

Maninvest International Special Report

Trust Law in Taiwan

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Development of the Trust Industry in Taiwan

The Taiwan Trust Act ("TA") was enacted in 1995 and promulgated in 26 January 1996. Related regulations and laws governing the trust industry were also enacted in the last few years. Prior to that, the concept of a professional trustee taking care of the assets of a settlor for the benefit of beneficiaries did not exist per se, even though informal trust relationships have long been a salient feature of the Chinese culture.¹ Nonetheless, trust and investment corporations have been in existence since the 70s to look after clients' monies and investments. Those companies are in fact quasi-retail banking institutions using the word trust to denote a very different type of financial service.

The history of this anomaly can be traced back to the privatization of banks in Taiwan over a decade ago. Before that, all banks were state-owned. Private organizations wanting to position themselves as banks were unable to do so. A creative solution was found by applying for a trust and investment company license. As a result, trust and investment companies blossomed, providing banking related services to their client bases.

Subsequent to privatization, banking licenses have been granted to various organisations. The old trust and investment companies have retained their names, hence the same terminology, different definitions.

Since the passing of the TA, interest has been kindled and both investors and professionals are keen to learn more. Many onshore trusts (mostly mutual funds/unit trusts) have been formed for investment purposes. There is also a growing interest in offshore trusts among the locals.

¹ One example is "clan-trust" whereby an elected elderly hold and manage the clan's assets on behalf of the whole clan, with the purposes of providing for the worship of ancestors, caring for the elderly, youths and widows, and prospering the general welfare of the clan members.

The Present Situation

After the passing of TA, subsidiary legislations including the Trust Industry Act ("TIA") and Trust Business Establishment Standards ("TBES"), and the amendment of various tax acts relating to trust business came into force in 1996 to 1997. From July 2002, after the promulgation of the "Regulations on the Implementation of Trust Industry Law", all banks with trust business as part of their authorized business can set up mutual funds, which are indeed, the most used form of trust in Taiwan.

As suggested by Mr. Tseng, the Deputy Chief of Finance Bureau, Ministry of Finance, the use of trust in Taiwan would fall within five categories² – (1) Forming and management of mutual funds, (2) Management of retirement or welfare funds (3) Management of debt securitisation products, (4) Management of real estate investment funds (5) Management of funds with a public purpose (charitable funds).

In reality, since enactment of the act, the main businesses conducted by the trust enterprises are mutual funds and (out of Mr. Tseng's prediction) management of stock investment for private clients.

As to the historical problem created by those Trust and Investment Corporation which are still in existence, it has been resolved by the amendment of Article 60 of the TIA on 15 December 2000 such that all trust and investment corporations must either re-register under the Banking Act or the TIA before 20 July 2005.³

As to who can conduct trust business, keen competition has been seen among banks, Investment Advisors ("IA") and Independent Financial Advisors ("IFA"). Originally, only banks can provide trust services to clients. It has been resolved recently that IA and IFA practitioners will be allowed to operate trust business as well. In return, banks will be able

² 工商時報 (Commercial Daily) "曾國烈：信託業務商機 五大方向可循" ("Mr Tseng: The Five Key Directions for the Trust Industry") 17 August 2000

³ Art 60 Trust Industry Act (Amended 2000)

to handle discretionary accounts on stock investment for clients (previously a Discretionary Investment Agent licence (委任代客操作執照) was needed).

From 30 September 2002, trust enterprises promoting trust services must employ individuals who have passed a relevant examination. The first examination was held in October 2001. Up to now, over a one hundred fourteen thousand individuals have passed the examination.

Private Trustees and Trust Enterprises

The regulation of private trustees (known as non-trading trustees) and trust enterprises (known as trading trustees, which must be corporate trustees) are regulated differently. In brief, private trustees are regulated under the TA and are treated by the courts in accordance with “contractual relationship” between parties⁴. Trustee corporations are regulated by TA, TIA and TBES, and if the trustee corporation is a bank, the Banking Act also regulates it.

