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## FIDUCIARY MATTERS

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# Trusts – it is possible to retain control over your assets

For many people, the concept of a trust is either unfamiliar or difficult to understand. A trust can best be described as a relationship: an arrangement whereby property or assets are transferred from one person (the ‘settlor’) to another person (the ‘trustee’) to hold for the benefit of others (the beneficiaries). When dealing with personal wealth, the idea of transferring legal ownership of assets to a trustee can make people uneasy or suspicious – despite the high level of fiduciary duties imposed on the trustee by equity and law.

I spent the better part of 2014 working in Hong Kong and assisted several Chinese clients with trust structures.

As a civil law jurisdiction, the concept of a trust is even less familiar in China than it is in South Africa. However both Hong Kong and Singapore follow English common law and recognise the concept of trusts. They also provide a ‘safe harbour’ for optimising Chinese wealth. As a result there were lengthy discussions – with the assistance of Chinese translators, of course – about the meaning and consequences of transferring ‘legal ownership’ to a professional trustee.

South African entrepreneurs looking to expand their businesses internationally might want to consider growing and preserving wealth abroad. South Africa faces economic uncertainty for the foreseeable future and most South Africans have accepted this. Many, however, are unacquainted with the international

solutions available. Perhaps, these can best be explained by an example.

Having built up a successful manufacturing business in South Africa, Joe Soap has recently agreed to terms for his products with two international buyers. He will sell at a significant profit and transact in US dollars to benefit from potential currency advantages. Joe’s domestic business generates sufficient wealth to support his family, so he wants to take

a long term view and is considering leaving some external profits outside South Africa. Depending on where his buyers are located, Joe would best be advised to incorporate an entity in a well-regulated and reputable jurisdiction with a beneficial tax regime.

His main concern is how to keep these profits ‘safe’ without surrendering ‘ownership’ within the normal concept of a trust? Acting as joint trustee alongside the professional trustee might be one option but, as well as being a cumbersome process, this could have negative tax consequences for Joe.

### Both Hong Kong and Singapore follow English common law



Guernsey

Guernsey’s trust laws allow for the creation of non-charitable trusts (NCPT), where the trust fund can be used for a purpose which is not charitable provided that its purpose cannot be regarded as ‘impossible’, ‘against public policy’ or ‘immoral’. There is no requirement to identify beneficiaries. The document establishing the NCPT – the ‘trust deed’ – must state the purpose for which the trust has been created and must appoint an ‘enforcer’ to ensure that the terms of the trust are met. The enforcer must be independent of the trustees. In other words, if Joe is himself appointed as enforcer, he will be in a position to police the trustees to ensure that his wishes – set out in the trust deed – are carried out.

NCPTs are especially popular with clients who wish to put the shares of a private company that owns a business into a trust, but who do not want to create the potential trustee intervention on behalf of the beneficiaries. The NCPT does not have beneficiaries so in theory the trustee is relieved of any obligation to intervene. This could also be applied to clients with controlling interests in listed companies.

NCPTs provide an efficient, controlling structure and an added layer of privacy. They also help clients who want to protect the succession of their family business through the generations. The trustee of a NCPT can hold the shares for the purposes of supporting the continuation and the growth of the business thereby acting neutrally and independently of the family.

There are two alternatives that Joe might want to consider, depending on his personal and commercial circumstances:

- A Purpose Trust in Guernsey; or
- A Private Trust Company in Singapore.

(See details above)



Singapore

Foreign trusts in Singapore – trusts with non-Singapore resident beneficiaries – are exempt from income tax in Singapore on income generated from *designated investments* (such as immovable property outside Singapore). Singapore trust law also allows for the creation of a Private Trust Company (PTC) to act as the trustee of Singapore foreign trust provided that each beneficiary of the trust is a person connected – by blood, marriage or adoption – to the settlor of that trust. A PTC is exempt from licensing but must engage the services of a licensed trust company to provide administration services.

PTCs provide the settlor with a means of retaining a greater degree of control over trust assets without compromising its validity. Appointing a PTC to act as trustee would give Joe the opportunity to ultimately retain control over the overseas portion of his business, whilst having the added benefit of growing his wealth through a trust in a reputable financial jurisdiction.

PTCs are also preferred vehicles for establishing a family office structure because they provide a mechanism for family members, such as children and grandchildren, to become involved through functions within the PTC; for example, as a member of an investment recommendation committee.

Both these structures can provide business people with a legal way of creating and preserving wealth abroad – or, in other words, having their cake and eating it too. However, when contemplating such important decisions it is always best to consult first with a reputable fiduciary service provider.

**This article was written by Johan Odendaal, FISA member and Legal Counsel at the Sovereign Trust (Hong Kong) Limited, a subsidiary of the Sovereign Group worldwide.**

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