

立法會
Legislative Council

LC Paper No. CB(1)1090/12-13
(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 third meeting held on
Tuesday, 9 April 2013, at 10:45 am
in Conference Room 2A of the Legislative Council Complex**

Members present : Hon NG Leung-sing, SBS, JP (Chairman)
Hon Kenneth LEUNG (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Abraham SHEK Lai-him, SBS, JP
Hon CHAN Kin-por, BBS, JP
Hon Paul TSE Wai-chun, JP
Hon Dennis KWOK
Hon Martin LIAO Cheung-kong, JP

Members absent : Hon James TO Kun-sun
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Hon Starry LEE Wai-king, JP

Public officers attending : **Agenda item I**
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 Meeting with the Administration

A. Matters arising from the meeting on 19 March 2013

(LC Paper No. CB(1)800/12-13(01) -- Follow-up action to be
taken by the Administration
for the meeting on 19
March 2013

LC Paper No. CB(1)800/12-13(02) -- Administration's response
to issues raised by members
at the meeting on 19 March
2013)

Action

B. Clause-by-clause examination of the Bill

- (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*))

Other relevant papers

- (File Ref.: G4/55/5C -- Legislative Council Brief
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))

The Chairman declared interest as being a director of two companies which were engaged in trust businesses. The Bills Committee deliberated (Index of proceedings attached at the **Appendix**).

Follow-up actions to be taken by the Administration

Abolition of the rule against perpetuities

2. Given that the rule against perpetuities ("RAP") for trusts under the common law regime had been applied for many years and was retained in other common law jurisdictions, such as the United Kingdom and Singapore, for the purpose of ensuring that assets, especially land, would not be tied up in trust longer than desirable, some members had expressed concern about the implications of the proposed abolition of RAP in Hong Kong. The Administration was requested to provide --

- (i) a comparison setting out the details about the existing RAP in Hong Kong and other common law jurisdictions; and
- (ii) considerations and rationale, in detail, for proposing the abolition of RAP in Hong Kong.

Action

Abolition of the rule against excessive accumulations of income

3. On the proposed abolition of the rule against excessive accumulations of income ("REA") for new non-charitable trusts, the Administration was requested to provide --

- (iii) a comparison setting out the details of the existing REA in Hong Kong and other common law jurisdictions; and
- (iv) considerations and rationale, in detail, for proposing the abolition of REA in Hong Kong.

Other legislative amendments in the Bill

- (v) To facilitate members' consideration of other legislative amendments (apart from the abolition of RAP and REA) in the Bill, the Administration was requested to provide the considerations and rationale, in detail, for proposing each of these amendments.

(Post-meeting note: The Administration's supplementary information covering (i) to (v) above was circulated to members vide LC Paper Nos. CB(1)869/12-13(02) &(03) on 18 April 2013.)

II Any other business

Submissions received

4. The Chairman advised that a total of 10 submissions on the Bill had been received from relevant organizations/individuals and only one organization had indicated that it would attend a public hearing, if arranged, to present its views to the Bills Committee. The Administration was requested to provide a paper to address the comments/suggestions in the submissions for discussion at the next Bills Committee meeting. Members agreed that after the Administration had provided its response to the submissions, the Bills Committee would decide whether to hold a public hearing for relevant organizations/individuals to present their views.

Action

Date of next meeting

5. The Chairman reminded members that the next meeting of the Bills Committee would be held on Monday, 22 April 2013 at 10:45 am.
6. There being no other business, the meeting ended at 12:14 pm.

Council Business Division 1
Legislative Council Secretariat
23 May 2013

Bills Committee on Trust Law (Amendment) Bill 2013

**Proceedings of the third meeting
on Tuesday, 9 April 2013, at 10:45 am
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
000302 - 000721	Chairman Administration	Chairman's opening remarks Administration's briefing on its response to issues raised by members at the meeting on 19 March 2013 (LC Paper No. CB(1)800/12-13(02))	
000722 - 002502	Mr Albert HO Administration	Mr Albert HO enquired about the justifications for the proposed abolition of the rule against perpetuities ("RAP") as applied in Hong Kong given that RAP had been in place in common law jurisdictions for many years. The Administration explained the following -- (a) the relevant considerations for the proposed abolition of RAP as applied in Hong Kong had been discussed in detail in the previous meeting and in the Consultation Documents; (b) the United Kingdom ("UK") and Singapore had also reformed the RAP by extending fixed perpetuity period to 125 years and 100 years respectively, which were beyond the normal life expectancy; (c) in response to the trust industry's request that more forward-looking measures should be implemented to enhance Hong Kong's attractiveness as a trust domicile, the Administration agreed that RAP could be abolished in Hong Kong as the local circumstances were different from other comparable common law jurisdictions; (d) in particular, with almost all private land in Hong Kong being leasehold land held from the Government with a fixed lease term and there were various ordinances providing for	

