

立法會
Legislative Council

LC Paper No. CB(1)1577/12-13
(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 fifth meeting held on
Monday, 27 May 2013, at 9:00 am
in Conference Room 3 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 James TO Kun-sun
Hon Abraham SHEK Lai-him, SBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Paul TSE Wai-chun, JP
Hon CHAN Kin-por, BBS, JP
Hon Martin LIAO Cheung-kong, JP

Members absent : Hon Starry LEE Wai-king, JP
Hon Dennis KWOK

Public officers attending : **Agenda items II and III**

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

Mr Manuel NG
Senior Government Counsel (Acting)
Department of Justice

Attendance by Invitation : Agenda item II

Mr William AHERN
Joint Chairman
Joint Committee on Trust Law Reform

Mr Mark LEA
Member
Joint Committee on Trust Law Reform

Mr David GUNSON

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)1090/12-13 -- Minutes of meeting on 9 April 2013)

The minutes of the meeting held on 9 April 2013 were confirmed.

Action

II Meeting with deputations and the Administration

- (LC Paper No. CB(1)869/12-13(04) -- Summary of views submitted by organizations/individuals on the Bill and the Administration's response (Position as at 17 April 2013)
- LC Paper No. CB(1)1089/12-13(01) -- Letter from the Clerk inviting organizations/individuals to attend the meeting on 27 May 2013)

Submissions from organizations/individuals not attending the meeting

- (LC Paper No. CB(1)798/12-13(02) -- Submission from The Chinese General Chamber of Commerce dated 12 March 2013
- LC Paper No. CB(1)798/12-13(04) -- Submission from Zurich Insurance (Hong Kong) dated 25 March 2013
- LC Paper No. CB(1)798/12-13(05) -- Submission from Mr YEUNG Wai-sing, Eastern District Council member dated 27 March 2013
- LC Paper No. CB(1)798/12-13(06) -- Submission from The Chinese Manufacturers' Association of Hong Kong dated 28 March 2013
- LC Paper No. CB(1)798/12-13(07) -- Submission from The Hong Kong Association of Banks dated 28 March 2013
- LC Paper No. CB(1)798/12-13(08) -- Submission from Baker & McKenzie dated 28 March 2013
- LC Paper No. CB(1)798/12-13(09) -- Submission from Hong Kong General Chamber of Commerce dated 28 March 2013

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- LC Paper No. CB(1)798/12-13(10) -- Submission from The Law Society of Hong Kong dated 2 April 2013
- LC Paper No. CB(1)1089/12-13(03) -- Submission from Hong Kong Bar Association dated 16 May 2013
- LC Paper No. CB(1)1089/12-13(04) -- Position paper of the Hong Kong Bar Association dated 21 May 2012 on the consultation of detailed legislative proposals on trust law reform issued in March 2012
- LC Paper No. CB(1)1089/12-13(05) -- Second submission from The Hong Kong Association of Banks dated 20 May 2013)

Welcoming remarks by the Chairman

2. The Chairman welcomed the attendance of the representatives of the Joint Committee on Trust Law Reform and Mr David GUNSON. He reminded them that when addressing the Bills Committee, they would not be covered by the protection and immunity of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) and their written submissions were also not covered by the said Ordinance.

Presentation by deputations

Joint Committee on Trust Law Reform
(LC Paper No. CB(1)798/12-13(03) (English version only))

Mr David GUNSON
(LC Paper No. CB(1)798/12-13(01) (English version only))
(LC Paper No. CB(1)1089/12-13(02) (English version only))

3. The Bills Committee received views from the Joint Committee on Trust Law Reform and Mr David GUNSON on the Administration's response to their submissions as well as the following subjects:

- (a) the proposed abolition of RAP as applied in Hong Kong;

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- (b) the proposed statutory control of trustees' exemption clauses; and
- (c) the proposal on adding statutory provisions on "anti-Bartlett v Barclays" clauses to the Bill.

(Index of proceedings attached at the **Appendix**)

III 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)

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
(issued on 12.3.2013) (background brief))

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

Follow-up actions

The Administration's follow-up actions - response to written submissions

5. The Administration was requested to provide written response to the following:

- (a) the submission of the Hong Kong Bar Association (LC Paper No. CB(1)1089/12-13(03));
- (b) the second submission from The Hong Kong Association of Banks (LC Paper No. CB(1)1089/12-13(05)); and

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- (c) the second submission from Mr David GUNSON (LC Paper No. CB(1)1089/12-13(02)).

