

Review of the Trustee Ordinance and Related Matters
Consultation Paper

Position Paper of the Hong Kong Bar Association

1. In the Consultation Paper, 8 very different areas are covered:
 - (1) trustees' duty and standard of care;
 - (2) trustees' powers for performance of their duties;
 - (3) trustees' entitlement to remuneration;
 - (4) trustees' exemption clauses;
 - (5) beneficiaries' right to information;
 - (6) beneficiaries' right to remove trustees;
 - (7) rules against perpetuities and excessive accumulations of income;
 - (8) miscellaneous proposals put forward by trust practitioners.

2. Many of the areas of consultation touch on matters of administration and trustee powers. These are matters with which those with day to day contact with trust administration such as professional trustees, bankers and trust draftsmen are well equipped to provide their views from a practical perspective. The Bar shall confine its views to matters of broad legal principles.

3. In a nutshell, the various proposals and queries identified in the Consultative Paper may be classified as follows:

- (1) Proposals/queries principally based on the recommendations of the major Commonwealth law reform bodies (principally the UK Law Commission) and/or the major Commonwealth legislation (principally the legislation in the UK).
- (2) Proposal which the UK Law Commission Report in 2006 had not adopted.
- (3) Proposals which are not based on any UK Law Commission Report or legislation.
- (4) Proposals and queries based on the experiences of offshore trust jurisdictions/tax havens.

(1) Proposals and queries on subject matters which have been dealt with by reforms in major Commonwealth legislation (principally legislation in the UK)

4. The proposals/queries which fall within this category are:

- (1) Proposal to introduce a statutory duty of care on trustees similar to §7 of Schedule 1 to the Trustee Act 2000 (“TA 2000”).¹
- (2) Proposal that Schedule 2 of the Trustee Ordinance (“TO”) (which sets out the range of permissible investments) should be retained.²
- (3) Proposal regarding trustee’s power of delegation similar to section 7 of Trustee Delegation Act 1999 (namely to amend section 27(2) of TO to provide an overriding condition that if a trust has more than 1 trustee, a delegation made under section 27 should not result in having only one

¹ See §2.13 of Consultation Paper.

² See §2.28 of Consultation Paper.

attorney or one trustee administering the trustee, unless that attorney or trustee is a trust corporation).³

- (4) Query whether to provide trustees with a general power of appointing agents similar to section 11(2) of TA 2000.⁴
- (5) Proposal to provide trustees with a general power to employ nominees and custodians in relation to such of the trust assets as they determine similar to sections 16-20 of TA 2000.⁵
- (6) Proposal to widen trustees' power to insure similar to section 34(1) of TA 2000.⁶
- (7) Proposal to provide a statutory charging clause in the TO to enable the remuneration of professional trustees of non-charitable trusts similar to sections 28-30, 33 of TA 2000.⁷
-
- (8) Proposal to give beneficiaries a statutory right under the TO to appoint and replace trustees similar to sections 19 and 20 of the UK Trusts of Land and Appointment of Trustees Act 1996.⁸
- (9) Proposals to reform the rule against perpetuities (either by abolishing the rule altogether or by introducing a fixed perpetuity period as recommended by the UK Law Commission in 1998 which were introduced to the UK Parliament on 1st April 2009)⁹ and to abolish the

³ See §2.34 of Consultation Paper.

⁴ See §2.44 of Consultation Paper.

⁵ See §2.49 of Consultation Paper.

⁶ See §2.54 of Consultation Paper.

⁷ See §2.61 of Consultation Paper.

⁸ See §4.14 of Consultation Paper.

⁹ See §5.12 of Consultation Paper.

Rule against Excessive Accumulations following the examples of the UK and a number of other Commonwealth jurisdictions¹⁰

5. The purpose of these proposals/queries is to attempt to modernize certain provisions in the local legislation relating to trust law (namely, the Trustee Ordinance (Cap 29) and the Perpetuities and Accumulations Ordinance (Cap 257)), which may be said to be outdated.
6. The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principal the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has always been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject matter can be followed.
7. The one exception to the Bar's support of following the UK experience is that relating to widening of trustees' default powers of investment¹¹. The Bar notes that the Consultation Paper has recommended retaining the present Schedule 2 (subject to review from time to time), and has *not* recommended following the UK example of providing for a wide default power. The Bar supports the approach in the Consultation Paper for the reasons given therein. After all, one is here dealing with a default power. If the settler, having positively addressed his mind to the matter, wishes the trustee to have more wide ranging investments or power to make more ambitious or hazardous investments, there is nothing to prevent him from doing so in the trust instrument.

¹⁰ See §5.18 of Consultation Paper.

¹¹ See §2.28 of Consultation Paper.