Time marker	Speaker	Subject(s)	Action required
		<p>the resumption of land, the consideration for maintaining RAP to ensure that land would not be tied up in trusts was not relevant in Hong Kong's case;</p> <p>(e) RAP as applied in Hong Kong was archaic and complicated, and might produce a result not expected by settlors, because a non-observance of RAP would render a disposition void; and</p> <p>(f) the majority of respondents of past consultation exercises supported the abolition of RAP.</p> <p>Mr HO pointed out that assets held by trusts could include assets other than land and the abolition of RAP would affect the circulation of the assets. In his view, the abolition of RAP would only benefit professional trustees as they might earn more from the service charges on perpetual trusts. He requested the Administration to provide a comparison between RAP in Hong Kong and overseas jurisdictions.</p> <p>The Administration explained that –</p> <p>(a) the existing provisions on RAP were complicated;</p> <p>(b) the RAP was retained in the UK mainly out of concerns arising from the freehold land tenure system; however, as almost all private land in Hong Kong was leasehold, the concern about freehold land would not be relevant in Hong Kong's case;</p> <p>(c) assets other than land in the trust fund would be invested and thus be in a constant course of circulation in the market; and</p> <p>(d) given the feedback from industry during public consultation, the Administration considered that RAP as applied in Hong Kong should be abolished, which would enable Hong Kong to stand out from the other common law jurisdictions in attracting</p>	<p>The Administration to take follow-up action as in paragraph 4(i) of the minutes</p>

Time marker	Speaker	Subject(s)	Action required
		trust business.	
002503 - 003042	Mr CHAN Kin-por Chairman Mr Albert HO Mr Abraham SHEK	<p data-bbox="608 322 1227 394"><u>Discussion on whether to meet with deputations</u></p> <p data-bbox="608 434 1236 651">The Chairman advised that a total of 10 submissions on the Bill had been received from relevant organizations/individuals and only one organization had indicated that it would attend a public hearing, if arranged, to present its views to the Bills Committee.</p> <p data-bbox="608 696 1236 837">The Administration was requested to provide a paper to address the comments/suggestions in the submissions for discussion at the next meeting.</p> <p data-bbox="608 882 1236 1061">Members agreed that after the Administration had provided its response to the submissions, the Bills Committee would decide whether to hold a public hearing for relevant organizations/individuals to present their views.</p>	
003043 - 004227	Mr Albert HO Administration Deputy Chairman	<p data-bbox="608 1106 1236 1285">Mr Albert HO and the Deputy Chairman enquired about the existing rule against excessive accumulation of income ("REA") as applied in Hong Kong and the proposed changes.</p> <p data-bbox="608 1330 1082 1368">The Administration explained that --</p> <p data-bbox="608 1413 1236 1666">(a) ,with reference to footnote 4 of the Legislative Council Brief on the Bill, the existing REA as applied in Hong Kong was complicated, as it provided for six alternative statutory accumulation periods for which the income of a trust might be accumulated;</p> <p data-bbox="608 1711 1236 1964">(b) during previous consultation exercises when the considerations for and the proposal of abolition of REA as applied in Hong Kong were put forth for consultation, the majority of respondents considered REA too complicated and difficult to apply, and supported its abolition; and</p>	