The Administration's follow-up actions - statutory control of trustees' exemption clauses

6. Noting that the proposed new section 41W provided that a remunerated trustee acting in a profession or business would not be allowed to be exempted from liability for a breach of trust arising from the trustee's own fraud, willful misconduct or gross negligence, Mr Albert HO enquired about the relationship between the new section and other similar provisions under the existing Ordinances governing the exemption clauses in contracts, in particular how the two would interact. Some members questioned the Administration's view that the law governing exemption clauses in contracts would not apply to trust deeds. The Chairman requested the Administration to provide written information to elaborate its position on this issue.

(Post-meeting note: The Administration's supplementary information covering paragraphs 5 and 6 above was circulated to members vide LC Paper Nos. CB(1)1186/12-13(02) &(03) respectively on 3 June 2013.)

Follow-up actions by the Legal Adviser and the Clerk

7. During the discussion on the proposed abolition of the rule against perpetuities ("RAP"), the Bills Committee noted there were views that under the law, all beneficiaries of full age and legal capacity could act together to terminate a trust if they so wish. The Deputy Chairman pointed out that termination of a trust under this circumstance was subject to certain conditions and restrictions. The Chairman requested that the Legal Adviser to the Bills Committee to provide information about the conditions under which beneficiaries of full age and legal capacity might terminate a trust and the restrictions, if any, that might be imposed.

(Post-meeting note: A paper on termination of a trust by beneficiaries prepared by the Legal Service Division was circulated to members vide LC Paper No. LS57/12-13 on 31 May 2013.)

8. As far as the proposed abolition of RAP was concerned, some members remained concerned about the impact of the abolition on tying up assets, especially land, in trust longer than desirable, thus affecting the circulation of such assets in the market. The Chairman instructed the Clerk

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to seek written information from the Joint Committee on Trust Law Reform about --

- (a) estimation of the number and/or percentage of trusts in force in Hong Kong which held private land/real estates,
- (b) if available, the estimation of the value of the land/real estates held in trust as compared with the total value of the trusts in force in Hong Kong, and
- (c) the information on which the estimations at (a) and (b) were based.

(Post-meeting note: The reply from the Joint Committee on Trust Law Reform was tabled at the meeting on 4 June 2013 and was circulated to members vide LC Paper No. CB(1)1303/12-13(01) on 14 June.)

IV Any other business

9. The Chairman reminded members that the next meeting of the Bills Committee would be held on Tuesday, 4 June 2013 at 4:30 pm.