There are many stringent provisions regulating the operations of the trust enterprises, the aim of which is to protect the uninformed public. Another possible reason behind the stringent regulations is that they are written for the purpose of regulating the prospering “mutual fund” industry in Taiwan. In fact, some of the regulations of the TIA specifically refer to the governing of mutual funds⁵.

Regulation of Trust Enterprises

At present, according to the TIA, the minimum capital for setting up a trust corporation is NTD2,000 million (USD64 million)⁶. Trust enterprises include trust corporations set up for conducting trust business or banks

⁴ [This is perceived as a need for Taiwan, as a Civil Law jurisdiction, to adopt those principles under common law trusts, so that the law relating to trust can be dealt with in accordance with the “law of obligations” under the Civil Code. See below.](#)

⁵ For example, Articles 29 and 30 of TIA

⁶ [Art. 3, Trust Industry Act. Minimum capital for a Trust Enterprise which engages in investment of real estate only is NTD1,000 million \(USD31 million\) and for a Trust Enterprises which engages in real estate trust only is NTD300 million \(USD10 million\).](#)

involved in the trust business. Trust enterprises must be organised as a company limited by shares regulated under the Companies Act of Taiwan. The TIA regulates the operations, organisation and management procedures of trust enterprises. It is interesting that the permitted “auxiliary” businesses of trust enterprises include acting as an agent in issuing and management of securities, investment advisory of securities, administration of wills and probate, bankruptcy and liquidation, custodian as well as safety box business. A trust enterprise must join the trade organization, the Trust Association of ROC, which has the power to propose management and operation guidelines for the trust enterprise. There are currently 57 members, of which 56 are banks⁷, with 10 of them being branches of foreign banks⁸. The TIA also authorizes the setting up of reserves for compensation if the trustees default. Diagram “A” is an interesting analysis of the types of main and auxiliary businesses these trust enterprises engage in. Most of them provide trusteeship of cash and investment portfolio as their main businesses. As for auxiliary business, they provide safety box services, securities broker, shares issuer and securities agent. There is only one bank engages in retirement fund and debenture issuing business.

Shareholders of trust enterprises must include a bank, insurance company or fund management company and their shareholders should not be less than 40%.

Technical Aspects of the Taiwan Trust Act

A civil law country like Taiwan, when enacting trust laws, is not without problems. Lusina Ho proposes that when the law draftsmen of a civil law jurisdiction try to accommodate the features of a common law trust within the framework of a code-law system, they encounter at least five difficulties. Of these difficulties, I think the following three are the most important, according to Ho’s in her work “Trust Law in China”⁹:-

⁷ The remaining one is the “Central Trust Fund of Taiwan”, a government trust fund.

⁸ HSBC, Citibank, ABN, DG, Chase, BNP, Standard Chartered, USB, SG, ING

⁹ Ho, Lusina, “Trust Law in China” pp33-34, Sweet & Maxwell Asia 2003

"1 Under the civil law, ownership is absolute and indivisible, and there is no separate equitable jurisdiction. Yet the common law trust involves splitting full ownership into legal and equitable ownership, neither of which is absolute.

2 In so far as trust contains both features of the laws of obligations and of property, it is extremely difficult to determine which part of the Civil Code a trust should fit in, and how this can be achieved

3 The extensive proprietary remedies available to beneficiaries are at the very least radical in the eyes of civil law. "

As Tony Honoré¹⁰ observed, civil law countries find it difficult to accept that trustees have legal title to the trust properties which the beneficiaries have an equitable interest in the properties. According to Honoré, the Taiwan TA is a good example of how a civil code jurisdiction adopts common law into its system. In his own words:

The Taiwan law possesses the structural features of a genuine trust law. The trust property forms a separate estate¹¹. The trust must be for the benefit of a beneficiary or for a specified purpose¹². Trusteeship is an office¹³. The court has a supervisory jurisdiction over the administration of the trust¹⁴.

