneficiaries vis-à-vis the common law position which only invalidated an exemption clause seeking to avoid liability arising from fraud, since a trustee's exemption clause would be void, under the proposal, if the clause sought to exempt trustees from liability arising from fraud, willful misconduct and gross negligence; besides, the trust instrument could set out a more stringent control on the exemption clause; and</p> <p>(e) the right of beneficiaries to invoke the court-free mechanism to remove trustees was subject to conditions; only beneficiaries of full age and capacity absolutely entitled to the trust property, who were already afforded a power under the common law to terminate the trust, could invoke the aforesaid mechanism; it</p>	

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		<p>would also be subject to contrary intention in the instrument creating the trust.</p>	
<p>004337 - 005139</p>	<p>Mr CHAN Kin-por Administration</p>	<p>Mr CHAN Kin-por relayed the support of the trust industry to the proposals in the Bill and the opinions that the Bill should be passed as soon as possible. He suggested the Administration to consider the following further proposals of the industry at a future review of TO --</p> <p>(a) to allow for the establishment of non-charitable purpose trusts; and</p> <p>(b) to allow wider reserved powers of settlors.</p> <p>The Administration explained that --</p> <p>(a) in order to maintain and enhance Hong Kong's status as a major international asset management and financial centre, it would keep in view the implementation of the legislative proposals in the Bill after its coming into operation and would continue its liaison with the trust industry on further review of the trust law regime;</p> <p>(b) non-charitable purpose trusts had no specified beneficiaries and were generally held to be void under common law; no comparable common law jurisdictions had provided for the setting up of non-charitable purpose trusts as there were regulatory concerns on the transparency of such arrangements and on the risk of tax evasion; in order not to undermine Hong Kong's status as a major international financial centre, it would be prudent not to rush to pursue this proposal at this stage; and</p> <p>(c) as regards the proposal to further widen the reserved powers of settlors, it was necessary to ensure that there was a reasonable balance such that the reserved powers would not be excessive, and it would take considerable time beyond the target timeframe for the current Bill to</p>	

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		<p>assess carefully the implications and desirability of this proposal.</p>	
005140 - 010028	Mr Dennis KWOK Administration	<p>Mr Dennis KWOK asked if the Administration would reconsider the Hong Kong Bar Association's proposal to substitute the term "gross negligence" by "reckless act" for the statutory control on exemption clause in relation to trustees acting in a business or profession. He opined that the definition of "gross negligence" was imprecise.</p> <p>Considering that trustees acting in the course of business or profession had less liabilities than lawyers and accountants in rendering services to clients, i.e. not to be responsible for "reckless act" and not required to take out any professional indemnity insurance, Mr KWOK expressed concern that the regulatory regime on the conduct of trustees might not be adequate to protect beneficiaries' interests, especially where such professionals as lawyers and accountants might also act as trustees.</p> <p>The Administration explained that --</p> <p>(a) the suggestion of "reckless act" in the consultation paper during the two-month public consultation on the detailed legislative proposals in March 2012 did not receive support from the majority of respondents and there were views that this formulation was not appropriate as it was derived from criminal law;</p> <p>(b) "gross negligence" had been adopted in Hong Kong laws and there was continued development of case law;</p> <p>(c) the difference between "gross negligence" and "wilful misconduct" could be explained clearly by reference to the presence of a mental element on the part of the perpetrator in the case of "wilful misconduct";</p> <p>(d) the proposals in the Bill sought to enhance the protection of beneficiaries' interests;</p>	

