

立法會
Legislative Council

LC Paper No. CB(1)1707 /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 seventh meeting held on
Thursday, 13 June 2013, at 2:30 pm
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 Starry LEE Wai-king, JP
Hon Ronny TONG Ka-wah, SC
Hon CHAN Kin-por, BBS, JP
Hon Paul TSE Wai-chun, JP
Hon Dennis KWOK
Hon Martin LIAO Cheung-kong, JP

Member absent : Hon James TO Kun-sun

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

Mr Manuel NG
Senior Government Counsel (Acting)
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 Fred PANG
Council Secretary (1)6

Ms Christina SHIU
Legislative Assistant (1)6

Action

I Meeting with the Administration

A. Matters arising from the meeting on 4 June 2013

(LC Paper No. CB(1)1275/12-13(01) -- Follow-up actions to be taken by the Administration for the meeting on 4 June 2013

LC Paper No. CB(1)1275/12-13(02) -- Administration's response to issues raised by members at the meeting on 4 June 2013

LC Paper No. CB(1)1275/12-13(03) -- Administration's letter to the Joint Committee on Trust law Reform dated 10 June 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*)
LC Paper No. CB(1)1235/12-13(01) -- Amendments to the proposed new section 41W of the Trustee Ordinance proposed by Hon Dennis KWOK)

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))

Members noted that a letter from the Joint Committee on Trust Law Reform dated 13 June 2013 in response to the Bills Committee's request for information about the abolition of the rule against perpetuities ("RAP") arising from the meeting on 4 June 2013 was tabled at the meeting.

(*Post-meeting note:* The letter was circulated to members vide LC Paper No. CB(1)1303/12-13(02) on 14 June 2013.)

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

3. Regarding the use of the term "gross negligence" in the proposed statutory control on trustees' exemption clause (new section 41W of the Trustee Ordinance ("TO"))(Cap. 29), Mr Dennis KWOK requested to put on record that, in his view, two of the cases cited by the Hong Kong Bar Association in its submission, namely "Red Sea Tankers v Papachristidis (The Ardent)" and "Midland Bank Trustee (Jersey) Ltd v Federated Pension Services", could provide guidance to litigants and the courts in respect of the interpretation of the term.

Action

Follow-up actions to be taken by the Administration

Proposed abolition of the rule against perpetuities

4. Members noted the seven overseas trust jurisdictions, including The Bahamas, Cyprus, Guernsey, Jersey, etc., that had abolished RAP. They requested the Administration to advise whether the State of New York, the State of California and the State of Illinois were among the some 20 US States that had abolished RAP.

Spelling of "authorize"

5. Members noted that the words "authorize" and "authorized" appeared in many places in the Bill. The Administration was requested to advise whether it would consider adopting "authorise"/"authorised" (i.e. British spelling) for the sake of consistency with the prevailing legal language used in Hong Kong legislation.

New section 41(I) -- Investment in bearer securities

6. As the proposed new section 41(I)(4) of TO provided that "Subsection (3) does not apply if the instrument creating the trust or an enactment contains a provision that (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person as a custodian", members requested the Administration to consider moving "(however expressed)" forward to follow "a provision".

New section 41Y -- Transfer of movable property not affected by foreign law of inheritance

7. The proposed new section 41Y(1) of TO stipulated that "[t]his section applies in relation to a trust (whenever created) only if –

- (a) the trust is expressed to be governed by Hong Kong law; and
- (b) at all times when the trust is in force, each trustee of the trust is either -- (i) an individual who ordinarily resides in Hong Kong; or (ii) a body corporate the central management and control of which is in Hong Kong".

Action

Members opined that the coverage under (b) above could be widened to attract more trust business to operate in Hong Kong by including companies incorporated in Hong Kong. The Administration was requested to provide written response to this suggestion; and, if the suggestion was not to be taken, the reasons.