Furthermore, from the resumes of the Grand Judges of the Judicial Yuan (The highest authority of the court system), at least half of the Grand Judges were educated or have experience in the common law system, mainly in USA and UK. This phenomenon indicates why Taiwan Trust Act has incorporated many of the fundamental features of a common law trust.

10 Tony Honoré, "On Fitting Trusts into Civil Law Jurisdictions", unpublished work.

11 Taiwan Trust Act Arts. 9-13,24.

12 Art.1.

13 Art.8

14 Art.28,36,38,46,52-59 (trust supervisor), 60-1 (court supervision over trusts other than business and charitable trusts).

Features of Taiwan Trusts

Taiwan trusts must be written.¹⁵ There is no provision in the TA about the perpetuity of Taiwan trusts and we can assume that they can exist forever. In addition to the provisions concerning the appointment, removal and supervision of trustees, the Trust Act also provides for the appointment of protector (supervisor) under certain circumstances. Rights of beneficiaries and settlor, rights and obligations of trustees are defined under the TA. In some cases, these are statutory rights and obligations which cannot be removed, indemnified or restricted by the trust deed¹⁶:-

- 1 The right to change method of managing the trust assets, which is exercised jointly by the settlor, beneficiary and trustees.¹⁷
- 2 The right to apply to court to intervene into the method of managing the trust assets, which can be exercised by the settlor, beneficiary or trustees.¹⁸
- 3 The right to invite the court to intervene when trustees are not acting according to the trust deed.¹⁹
- 4 The right of settlor or beneficiary to claim for damages from the trustees and reduce the remuneration payable to the trustees when the latter has mis-managed the trust assets.²⁰
- 5 The joint and several liabilities imposed on trustees if they have appointed an agent (and sustained a loss) that is unauthorized by the trust deed²¹.

¹⁵ Art 2.

¹⁶ This is in sharp contrast to the flexibility found in common law trust arrangements and the wide interpretation of exemption clauses (*Armitage v Nurse* [1998] Ch 241, *Bogg v Raper*, *The Times*, April 22, 1998, CA)

¹⁷ Art 15

¹⁸ Art 16

¹⁹ Art 18

²⁰ Art 23

²¹ Art 25 and Art 26

- 6 The joint and several liabilities imposed on joint Trustees.²²
- 7 The obligation of the trustees to prepare accounts and the right of settlor, beneficiary and "connected persons"²³ to inspect accounts²⁴
- 8 The right of the beneficiary to disclaim his rights under the trust deed.²⁵

However, since the TA is newly enacted, there are not much guidance, cases and interpretation in connection to the operations of the TA, TIA and TBES.

Protection of Creditors

Creditors may apply to the courts to set aside a trust if it will damage the rights of the creditors²⁶. Such rights are presumed to be damaged if the settlor declares bankruptcy within six months of the trust's establishment. One very interesting point is that a bona fide beneficiary need not return any distributed assets if he is unaware of the fact that the trust created could damage the creditors. In comparison, in common law jurisdictions, only bona fide purchasers without notice are protected. This level of protection for beneficiary is the same as most of the Asia civil law jurisdictions²⁷.

Any legal challenge to a trust must be made within ten years of the trust's existence or within one year of the creditor's knowledge.²⁸

Protection of the rights of the creditors is further enhanced by the ability to apply for the inspection of the trust accounts if they are proved to be

²² Art 29

²³ Defined below.

²⁴ Art 31 and Art 32, Trust Act

²⁵ Art 40

²⁶ Art 6

²⁷ [Ho, "Trust Law in China", P205](#)

²⁸ Art 7

“connected persons”.²⁹

The Role Played by the Courts

Courts have vast powers under the Act to supervise the trust. Indeed, the TA does retain certain powers, which are not exercised by their common law counterparts. In addition to the power of the courts to intervene into a trust arrangement, the courts can intervene and interpret the trust deed in accordance with the “Civil Code” using provisions applicable to contractual relationships.