10. There being no other business, the meeting ended at 10:35 am.

Council Business Division 1
Legislative Council Secretariat
18 July 2013

Bills Committee on Trust Law (Amendment) Bill 2013

**Proceedings of the fifth meeting
on Monday, 27 May 2013, at 9:00 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
000335 - 000430	Chairman	Confirmation of minutes of meeting on 9 April 2013 (LC Paper No. CB(1)1090/12-13)	
<u>Meeting with deputations and the Administration</u>			
000431 - 000745	Chairman	Introductory remarks	
000746 - 001057	Joint Committee on Trust Law Reform ("JCTLR")	<p>Presentation of views that --</p> <p>(a) the proposals in the Bill would help make Hong Kong a more attractive domicile for trusts;</p> <p>(b) although JCTLR had proposed other suggestions to further take forward the trust law reform in Hong Kong, it supported that the Bill be passed in its present form in order not to delay its implementation;</p> <p>(c) one of JCTLR's suggestions was to introduce statutory provisions on anti-Bartlett v Barclays clauses; these clauses relieved trustees from management and supervisory obligations with respect to underlying companies in certain situations and correspondingly exonerate them from claims; statutory provisions in this regard were important for the development of Hong Kong as a trust administration jurisdiction; and</p> <p>(d) the rule against perpetuities ("RAP") as applied in Hong Kong was too complicated and outdated; the original purpose of the rule was to address an entirely Anglican issue and the relevant considerations were not applicable to Hong Kong; JCTLR supported the</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>abolition of RAP;</p> <p>(e) that perpetual trusts were allowed did not mean that all trusts would be set up as perpetual; settlors are at liberty to stipulate a shorter perpetuity period and</p> <p>(f) RAP would not be suitable for many commercial trusts, such as investment funds and pension funds.</p>	
001058 - 001557	Mr David GUNSON	<p>Presentation of views that --</p> <p>(a) RAP as applied in Hong Kong should be abolished as the original purpose to ensure that land would not be tied up by trusts longer than necessary was not applicable in Hong Kong; the rule would also pose an insurmountable impediment to the restructuring of old pension funds;</p> <p>(b) it would be desirable to set general and conceptual standards of behaviour of trustees, yet the court should be the ultimate regulator for trusts; while there were four conceptual levels of standards, namely, criminal, negligence, "reasonable man" and prudence, it was preferable to synchronize the concepts in the Bill; and</p> <p>(c) regarding the statutory provisions on anti-Bartlett v Barclays clauses, some consideration should be given to limiting trustees' liabilities; however, there were doubts as to why trustees should be treated differently from other shareholders.</p>	
001558 - 002309	Administration	<p>The Administration noted the support of the deputations for the Bill and responded to the enquires and comments raised by deputations as follows:</p> <p>(a) the proposed abolition of RAP, which was supported by the deputations, was devised with regard to the industry's suggestion and was intended to enhance Hong Kong's attractiveness as a trust domicile; the main considerations behind RAP were not</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>applicable in Hong Kong as most land in Hong Kong was leasehold rather than freehold as in the United Kingdom ("UK");the proposal to abolish RAP would endow Hong Kong with a competitive edge over other comparable common law jurisdictions, such as UK and Singapore; and</p> <p>(b) the proposal of inclusion of statutory provisions on anti-Bartlett v Barclays clauses would have implications on the interest of settlors, beneficiaries as well as trustees, and it was necessary to study carefully the implications of such provisions on all relevant parties as well as the diverse forms that anti-Bartlett v Barclays clauses could take, before a policy view could be taken as to whether or not to pursue the idea; it should be noted that there were no such statutory provisions in any major comparable common law jurisdictions and there were already established common law cases on underlying companies; the Administration would consider the suggestion separately and outside the context of the current Bill in consultation with the trust industry in future review of the trust law.</p>	
002310 - 003054	Mr James TO JCTLR Mr David GUNSON	<p>Noting that some people from the Mainland had purchased properties in Hong Kong only to leave them vacant, Mr James TO expressed concern that the abolition of RAP would lead to perpetual trusts being set up in Hong Kong to hold local properties. As a consequence, less properties would be available for circulation in the market. Under the existing land resumption mechanism, the Administration could resume land for public purposes. He opined that a conservative approach should be adopted by extending the perpetuity period rather than allowing perpetuities.</p> <p>JCTLR remarked that at present, only a small number of people from the Mainland had set up trusts in Hong Kong. The issue of vacant properties might be better dealt with by other</p>	

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		<p>legislative and/or administrative measures; trust law was not a proper vehicle to deal with the issue..</p> <p>Mr David GUNSON said that as the Government was the owner of most of the land in Hong Kong, RAP, which was set up to ensure that assets, mainly land, would not be locked up in trusts longer than necessary, was not applicable in the local context. He echoed with JCTLR that legislation in other areas of law was more appropriate to deal with the potential issue of vacant properties.</p>	
003055 - 004108	Mr Martin LIAO JCTLR	<p>Pointing out that as a legislator, he had to consider the proposals in the Bill from a wider perspective, Mr Martin LIAO invited the deputations to advise/comment on --</p> <ul style="list-style-type: none"> (a) which jurisdictions had abolished RAP and the rule against excessive accumulation of income; (b) the suggestion that a longer fixed perpetuity period be set instead of abolishing RAP; and (c) whether a distinction could be drawn between private trusts and trusts of a public nature so that the abolition of RAP would only apply to private trusts. <p>JCTLR replied that --</p> <ul style="list-style-type: none"> (a) it had compared 18 jurisdictions in respect of the application of RAP and REA; some of these jurisdictions had extended the perpetual period for trusts, say, to as long as 360 years, and many states in the United States had abolished RAP; since the problem of locking up land assets which RAP was intended to address did not exist in Hong Kong, JCTLR firmly believed that RAP as applied in Hong Kong was not necessary; extending the perpetuity period would not be able to address the complexity and other problems associated with the rule; 	