(Post-meeting note: The Administration's response to paragraphs 4 to 7 above was circulated to members vide LC Paper No. CB(1)1313/12-13(02) on 17 June 2013.)

Proposed Committee Stage Amendments

8. The Administration was requested to submit all the Committee Stage amendments ("CSAs") that it intended to move to the Bill Committee for members' consideration.

(Post-meeting note: CSAs proposed by the Administration were circulated to members vide LC Paper No. CB(1)1326/12-13(01) and discussed on 18 June 2013.)

II Any other business

9. The next meeting would be held at 2:30 pm on 18 June 2013.

10. There being no other business, the meeting ended at 4:10 pm.

Council Business Division 1
Legislative Council Secretariat
19 August 2013

Bills Committee on Trust Law (Amendment) Bill 2013

**Proceedings of the seventh meeting
on Thursday, 13 June 2013, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
<u>Matters arising from the meeting on 4 June 2013</u>			
000451 - 001404	Chairman Administration	<p>The Administration's briefing on its response to the matters arising from the meeting on 4 June 2013 (LC Paper No. CB(1)1275/12-13(02))</p> <p>The meeting noted the letter dated 13 June 2013 from the Joint Committee on Trust Law Reform (LC Paper No. CB(1)1313/12-13(02)) in response to the Bills Committee's request made at the meeting on 4 June 2013 for information about the abolition of the rule against perpetuities ("RAP")</p>	
001405 - 001448	Mr Martin LIAO Administration	Mr Martin LIAO requested the Administration to advise whether the State of New York, the State of California and the State of Illinois were among the some 20 US States that had abolished RAP.	The Administration to take follow-up action as in paragraph 4 of the minutes
001449 - 001759	Deputy Chairman Administration	<p>The Deputy Chairman's query on whether it was appropriate to make Hong Kong comparable to some offshore financial centres that were regarded as tax havens in respect of abolition of RAP</p> <p>The Administration's response that --</p> <p>(a) the proposals in the Bill had been formulated with reference to the regimes of the United Kingdom and Singapore, but not offshore jurisdictions, and with Hong Kong's status as an international financial centre firmly in mind;</p> <p>(b) as indicated by the industry in the meeting with deputations, the abolition of RAP had no tax or anti-money laundering implications; and</p> <p>(c) on the other hand, the abolition of RAP would give Hong Kong a competitive edge</p>	

Time marker	Speaker	Subject(s)	Action required
		over comparable common law jurisdictions	
001800 - 002044	Mr Martin LIAO Administration	<p>Mr Martin LIAO referred to the Hong Kong Bar Association's suggestion on providing a definition for "gross negligence" in relation to the statutory control on trustees' exemption clause and enquired about the Administration's position.</p> <p>The Administration's response that it was not prudent to commit to a specific definition of the term in the trust law regime at this stage, pending further development of case law and given that it was important to consider carefully the possible implications of any proposed definition of the term on different stakeholders and their views on any such proposal</p>	
<u>Clause-by-clause examination of the Bill</u>			
002045 - 002619	Chairman Deputy Chairman Administration	<p><u>Clause 27 – Parts IVA to IVD added</u></p> <p><i>New section 41D- Linked functions, etc.</i> <i>New section 41E - Terms of agency</i> <i>New section 41F - Special restrictions relating to asset management</i></p> <p>The Administration's briefing on the above new sections</p> <p>The Deputy Chairman's enquiry about the definition of asset management and the Administration's response</p>	
002620 - 002803	Mr Paul TSE Administration	<p>Given that the words "authorize" and "authorized" appeared in many places in the Bill, Mr Paul TSE requested the Administration to advise whether it would consider adopting "authorise"/"authorised" (i.e. British spelling) for the sake of consistency with the prevailing legal language used in Hong Kong legislation.</p>	The Administration to take follow-up action as in paragraph 5 of the minutes
002804 - 003310	Administration Mr Paul TSE	<p><u>Clause 27 – Parts IVA to IVD added</u></p> <p><i>New section 41G - Power to appoint nominees</i></p> <p><i>New section 41H - Power to appoint custodians</i></p>	

