

Hong Kong Trust Law (Amendment) Bill 2013

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Hong Kong's Legislative Council yesterday passed the Trust Law (Amendment) Bill 2013. This amends the Trustee Ordinance (Cap.29) and the Perpetuities and Accumulations Ordinance (Cap.257) which date back respectively to 1934 and 1970. Other common law jurisdictions such as the UK and Singapore have already significantly modernised their trust law during this period, leaving Hong Kong at a competitive disadvantage. Hong Kong amendments usher in much needed improvements to the legal infrastructure for trusts subject to Hong Kong law and will further improve Hong Kong's standing as an international trust planning jurisdiction.

Following those changes, families should consider reviewing their succession planning, both wills and trusts. This is also an opportunity for international trust companies to consider setting up a Hong Kong operation.

Key legislative changes:

Reserved powers

Settlors often wish to reserve to themselves powers relating to investment or asset management functions. There are new provisions which will confirm that the inclusion of such provisions in the trust deed will not invalidate the trust. This will increase the attractiveness of Hong Kong as a governing law where a settlor wishes to retain a degree of control over the investment of trust assets.

Forced heirship

The new legislation provides that foreign forced heirship rules will not affect the validity of a lifetime transfer of movable assets to a trust expressly governed by Hong Kong law. This will help make Hong Kong trusts appealing for settlors in jurisdictions which limit testamentary freedom.

Abolition of the rule against remoteness of vesting

Any Hong Kong trust can now be set up so that it lasts for an unlimited period of time. This is a fundamental change that will make Hong Kong trusts appealing for those settling very high value trusts where a long-stop date might not be attractive for succession planning purposes. Families may wish to have existing trusts reviewed and resettled in order to create a perpetual trust.

Enhancement of trustees' default powers where trust instrument is silent

Trustees' powers are found in the relevant trust's governing instrument. If that instrument fails to confer adequate powers then the Trustee Ordinance steps in to provide default powers. These default powers will be enhanced as follows:

(a) Appointment of agents, nominees and custodians

Trustees will now be able to appoint agents to perform most of their trustee functions. For example trustees will be able to delegate the management of investments to suitable fund managers thus enabling the trust portfolio to be managed on a discretionary basis. Delegation of such powers however will be subject to safeguards, in particular an obligation to keep the performance of the agents under review.

(b) Powers to insure

The default powers to insure trust property will be extended to any risk of loss or damage, not just loss through fire and typhoon which is the present position.

(c) Trustees' remuneration

Hitherto it has not been possible for trustees to be paid unless there is an express provision in the trust deed to that effect. Professional trustees may now receive reasonable remuneration in the absence of an express provision in the trust deed.

(d) Authorised investments

The Second Schedule to the Ordinance restricts trustees, in the absence of an express provision to the contrary, to a limited range of conservative investments. In the case of quoted companies, trustees are currently limited to investing in companies with a market capitalisation of not less than HK\$10 billion and a track record of having paid cash dividends over the preceding 5 years. These two requirements will now be relaxed to

HK\$5 billion and 3 years respectively.

Duty of care

Subject to the terms of the trust instrument, the new legislation imposes a statutory duty of care on trustees so that they must exercise such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience that the trustee has or that is held out by the trustee as having; if the trustee is acting in the course of a business or profession, having regard in any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

Exemption clauses

At common law, a trust instrument can exempt a trustee from liability for all breaches of trust except for fraud or wilful default. The new amendments provide a degree of protection for beneficiaries. A trust instrument can no longer exempt a trustee from liability for wilful misconduct and gross negligence, as well as fraud. This applies to trust created before or after the commencement of the new Ordinance. These provisions will however be limited to professional trustees.

Removal of trustees

The new legislation includes a court free process for beneficiaries of full age and capacity who are absolutely entitled under the trust to appoint new trustees in place of the existing trustees, without terminating the trust.

The legislation will come into force on 1 December 2013.

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