

# **LOMA Society of Hong Kong**

## **Will and Enduring Power of Attorney (EPOA) and their application on Wealth Management**

**Date: 30 May 2013**

**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**

# Will and Law of Succession

## 遺囑及繼承法

# What Happen If Died Intestate ? 如果沒有立遺囑，死後會怎樣？

## Law of Succession 繼承法

Relative Surviving	Other Relatives	Entitlement
1. Spouse	No issue, or parent or brother or sister of the whole blood or issue of such a brother sister	All to spouse
2. Spouse and issue	Other relatives immaterial	Spouse takes \$500,000 and half of the residue; the other half is held on statutory trusts for issue
3. Spouse and parent or brother or sister of the whole blood or issue of such brother or sister	No issue	Spouse takes \$1,000,000 and half of the residue; the other half is held for parent(s) or on statutory trusts for such brothers or sisters
4. Issue	No spouse	All to issue on statutory trusts
5. Parent(s)	No spouse, no issue	All to parent(s)
6. Brothers and sisters of the whole blood	No spouse, no issue, no parent	All to such brothers and sisters on statutory trusts
7. Brothers and sisters of the half blood	No spouse, no issue, no parent, no brother or sister of the whole blood	All to such brothers and sisters on statutory trusts
8. Grandparent(s)	None of the above	All to grandparent(s)
9. Uncles and aunts of the whole blood	None of the above	All to such uncles and aunts on statutory trusts
10. Uncles and aunts of the half blood	None of the above	All to such uncles and aunts on
11. None of the above relatives		All to Hong Kong Government as <i>bona vacantia</i>

# Who should make a Will

## 誰應該立遺囑

- Person with young children 有年幼子女之人
- Married couple & without children 已婚而無子女之人
- Remarried person with children borne with previous spouse 有不同配偶及不同配偶所生的子女之人
- Person travel outside Hong Kong frequently with spouse 時常與配偶一同外遊之人

## (Con't) Who should make a Will

### (續)誰應該立遺囑

- Person without any children or relative  
無親無故之人
- Unmarried person 未婚之人
- Person with special testamentary intention  
有特別意願之人
- Person who own property outside Hong Kong 國外有財產物業之人

## 「平安書」內容

[如有疑問請與本行溫小姐聯絡（電話: 2526 7666）。]

**TESTATOR**  
立「平安書」人

NAME : \_\_\_\_\_ (\_\_\_\_\_)   
姓名                  Surname                  Given Name                  (In Chinese)   
姓                      名                      中文

SEX : \_\_\_\_\_  
性別

PASSPORT/H.K.I.D. NO. : \_\_\_\_\_ (Photocopy is enclosed)  
護照 / 香港身份証號碼 (附上影印本)

OCCUPATION : \_\_\_\_\_ DATE OF BIRTH : \_\_\_\_\_  
職業 出生日期

RESIDENTIAL ADDRESS 地址: \_\_\_\_\_

MARRIAGE STATUS : Single/ Married/Divorced (Please delete whichever inapplicable)  
 婚姻狀況 單身 / 已婚 / 離婚 (請刪去不適用者)

**EXECUTOR AND TRUSTEE**

執行人及信託人

NAME : \_\_\_\_\_ ( \_\_\_\_\_ )

姓名

Surname

姓

Given Name

名

(In Chinese)

中文

SEX : \_\_\_\_\_

性別

PASSPORT/H.K.I.D. NO. : \_\_\_\_\_ (Photocopy is enclosed)

護照 / 香港身份証號碼

(付上影印本)

OCCUPATION : \_\_\_\_\_

職業

DATE OF BIRTH : \_\_\_\_\_

出生日期

RESIDENTIAL ADDRESS 地址 : \_\_\_\_\_

\_\_\_\_\_

RELATIONSHIP WITH TESTATOR : \_\_\_\_\_

與立「平安書」人之關係

(Copy Right Reserved)



