

Hong Kong Trustees' Association and Society of Trust and Estate Planners HK

RESPONSE

to

**The Outline Consultation Paper
concerning Review of the Trustee Ordinance and Trust Law in Hong Kong**

A. Background:

1. The Existing Regime:

No comment.

2. Hong Kong's Trust Industry:

- Key figures:

As agreed, we are seeking information from Singapore to show how changes there have benefited the Singapore economy. We will then seek to extrapolate that to Hong Kong.

- Strengths and Weaknesses:

(i) Strengths:

The rule of law. Experience in the trust industry reflected in the workforce. The proximity to and focus on the China market. Small autonomous government interested in the proposed changes.

(ii) Weaknesses:

No up to date trust law. Reluctance to date of the government to be actively involved in marketing the jurisdiction.

3. Reforms in Other Jurisdictions:

- Major common law jurisdictions:

No comment.

- Offshore jurisdictions:

We entirely understand and agree with the view that Hong Kong is a major "onshore" economy and would therefore wish to compare itself with other major common law jurisdictions. Nevertheless, comparison with well drafted trust law of "offshore" jurisdictions will not affect the status of Hong Kong and may provide modern, sensible and innovative examples of change not necessarily available in the major "onshore" regimes.

We therefore suggest looking at:-

- (i) The Dubai International Financial Centre Trust Law (No. 11 of 2005)
- (ii) The amendments to The Trusts (Guernsey) Law 1989 introduced in March 2008.

Also the introduction of reforms to Labuan may need to be noted.

4. Reasons for the Review and Objectives:

We agree with all that you say. We have referred to the work we are doing to provide an impact report. We believe that an important consideration for modernising the trust law of Hong Kong lies in the marketing of the jurisdiction to obtain valuable business. In essence, the key words are Greater transparency - Certainty with clarity - The provision of trustees' responsibilities with appropriate powers.

5. Next Steps:

We note and agree with what you say. Whilst we appreciate the work involved and the desire to speed change, there is urgency in avoiding the competition seizing the initiative so that it will become much more difficult for Hong Kong to re-establish the initiative and market presence.

B. Proposals for Improving Trust Administration:

1. Trustees' Statutory Duty of Care:

We agree with the proposals to introduce a statutory duty of care modeled on UK and Singapore. We believe this to be no more than standard best practice, which is good for the jurisdiction.

2. Trustees' General Partner of Investment:

We agree with the proposals to provide a general power of investment modeled on the UK and Singapore. This too is modern best practice looked for by users of a trust law.

[Please see HKTA/STEP proposals pages 39-51]

3. Trustees' power of delegation:

We agree with the proposals to provide a power of delegation modeled on those of the UK and Singapore. Such sensible yet flexible legislation will benefit the jurisdiction and assist trustees in meeting clients' needs.

4. Trustees' power to insure:

We agree with the proposal to provide modern and wide powers of insurance modeled on those of the UK and Singapore. It must be appropriate for trustees to be able to insure against any risk and pay premiums out of income or capital.

5. Trustees' power to receive remuneration:

We agree with the proposal to provide for powers of remuneration modeled on those of the UK and Singapore. This is a prudent and reasonable protection for trustees and avoids problems arising, particularly in Wills, if there are no charging clauses.

Note: We suggest that the powers of maintenance and advancement should be widened to remove current restrictions. This prevents the perpetual need to draft documents to remove the restrictions and provides modern best practice.

C. Further Proposals for Promoting the Use of Hong Kong Trust Law:

1. Perpetuity:

Reform is proposed and we support this. We suggest:

- that there is no requirement for a perpetuity period;
- provisions for the power for the Trustees to select a fixed period at the outset of the trust or at any time during the trust period;
- provisions for the power for the Trustees to reduce, but not extend, a fixed period at any time during the trust period.

We believe the need for the restrictive practice of a perpetuity period has gone with modern life and global markets. The reform will help to make Hong Kong attractive as a jurisdiction.

2. Accumulation:

We agree that the accumulation of income should be permissible throughout the life of a trust.

3. Validity, Proper Law and Conflict Provisions:

We suggest these three sometimes overriding issues be looked at together. The broad objective of these proposals is to strengthen the integrity of the trust law itself and the jurisdiction the courts have over it by adding certainty.

The “validity” provisions remove common law uncertainty concerning the extent to which powers may be reserved to persons other than trustees and thus represent an internal strengthening of the jurisdiction.

The “proper law” provisions strengthen internally and externally the jurisdiction by specifically incorporating in our domestic law principles of private international law found in the Hague Convention. This makes it easier for our courts, and foreign courts, to apply our trust law.

The “conflict of laws and forced heirship” provisions strengthen our jurisdiction externally by removing the uncertainty created by private international law principles over when our courts should entertain claims made under foreign law. These provisions make it clear that our courts may ignore claims against Hong Kong law trusts that may arise under foreign law.

The powers of settlors and of protectors can be proactive or reactive. We suggest that there should be clear and limited powers which may be reserved unless removed by the trust deed.

For validity provisions generally you may wish to look at Articles 23, 24 and 27 DIFCTL - see HKTA / STEP proposals pages 27 and 28 .

We suggest that there is danger of abuse and misuse if there are express provisions that trusts shall be valid despite the inclusion of very wide reserved powers to a settlor or to a protector. We therefore suggest that SS 13 to 15 CTL and Article 9A JTL are much too wide.