(2) Proposal which the UK Law Commission Report in 2006 had not adopted

8. The proposal which falls within this category is that concerning trustees' exemption clauses. In 2006, the UK Law Commission concluded that trustee exemption clauses might be justified in certain circumstances and suggested to adopt a non-statutory approach.¹²
9. It is proposed in the Consultation Paper that trustee exemption clauses seeking to exempt professional trustees who receive remuneration for their services should be subject to statutory control. Such a proposal does not appear to be based on the model in any other Commonwealth jurisdictions. That said, judicial sentiments have been expressed (as noted in §3.5 of the Consultation Paper) as to the need to restrict professional trustees' ability to exempt their liability. In view of the tendency for large trust corporations to force standard form exemption clauses upon users/clients who very often have no choice (or little awareness that such clauses are being included in the trust instruments that they are signing as settlor), the Bar recognizes that this is an area deserving serious attention.
10. As to the legal mechanism of tackling the problem, there are two broad techniques. One is to leave it to the Courts to deal with the issues as and when they arise, by reference to existing common law or equitable doctrines (such as the line of reasoning developed by Millett LJ, as he then was, which was cited in §3.5 of the Consultation Paper), with or without the adoption by the industry of any Code of Practice. The other is by statutory intervention.
11. It may be said that the common law is already capable of providing sufficient protection against unreasonable or oppressive exemption clauses. However, the position may not be clear cut. The sentiments of Millett LJ cited §3.5 of the Consultation Paper can be said, if one reads the passage in context, not to

¹² See §3.3 of Consultation Paper.

represent a statement as to what the law *was* but merely Millett LJ's recitation of what a lot of people had wished the law *to be*. His Lordship expressly stated (at 256D) that the matter should be left to Parliament to deny legal effect to exemption clauses of the type before him.

12. In the Bar's view a better way of tackling exemption clauses which are regarded as unreasonable would be *via* statutory intervention. However, the Bar is not convinced that the appropriate model is the one based on the MPFS. A more appropriate model would be one based on Control of Exemption Clauses Ordinance. That has the benefit of being tried and tested and hence the Courts (and trustees and clients alike) have a body of jurisprudence from which to consult. Other regimes (e.g. those based on MPFS or provisions in the Companies Ordinance governing debenture trustees) are peculiar to the specific type of trusts concerned and the rationale may not readily apply to all trusts. The Bar is of the view that the proposed regulation should only apply to trustees who provide services as part of their business.
13. As to safeguards about "client awareness" of the existence of exemption clauses the Bar is inclined to leave this matter to be dealt with by the existing legal principles. If the Control of Exemption Clauses model is followed, then it is to be noted that one of the statutory factors taken into by the courts is, in effect, client awareness. The problem of onerous terms being forced on a party or a client without any positive or subjective awareness is not unique to the area of trusts and we think that the problem should be tackled by the general law rather than some peculiar provisions applicable only to this area of the law.

(3) Proposal which are not based on any UK Law Commission Report or legislation

14. The proposal which falls within this category is that concerning beneficiaries' right to information. Such a right is not codified in the UK and is governed by the leading case of *Schmidt v Rosewood Trust Ltd* [2003] AC 2 AC 709.

15. It is proposed in the Consultation Paper that the TO should provide certain basic rules regarding beneficiaries' right to information either by following the suggestion of the Law Institute of British Columbia of Canada in their 2004 report which proposes an additional duty to inform beneficiaries over and above the common law duty to provide accounts or other trust information requested by the beneficiaries, or by requiring trustees to inform beneficiaries of their interests in the trust unless exceptional circumstances apply.¹³
16. Trusts (and trust information) come in all shapes and forms. The existing common law contains sufficient flexibility to enable the Courts to cater for the facts of individual trusts. The Bar does not believe that it would be fruitful to define the sort of information which, by default, trustees are obliged to provide to beneficiaries. The Bar does not support this proposal.

(4) Queries based on the experiences of offshore trust jurisdictions/tax havens

17. The queries which fall within this category are:
 - (1) Query whether "protectors" should be statutorily defined in the TO.¹⁴
 - (2) Query whether there should be legislation providing that a trust shall not be invalidated merely because the settler had reserved to himself certain powers¹⁵.
 - (3) Query whether there is a need to codify common law principles in relation to the governing law of trusts.¹⁶

¹³ See §§4.9 and 4.10 of Consultation Paper.

¹⁴ See §6.11 of Consultation Paper.

¹⁵ See §6.12-6.15 of Consultation Paper.

¹⁶ See §6.21 of Consultation Paper.

- (4) Query whether there should be statutory provisions to the effect that forced heirship rules will not affect the validity of trusts or the transfer of property into trusts that are governed by Hong Kong law.¹⁷
- (5) Query whether the law should be amended to allow the creation of non-charitable purpose trust.¹⁸

18. The issues raised by these queries are wide-ranging and extensive. The last query is a radical and fundamental change to trusts law in the Commonwealth jurisdictions. There has yet been no reported consensus internationally on this subject. Generally the Bar does not see any present need to reform the existing rules on the above areas. The Bar therefore does not favour any change.

Dated this 20th day of November 2009

Hong Kong Bar Association

¹⁷ See §6.25 of Consultation Paper.

¹⁸ See §§6.30-6.32 of Consultation Paper.