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By email: bc_03_12@legco.gov.hk

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

Dear Sirs

Trust Law (Amendment) Bill 2013

We thank you for your letter of 7 March 2013 inviting the Association's views on the subject Bill. We would like to provide our comments as follows:

Clause 3A

This should provide that the statutory duty of care does not affect the legality of anything done prior to the effective date of the amending Ordinance; see Clause 3A(3) of the Consultation Paper.

Clause 40A(1)(a)

The provision giving beneficiaries the entitlement to remove trustees is stated not to apply if the trust instrument provides for a person nominated for the purpose of appointing new trustees. Given that the power of removal of trustees is only vested in either a sole beneficiary or all of the beneficiaries who are of full age and capacity who are absolutely entitled to the trust property we see no reason why this power should be restricted in this way. This is because at the end of the day as a matter of law, they would be entitled to demand the transfer of the trust property to them, so there does not seem to be any reason why they should not be entitled to remove a trustee.

Clause 40A(2)(a)

The power to direct a trustee to retire from the trust is presumably intended also to include the power to direct one or more trustees to retire from the trust and perhaps this should be clarified.

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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Clause 40A(4)

The reference to the trustee being discharged from the trust by a deed declaring his retirement should be subject to an exception to the effect that he is not discharged in respect of actions taken by the trustee prior to his retirement.

Clause 40B(1)(b)

The ability of beneficiaries to require retirement of a mentally incapacitated trustee is subject to no other person being entitled and willing to be appointed in place of the mentally incapacitated trustee. It is not clear to us why this is the case given that the beneficiaries are required to be of full age and capacity and absolutely entitled to the trust property. See also Clause 40A(1)(a).

Clause 40D(5)

It is not clear why Sections 40A and 40B do not allow beneficiaries to remove a personal representative particularly as the power is limited to persons of full age or trust corporations who are absolutely entitled to the trust property.

Clause 41B(3)

In our earlier submission, we expressed the view that there was no compelling argument as to why the trustees of a charitable trust need to have wider powers of delegation than the trustees of non-charitable trusts. We remain of this view.

Clause 41C(2)

These provisions contain restrictions on two persons being appointed as an agent unless they are restricted to exercise their functions jointly. It is not clear why this restriction is included and there is no discussion in the Consultation Paper regarding this.

Clause 41I(2)

This states that if a trust instrument provides that investments must be retained or made "in the name of a trustee" it does not amount to an express prohibition on trustees making investments in bearer form. We would have thought that the opposite was true and given that the intention is that the power appointment of nominees or custodians is subject to a contrary intention in the trust instrument (see Clause 3(2A)), we do not believe that Clause 41I(2) is appropriate. There is no discussion of this provision in the Consultation Paper.

Clause 41I(5) and (6)

We believe it is reasonable to disapply Clauses 41I(3) and (4) to a sole trustee which is a trust corporation or a trust having a custodian trustee. We do not however see why Clause 41I(5) (the obligation to evidence and appointment of a



custodian in writing) should not continue to apply. See Clause 41F(1) in respect of asset management agreements.

Clause 41S(1)(a)(ii) and (b)(i)

It is not clear to us why a sole trustee acting in a professional capacity for a charitable trust is treated any differently from trustees where there is more than one trustee. Also, in Clause 41S(1)(b)(ii) following from this the wording beginning "only to the extent that" should be extended to cover the situation where the trustee is a sole trustee. A similar issue arises under Clause 41T(1)(b).

Clause 41T(7)(b)

The definition of reasonable remuneration makes reference to the provision of services by a trustee who is an authorized institution under the Banking Ordinance and provides services "in the course of, or incidental to, the exercise of its functions as a trustee". It is not clear to us what this means and some elaboration is required. If an authorized institution is a trustee, many of the services that it would provide to the trust would not necessarily be in the course of, or incidental to, its capacity as a trustee. We believe that this provision needs to be elaborated.

Clause 41V(2)(b)

Following from the previous point, we wonder whether it is necessary here also to refer to services provided by an agent, nominee or custodian which is also an authorized institution along the same lines with Clause 41T(7)(b) with some suitable elaboration.

Clause 41W(3) and (4)

These provisions refer to "gross negligence". There is authority to the effect that gross negligence is no more than ordinary negligence. We suggest that these be clarified along the lines of activity that involves unreasonably ignoring a known risk.

Clause 41W(3)(b)

We are of the view that it is reasonable and in line with market practice to indemnify a professional trustee against liability incurred by him but not a liability which is caused by or arising out of or in connection with the trustee's own fraud, wilful misconduct or reckless act. We suggest that the drafting in Clause 41W(3)(b) be modified as follows:

(3) The terms of a trust must not-

(b) grant the trustee any indemnity against the trust property in respect of any liability arising from the trustee's own fraud, wilful misconduct or [conduct involving unreasonably ignoring a known risk].