**BENEFICIARY**

受益人

A) NAME : \_\_\_\_\_ ( \_\_\_\_\_ )

姓名 Surname 姓 Given Name 名 (In Chinese) 中文

Sex : \_\_\_\_\_

性別

Passport/H.K.I.D. No. : \_\_\_\_\_

護照 / 香港身份証號碼

Date of Birth : \_\_\_\_\_

出生日期

Relationship : \_\_\_\_\_

關係

Residential Address 地址 : \_\_\_\_\_

% of Estate : \_\_\_\_\_

財產分配百分比

(Copy Right Reserved)

**INFANT BENEFICIARY**

未成年受益人  
(即十八歲以下)

NAME : \_\_\_\_\_ ( \_\_\_\_\_ )

姓名

Surname

姓

Given Name

名

(In Chinese)

中文

SEX : \_\_\_\_\_

性別

Passport/Birth Certificate No. : \_\_\_\_\_

護照 / 出生證明書號碼

Date of Birth: \_\_\_\_\_

出生日期

Relationship : \_\_\_\_\_

關係

Residential Address 地址 : \_\_\_\_\_

If the Beneficiary is under the age of 18, we suggest that you should appoint a guardian.

如受益人年齡為18歲以下，我們提議你委任一位監護人。

**GUARDIAN****監護人**

NAME : \_\_\_\_\_ ( \_\_\_\_\_ )

姓名 Surname 姓 Given Name 名 (In Chinese) 中文

SEX : \_\_\_\_\_

性別

PASSPORT/H.K.I.D. NO. : \_\_\_\_\_ (Photocopy is enclosed)

護照 / 香港身份證號碼 (付上影印本)

RELATIONSHIP : \_\_\_\_\_

關係

RESIDENTIAL ADDRESS 地址 : \_\_\_\_\_

Note : Please ensure she/he is willing to act

備註：請確保她 / 他願意成為監護人

(Copy Right Reserved)

\_\_\_\_\_  
SIGNATURE

簽署

\_\_\_\_\_  
DATE

日期

CONTACT TEL. NO.

聯絡電話

# Law of Succession

## 繼承法

- Probate 遺囑檢定書
- Letters of Administration 遺產承辦書

# When to Write a Will

## 訂定遺囑的最好時間

- When you are healthy, physically and mentally 身體及精神都良好的時候

## Sharp v. Adam

Adam – successful – stud farm – multiple  
scleroses (93) – cannot speak/write –  
spelling board – nodding – shaking his head  
– rolling eyes, blinking – dies in Aug 2002

2 daughters – mother divorced (92) –  
3/2001 – change Will – good friend –  
solicitor - appeal

# Tam Mei Kam v. HSBC International Trustee Ltd (Anita Mui's case)

- Write a Will and a Trust on the same day.
- 18 days of Trial.

# Enduring Powers of Attorney

Enduring Powers of Attorney  
Ordinance (Cap.501)



# What is an EPA?

- A legal document
- Donor (“D”)(授權人): gives A power
- Attorney (“A”)(受權人): act on D’s behalf
  - D subsequently becomes mentally incapable
  - A to take care of D’s specified financial affairs

# Who needs an EPA?

- EPA **NOT revoked** by D's subsequent mental incapacity
  - *cf.* General Power of Attorney (revoked)
- Mental incapacity
  - Mental disorder / mental handicap; OR
  - Unable to communicate to grant a PA

# How to create an EPA?

## (1) Execution

- (a) Prescribed form

- (b) Prescribed manner

## (2) Registration

# Execution – Prescribed Form

- Must specify (i) the power and/or (ii) property or financial affairs
  - Collect income due to D
  - Collect capital due to D
  - Sell D's movable property
  - Sell/lease/surrender D's immovable property
  - Spend D's income
  - Spend D's capital
  - Exercise D's power as trustee
- *cf.* GPA (general power over all of D's properties)

