

Certified Trust Practitioner™ Accreditation Programme
Trust Training Certificate

Unit 9 – The Contents of Trusts and Drafting
Module 14 – Drafting Provisions required for Non-Discretionary Trusts

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Study Guide & Annexures

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UNIT 9

THE CONTENTS OF TRUSTS AND DRAFTING

MODULE 14

DRAFTING PROVISIONS REQUIRED FOR NON DISCRETIONARY TRUSTS

UNIT 9 – THE CONTENTS OF TRUSTS AND DRAFTING
MODULE 14 – DRAFTING PROVISIONS REQUIRED FOR
NON DISCRETIONARY TRUSTS
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3. THE USUAL PROVISIONS WHEN DRAFTING A RESERVED POWERS TRUST

- a. Governing law is key.
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 - i. Anti- Bartlett provisions

- ii. M&A of holding company. Need to give authority to investment manager.

4. THE USUAL PROVISIONS WHEN DRAFTING A VISTA/LST/ SISTA

- a. Specific legislation in each jurisdiction.
- b. Certain prescribed features.
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- d. Rules relating to appointment and removal of directors.
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- a. Only Samoa has specific legislation.
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- a. Standard limited partnership. Also
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- a. Revocable or not?
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 - iii. Notice period
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 - i. IRS Code
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- c. If irrevocable, distributions need to be restricted during lifetime of grantor.
- d. Need to ensure trustee appointment provisions restrict to Independent Trustees.

8. THE USUAL PROVISIONS WHEN DRAFTING A LIFE INSURANCE TRUST

- a. Revocability provides flexibility but no estate tax or creditor protection.
- b. Irrevocability offers creditor and tax protection but the terms cannot be changed.
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MODULE OVERVIEWS:

This Module provides for the the key deed provisions required when drafting the following:-

- Charitable Trusts;
- Non-Charitable Purpose Trust;
- Reserved Powers Trust;
- VISTA, LST and SISTA;
- Trust combined with a Limited Partnership;
- Foreign Grantor Trusts
- Life Insurance Trusts

and the special provisions to be included in a Limited Partnership Agreement to be combined with a Trust.

LEARNING OUTCOMES:

At the end of this Module, students will

- i. understand the differences required for various aspects of trusts for specific purposes
- ii. understand the requirements for different jurisdictions
- iii. be able to define the key requirements in the drafting for the various types of trusts and their purposes.

1. PROVISIONS REQUIRED WHEN DRAFTING A CHARITABLE TRUST:

- 1.1 With many jurisdictions it is possible to create a valid trust for persons and purposes, including both charitable and non-charitable purposes.
- 1.2 This paragraph is concerned with a Trust, which is purely for charitable purposes.

- 1.3 Many jurisdictions vary as to the scope of the definition of “charitable purpose”. Therefore, it will be important to choose a governing law which permits the scope required. If the scope of benefit is too wide, then consideration should be given to the creation on a non-charitable purpose trust.

Also, the question of benefit to a “community” needs to be considered as to whether this can be any community in any country or merely the community in the jurisdiction of the governing law of the trust.

Bearing these factors in mind, there will need to be a clear definition of the charities or charitable purposes which are to benefit from the trust.

- 1.4 In all jurisdictions, there will be statutory provision for the Court to provide for an order cy pres for other charities or charitable purposes, if the charities or charitable purposes selected fail for any reason.

To avoid the need for a Court order, it will be appropriate for the Trustees, perhaps with the prior written consent of the Protector or with the requirement to give notice to the Protector first, to be able to remove from or add to the charities or charitable purposes.

- 1.5 If it is intended that the trust shall be for a specific charity or charitable purpose only, then there may need to be specific provision as to the disposal of the trust property if or when the specific charity or charitable purpose fails for any purpose.

- 1.6 Assuming that the governing law of the trust does not provide for perpetual trusts, then the governing law of the trust may well provide for a charitable trust to continue indefinitely without the need for a perpetuity period. If this is not the case, then there will need to be powers or trusts to determine the destination of the trust property on termination of the trust period.

- 1.7 It should be noted with regard to a charitable trust, governed by the law of Samoa, that if the selected charity or charitable purpose fails, and the trust provides for the property to then revert to the settlor, if the settlor is then living, then this provision will take effect in priority to and instead of the requirement for an order *cy pres*.