In addition, the courts can under certain circumstances³⁰, under the application of “connected persons” or “Attorney General”, appoint supervisors (protectors).

Registrable Assets

Assets which are registrable have to be registered or recorded with the fact that the assets are owned by a trust through trustees³¹, otherwise it will be prejudiced against the interest of a third party. Note that the requirement for registration is not a pre-requisite of the legal position of the assets being held in trust,³² it is only that when a third party has a claim on the said assets, the trustee or the settlor cannot claim the assets has been transferred to a trust.

In case of land and landed properties, Land Registration Regulation of Taiwan has been amended on 23 Sep 2003 to include a whole chapter entitled “Registration of Land Rights under Trust”,³³ which give detailed formal procedures of such registration, de-registration, recognition, retention of records and resolve of disputes.

²⁹ Art 32

³⁰ Art 52, when the beneficiary is not defined, non-existent, or on some necessary purposes for the protection of the beneficiary

³¹ Art 4

³² [台灣] 呂紹坤 “信託登記” 台中市政府計畫室 - 自行研究發展報告 2002 P5

³³ [Chapter 9, Registration of Land Right under Trust, \(第九章 土地權利信託登記\), Regulation of Land Registration 《土地登記規則》](#)

In case of securities, the fact should be stated on the documents (or registers) recording the ownership. For shares and debentures; the fact should be informed to the issuing company.

Confidentiality

As seen from above, settlor, beneficiary and connected persons (which include creditors) can apply for inspection of the trust accounts. Trust assets also have to be duly registered as mentioned above. These can be very dangerous provisions against confidentiality. Probably the lawmakers were too pre-occupied with public interest and somehow have neglected the needs for the privacy of private individuals.

Remuneration

There is a provision³⁴ in the Act that allows trust enterprises to receive remuneration. Since trust enterprises (trading trustees) are commercial organisations, they should be allowed to receive remuneration, but the position of a private trustee is not clear.

Moreover Article 23 states that settlor, beneficiary and other trustees (joint trustees) can apply to the court for reduction of remuneration of the trustees in certain circumstances. In addition, Article 34 allows trustees to enjoy the benefits of the trust if they are also beneficiaries.

Management of Trust

There is also statutory right of settlor and beneficiary under Article 23 to demand the trustees to reinstate trust assets and claim for damages from the trustees if they mis-manage the trust assets or not act according to the purposes of the trust. This provision may work well to protect the beneficiary of a mutual fund but if the trust is a private trust

³⁴ [TA Art 38](#)

and the trustees are private trustees, it can impose an unnecessary burden on the trustees and is extremely dangerous if the beneficiary has his “private agenda”.

The trustees, together with the settlor and beneficiary acting jointly have statutory authority to amend the management method of the trust assets³⁵. This is a statutory right and cannot be restricted by provisions in the trust deed. From an asset protection point of view, this is most undesirable as a Taiwan trust has statutory retained residual power for the settlor.

Trustees and Agent

There is statutory power granted to trustees to appoint agents to act for the trust on their behalf³⁶. If an agent is appointed, the liabilities of the trustees (relating to the agent’s operation) pass to the agent. Trustee’s liabilities are limited to appointment and supervision only³⁷. This is in line with the common law principle that trustees in applying the “prudent man of business” standard in employing agents, are not liable for the default of the agents³⁸. If the trust deed does not allow the appointment of an agent, the trustees and agent bear joint and several liabilities.³⁹

Is Foreign Trust Recognized in Taiwan?

After the enactment of TA in Taiwan, it seems that foreign trusts are not prohibited from owning any assets within Taiwan as they should also be regulated by TA.