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		<p>under the common law, a trustees' exemption clause in the trust instrument could validly exempt trustees from liability of all breaches of trust except fraud, whereas under the Bill, clauses to exempt liability arising from fraud, wilful misconduct and gross negligence would be void; and</p> <p>(e) the long-standing regime governing trustees under the common law was different from the regime governing other professionals, therefore it was not appropriate to make direct comparison with the relevant provisions for legal or accounting professions; notwithstanding this, this proposal in the Bill accorded with Mr KWOK's opinion that protection of beneficiaries' interests should be enhanced.</p>	
010029 - 010536	Deputy Chairman Administration	<p>The Deputy Chairman enquired about the justifications for the abolition of the rule against perpetuities ("RAP").</p> <p>The Administration explained that --</p> <p>(a) RAP was originally formulated to help ensure that assets, especially land, would not be tied up in trusts longer than desirable; unlike some other countries where freehold land existed, almost all land in Hong Kong was held on leasehold tenure; accordingly, in Hong Kong, the risk of land being tied up had been reduced;</p> <p>(b) RAP might produce a result not expected by settlors, because a non-observance of RAP would render a disposition void from the outset;</p> <p>(c) respondents' views during past consultation exercises also supported the abolition of RAP; there were also views that no evidence suggested that abolition of RAP would lead to substantial amount of assets being locked up; and</p>	

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		<p>(d) abolition of RAP would only take prospective effect for all new trusts created after the commencement of the Bill.</p> <p>The Deputy Chairman expressed concerns about the implication, after the abolition of RAP in Hong Kong, for trusts governed by the laws of Hong Kong but holding assets in other common law jurisdictions where RAP was retained. He asked the Administration to provide information on the impact of the abolition of RAP on these trusts.</p>	<p>The Administration to take follow-up action as in paragraph 4 of the minutes</p>
<p>010537 - 012144</p>	<p>Mr Paul TSE Administration</p>	<p>Mr Paul TSE opined that --</p> <p>(a) as some clauses in the Bill would be applicable to both existing and new trusts while the abolition of RAP would only be confined to new trusts, this would cause confusion; and</p> <p>(b) to avoid confusion, it was preferable to have a clear-cut and across-the-board application of the Bill.</p> <p>Mr TSE enquired about --</p> <p>(a) the justifications for applying the abolition of RAP only prospectively to all new trusts formed after the enactment of the relevant law;</p> <p>(b) whether the applicability of each clause to existing trusts and/or new trusts would be stated clearly in the Bill; and</p> <p>(c) the justifications for not codifying the common law rules with respect to what constituted a valid trust.</p> <p>The Administration replied that --</p> <p>(a) some existing trusts were still subject to the statutory "wait-and-see" period which would end after the commencement of the Bill; retrospective application of the abolition of RAP to existing trusts might lead to uncertainty as to the validity of</p>	

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		<p>pre-existing trusts; to avoid possible implications on the validity of any pre-existing trust, the Administration proposed that the abolition of RAP would only apply to new trusts; this arrangement would not be unfair to settlors of existing trusts as they had expected RAP to be applicable when they set up the trusts;</p> <p>(b) all amendments to TO as proposed in the Bill would be applicable to all trusts; if the provisions were intended to differ from the aforesaid position, this would be stipulated expressly, for instance, the abolition of RAP had been expressly stated to apply prospectively to new trusts set up after the commencement of the Bill;</p> <p>(c) the Administration had no intention to make changes to the other elements of the common law as far as trusts were concerned, which fell outside the scope of the Bill; for the purpose of the Bill, reference had been made, inter alia, to other comparable common law jurisdictions, such as the UK and Singapore, in codifying certain common law rules and updating Hong Kong's trust law regime to facilitate trust administration and attract more trust businesses; and</p> <p>(d) most of the proposals in the Bill were default in nature and would be subject to the intentions of the settlors at the time the trusts had been set up as reflected in the trust instrument.</p>	
012145 - 012640	Deputy Chairman Administration Chairman	<p>The Deputy Chairman pointed out that upon the enactment of the proposals in the Bill, there would be at least four scenarios for existing trusts --</p> <p>(a) scenario A - default provisions in the Bill would apply to a trust if the trust instrument was silent on the relevant issues;</p> <p>(b) scenario B - the trust instrument could override the default provisions in the Bill;</p>	