Time marker	Speaker	Subject(s)	Action required
		<p><i>New section 41I - Investment in bearer securities</i></p> <p>The Administration's briefing on the above new sections</p> <p>The new section 41I(4) stipulated that "subsection (3) does not apply if the instrument creating the trust or an enactment contains a provision that (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person as a custodian." Mr Paul TSE requested the Administration to consider moving "(however expressed)" forward to follow "a provision".</p>	<p>The Administration to take follow-up action as in paragraph 6 of the minutes</p>
003311 - 004809	Administration Chairman	<p><u>Clause 27 – Parts IVA to IVD added</u></p> <p><i>New section 41J - Persons who may be appointed as nominees or custodians</i></p> <p><i>New section 41K - Terms of appointment of nominees and custodians</i></p> <p><i>New section 41L - Application of sections 41M, 41N and 41O</i></p> <p><i>New section 41M -. Review of agents</i></p> <p><i>New section 41N- Review of nominees and custodians</i></p> <p><i>New section 41O - Liability for agents, nominees and custodians</i></p> <p><i>New section 41P - Effect of trustees exceeding their powers</i></p> <p><i>New section 41Q - Application of Part IVB</i></p> <p><i>New section 41R - Interpretation of Part IVB</i></p> <p><i>New section 41S - Remuneration of trustees under instrument creating trust</i></p> <p><i>New section 41T - Remuneration of trustees other than under instrument creating trust</i></p>	

Time marker	Speaker	Subject(s)	Action required
		<p><i>New section 41U - Trustee's expenses</i></p> <p><i>New section 41V - Remuneration and expenses of agents, nominees and custodians</i></p> <p><i>New section 41W - Trustee is not exempted from liability for breach of trust</i></p> <p>The Administration's briefing on the above new sections</p> <p>The Chairman's enquiry on whether the trust services industry had any views regarding the one-year grace period for the commencement of new section 41W under the new section 41W(6)</p> <p>The Administration's response that the industry had raised no objection</p>	
004810 - 005114	Mr Dennis KWOK Administration	<p>Discussion on the Hong Kong Bar Association's comments on the new section 41W in respect of the definition of "gross negligence"</p> <p>The Administrations views that it was not prudent to commit to a specific definition of the term in the trust law regime at this stage, pending further development of case law and given that it was important to consider carefully the possible implications of any proposed definition of the term on different stakeholders and their views on any such proposal</p>	
005115 - 005437	Administration Deputy Chairman	<p><u>Clause 27 – Parts IVA to IVD added</u></p> <p><i>New section 41X - Reserve power of settlor</i></p> <p>The Administration's briefing on the above new section</p> <p>The Deputy Chairman's enquiries on --</p> <p>(a) whether the common law principles on settlor's reserved powers were changed by the introduction of the new section 41X; and</p> <p>(b) the meaning of "asset management functions"</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration's response that --</p> <p>(a) the new section 41X did not alter the relevant legal principles; and</p> <p>(b) there was no definition of "asset management functions" in the equivalent Singaporean provision and the functions pertain to, inter alia, the sale and purchase of trust investments</p>	
005438 - 010307	Mr Paul TSE Administration	<p>Mr Paul TSE's enquiry on whether the new section 41X(4) had retrospective effect</p> <p>The Administration's response that --</p> <p>(a) trusts previously declared invalid would not be revived by section 41X and that the provision was in line with common law; thus trusts invalid in law would not be validated by virtue of the provision; and</p> <p>(b) the provision only sought to clarify that trusts would not be rendered invalid merely because the settlor had reserved to himself powers of investment or asset management functions</p>	
010308 - 012345	Administration Chairman Mr Paul TSE Deputy Chairman Mr Dennis KWOK	<p><u>Clause 27 – Parts IVA to IVD added</u></p> <p><i>New section 41Y - Transfer of movable property not affected by foreign law of inheritance</i></p> <p>The Administration's briefing on the new section</p> <p>Discussion on the definition of a body corporate the central management and control of which was in Hong Kong (new section 41(Y)(1)(ii))</p> <p>Members suggested widening the coverage of the new section 41(Y)(1)(ii) by including companies incorporated in Hong Kong to attract more trust business to operate in Hong Kong. The Administration was requested to provide written response to this suggestion; and, if the suggestion was not to be taken, the reasons.</p>	<p>The Administration to take follow-up action as in paragraph 7 of the minutes</p>

