

立法會

Legislative Council

LC Paper No. LS26/12-13

Paper for the House Committee Meeting on 22 February 2013

Legal Service Division Report on Trust Law (Amendment) Bill 2013

I. SUMMARY

- 1. The Bill**

The Bill seeks to modernize the trust law so as to facilitate more effective trust administration. To that effect, the Trustee Ordinance (Cap. 29) and the Perpetuities and Accumulations Ordinance (Cap. 257) are proposed to be amended to, inter alia, -

 - (a) introduce a trustees' statutory duty of care;
 - (b) empower trustees to appoint agents, nominees and custodians and to insure trust properties against loss or damage due to any event;
 - (c) allow certain trustees to receive remuneration and regulate the exemption clauses applicable to them;
 - (d) empower beneficiaries to give directions on the appointment and retirement of trustees; and
 - (e) abolish the rule against perpetuities and the rule against excessive accumulations of income with respect to new instruments while retaining certain restrictions on accumulations of income for new charitable trusts.

- 2. Public Consultation**

A public consultation on the broad direction for modernising the trust laws was conducted in 2009 and another public consultation on the detailed legislative proposals was conducted in 2012 to solicit the views of the public and stakeholders. The majority of respondents were generally in support of the legislative proposals.

- 3. Consultation with LegCo Panel**

The Panel on Financial Affairs was consulted on the legislative proposal on 3 December 2012. Various concerns were expressed by Panel members.

- 4. Conclusion**

In view of Members' concerns raised at the Panel meeting and the significance of the Bill's impact on the trust law in Hong Kong, Members may wish to consider setting up a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 20 February 2013. Members may refer to the LegCo Brief (File Ref.: G4/55/5C) issued by the Financial Services and the Treasury Bureau on 6 February 2013 for further details.

Object of the Bill

2. To amend the Trustee Ordinance (Cap. 29) (TO) and the Perpetuities and Accumulations Ordinance (Cap. 257) (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 amendments.

Background

3. TO and PAO have not been substantially reviewed or modified since their respective enactment in 1934 and 1970. According to the Administration, some of their provisions cannot meet the needs of present-day trusts. The Bill is introduced in view of the recent trust law reform of the United Kingdom and Singapore and in order to enhance Hong Kong's status as an international asset management centre.

4. Broadly, where a person has property or rights which he holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or particular purposes, he is said to hold the property or rights on trust for that other or those others, or for that purpose or those purposes, and he is called a trustee¹.

¹ Halsbury's Laws of Hong Kong, vol. 26(2) (2009 reissue), at para. 400.003

Provisions of the Bill

5. Clause 4 of the Bill amends section 3 of TO to the effect that the powers conferred by TO on trustees are subject to, not only the terms of the instrument creating the trust, but also the terms of an enactment². These powers are in addition to the powers conferred by that instrument or enactment unless a contrary intention is expressed in that instrument or enactment.

Trustees' statutory duty of care

6. Clause 5 adds a new section 3A to TO to specify a statutory duty of care for trustees to exercise such care and skill as is reasonable in the circumstances, having regard to the trustee's special knowledge, experience or professional status. Subject to the contrary terms of the trust instrument or enactment, the statutory duty of care will apply to trustees when they are exercising the powers and duties in relation to making investments, appointment of agents, nominees and custodians, taking out insurance, etc. as set out in the new Third Schedule (Clause 40 of the Bill). Where this new statutory duty of care applies, it replaces the existing common law duty of care for trustees. The duty may be excluded by a deed executed in relation to an existing trust by the person creating the trust (the settlor) or the beneficiaries.

7. Clauses 7, 9, 13 and 17 amend sections 7, 11, 16 and 24 of TO to make the protection of trustees from liability, e.g. retention of unauthorized investment, conditional on the trustees discharging the statutory duty of care.

8. Clause 22 repeals section 32 of TO, which provides for implied indemnity of trustees, as being inconsistent with the proposed statutory duty of care.

Scope of authorized investment

9. Section 4 of TO provides that trustees may invest any trust funds in authorized investments that satisfy the conditions specified in the Second Schedule. Clause 39 amends the Second Schedule to lower the market capitalisation of the company issuing the shares from HK\$10 billion to HK\$5 billion, replace the current five-year dividend requirement by a requirement of dividend payment in any three of the previous five years and accept dividends in forms other than cash for the purposes of satisfying the dividend requirement. It is also expressly stipulated that the authorized investments do not include structured products as defined in the Securities and Futures Ordinance (Cap. 571).

² "enactment" has the same meaning as Ordinance, as defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1).

10. Clause 10 amends section 12(2) of TO so that the trustees may apply not only the capital money but also the income of the trust, e.g. rents and profits, to pay the calls on any shares subject to the trust.

