

Legal Week Private Client Forum Hong Kong 2013

The Trustee Ordinance and the Trust Law (Amendment) Ordinance

Presented by: Mrs Christine Koo

Christine M. Koo & Ip, Solicitors & Notaries



Address : Room 601, Tower 1, Admiralty Centre
18 Harcourt Road, Hong Kong

Tel. No. : (852) 2524 8996

Fax No. : (852) 2523 6922

E-mail : christinekoo@cmkoo.com.hk

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Hague Convention

Hong Kong, a party to Hague Convention on “The Law Applicable to Trusts and on Their Recognition” since 1997.

(see attachment 1)

**30. CONVENTION ON THE LAW APPLICABLE
TO TRUSTS AND ON THEIR RECOGNITION¹**

(Concluded 1 July 1985)

The States signatory to the present Convention,
Considering that the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution,
Desiring to establish common provisions on the law applicable to trusts and to deal with the most important issues concerning the recognition of trusts,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE

Article 1

This Convention specifies the law applicable to trusts and governs their recognition.

Article 2

For the purposes of this Convention, the term "trust" refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics –

- a) the assets constitute a separate fund and are not a part of the trustee's own estate;
- b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

Article 3

The Convention applies only to trusts created voluntarily and evidenced in writing.

Article 4

The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

¹ This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions". For the full history of the Convention, see Hague Conference on Private International Law, *Proceedings of the Fifteenth Session (1984)*, Tome II, *Trusts – applicable law and recognition* (ISBN 90 12 04930 X, 423 pp.).

Article 5

The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved.

CHAPTER II – APPLICABLE LAW

Article 6

A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.

Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.

Article 7

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to –

- a) the place of administration of the trust designated by the settlor;
- b) the situs of the assets of the trust;
- c) the place of residence or business of the trustee;
- d) the objects of the trust and the places where they are to be fulfilled.

Article 8

The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.

In particular that law shall govern –

- a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
- b) the rights and duties of trustees among themselves;
- c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
- d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
- e) the powers of investment of trustees;
- f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;
- g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
- h) the variation or termination of the trust;
- i) the distribution of the trust assets;
- j) the duty of trustees to account for their administration.

Article 9

In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law.

Article 10

The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law.

CHAPTER III – RECOGNITION

Article 11

A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust.

Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.

In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular

- a) that personal creditors of the trustee shall have no recourse against the trust assets;
- b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;
- c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;
- d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

Article 12

Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.

Article 13

No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.

Article 14

The Convention shall not prevent the application of rules of law more favourable to the recognition of trusts.

CHAPTER IV – GENERAL CLAUSES

Article 15

The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters –

- a) the protection of minors and incapable parties;
- b) the personal and proprietary effects of marriage;
- c) succession rights, testate and intestate, especially the inalienable shares of spouses and relatives;
- d) the transfer of title to property and security interests in property;
- e) the protection of creditors in matters of insolvency;
- f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

- **Trust Law (Amendment) Ordinance**
 - passed on 17 July 2013
 - effective 1 December 2013
- **Trustee Ordinance (Cap 29)**
- **Perpetuities and Accumulations Ordinance (Cap 257)**

Trustee Ordinance (Cap. 29)

- Current Position

Part II. Investment

Part III. General Power of Trustee and Personal Representations

Part IV. Appointment and Discharge of Trustee

Part V. Power of Court

Trustee Ordinance (Cap. 29)

- Current Position

Part VI. Judicial Trustee

Part VII. Official Trustee

Part VIII. Trust Companies

S.97 “every person employed by the company to discharge any duties of such office shall be personally liable”

Types of Trustee

- **Individual**
- **Trustee Company**
 - Subsidiary of Bank
 - Subsidiary of Insurance Company
- **Independent Trustee Companies**
 - Foreign
 - Local

Use of Trust

Individual Clients

1. Trustee of Discretionary Trust
2. Trustee of Family Trust
3. Acting as Executor and Trustee of a Will
4. Acting as Attorney of Enduring Power of Attorney

Use of Trust

Individual Clients

5. Trustee for holding assets, e.g. in divorce cases
6. Trustee of Single Premium Life Policy
7. Trustee of Juvenile Life Policy

Use of Trust

Corporate Clients

1. Trustee for Charitable Foundation
2. Trustee for Retirement Fund
(MPF and ORSO Scheme)
3. Trustee for Investment Fund and Private
Equity Fund

and so on.

Amendments

Purpose

- Bolster the competitiveness of Hong Kong's trust services industry.
- Attract settlors to set up trusts in Hong Kong.
- Enhancing Hong Kong's status as an international asset management centre.
- Enabling settlors to establish perpetual trusts.

Amendments

Purpose

- Imposing statutory control on exemption clauses which limit trustees' liability.
- Free from forced heirship rules.
- Enhances trustees' default powers and duties.

Control on Trustee's Exemption Clause

- New trust established on 1st December 2013 or afterwards, apply immediately.
- Existing trust established before 1st December 2013, will take effect on 1st December 2014.

Reserved Powers

Reserving power to settlor relating to investment.

Forced Heirship

Foreign forced heirship rules will not affect the validity of a lifetime transfer of assets to a trust expressly governed by Hong Kong law.

Trustees' Default Powers

- Delegate the management of investments to suitable fund managers.
- Powers to insure trust property will be extended

Trustees' Remuneration

Professional trustees may now receive reasonable remuneration in the absence of an express provision in the trust deed.

Authorised Investments

- The Second Schedule of the Trustee Ordinance
 - Categories of Investment relaxed.

Change of Trustee

- Beneficiaries of full age and capacity.
- Absolutely entitled under the trust.

Q & A

問題討論



CHRISTINE M. KOO & IP, SOLICITORS & NOTARIES

Address : Room 601, 6/F, Tower 1, Admiralty Centre,
18 Harcourt Road, Hong Kong

Tel No.: (852) 2524 8996

Fax No.: (852) 2523 6922

E-mail: christinekoo@cmkoo.com.hk

Web-site: <http://www.cmkoo.com>

PLEASE NOTE

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

請注意

本題目之法律及程序十分專門。此文章只屬一般性之解釋，供你參考，而不應被依賴為關於任何特定事件之法律意見。如需法律意見，請與我所律師聯絡。

Christine M. Koo & Ip, Solicitors & Notaries LLP
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