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		<p>(b) the objections to the rule were equally applicable to both private trusts and trusts of a more public nature; It would be difficult to define private trusts and trusts of a more public nature; and</p> <p>(c) under the existing common law, irrespective of the perpetuity period of a trust, all beneficiaries of full age and legal capacity could act together to terminate a trust if they so wished.</p> <p>Mr Martin LIAO referred to the report on perpetuities and excessive accumulations compiled by the UK Law Commission and sought the comments of deputations on the statement that the majority of respondents to the consultation exercise in the UK were against the abolition of RAP. They considered that the rule still fulfilled the function of controlling the power of one generation to dictate the devolution of property, that such a function remained an important one, and that no other rule of law was either sufficient to or as effective in achieving it.</p> <p>JCTLR said that a mere comparison between Hong Kong with the UK in respect of the trust law regime might not represent the full picture. There had been an international trend to relax RAP. The abolition of RAP as applied in Hong Kong would make Hong Kong more competitive in attracting settlors worldwide to set up trusts, for private and also commercial purposes.</p>	
004109 - 004824	Mr CHAN Kin-por JCTLR Mr David GUNSON	<p>Mr CHAN Kin-por enquired about the benefits and the impact on Hong Kong's competitiveness vis-à-vis other major financial centres if the Bill was passed.</p> <p>JCTLR said that if the proposals in the Bill were implemented, the trust law regime of Hong Kong would have an edge over Singapore, of which the trust law had been reformed in 2004. It was expected that the passage of the Bill would bring in more private trusts and settlors to Hong Kong. For</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>Singapore, some professionals had expressed concern that they might lose business due to the absence of statutory provisions on anti-Bartlett v Barclay clauses in the trust law. In Asia, Malaysia had implemented a trust law reform which was broader in scope. That said, JCTLR was supportive of the current Bill.</p> <p>Mr David GUNSON said that some potential transfers of overseas pension funds to Hong Kong had not been implemented due to RAP in Hong Kong. If the proposals in the Bill were implemented, he believed that more trusts would be set up in Hong Kong and Hong Kong would be able to become a premier pension administration centre in Asia.</p> <p>In response to Mr CHAN Kin-por's enquiry about the preferred timeframe for the next review of Hong Kong's trust law regime, JCTLR said that the Administration could reconsider the Joint Subcommittee's suggestions on the recognition of non-charitable purpose trusts and the inclusion of statutory provisions on anti-Bartlett v Barclays clauses shortly after the Bill was passed. The next review could be done in about two to five years, but frequent reviews on trust law thereafter would be too disruptive.</p> <p>JCTLR added that while the Administration had listened to the views of the industry and taken almost all of them forward by putting them in the Bill, it was the Joint Committee's wish that the trust law reform could go a step further to incorporate other suggestions made by JCTLR so as to better facilitate trust business, create more employment opportunities and underpin Hong Kong's status as a premier financial centre.</p>	
004825 - 010021	Deputy Chairman JCTLR Mr David GUNSON Administration	The Deputy Chairman said that while he welcomed a reform of the trust law regime in Hong Kong, he agreed with Mr Martin LIAO that legislators needed to consider the Bill from a wider perspective. As Hong Kong had adopted a land administration system different from that of the UK, it might not be appropriate to compare Hong Kong with the UK in the	

Time marker	Speaker	Subject(s)	Action required
		<p>application of RAP. He invited comments from the deputations on whether the abolition of RAP would have an impact on property prices.</p> <p>JCTLR said that the abolition of RAP would have no impact on property prices. It did not expect that there would be a rush to set up perpetual trusts in Hong Kong to acquire properties upon the abolition of RAP. Even if RAP were abolished, the settlors would be advised to consider carefully if they intended to set up perpetual trusts. JCTLR considered that other measures, such as stamp duty, would have impact on property prices but the trust law would not.</p> <p>Mr David GUNSON opined that property prices were affected more by various taxes imposed on property transactions and the scarcity of land supply than by a provision allowing the setting up of perpetual trusts. He considered that the impact of abolition of RAP on property prices would be neutral. In particular, he queried why there was an artificial time limit imposed on trusts but not on other forms of legal entities such as limited companies which could hold land in perpetuity.</p> <p>Responding to the Deputy Chairman's enquiry about enhancement to the Bill, JCTLR said that it would suggest adding statutory provisions on anti-Bartlett v Barclays clauses. It urged the Administration to discuss with the industry on this suggestion.</p> <p>The Administration advised that, under common law, settlors could already exclude trustees' certain duties and liabilities through the trust instruments. Whether it was necessary to incorporate provisions on anti-Bartlett v Barclays clauses in statute and its implications had to be considered carefully from the perspectives of trustees, settlors and beneficiaries. The Administration would also have to consider the drafting, as there were no such statutory provisions in any major comparable common law jurisdictions.</p>	