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		<p>(c) on the other hand, in view of the public nature of the needs that charitable trusts met, it was proposed in the Bill that certain restrictions on accumulations of income would be retained for new charitable trusts to ensure that the income would be applied for the intended charitable purposes.</p> <p>The Deputy Chairman opined that --</p> <p>(a) as the subject of trust law was technical, the respondents to public consultations were mostly from the trust industry; however, any proposals that were only based on minorities' views might not have represented public interests and might be biased;</p> <p>(b) the abolition of RAP as applied in Hong Kong might lead to assets being locked up for too long and would have an impact on the economy of Hong Kong;</p> <p>(c) whilst he concurred with the objective of the Bill to enhance Hong Kong's status as an asset management centre and modernize the trust law, the Administration should balance the public interests and the need to facilitate the trust industry; and</p> <p>(d) while the trust law in Hong Kong should be modernized, an over-simplified trust regime could lead to lack of regulation.</p> <p>The Administration's response that -</p> <p>(a) the proposals in the Bill were not biased towards the interests of any parties;</p> <p>(b) the public consultation represented a holistic due process that was intended to canvass views from different sectors of the community; it was entirely up to individual members of the public and individual organizations whether or not to offer any comments on the proposals in the consultation document; and</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>(c) the Administration had not adopted various other proposals put forth by the industry and indeed had adopted a conservative approach in assessing each proposal; the abolition of RAP and REA as applied in Hong Kong were the only prominent legislative proposals in the Bill that would put Hong Kong into a much forward-looking position vis-à-vis the other major comparable common law jurisdictions</p> <p>Mr HO requested the Administration to provide a comparison between REA as applied in Hong Kong and overseas jurisdictions.</p>	<p>The Administration to take follow-up action as in 4(iii) of the minutes</p>
004228 - 004430	Mr CHAN Kin-por	<p>Mr CHAN Kin-por's views that -</p> <p>(a) as far as RAP was concerned, the wish of the settlor should be respected;</p> <p>(b) there were individual persons/organizations who supported the retention of RAP and REA as applied in Hong Kong;</p> <p>(c) it should be acknowledged that the Administration did not indiscriminately accept all the proposals put forth by the industry; and</p> <p>(d) more information and studies were needed before he could decide whether to support the proposed abolition</p>	
004431 - 004849	Mr Abraham SHEK Administration	<p>Mr Abraham SHEK enquired about the rationale behind the proposals to abolish RAP and REA as applied in Hong Kong and whether reference had been made to other common law jurisdictions, such as UK and Singapore. He said more information on the proposals than that in the documents provided to the Bills Committee was needed for members' deliberation.</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration replied that --</p> <ul style="list-style-type: none">(a) various documents, including the Legislative Council Brief and consultation documents, had set out the proposals and their rationale in detail;(b) the proposed abolition of RAP and REA as applied in Hong Kong were put forward after considering comments expressed in previous consultation exercises and overseas experience, including that of UK and Singapore;(c) UK and Singapore had reformed their RAP by adopting fixed perpetuity periods of 125 and 100 years respectively a few years ago and so far no adverse impact had been observed; and(d) the Administration had proposed to go one step further than the UK and Singapore by abolishing the RAP as applied in Hong Kong with a view to providing more flexibility and increasing the attractiveness of setting up trusts in Hong Kong.	
004850 - 005530	Mr Martin LIAO Administration	<p>Mr Martin LIAO queried --</p> <ul style="list-style-type: none">(a) the relationship between abolition of RAP as applied in Hong Kong and the promotion of trust businesses in Hong Kong; and(b) whether the Administration had assessed the impact of abolition of RAP as applied in Hong Kong on business operations in Hong Kong. <p>The Administration explained that --</p> <ul style="list-style-type: none">(a) the abolition of RAP as applied in Hong Kong was not the only measure, but one among a package of measures, to modernize and enhance the trust law regime of Hong Kong;(b) basically the Administration had adopted a conservative and cautious approach in	

