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By email: bc_03_12@legco.gov.hk

The Bills Committee on the Trust Law (Amendment) Bill 2013
Legislative Council Secretariat
The Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Sir

Bills Committee on Trust Law (Amendment) Bill 2013

We thank you for your letter of 29th April inviting the Association's comments on the four issues specified in your letter.

We would like to state our support to the initiative of the Government to revise and modernize the trust law regime in Hong Kong to strengthen the competitiveness of its trust services industry and further consolidate its status as an international asset management centre. This step will be pivotal to Hong Kong's status and aspiration as the financial hub in the Region going forward, towards the well-being of Hong Kong and the industry alike.

We are pleased to enclose our detailed comments on the specific issues as follows:

(a) **Proposed Section 3A to the Perpetuities and Accumulations Ordinance**

As stated in our earlier submissions, we note that there are strong policy arguments for there being a period beyond which assets should not be tied up, and rather than there being the complex formulation of a life or life in being plus 21 years, a fixed period would be desirable, as to which of the periods suggested is really a matter of balancing freedom of the settlor to tie up his assets in such way as he chooses against the undesirability of assets being tied up for an excessively long period. We still maintain that this balance is important and valid. However, we also note that in practical terms a limitation of 150 years vs. no limitation makes no difference. Therefore, we do not object to the abolition of the rule.

Chairman Standard Chartered Bank (Hong Kong) Ltd
Vice Chairmen Bank of China (Hong Kong) Ltd
The Hongkong and Shanghai Banking Corporation Ltd
Secretary Boey Wong

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副主席 中國銀行（香港）有限公司
香港上海匯豐銀行有限公司
秘書 黃凱儀

(b) Proposed Section 41W to the Trustee Ordinance

Again, we have already commented on this provision and would like to reiterate our comments as follows:-

- (1) We agree with the general concept of the section to render void exemption clauses and indemnities which seek to exempt trustees from liability arising from fraud, wilful misconduct and “gross negligence” (meaning negligence greater than ordinary negligence).
- (2) In respect of the usage of the term “gross negligence” in the legislation, we believe this as this is legally problematic in that in some cases it has been decided that “gross negligence” connotes something no more than ordinary negligence and if this is the result then the effect of the section would be broader than intended. See in particular *Pentecost v. London District Auditor* ([1951] 2 All ER 330) where the following is stated:-

“Epithets applied to negligence, so far as common law is concerned are meaningless. Negligence is well known and well defined. A man is either guilty of negligence or is not. Gross negligence is not known to the English common law so far as civil proceedings are concerned and one only has to consider the phrase in criminal cases particular in cases of manslaughter.”

- (3) We suggest that Section 41W be revised appropriately so as to delete reference to “gross negligence” and include a description which does not refer to “gross negligence” but references conduct more serious than ordinary negligence involving unreasonably risky behaviour.

(c) *Bartlett v. Barclays Trust Co. Limited*

We have reviewed the English case of *Bartlett v. Barclays Trust Co., Limited*. Hong Kong trusts do very often involve private companies, holding large amounts of family assets where, although the trustees are holding the shares, they are not involved in the management of the companies. Based on this English case law authority, trustees would be exposed to liability unless either they became involved in the running of the company or the trust instrument provided for some exclusion from liability excluding liability for not involving themselves in the affairs of the company.

With the enactment of the statutory duty of care and the proposed Section 41W of the Trustee Ordinance, such a provision excluding liability in this case may well be subject to a legal challenge.

It seems to us that if the settlor of the trust wishes to set up a trust giving the trustees this level of exemption, then that is something which should be honoured and if the law in Hong Kong does not accommodate this, then the



likelihood is that settlors will establish their trusts in other jurisdictions where trustees are capable of being excused from liability under these circumstances. Accordingly, we endorse and support the view expressed by the Joint Committee on Trust Law Reform – a Joint Committee of the Society of Trust and Estate Practitioners Hong Kong Branch and the Hong Kong Trustees Association Limited and the reasons which they put forward for the proposal to give statutory effect to clauses in trust instruments which relieve the trustees from liability for management and supervisory obligations to which they would otherwise be subject.

(d) Other comments in our submission

We would like to reiterate and expand on our comments on the following:-

Proposed Section 41Y of the Trustee Ordinance

The purpose of this section is to prevent transfer of property being subject to foreign law of inheritance (i.e. forced heirship rules).

Our comments were two fold:-

- (1) The section only applies if the trustees are either individuals who are ordinarily resident in Hong Kong or bodies corporate with central management and control in Hong Kong. It seems to us that this could give rise to uncertainty for both individuals and corporates and particularly for individuals who may have an itinerant lifestyle. It seems to us that the protection provided by the section should be available when the trust is governed by Hong Kong law irrespective of the residence or central management control of the trustees. As drafted, it seems to us that the section would be of uncertain application with the possibility of it being argued that the section would not apply to a Hong Kong trust because one or more of the trustees might not meet the residence or control test.
- (2) The section only applies to movable property and not immovable property. It seems to us that it should apply to immovable property particularly that located in Hong Kong although as mentioned in the Administration's response to our submission, foreign law will probably mandatorily apply to immovable property in the jurisdiction of the relevant foreign law.

Second Schedule to the Trustee Ordinance

- (1) Only minor changes have been suggested and our comment was to the effect that this Schedule should have been the subject of a detailed review given that it has not been the subject of such a review since its original enactment.



- (2) We are supportive of the amendments proposed to be made but feel that a further review is necessary to bring this Schedule up to date.

Amendments to the Enduring Powers of Attorney Ordinance

The effect of the revisions to the Enduring Powers of Attorney Ordinance are that a person may not appoint an attorney to exercise his powers as trustee after he has become mentally incapacitated. There does not seem to be any valid reason for this and it is not inappropriate for a person to be able to choose who he should want to discharge his duties as trustee after supervening mental incapacity. The statement in the response from the Administration to the effect that the mentally incapacitated person would not be able to supervise the attorney after supervening incapacity is true but that is also true in relation to any other powers (other than as a trustee) exercised by an attorney under an enduring power of attorney. Indeed, it is the intention of the legislation to provide for an attorney to be able to act when the appointor is no longer able to do so.

The alternative mechanisms for removal of trustees under Section 37 of the Trustee Ordinance or the proposed Section 40B do not address the same concept which is that a person prior to supervening mental incapacity should be able to appoint somebody of his choice who is able to act in his capacity as trustee after he has become mentally incapacitated. The existing and proposed powers under the Trustee Ordinance relate to removal of trustees by the beneficiaries or trustees. There is no reason why those powers should not co-exist with the ability of a person to appoint a person to fulfil his position as a trustee after that person supervening mental incapacity.

Should you require any further elaboration to any of the above, please contact the Secretariat (Ivy Wong at 2521-1160).

Yours faithfully

Boey Wong
Secretary