

立法會 *Legislative Council*

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Bills Committee on Trust Law (Amendment) Bill 2013

Background brief

Purpose

This paper provides background information on the Trust Law (Amendment) Bill 2013 ("the Bill"), and a summary of members' views and concerns on related matters during discussions at meetings of the Panel on Financial Affairs ("FA Panel").

Background

Existing trust law regime

2. The trust law regime in Hong Kong is mainly based on common law principles, and supplemented by the Trustee Ordinance (Cap. 29) ("TO") and the Perpetuities and Accumulations Ordinance (Cap. 257) ("PAO"). TO was enacted in 1934, based on the Trustee Act 1925 of the United Kingdom ("UK"). Other than the range of authorized investments in its Schedule 2, there has been no substantial review of TO since its enactment. PAO was enacted in 1970, based on UK's Perpetuities and Accumulations Act 1964, to modify the common law rules regarding perpetuities and accumulations of income. PAO has not been reviewed since its enactment.

Review and consultation on the trust law regime

3. In August 2007, the Joint Committee on Trust Law Reform ("JCTLR")¹, which represented the trust industry in Hong Kong, submitted

¹ The Joint Committee was formed by the Hong Kong Trustees' Association and the Society of Trust and Estate practitioners.

proposals to the Government, advocating a comprehensive review of the trust law regime. The Administration commenced the review in early 2008 and published a "Consultation Paper on Review of the Trustee Ordinance and Related Matters" on 22 June 2009 for a three-month public consultation on proposals to reform TO and other laws relating to trusts. The Administration issued the consultation conclusions on 22 February 2010. According to the Administration, all the respondents indicated general support for most of the proposals and many respondents considered the review timely and necessary.

4. Based on the consultation conclusions, the Administration prepared legislative proposals to amend TO and PAO and conducted a two-month public consultation on the detailed legislative proposals on 22 March 2012. The legislative proposals covered three major areas, namely clarification of trustees' duties and powers to provide clearer guidelines on the role of trustees, enhancing the protection of beneficiaries' interests, and modernization of the trust law.

The Bill

5. The Administration introduced the Bill into the Legislative Council ("LegCo") on 8 February 2013. The Bill seeks to amend TO and PAO to:

- (a) extend certain trustees' powers;
- (b) impose a statutory duty of care on trustees;
- (c) provide for the validity of certain trusts;
- (d) abolish the rule against perpetuities;
- (e) change the rule against excessive accumulations of income;
and
- (f) provide for related and consequential amendment.

6. The Bill does not cover the common law rules with respect to how a trust is constituted and when a person is to be regarded as a settlor, trustee, or beneficiary. There will be no change to other aspects of trust law or legislation not specifically covered by the Bill.

7. The major provisions of the Bill are as follows:

Amendments to TO

Part 2 of the Bill contains amendments to TO in the following areas:

- (a) enhancing trustees' default powers in the following aspects:
 - (i) power to appoint agents, nominees and custodians (new sections 41A to 41P);
 - (ii) power to insure the trust property against certain risks (the amended section 21);
 - (iii) entitlement to receive remuneration (new sections 41Q to 41T);
 - (iv) relaxation of the scope of authorized investments (the amended Second Schedule);
- (b) providing appropriate checks and balances through:
 - (i) imposing a new statutory duty of care for trustees (new section 3A);
 - (ii) imposing statutory control on exemption clause in relation to trustees acting in a business or profession (new section 41W);
 - (iii) restrictions on the trustees' power to delegate (the amended section 27); and
 - (iv) specification of beneficiaries' rights to appoint and retire trustees (the new sections 40A to 40D);
- (c) clarification of reserved powers by settlors (new section 41X);
- (d) provision against forced heirship rules (new section 41Y);

Amendments to PAO

Part 3 of the Bill contains amendments to PAO to abolish the rule against perpetuities and the rule against excessive accumulations of income to allow a trust to continue in existence for an unlimited period of time under certain circumstances (new Part 2 containing new sections 3A, 3B and 3C); and

Related and consequential amendments

Part 4 contains related and consequential amendments to the Enduring Powers of Attorney Ordinance (Cap 501) and its subsidiary legislation.

8. Details of the major provisions are set out in the Legislative Council Brief issued by the Financial Services and the Treasury Bureau on 6 February 2013 (File Ref: G4/55/5C).

Major views and concerns expressed by members of the Panel on Financial Affairs

9. FA Panel discussed the Administration's consultation proposals on the trust law reform, key proposed legislative proposals to amend TO and PAO, as well as the way forward at meetings on 6 July 2009, 1 March 2010, 2 April 2012 and 3 December 2012. Members in general had no objection to the Administration introducing the Bill into LegCo. The major concerns/views expressed by members and the Administration's responses are summarized in the ensuing paragraphs.