# Execution – Prescribed Manner

- D must execute in the presence of...
  - Registered medical practitioner and solicitor;  
OR
  - Registered medical practitioner, then within  
28 days solicitor
  - Certify mental capacity and  
voluntariness/authorisation

# Execution – Prescribed Manner

- Neither the registered medical practitioner nor the solicitor be:
  - A
  - A's spouse
  - Related by blood or marriage to A
  - Related by blood or marriage to D

# Execution – Prescribed Manner

- If D is physically incapable of signing, may instruct a person to sign **in the presence**, and **under the direction**, of D
- The person signing on D's behalf shall NOT be:
  - A
  - A's spouse
  - The registered medical practitioner or his/her spouse
  - The solicitor or his/her spouse

# Execution – Prescribed Manner

- A must execute in the presence of...
  - 1 witness (NOT D / other A in the same EPA)
- A must be...
  - Trust corporation; OR
  - Individual: 18 or above + NOT bankrupt
  - NOT mental incapable



# Effective Date

- Date of execution (before solicitor); OR
- D may specify a date / a triggering event in EPA

# Registration

- To Registrar of the High Court
- A can only deal with D's assets after registration
- Registration does not validate invalid EPA
- Register is open for public inspection

# Can EPA be revoked?

- D may revoke when mentally capable
- After recovery from mental incapacity, D may revoke with court order confirming the revocation
- A becomes bankrupt
- A/D dies
- By court order/direction

# Trust 信託

# What is Trust Law ?

# 什麼是信託法？

## Express Trust (明示信託)

- A) Discretionary Trust (酌情信託)
- B) Unit Trust (單位信託)
- C) Charitable Trust (慈善信託)
- D) Family Trust (家事信託)

# (Con't) What is Trust Law ?

## (續) 什麼是信託法 ?

### Implied Trust

- A) Resulting Trust (歸復信託)
- B) Constructive Trust (構定信託)

# What is a Trust ?

## Definition:

- A Trust is an equitable obligation binding a person (the trustee) to deal with the property over which he has control (the trust fund) for the benefits of persons (the beneficiaries).

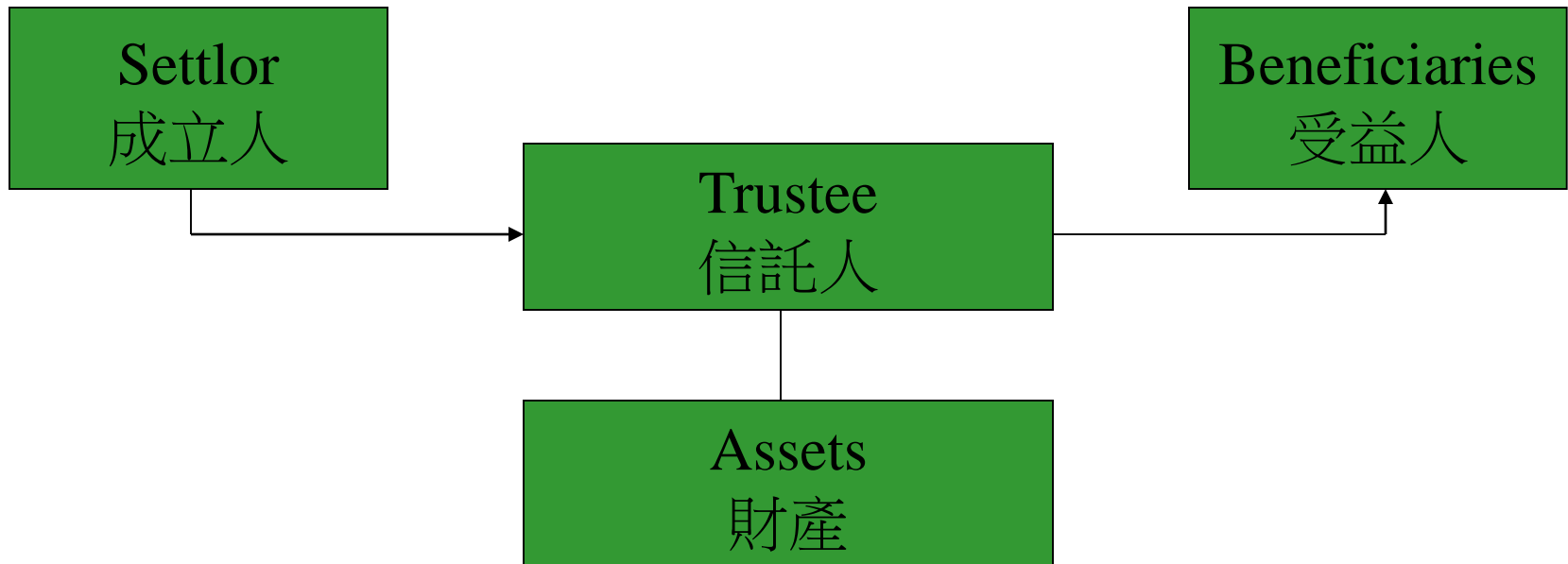
## (Con't) What is a Trust ?