Clause 41X

Although we are in favour of a statutory provision to the effect that a trust will not be invalidated by reason of only certain reserved powers of settlors, we believe that these should be limited to the power of adding or removing trustees, protectors or beneficiaries or the powers of investment.

Clause 41Y(1)(b)(i)

The provision requiring an individual trustee to be ordinarily resident at all times may be too restrictive possibly resulting in the disapplication of the rule against forced heirship because a trustee is resident for part of the time outside Hong Kong.

Clause 41Y(2)

This provision only applies to movable property thereby excluding land. This needs to be reconsidered.

Second Schedule

The changes made here were not discussed in the Consultation Paper and are very limited and suggestive of the fact that a detailed review of this Schedule has not occurred. We would have thought that a comprehensive review was appropriate given the fact that this Schedule has not been the subject of a comprehensive review since its original enactment.

However, we welcome the Government's current proposal to relax the market capitalisation and dividend requirements concerning investment in shares. We would suggest that a more detailed review of the Second Schedule is carried out to provide further relaxation of the investment restrictions such that the investment universe for a trustee may be expanded.

Third Schedule, Division 1, Paragraph 1(b)

This provision however applies the duty of care to Section 11(1), (2), (3), (4) and (5) and Section 12. These are somewhat technical supplementary provisions which we suspect are seldom used and no discussion is contained in the Consultation Paper or the earlier paper regarding application of the duty of care to these provisions. In view of their highly technical nature, we would suggest that these provisions should not be included in this part of the Third Schedule.

Third Schedule, Division 3, Paragraph 5(a)

Unless a clear case can be made for applying the duty of care to Section 16 of the Trustee Ordinance, the duty of care should not apply in view of the technical nature of this section. There is no discussion of this aspect in the previous Consultation Papers and we remain of the view that the statutory duty of care should not apply to this section.

Third Schedule, Division 3, Paragraph 7(a)

We are of the view that the duty of care should not be applied to the powers under Section 24(1) or (3) of the Trustee Ordinance because of the technical nature of these provisions unless a clear case can be made to support this. There is no discussion of this aspect in either of the Consultation Papers and therefore in our view the duty of care should not apply to these provisions.

Amendments to Perpetuities and Accumulations Ordinance

Clause 3(1A)(a)

This provides that the changes apply in respect of an instrument taking effect after the commencement of the Ordinance which is appropriate; however the clause goes on to state that the changes do not apply to a will executed before the commencement but taking effect after the commencement. There does not seem to be any logic to this approach which potentially delays application of the changes to wills.

Clause 3A

It seems to us that there are policy arguments in favour of there being a period beyond which assets should not be tied up and we would prefer a longer period rather than no limitation (in our earlier submission we suggested 150 years). The comment in the Consultation Paper that land should not be tied up for an outdated purpose simply because all private land is leasehold does not, we think, justify a wholesale abandonment of the rule against perpetuities. Many trusts include assets other than land.

Clause 3B(3)

There is no discussion of this provision which indicates that the restrictions on the ability to accumulate income does not apply if the power to accumulate income ceases to have effect on the death of the settlor or one or more of the settlors. We can see no reason why this should be an exclusion of the general provision.

Amendments to Enduring Powers of Attorney Ordinance

We are of the view that there is a case for retaining Section 8(3)(a) of the Enduring Powers of Attorney Ordinance revised appropriately to reflect the proposed revisions to Section 27 of the Trustee Ordinance to the effect that where the relevant trust has more than one trustee, the exercise of the powers under the enduring power of attorney must not result in the trust having only one attorney or one trustee administering the trust unless the attorney or trustee is a trust corporation. This is because the Enduring Powers of Attorney Ordinance is addressed to a particular situation namely an ability for an individual to appoint



an attorney which will be in effect after the individual has become mentally incapacitated. Deleting Section 8(3)(a) of the Enduring Powers of Attorney Ordinance would mean that this kind of power of attorney cannot be granted which would reduce its effectiveness insofar as the individual who has become mentally incapacitated is a trustee. We can see no policy reason why it is inappropriate for an enduring power of attorney not to include the exercise of powers as a trustee. See also Rule 5(3)(g) of the Enduring Powers of Attorney (Prescribed Form) Regulation. We believe that this aspect needs to be reconsidered.

For any questions, please contact the Secretariat (Ms Ivy Wong at 2521-1160).

Yours faithfully

A handwritten signature in black ink, appearing to be "Boey Wong", written in a cursive style.

Boey Wong
Secretary