Time marker	Speaker	Subject(s)	Action required
012346 - 014101	Administration	<p><u>Clause 28 – Cross-heading before section 42 repealed</u></p> <p><u>Clause 29 – Part V, Division 1 heading added</u></p> <p><u>Clause 30 – Cross-heading before section 45 repealed</u></p> <p><u>Clause 31 – Part V, Division 2 heading added</u></p> <p><u>Clause 32 – Cross-heading before section 56 repealed</u></p> <p><u>Clause 33 – Part V, Division 3 heading added</u></p> <p><u>Clause 34 – Cross-heading before section 62 repealed</u></p> <p><u>Clause 35 – Part V, Division 4 heading added</u></p> <p><u>Clause 36 – Section 77 amended (application by company to be registered as a trust company)</u></p> <p><u>Clause 37 – Section 81 amended (objects)</u></p> <p><u>Clause 38 – Section 110 added</u></p> <p><u>Clause 39 – Second Schedule amended (authorized investments)</u></p> <p><u>Clause 40 – Third and Fourth Schedules added</u></p> <p><u>Clause 41 – Perpetuities and Accumulations Ordinance amended</u></p> <p><u>Clause 42 – Cross-heading before section 1 repealed</u></p> <p><u>Clause 43 – Part 1 heading added</u></p> <p><u>Clause 44 – Section 2 amended (interpretation)</u></p> <p><u>Clause 45 – Section 3 amended (application)</u></p> <p><u>Clause 46 – Part 2 added</u></p> <p><u>Clause 47 – Cross-heading before section 4 repealed</u></p>	

Time marker	Speaker	Subject(s)	Action required
		<p><u>Clause 48 – Part 3 heading and Division 1 heading added</u></p> <p><u>Clause 49 – Section 13 amended (administrative powers of trustees)</u></p> <p><u>Clause 50 – Section 16 amended (possibilities of resulting trust, conditions subsequent, exceptions and reservations)</u></p> <p><u>Clause 51 – Cross-heading before section 17 repealed</u></p> <p><u>Clause 52 – Part 3, Division 2 heading added</u></p> <p><u>Clause 53 – Section 18 amended (qualification of restrictions on accumulation)</u></p> <p><u>Clause 54 – Enactments amended</u></p> <p><u>Clause 55 – Section 8 amended (scope of authority, etc. of attorney under enduring power)</u></p> <p><u>Clause 56 – Section 20 added</u></p> <p><u>Clause 57 – Section 5 amended (donor to specify decisions attorney may make)</u></p> <p><u>Clause 58 – Schedule 1 amended (Form 1)</u></p> <p><u>Clause 59 – Schedule 2 amended (Form 2)</u></p> <p>The Administration's briefing on the above clauses</p>	
014102 - 014510	Chairman	<p>Date of next meeting</p> <p>The Chairman requested that the Administration should submit all the Committee Stage amendments that it intended to move to the Bill Committee for members' discussion at the next meeting.</p> <p>Date for the resumption of the Second Reading debate on the Bill</p>	<p>The Administration to take follow-up action as in paragraph 8 of the minutes</p>

Council Business Division 1
Legislative Council Secretariat
19 August 2013