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		<p>updating the trust law regime; the abolition of RAP and REA as applied in Hong Kong were the only prominent legislative proposals in the Bill that would put Hong Kong into a forward-looking position vis-à-vis other major comparable common law jurisdictions; and</p> <p>(c) the abolition of RAP would not lead to more serious impact on business operations vis-à-vis the UK/Singapore model which set out a long fixed perpetuity period.</p>	
005531 - 005811	Deputy Chairman Administration	<p>The Deputy Chairman enquired about the Administration's rationale for proposing the abolition of RAP and REA, apart from believing that it might attract more trusts to be set up in Hong Kong. He requested the Administration to provide written information about its considerations and rationale, in detail, for proposing the abolition.</p> <p>The Administration explained that the consultation paper had put forth two alternative options with a discussion on the relevant considerations to seek public views, viz. abolishing RAP as applied in Hong Kong and adopting a longer fixed perpetuities period (i.e. longer than the current stipulations of 80 years in absolute terms or alternatively 21 years after the termination of the last life in being). The majority of the respondents supported the abolition of RAP.</p>	The Administration to take follow-up action as in paragraphs 4(ii) and (iv) of the minutes
005812 - 010417	Mr Dennis KWOK Administration	<p>Mr Dennis KWOK pointed out that RAP and REA could be traced back to the 16th and 17th centuries to prevent the locking up of assets by trusts in UK. Given the starkly different socio-economic circumstances nowadays, he recognized that there might be a need to review the rules.</p> <p>Referring to the submissions received by the Bills Committee on the Bill, Mr Dennis KWOK enquired about --</p> <p>(a) whether the Administration would consider the provision of a statutory "anti-Bartlett v</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>Barclays clause" in Hong Kong;</p> <p>(b) justifications for adopting "gross negligence" in the statutory control on exemption clause in relation to trustees acting in a business or profession; and</p> <p>(c) the codification of beneficiaries' right to information.</p> <p>The Administration explained that --</p> <p>(a) the idea of an "anti-Bartlett v Barclays" clause, which was related to the reserved powers of the settlors and the management of underlying companies, had not been raised in public submissions during previous consultation exercises; the Administration had to assess how the clause could work and its implications carefully; as such, it would cause serious delay to the enactment of the Amendment Bill if this idea had to be explored in the same legislative exercise;</p> <p>(b) the use of the term "gross negligence" was common in the law of Hong Kong and the industry had reaffirmed its support for the use of the term; under the relevant clause in the Bill, protection for beneficiaries would be enhanced as any clauses in trust instruments exempting trustees from liability arising from fraud, wilful misconduct and gross negligence would become void under the proposed statutory control; this augmented the common law position which only invalidated exemption clauses seeking to exempt liability for fraud; and</p> <p>(c) as explained at the meeting of the Panel on Financial Affairs in December 2012, the Administration had engaged an expert on Hong Kong trust law to conduct a consultancy study, which concluded that there were no imminent or compelling reasons to introduce legislation on beneficiaries' right to information in Hong</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>Kong given that other major comparable common law jurisdictions had not codified such right; and</p> <p>(d) a Privy Council decision in 2003 also held that beneficiaries' right to information fell under the court's "inherent jurisdiction" and what was to be disclosed had to depend on the varied circumstances surrounding each trust; while concurring with the conclusion of the consultancy study, the Administration would monitor the evolution of the common law and overseas practices in this area and keep under review the need and appropriateness to introduce any statutory requirement in due course.</p>	
010418 - 012126	Mr Albert HO Administration Chairman	<p>Mr Albert HO's views that --</p> <p>(a) as some of the proposals in the Bill were complicated and technical, LegCo Members, playing the gate-keeper's role, should have had sufficient information and discussion on them; it was not unreasonable that LegCo Members queried the proposals in the process of deliberation and scrutiny due to concerns about public interests; and</p> <p>(b) the proposed amendments to the existing trust law regime was too modest in scope since it had not addressed important issues, such as what constituted charitable trusts and beneficiaries' right to information</p> <p>Drawing reference to the adverse possession rule in which occupiers who had uninterrupted and unchallenged possession and occupation of a piece of private land for 12 years might claim for adverse possession, Mr HO reiterated his concern that abolition of RAP might unnecessarily lock up assets.</p> <p>Mr HO enquired about --</p> <p>(a) the details of the asset management functions under the proposal on reserved powers of settlors in the Bill; and</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>(b) whether the proposed provision on reserved powers of settlors was related to the abolition of estate duty.</p> <p>The Administration explained that --</p> <p>(a) the proposed provision on reserved powers of settlors had no connection with the abolition of estate duty;</p> <p>(b) the proposal had made reference to similar overseas legislation and had been adopted taking into account suggestions from the trust industry; it had been devised under the common law framework, where there could be a limit to the scope and extent of delegation as excessive reservation of powers to settlors might render a trust to be a sham;</p> <p>(c) the proposal intended to put it beyond doubt that a trust would not be invalidated because of the mere fact that the settlor had kept to the settlor powers of investment or asset management functions; whether a trust was to be considered a sham due to excessive reservation of powers to settlors had to be decided by the court in light of the totality of facts; the proposal would be in line with the common law; and</p> <p>(d) details of the scope and level of delegation which would be permissible under the modernized regime had been specified in the Bill.</p>	
012127 - 012724	Chairman	<p>The Chairman's declaration that he was director of two companies engaged in trust businesses.</p> <p>The Chairman's views that -</p> <p>(a) given that the existing trust law regime had not been substantially reviewed and modified since it was enacted 80 years ago, it was necessary to modernize and update the regime to meet the needs of present-day trusts;</p>	

Time marker	Speaker	Subject(s)	Action required
		(b) a balance had to be struck between modernizing the trust law regime to develop Hong Kong as an international asset management centre and protecting the interest of the general public; and (c) the Administration should provide a paper elaborating the considerations and justifications for the proposals (apart from the abolition of RAP and REA) in the Bill to facilitate members' deliberation	The Administration to take follow-up action as in paragraph 4(v) of the minutes
012725 - 013019	Chairman	Date of next meeting and items for discussion	