### Key Concept in Common Law:

- Separation of ownership of property (legal ownership) and the enjoyment of property (beneficial ownership).
- The Trustees have legal ownership and cannot benefit from the property and the beneficiaries have an equitable interest in the property (I.e. the right to enjoy/benefit) that they do not legally own.



# Discretionary Trust / Company Structure



# The First Question a Potential Settlor Needs to Ask Themselves

- Incapacitated
- Divorce of son/daughter
- Confidentiality
- Taxes
- Spouse, children, grandchildren will receive the inheritance you want them to receive?

# Advantage of Setting Up a Trust

## 成立信託的好處

- Avoid Probate
- Succession Planning
- Disability
- Confidentiality
- Asset Management

## (Con't) Advantage of Setting Up a Trust (續) 成立信託的好處

- Taxation:-
  - US Estate Duty
  - UK Inheritance Tax
  - Withholding Tax

# Beneficiaries

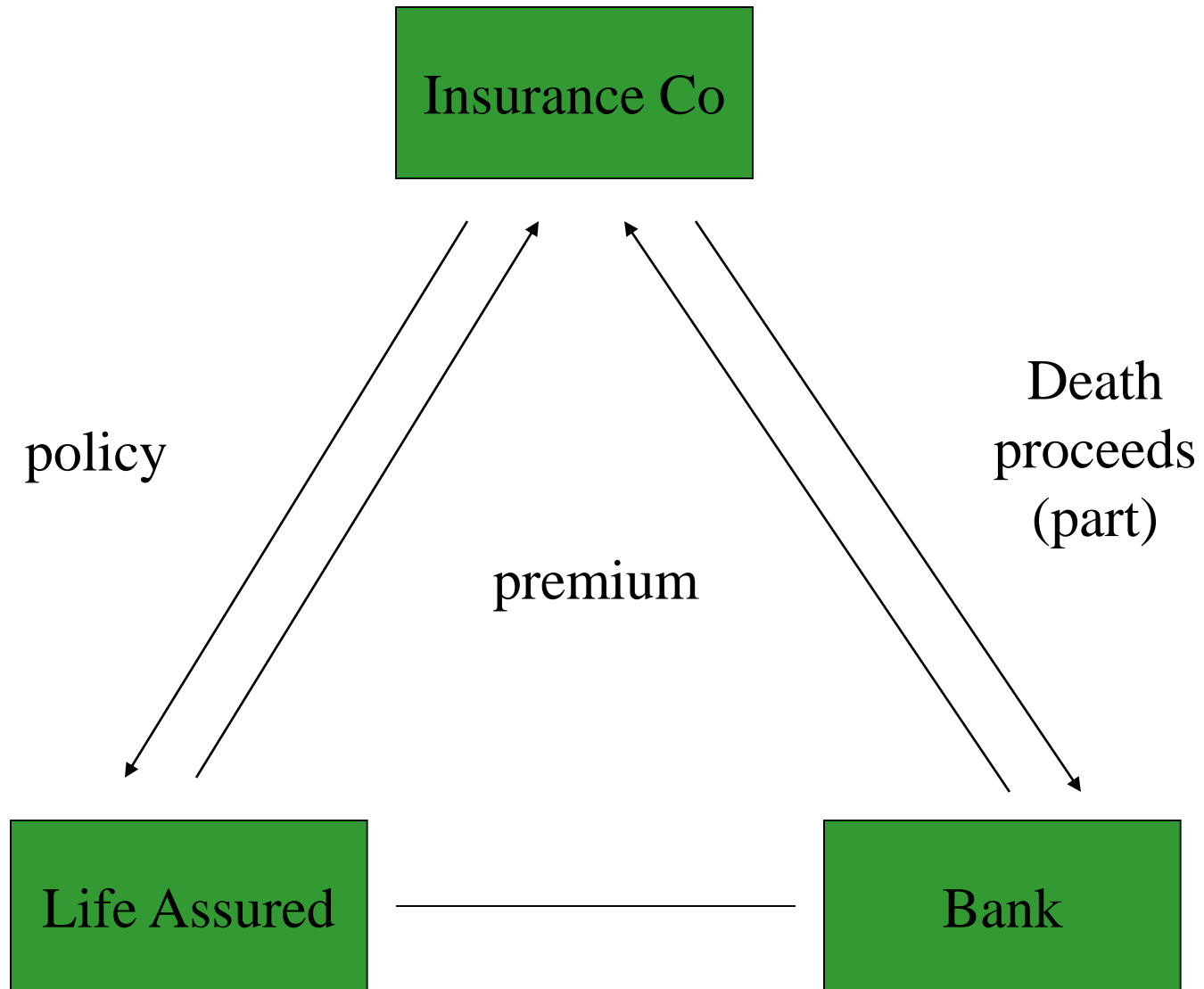
Who can be a beneficiary?