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		<p>(c) scenario C - certain provisions in the Bill could override the trust instrument (e.g. trustees' exemption clause); and</p> <p>(d) scenario D - certain provisions in the Bill would not apply to an existing trust (e.g. abolition of RAP).</p> <p>The Deputy Chairman was concerned that such complexity would create difficulty for trustees to differentiate the applicability of different provisions in the Bill and opined that, to facilitate the smooth implementation of the proposals in the Bill, the Administration should consider applying the Bill to all trusts or all new trusts.</p> <p>The Chairman suggested that the Administration could liaise with the industry to understand whether the point raised by the Deputy Chairman would be an issue.</p> <p>The Administration replied that --</p> <p>(a) for scenario C, only the proposed statutory control on the exemption clause would be relevant; and for scenario D, only the abolition of RAP would be relevant;</p> <p>(b) scenarios A and B would apply to all existing and new trusts; and</p> <p>(c) the applicability of specific new requirements had been indicated clearly in the Bill;</p> <p>as such, the proposed scheme would not be unduly complicated to understand but the Administration would continue to maintain liaison with the trust industry which was already fully aware of the provisions of the Bill.</p>	
012641 - 013333	Mr Paul TSE Administration	<p>Mr Paul TSE enquired whether the Administration would consider --</p> <p>(a) differentiating between trusts of which settlors were still alive and those of which</p>	

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		<p>settlers who had passed away in considering the applicability of the provisions in the Bill; and</p> <p>(b) providing an omnibus escape clause whereby relevant parties could apply for exemption from the applicability of the new provisions to certain trusts.</p> <p>The Administration replied that --</p> <p>(a) the Bill already provided additional checks and balances on trustees in light of the proposals to provide them with additional default powers; besides, the Bill contained a proposal of court-free procedures for eligible beneficiaries to change the trustees; and eligible beneficiaries could stop the operation of the trust through court procedures; these measures would help ensure that the interests of the beneficiaries were adequately protected; and</p> <p>(b) the introduction of an escape clause might cause confusion and uncertainty and have other wider implications which had not been examined.</p>	
013334 - 014000	Deputy Chairman Administration Chairman	<p>Noting that "charitable trusts" was mentioned in the Bill, the Deputy Chairman asked whether the definition of "charitable trusts" would tie in with the charitable trusts registered under section 88 of the Inland Revenue Ordinance (Cap. 112) ("IRO"). If the reference to "charitable trusts" would be retained in the Bill, he suggested that the relevant provisions should form a separate section to facilitate the compliance of trustees. He proposed that a public hearing be held for deputations, including parties concerned with charitable trusts, to present their views on the Bill to the Bills Committee.</p> <p>The Administration advised that --</p> <p>(a) the concept of charitable trusts was not new and could be found in common law; such trusts were differentiated by their purposes</p>	

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		<p>and were not restricted to those registered under section 88 of IRO;</p> <p>(b) there was a body of case law on what constituted a charitable trust;</p> <p>(c) considering the public nature of the objectives of these trusts, the Bill had proposed that some restrictions on accumulations of income for new charitable trusts be retained so that the income would be applied for the intended charitable purposes; and</p> <p>(d) to enhance user-friendliness, consideration could be given to compiling a non-legal publication to cover the provisions applicable to charitable trusts.</p> <p>With regard to the Chairman's suggestion on soliciting the views of long-established charitable trusts on the Bill, the Administration advised that it had not received any adverse comments from charitable trusts on the related proposals in the Bill.</p>	
014001 - 014351	Mr Ronny TONG Administration	<p>Mr Ronny TONG pointed out that the legal definition of a charitable trust was well established in the common law regime by case law. In the UK, there was the <i>cy-près</i> doctrine which allowed the court to amend the terms of a charitable trust to prevent its failure. He asked if the Administration planned to adopt a similar system in Hong Kong.</p> <p>The Administration said that it had no intention to introduce any fundamental change to the trust law regime for charitable trusts.</p>	
014352 - 014643	Chairman	<p>Invitations issued for submissions on the Bill</p> <p>Date of next meeting and meeting schedule for April to June 2013</p>	