Power to insure

11. Clause 14 amends section 21 of TO to empower trustees to insure the trust property against risk of loss or damage caused by any event instead of loss or damage by fire and typhoon only, pay premiums out of the trust funds instead of the income of the trust only, and to remove restrictions on the amount of insurance that the trustees may take out. In the case of bare trust³, such power to insure is subject to the direction given by the beneficiary or each of beneficiaries.

Appointment and retirement of trustees on beneficiaries' directions

12. Clause 25 adds new sections 40A to 40D to TO to enable beneficiaries to appoint and retire trustees under specified circumstances without resort to the courts.

Appointment of agents, nominees and custodians by trustees

13. Clause 18 repeals section 25 of TO which provides for the trustees' power to employ agents. Clause 27 adds a new Part IVA (amongst others, new sections 41A to 41P) to provide for trustees' powers to appoint agents, nominees and custodians and to specify requirements in relation to the appointment including the trustees' duty to review the arrangements. The trustees may delegate their functions subject to restrictions expressly stated. In the case of trusts that are not charitable trusts, certain functions such as the functions relating to the distribution of trust assets and the appointment of other trustees are non-delegable. For charitable trusts, the agents can perform only those functions which relate to the investment of assets, raising of funds and implementing decisions of the trustees.

Remuneration of trustees

14. The new sections 41Q to 41T in a new Part IVB provides that in specified situations, trustees acting in a professional capacity (as defined in the new section 41R(1)) are entitled to charge remuneration for their services rendered to the trust.

³ It is defined in the new section 21(3).

15. The new sections 41U and 41V provides for reimbursement of trustees' expenses and remuneration and expenses of agents, nominees and custodians appointed by trustees out of trust funds.

Statutory control on trustees' exemption clause

16. A new section 41W provides, inter alia, that trustees acting in a professional capacity are not exempted from liability for breach of trust arising from the trustees' own fraud, wilful misconduct and gross negligence and any exemption clause to the contrary will be invalid. This new section applies to trusts whether created before or after commencement of the enacted Bill, but in case of existing trusts, it will take effect one year after the commencement of the enacted Bill.

Settlors' reserved power

17. The new section 41X provides that a settlor, having created the trust, reserving power relating to investment or asset management functions does not invalidate the trust. A trustee who has acted in accordance with the exercise of the power is exempt from liability.

Transfer of movable properties to a trust

18. The new section 41Y provides for certainty on the validity of a transfer of movable properties to a trust which is expressed to be governed by Hong Kong law if the settlor has the requisite capacity to make such transfer.

Abolition of the rule against perpetuities (RAP) and the rule against excessive accumulations of income (REA)

19. RAP under PAO specifies a time limit within which the interest in trust properties must vest in the beneficiaries. REA under PAO stipulates that settlors may choose one of the six statutory accumulation periods e.g. the life of the settlor, a term of 21 years from the death of the settlor or the date of the making of the disposition etc. for which the income of a trust may be accumulated. Accumulation beyond those periods is not allowed.

20. Clause 46 adds a new section 3A to PAO to provide that the RAP and REA cease to have effect in relation to instruments creating trusts or special powers of appointment taking effect on or after the commencement of the enacted Bill, and subject to the terms of the trust, to allow a trust to continue in existence for an unlimited period of time except non-charitable purpose trusts under the new section 3C. The new section 3B maintains certain restrictions on accumulations of income of charitable trusts.

Public Consultation

21. According to paragraph 14 of the LegCo Brief, a public consultation on the broad direction for modernising the trust laws was conducted in 2009 and another public consultation on the detailed legislative proposals was conducted in 2012 to solicit the views of the public and stakeholders including the trust industry, relevant professional bodies and practitioners, chambers of commerce, financial services regulators, major charitable organisations and academics. The majority of respondents were generally in support of the legislative proposals.

Consultation with LegCo Panel

22. The Clerk to the Financial Affairs Panel has advised that the Panel on Financial Affairs was consulted on the legislative proposal on 3 December 2012. Various concerns were expressed by Panel members. The major ones included the scope of control on trustee's exemption clauses, the lack of legal provisions for the creation of non-charitable purpose trusts and on disclosure of trust-related information to beneficiaries, and the needs for the trust law to strengthen regulation over trustees acting in a professional capacity, to keep up with the latest international developments, as well as to meet the future needs of the trust industry.

Conclusion

23. In view of Members' concerns raised at the Panel meeting and the significance of the Bill's impact on the trust law in Hong Kong, Members may wish to consider setting up a Bills Committee to study the Bill in detail.

Prepared by

LO Wing-yee, Winnie
Assistant Legal Adviser
Legislative Council Secretariat
19 February 2013