- Settlor
- Settlor's Spouse
- Settlor's Children
- Grandchildren
- Charities

# What are the Duties of the Trustees?

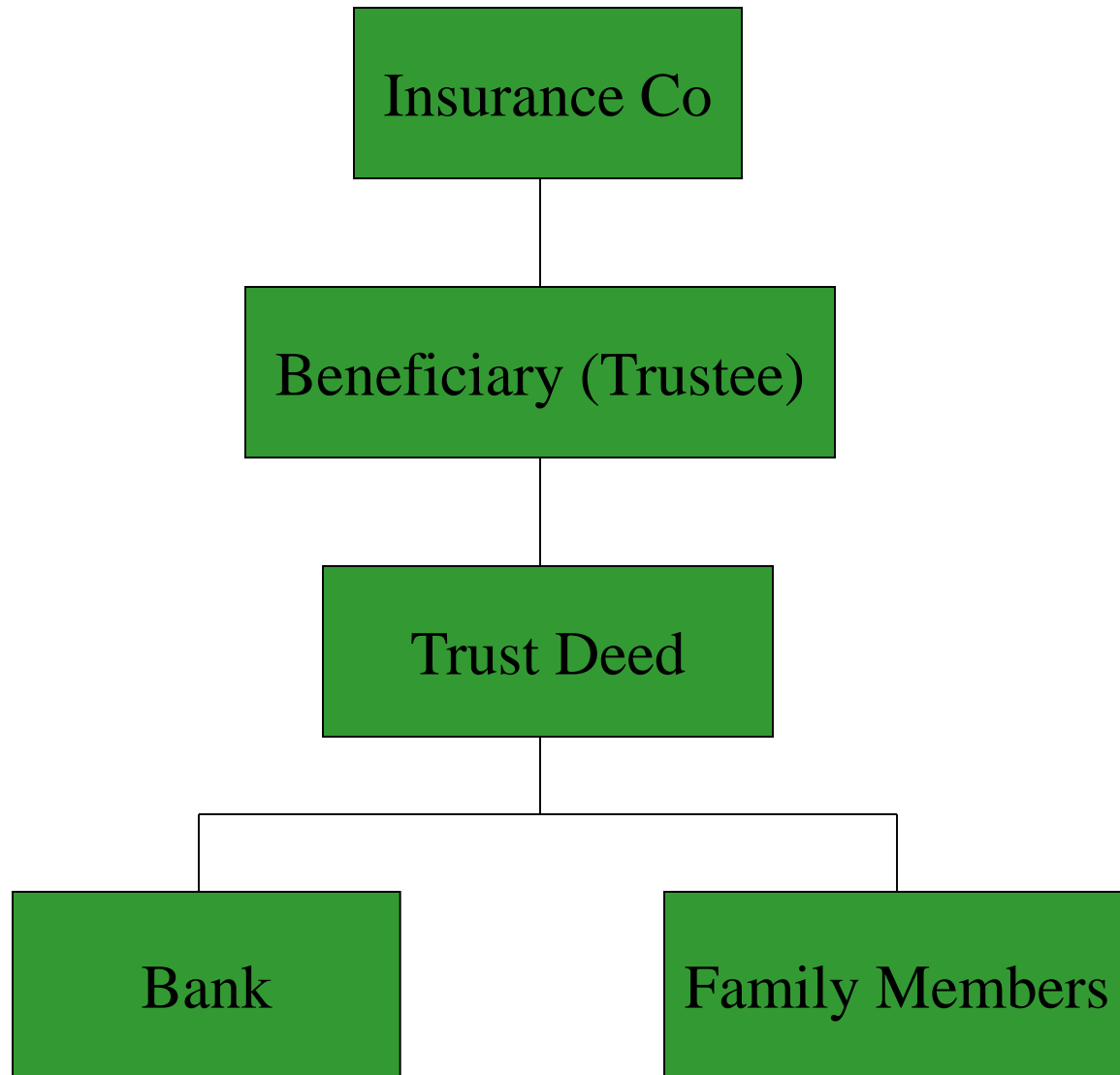
- To act in the best interests of the Beneficiaries
- Observe the terms of the trust
- Observe the proper law of the trust
- Impartiality
- Asset preservation
- To act in accordance with the laws of the governing jurisdiction

# How to make an investment-link policy work?





# Function of Trustee



# Trustee

- Independence and
- Impartiality

**Does one need a Will where a trustee is appointed?**

# How is EPA different from trust?

- Power of Attorney
- Donor
- Attorney (i.e. agent)
- Interested party
- Trust
- Settlor
- Trustee
- Beneficiary

# How is EPA different from trust?

- Legal ownership in D
- Public register/search
- Revoked by D's death
- Specified authority
- Legal ownership in T
- Confidential
- D's death is irrelevant
- May have discretion

# How is EPA different from trust?

- Should go hand in hand with Will

# Scenario 1

- Mr. A 70-year old
- \$3m savings
- He has a nephew, who is unemployed and financially relied on him
- He intends to leave all his property to his nephew after his death.
- EPoA, so he can use own savings to pay for medical expenses and to support his nephew 's living.
- Who to appoint as the attorney? What do you think?



## Scenario 2

- Mother is a 60-year old widow.
- She has \$8m savings. She has a daughter Ms. X and a retarded son Mr. X. The three live together.
- Daughter earns her own living while Mr. Y is taken care by the Mother.
- Aging, Mother plans to set up an EPoA to take care of herself and Mr. Y in case of her mental incapacity.
- Who should Mother appoint as the attorney? Why?

# Gold Haven Trust Co. Ltd.

豐銀信託有限公司

# 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](mailto: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**  
顧張文菊、葉成慶律師事務所 有限法律責任合夥