Beneficiaries' rights to information

10. On the protection of beneficiaries' rights to information, members considered that the Administration should legislate to provide for the basic rules on disclosure by trustees of information to beneficiaries. There was concern on the Administration's reluctance to introduce legal provisions in this aspect, and query on how the beneficiaries could exercise a proper and informed judgment in the removal of the trustees given the limited trust-related information available to beneficiaries.

11. The Administration advised that in the light of the advice of the Department of Justice that Hong Kong could leverage the trust law reform experience in overseas jurisdictions, reference had been made to the reform

experience/proposals of other common law jurisdictions. There was no statute stipulating the beneficiary's right to information in major common law jurisdictions like the UK. The Administration added that under the common law, a trustee had a duty, without demand, to inform a beneficiary who had attained majority and become entitled in possession under the settlement about the existence of the settlement and the beneficiary's interest under it. As the common law in this area was evolving and far from settled, it would be more appropriate to monitor the development of the common law and overseas practices in this area. The Administration also pointed out that under the Bill, the consent of all the beneficiaries of full age and legal capacity would be required for exercising the power to remove trustees by a court-free process.

Trustee's exemption clauses

12. Noting that the Hong Kong Bar Association ("HKBA") had reservations about the threshold of the legislative proposal to control trustee's exemption clauses which sought to prohibit trustees from excluding liability for "fraud, wilful misconduct or gross negligence" only, some members were concerned that the proposal might amount to a relaxation of the standard currently adopted by the industry and would reduce protection for the rights and interests of beneficiaries. The member called on the Administration to consider HKBA's views in finalizing the legislative proposal.

13. The Administration advised that the proposal would not relax the existing control imposed on trustee's exemption clauses, because under the common law, trustee's exemption clauses can validly exempt trustees from liability for all breaches of trust except fraud. The current proposal to prohibit trustees from excluding liability for "wilful misconduct" or "gross negligence" in addition to "fraud" would in fact expand the scope of and tighten the control on exemption clauses. The Administration also pointed out that the majority of views received during the public consultation in 2012 supported the imposition of statutory control on trustee's exemption clauses as currently proposed.

Regulation of trustees acting in a professional capacity

14. As the legislative proposals provided trustees acting in a professional capacity with remuneration out of the trust funds for services provided, some members considered that the regulation over trustees acting in a professional capacity should be strengthened. There were enquiries about the regulatory regime currently in place and new measures to be

implemented to strengthen regulation of trustees acting in a professional capacity.

15. The Administration responded that the legislative proposals served to elucidate the default powers of trustees, which were often provided for in the instruments for present-day trusts. There was regulation for certain trusts which had more interface with the general public, for example unit trusts which were currently subject to authorization by the Securities and Futures Commission. There was no uniform international practice regarding the regulatory approach in this area in other common law jurisdictions and the Administration had no plan to introduce a new statutory regulatory framework for trustees acting in a professional capacity. The Administration also advised that under the legislative proposals, the duty of care expected of a trustee acting in a professional capacity would be higher vis-à-vis other trustees.

Non-charitable purpose trusts and charitable trusts

16. Noting that non-charitable purpose trust had its functions in society, for example, to support the development of a political party in Hong Kong which a charitable trust was disallowed to do so, some members considered that the Administration should formulate a statutory framework to allow the creation of non-charitable purpose trust for genuine lawful purposes.

17. The Administration advised that under the common law, trusts formed for non-charitable purposes were generally held to be void. Other major common law jurisdictions (e.g. the UK) had yet to take forward any legislation to enable the creation of this kind of trusts. It was noted that during previous public consultations, views from respondents on this subjects were diverse. While some respondents welcomed the proposal for commercial reasons, some considered that safeguards were necessary to enforce this kind of trusts to avoid conferring excessive rights to trustees. The Administration considered it prudent to adopt a cautious approach in the matter and that any proposals relating to non-charitable purpose trusts should better be dealt with separately in future in order not to delay introduction of the Bill.

18. As regards charitable trusts, some members expressed concern about the lack of regulation over some charitable trusts and opined that an effective regulatory system should be put in place to enhance protection for the rights of the beneficiaries. Proposals in this regard included introducing provisions to ensure the transparency of charitable trusts, provisions for the regulatory/enforcement bodies to conduct spot checks on

the trustees in preventing malpractice, and establishing a public register system to publicize the detailed information and financial reports of trusts. There was also concern about how charitable trusts set up in overseas countries could be regulated locally.