Time marker	Speaker	Subject(s)	Action required
010022 - 010430	Deputy Chairman Mr David GUNSON Administration	<p>The Deputy Chairman enquired about the "prudent man" approach in the context of the permitted investments for a trustee.</p> <p>Mr David GUNSON said that the existing approach of setting out an authorized list of investments would not make the trustees' investment necessarily prudent. It was more important to adopt a "prudent man" approach which was internationally recognized to ensure that the beneficiaries would become better off from the investments.</p> <p>The Administration advised that the Second Schedule in the Trustee Ordinance (Cap. 29) was default in nature and was subject to the provisions in the trust instruments. Settlers could provide very wide investment powers to trustees and in those cases the Second Schedule would not be applicable. As some trustees might not be conversant with investment, the Schedule would provide a useful benchmark for prudential investments for such trustees.</p>	
010431 - 011031	Administration JCTLR Deputy Chairman	<p>With reference to JCTLR's remarks that generally beneficiaries acting together had the power to terminate a trust, the Administration asked the Joint Committee to elaborate on the manner and generality of application of the rule.</p> <p>JCTLR said that beneficiaries had the power to terminate a trust if all of them, being of full age and legal capacity, acted together to direct the trustee to transfer the trust assets/properties to them, if they so wish.</p> <p>The Deputy Chairman said that the termination of trusts might be subject to conditions and restrictions. The Legal Adviser was requested to provide written opinions on this subject.</p>	The Legal Adviser to take follow-up action as in paragraph 7 of the minutes
011032 - 011635	Mr Abraham SHEK Mr David GUNSON Administration	Referring to Mr David GUNSON's second submission (LC Paper No. CB(1)1089/12-13(02)), Mr Abraham SHEK invited Mr GUNSON to elaborate on the relationship between the "prudent man" standard of trustee investments and the	

Time marker	Speaker	Subject(s)	Action required
		<p>regulation of trustees in his submission.</p> <p>Mr GUNSON said that the "prudent man" standard was only pertaining to trustees' investment. The regulation of trustees was not relevant in the context. Regulation of trustees might not be desirable. The process would be slow, expensive and ineffective. There were already separate regulatory regimes governing trust companies which were engaged in certain investment activities or products. The present mechanism whereby the court was the ultimate umpire would be sufficient.</p>	
<u>Meeting with the Administration</u>			
011636 - 012425	Chairman Deputy Chairman Administration	<p>The Chairman asked if members would like to raise any more questions about the policy issues related to the Bill before the Committee was to start clause-by-clause examination of the Bill.</p> <p>The Deputy Chairman said he remained concerned about the impact of the abolition of RAP on tying up assets, especially land, thus affecting the circulation of such assets in the market. In this connection, he suggested that information about the estimation of the percentage/value of trusts in force in Hong Kong which held private land/real estates be sought to facilitate members' consideration of the proposed abolition of RAP.</p> <p>The Chairman instructed the Clerk to contact JCTLR on the availability of the above information.</p>	The Clerk to take follow-up action as in paragraph 8 of the minutes
012426 - 012557	Mr Martin LIAO	Mr Martin LIAO said that most of the views submitted to the Bills Committee were from the trust industry. The Bills Committee should examine the proposals in the Bill from a wider perspective as not many views of those outside the trust industry had been heard of.	
012558 - 012725	Mr Abraham SHEK Chairman	On the suggestion of Mr Abraham SHEK, the Chairman requested the Administration to respond to the latest submissions received by the Bills Committee.	The Administration to take follow-up action as in

Time marker	Speaker	Subject(s)	Action required
			paragraph 5 of the minutes
012726 - 013102	Mr Albert HO Administration	<p>Noting that the proposed new section 41W provided that a remunerated trustee acting in a profession or business would not be allowed to be exempted from liability for a breach of trust arising from the trustee's own fraud, willful misconduct or gross negligence, Mr Albert HO enquired about the relationship between the new section and other similar provisions under the existing Ordinances governing the exemption clauses in contracts, in particular how the two would interact.</p> <p>The Administration replied that the statutory rules that regulated the exemption clauses in contracts would not apply to trust deeds.</p> <p>Mr Albert HO said that there might be similarities between a contract and a trust deed and cast doubt on the Administration's statement above. He requested that the Administration or the Legal Adviser should provide a paper on how the new section would interact with other provisions governing the exemption clauses in contracts.</p>	
013103 - 013203	Mr Martin LIAO	<p>Mr Martin LIAO's view that contract law was not applicable to trusts. Contracts were made between two contractual parties on an equal basis, while in trusts there was a fiduciary relationship between the beneficiaries and the trustees. The trustees carried a higher responsibility than a normal contracting party. Therefore, the control of exemption clauses for trustees should adopt a higher standard.</p>	
013204 - 013359	Deputy Chairman Chairman	<p>The Deputy Chairman disagreed with the Administration that all the law governing exemption clauses in contracts would not apply to trust deeds.</p> <p>The Chairman requested the Administration to provide written information to elaborate its position on the issue.</p>	The Administration to take follow-up action as in paragraph 6 of the minutes

Time marker	Speaker	Subject(s)	Action required
013400 - 013510	Chairman	Date of next meeting	

Council Business Division 1
Legislative Council Secretariat
18 July 2013