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28 March 2013

The Hon Ng Leung-sing
Chairman
Bills Committee on the Trust Law (Amendment) Bill 2013
HKSAR Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr Ng,

Trust Law (Amendment) Bill 2013

I refer to Mr Anthony Chu's letter of ref: CB1/BC/3/12 on 7th March, 2013 inviting the Hong Kong General Chamber of Commerce's comments on the captioned.

The Chamber recognizes the importance of and supports the modernization of the Trustee Ordinance ("TO") to strengthen the competitiveness and attractiveness of Hong Kong's trust services industry. We appreciate the actions taken by the Administration that have culminated in the deliberation of legislative enhancements through the establishment of a Bills Committee. As noted from comments by respondents to the last two public consultations, although the effort to review and update the TO is very much welcomed a number of issues that could aid Hong Kong in realizing its full potential as a pre-eminent asset management centre have however remained unaddressed. Our view is that, whilst commendable, the proposed Trust Law reform does not go far enough and is not ambitious enough. Hong Kong should not be playing 'catch-up' to other trust jurisdictions but should aim higher to being a leading jurisdiction for the establishment and administration of trusts.

We believe that the goal of attracting trust businesses to Hong Kong will not be achieved by simply amending the TO on technical matters to include statutory duties of trustee, or to allow trustees to delegate certain functions. In our view, the very cautious and conservative proposals to the TO will not achieve the purpose of drawing trust business to Hong Kong.

It is often said that Hong Kong must not be seen as moving in the direction of offshore jurisdictions, or be seen as non-compliant with the heavy handed tax collection measures of the US, OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes. We understand the concern that Hong Kong must not develop into a 'tax haven'.

Perhaps the fear of tarnishing Hong Kong's financial industry is causing government hesitation in proposing sweeping reforms. However, in our view, such concerns should be addressed with the licensing and regulation of the trust industry, and by the tightening of our anti-money laundering legislation. Money laundering concerns do not, in our view, justify the very conservative and cautious approach taken by government to the trust law reform exercise.

Presently, Hong Kong trustees are placed in a position of considerable disadvantage to their competitors located in other jurisdictions with more modern trust laws. The proposed TO does little to change this position. In order to position Hong Kong as a leading trust jurisdiction, we would like to see the following developments in Hong Kong's trust law.

- **Clarity in tax regulation** - In our view, it is important for Hong Kong's tax law to be amended to provide clarity on how trustees and trusts are taxed under the Hong Kong's tax regime. At the moment, the tax law is far from clear, and this creates uncertainty to trustees contemplating setting up trusts or operations in Hong Kong. We would like to see Hong Kong enact legislation expressly exempting foreign trusts from Hong Kong taxation, akin to Singapore's exemption for foreign trusts.[1]

- **Provisions for trust asset protections in connection with the enforcement of overseas judgments** – We believe that we should introduce such asset protection provisions into our TO, not only to foreign judgments of forced heirship rules, but also to other types of claims on trust assets as a result of foreign court judgments such as divorce settlements, insolvency and creditors' claims. It is useful to note that one of the motivating factors behind foreign trust jurisdictions, such as Cayman Island, Jersey, Guernsey and BVI, to introduce provisions on protecting trust assets from foreign litigation is divorce claims. We should review provisions that currently mandate that amendments to a Hong Kong trust be taken up solely by Hong Kong courts, and that any Hong Kong trust law issues be addressed exclusively by Hong Kong courts.

- **Settlors reserved powers** – Many offshore jurisdictions have new trust legislations that allow settlors to reserve certain powers without rendering the trust invalid. In Hong Kong, settlors should also be allowed to have greater reserved powers without the validity of their trusts being affected. Whilst the current proposed amendments to the TO allow for this to some extent, we would like to see settlors being granted a greater number of reserved powers without the validity of their trusts being called into question. These include the power to manage the trust investments and the power to control and run a family operating business vested in a trust, for example.

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[1] Whilst a foreign trust managed by an offshore trustee can benefit under the Hong Kong Offshore Funds regime, we do not believe that this is sufficient. A trust managed by a professional trustee in Hong Kong, where the control and management of the trust is exercised in Hong Kong, would not be able to take advantage under the Offshore Funds Regime. There is also a requirement to use a Hong Kong licensed fund manager or bank. To attract trust business to Hong Kong, Hong Kong should have a regime akin to Singapore to give clarity that a trust managed by a Hong Kong trustee will not be taxed in Hong Kong under certain prescribed circumstances.

- **Non charitable purpose trusts** – We would like to see legislation allowing for the establishment of non-charitable purpose trusts. Private non charitable purpose trusts have useful legitimate purposes in family planning and financing vehicles structuring. For the time being, government has allowed this issue to idle on the basis that a study on non-charitable purpose trusts should be carried out by the Law Reform Commission before any further action is taken. We urge the Government to act proactively on this matter so that instead of playing 'catch-up' with other jurisdictions, Hong Kong at least has one modern trust law of substance which will mark the amending trust legislation of Hong Kong as a step ahead of its main rival, Singapore.

- **Regulatory regime for trustee companies** - Hong Kong should introduce a regulatory regime for licensed trustee companies. For the time being, under the TO, companies can register as trust corporations but only for the limited probate purposes. A new mechanism to allow trust companies to be properly registered in Hong Kong would be welcome.

- **Incorporation of private trust companies** – In parallel with the enactment of a regulatory and licensing regime for professional trustee, we would like to see the enactment of specific legislation allowing the incorporation of private trust companies in Hong Kong. Private trust companies are increasingly the vehicle of choice for high net worth families wishing to play a more active role in the management of the families own assets.

We further submit that the modernization of our trust law cannot be a standalone exercise. The development of offshore jurisdictions in their wealth management and trust activities, the evolving migration of capital and wealth globally, the emerging wealth markets especially in China, use of various structures for cross border investment activities are all factors that we need to look at. Policy direction changes or need for wider further consultation should not be reasons to not tackle these issues at the same time.

We hope that the Bills Committee and Government will take our comments and the interests of the trust industry into account, and act proactively to ensure that Hong Kong's competitiveness is not lost.

Yours sincerely,

Shirley Yuen
CEO