19. On the regulation over charitable trusts, the Administration advised that some specific requirements had been included in the legislative proposals for such trusts in view of their special nature. For example, the rules against excessive accumulations of income would apply to charitable trusts. The Administration also pointed out that currently there was no mandatory registration regime for trusts. Regarding charities established in the form of companies limited by guarantee, the Administration explained that they should be regulated by the Companies Ordinance (Cap. 32). The Administration would reflect members' concern on the above issues to the Law Reform Commission in the context of the review of the legal and regulatory framework for charitable organizations. On the regulation of overseas trusts, the Administration would be very prudent in making reference to relevant legislation of comparable jurisdictions so that such trusts would not become a tax evasion instrument.

Tax evasion

20. On members' concern about safeguards for preventing wealthy people from using a trust to evade tax payments if a settlor was allowed to decide the types and amounts of investments of the trust funds, the Administration advised that it had made reference to the trust statute in Singapore in drawing up the proposed provisions for a settlor to retain certain powers in deciding the investments of his trust. However, a settlor might face the risk of his trust being ruled as invalid in court if he controlled fully or to a significant extent the investments of the trust.

Costs afforded by beneficiaries

21. Regarding members' concern about high level of trustee fees, including the hidden cost of creating a trust and the cost of the legal procedures required for beneficiaries to break a trust, the Administration pointed out that the legislative proposals included a default charging clause to give professional trustees a right to receive remuneration subject to any contrary intention in trust instruments. There were also provisions to empower beneficiaries to remove a trustee through a court-free procedure provided that specified requirements such as unanimous consent among the beneficiaries were met. These proposals should help reduce the cost of the legal procedures involved.

22. In response to members' enquiry about the arrangements to handle complaints against trustees charging unreasonably high management fees for the trusts, the Administration advised that while there would be provisions to provide for remuneration of professional trustees, these provisions would be subject to reasonable safeguards if the trust instruments did not contain a charging clause.

Modernization of the trust law

23. Some members called on the Administration to take the opportunity of the current reform to modernize Hong Kong's trust law regime. They stressed that efforts should not only be put on keeping the regime in line with the latest international developments but also meeting the foreseeable needs of the trust industry in the coming decade. The Administration should proactively gauge the views of the trust industry and incorporate its views in the legislative proposals.

24. The Administration responded that it had maintained close communication and collaborated with the trust industry to understand market needs and practices, including updated developments in the regional competitors. The legislative proposals had incorporated many suggestions put forth by JCTLR and trust service providers during the 2009 and 2012 consultations.

Development of wealth management business in Hong Kong

25. On members' enquiry as how the trust law reform would facilitate the development of wealth management business in Hong Kong, the Administration advised that as revealed by the trust industry, many potential settlors did not create trusts in Hong Kong mainly because Hong Kong's trust law was outdated. The reform on trust law regime would keep it up with the trust law development in other comparable jurisdictions. Apart from the trust law reform, there were other initiatives to support the development of wealth management in Hong Kong, such as the abolition of the estate duty.

References

26. A list of relevant papers is in the **Appendix**.

Council Business Division 1
Legislative Council Secretariat
12 March 2013

Appendix

List of relevant papers

Date	Event	Papers/Minutes of meeting
6 July 2009	The Panel on Financial Affairs ("FA Panel") discussed the review of the Trustee Ordinance	Discussion paper (LC Paper No. CB(1)2095/08-09(02)) Minutes (LC Paper No. CB(1)73/09-10) Follow-up paper (LC Paper No. CB(1)2394/08-09(01))
1 March 2010	FA Panel discussed the review of the Trustee Ordinance and related matters	Discussion paper (LC Paper No. CB(1)1213/09-10(03)) Minutes (LC Paper No. CB(1)1725/09-10)
22 March 2012	The Administration launched a two-month public consultation on the draft legislation on trust law reform	Press Release Consultation paper (LC Paper No. CB(1)1397/11-12(01))
2 April 2012	FA Panel discussed the consultation paper on the detailed proposals on trust law reform	Discussion paper (LC Paper No. CB(1)1411/11-12(03)) Consultation paper (LC Paper No. CB(1)1397/11-12(01)) Follow-up paper (LC Paper No. CB(1)1648/11-12(01)) Minutes (LC Paper No. CB(1)2028/11-12)

Date	Event	Papers/Minutes of meeting
3 December 2012	FA Panel discussed the legislative proposals of the Bill	<u>Discussion paper</u> (LC Paper No. CB(1)207/12-13(05)) <u>Minutes</u> (LC Paper No. CB(1)585/12-13)
20 February 2013	The Bill was introduced in to the Legislative Council	<u>The Bill</u> <u>Legislative Council Brief</u> <u>Legal Service Division report</u> (LC Paper No. LS 26/12-13)