The position of a trust with foreign corporate trustees is doubtful. As we have discussed above, corporate trustees (or trading trustees) are

³⁵ Art 15

³⁶ Art 25

³⁷ Art 26

³⁸ *Speight v Gaunt* 91883-22CHD727, (1883)9APPCas1

³⁹ Art 27

regulated under TA, TIA and TES, these acts do not provide for the establishment of a foreign corporation to conduct trustee business, although a foreign corporation is not prohibited (although restricted) from doing business in Taiwan. Whether corporate trustees owning trusts with assets situated in Taiwan is considered doing business in Taiwan is not clear.

Whether non-Taiwan trusts can hold Taiwan assets is also an issue. Normally, the problem can be easily (except land, which can generally only be held by Taiwan local companies and individuals) circumvented by holding Taiwan assets (in particularly a business) through an offshore company and in turn, the offshore company is held by the trustees.

Since like every other Chinese society, the bulk of the wealth of the Taiwanese is invested in immovable property, perhaps the audience would like to know the mechanism and restrictions in the holding of real property in Taiwan.

Local companies in Taiwan (whether with resident or non-resident shareholders) are free to own properties. Offshore companies holding shares in Taiwan subsidiaries may also buy and sell property at will.

On the other hand, offshore companies registering as a branch or representative office in Taiwan are non-legal entities there. Whilst it is possible for those companies to purchase real property in Taiwan, approval from the authority is required in order to do so. Only properties purchased for the use of the companies as office premises are allowed

Offshore companies with no registration in any form in Taiwan are not allowed to purchase properties there. Thereafter, any attempt to use

the traditional offshore trust and holding company structures to hold properties in Taiwan would be futile.

Taxation of Trusts

The Income Tax Act has been made a lot friendlier for setting up of trusts after its amendment in 1997. Taxation issues relating to trusts before and after the amendment are listed hereunder.

	Before Amendment	After Amendment	Notes
Settlement of assets (excluding real properties) into a trust	Taxed according to provisions related to Gift Tax	Taxed according to provisions related to Gift Tax if the beneficiary and settler are not the same person, otherwise, no tax.	
Settlement of real properties	Taxed according to provisions relating to Gift Tax, Stamp Duties, Land Appreciation Tax	Taxed according to provisions relating to Gift Tax only.	
Calculation of Land Tax	Land value for land tax purposes is calculated by aggregating the total value of land owned by the trustees within the same "area".	If the beneficiary and settler are not the same person, land value is aggregated with all the land value of the beneficiary, otherwise, the settlor. ?	The tax payer is always the trustees
Income from trust assets	Aggregated, consolidated with the personal	Aggregated, consolidated with the personal income of the	

	Before Amendment	After Amendment	Notes
	income of the trustees and taxed in name of the trustees	beneficiary and taxed in name of the beneficiary. If the beneficiary does not exist or cannot be ascertained for the time being, taxed in name of trustees independently, and tax is payable from the trust assets	
Transfer of assets between retired trustees and new trustees	Ditto	No tax	
Distribution to beneficiary	Taxed according to provisions related to Gift Tax	No tax	

In addition, it is clearly stated in the Trust Act that trust assets do not form part of the estate of the trustees.⁴⁰ There are problems in execution and thus hindering the use of Taiwan trust for private client's purpose.

- (1) **Land Tax** This is a wealth tax on land ownership, in which the tax rate and computation are dependent on the total aggregated value of land within the same city or area. It is difficult to set up a trust that is unknown to the beneficiary without obtaining information about the land owned by the beneficiary in the same city or area.
- (2) **Income Tax** The same problem exists in reporting income tax. As

⁴⁰ Art 10 Trust Act

the beneficiary should report the tax, the operations and result of the trust has to be disclosed clearly to him/her.

In my opinion, the Taiwan TA is intended to regulate trusts with certain “public” characters, e.g. mutual funds, group retirement funds. It is probably not user friendly enough for trusts for private purposes.

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