We suggest instead that Hong Kong Trust Law should provide that a trust would be valid notwithstanding the inclusion in it of more limited powers to trustees and/or to protectors. We suggest that Article 68(2) DIFCTL may be used as a model for the powers concerned, except that the provision of Article 68(2)(g) should be replaced with a power of investment and of investment management.

This would mean that the limited reserved powers referred to above would be as follows:-

- To determine the law of which jurisdiction shall be the governing law of the trust;
- To change the forum of administration of the trust;
- To remove trustees;
- To appoint new or additional trustees;
- To remove any beneficiary of the trust and to declare that any person shall be excluded altogether from benefit under the trust;
- To add any person as a beneficiary of the trust in addition to any existing beneficiary of the trust;
- To exercise the power of investment and of investment management;
- To release any of these powers.

The legislation would therefore not invite or exclude additional reserved powers. Apart from the certainty of validity with regard to the limited powers mentioned, it will be left to the court to decide any questions on validity or otherwise having regard to any wider reserved powers.

4. Proper Law:

We do not agree with maintaining the status quo. We believe that there is certainly in providing for Hague Convention principles. The most modern example is to be found in Arts 12 and 13 DIFCTL. We do not agree that such legislation creates uncertainty; indeed we believe the reverse.

5. Conflict of Laws and Forced Heirship:

Please see our comments above under validity.

Such a provision is much sought after by the market when choosing trust law. We do not believe that such a provision should be tied to "capacity" as in S. 90 STA.

We recommend the introduction of a provision and have suggested comparison with S. 11A GTL, S. 11(5) MATA and Article 16 DIFCTL.

6. Beneficiaries' Rights to Information:

Prior to the decision in *Schmidt v Rosewood Trust Limited*, the law was that, by the very nature of their interests, beneficiaries had a right to information. The question was the extent of that right. For example, the decision in *the matter of the Rabaiotti 1998 Settlement* provided that sensitive and private information such as letters of wishes, or minutes, resolutions or other documents showing why the trustees had made certain decisions, need not be made available by trustees unless they wish to provide them. The decision in *Schmidt v Rosewood Trust Limited* changed the fundamental legal principle involved and provided that it is the court which has the equitable jurisdiction to decide in each case what information should be provided by trustees to beneficiaries. This places trustees in considerable difficulties. Guidelines would be welcome. This would be another feature to make Hong Kong an attractive trust jurisdiction.

We therefore suggest the following:-

- Distinction should be made between a beneficiary having a fixed or vested interest and the mere object of a power;
- A beneficiary with a fixed or vested interest should be entitled to information;
- Having regard to the object of a power, the settlor should be able to dictate through the trust deed the extent, if at all, that he wishes such object to receive information;
- To the extent that the trust deed does not provide for the settlor's wishes in this respect, the court would have jurisdiction, subject to the exception next mentioned, to order provision of information;
- The exception would follow the decision in the Rabaiotti case, so that trustees could not be compelled to provide sensitive information to the object of a power, but of course could do so if they wished.

We therefore suggest that the following statutory provisions may be referred to by way of example:-

Article 25 JTL S
33 GTL
Article 52(2) DIFCTL

7. Beneficiaries' Rights to Remove Trustees:

We distinguish this right from the right to terminate the trust under the decision in *Saunders v Vautier*. We consider that there may be potential danger and

complications in providing any power to beneficiaries to remove and appoint Trustees. What if there is a wide class of beneficiaries, some of whom are unborn? We have already proposed that a trust should be valid even if there is a reserved power to the settlor or to the protector to remove and appoint trustees. Otherwise, apart from a statutory power vested in trustees, the question of removal and appointment of trustees should be left to the court.

8. Non-Charitable Purpose Trusts:

Trusts for beneficiaries are enforceable by the beneficiaries. Trusts for charitable purposes have long been enforceable by the Attorney-General. The critical problem with non-charitable purpose trusts is that there was no-one with standing to enforce them; they were thus invalid. There was never a problem with the purposes of the trusts per se, except that they be sufficiently certain. The only solution to this problem was by legislating for their validity by providing for a person with standing to enforce them, i.e. the statutory office of "Enforcer" or its equivalent.

Issues of properness of purpose were, and are, governed by the general law and money-laundering statutes.

The introduction of purpose trust law into Guernsey in March 2008 was described as "long overdue".

We perceive that purpose trusts are gradually finding increasing and valuable use for wholly legitimate commercial reasons. In our proposals to government to change the trust law of Hong Kong, a number of examples of such uses are set out on page 17.

We believe that to exclude the introduction of purpose trusts into Hong Kong works against the general need for, and the objective of, achieving modernisation. It also detracts from the marketability of the jurisdiction.

We recommend the inclusion of non-charitable purpose trusts into Hong Kong trust law. This will open up a whole new area of Hong Kong law trusts for commercial purposes.

9. Protectors:

The office of protector is now more frequently found in modern trusts.

It would be simple to specify that such a person can exist in a trust and that such a person would be given specified powers unless the trust deed provides otherwise (see before).

The rest could be left to the court.

This simple provision would be practical, useful and attractive as a marketing factor.

We recommend such reform.

D. Proposals for Improving Regulatory Regime of Trust Companies:

We agreed at our recent meeting with Government that these were matters to be noted but not dealt with at this stage. We have, as agreed, concentrated on the trust law.