See **SATA S. 65(5), which provides as follows:**

“A provision in a charitable trust that would result in distribution of the trust property to a non-charitable beneficiary prevails over the power of the Court under subsection (4) to apply *cy-pres* to vary or terminate the trust only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor is still living.”

- 1.8 It may be that the settlor wishes there to be a committee of persons to advise the Trustees as to which charities or charitable purpose should benefit and when and to what extent. In that event, provisions for this need to be made governing such matters as
- 1.8.1 the composition of, minimum and maximum number of members of and quorum of the committee;
 - 1.8.2 the appointment, removal and resignation of members of the committee;
 - 1.8.3 all matters relating to notice of, rules concerning the running of and voting at and the keeping of records of meetings of the committee; and
 - 1.8.4 if so required, there needs to be provision for the remuneration of members of the committee.
- 1.9 The advice to the committee should be compared with the ability of the settlor to enforce the charitable purpose of a charitable trust, which is

governed by the law of Samoa, which permits the settlor to enforce the charitable purpose of the trust.

See **SATA S. 65(6)** which provides as follows:

“A charitable trust may be enforced by the settlor of the trust, if still living, maintaining a proceeding to enforce such trust or by the Court.”

- 1.10 Where the statutory duty of care applies, ((UK, Singapore, Hong Kong or Samoa), it needs to be remembered that if the trustee of the trust wishes to delegate functions to others, then there are specific rules as to the delegable functions permitted.
- 1.11 There will need to be provisions as to the requirement for and giving of a receipt for a charitable distribution.
- 1.12 As with all trusts, consideration needs to be given as to the appointment of a protector (see paragraph 1.4) and also for the removal and appointment of trustees. These are wise checks and balances.

2. THE USUAL PROVISIONS OF WHEN DRAFTING A NON-CHARITABLE PURPOSE TRUSTS:

- 2.1 The trust will need to provide for the non-charitable purpose(s) selected and will need to meet any conditions required by the governing law of the jurisdiction selected.
- 2.2 These conditions or other statutory provisions may, for example, include the validity and legality of any purpose, the requirement for a designated trustee from the jurisdiction and the need to specify the powers and trusts, which will provide for the destination of the trust property if the non-charitable purposes fail or the trust terminates.
- 2.3 It will be appropriate for the trust to provide for provisions for changes to the non-charitable purposes of the trust. This may be a power exercisable by

the trustee perhaps with the prior written consent of the protector or upon giving prior written notice in writing being given to the protector.

- 2.4 Every non-charitable purpose trust requires to provide for an enforcer, whose duty is to enforce the non-charitable purposes.
- 2.5 The legislation of the governing law of the trust may provide whether or not the enforcer's duty is a fiduciary duty and, if not, it may be appropriate for the trust so to provide.
- 2.6 Legislation may permit the enforcer to be the same person as the protector but it is better that these roles are independent of each other to provide check and balance. It may be appropriate for the Protector to have power to appoint and remove both the trustee and the enforcer.
- 2.7 These provisions concern purpose trusts in general and do not refer specifically to the special trust of the Cayman Islands, STAR Trust, which is referred to in **Part VIII SS. 95 to 109 CTL which are set out in Annexure 1 to this Unit 9, Module14**

3. THE USUAL PROVISIONS WHEN DRAFTING A RESERVED POWERS TRUST:

- 3.1 The first requirement is to understand that legislation of some jurisdictions do not provide for reserved powers trusts. The legislation of Hong Kong and Singapore provide specifically for reserved powers only of investment or asset management and only to the settlor so that reliance on reservation to another or others or assignment to another or others of reserved powers depends upon the common law. Other jurisdictions, such as Cayman Islands, Dubai, Guernsey and Jersey legislate for the formula for the reservation to grant by the settlor of powers; these enable powers to be exercised by another or others than the settlor. Some jurisdictions, such as Samoa, provide for reservation of powers to a settlor, the ability for powers to be reserved to a protector and for any persons to be able to provide "prescribed directions" to the trustee see **S. 47 SATA which provides as follows:**

“47. Prescribed directions-

(1) The power to give prescribed directions may be reserved in a trust:

(a) to the settlor under section 45(3); or

(b) to the protector; or

(c) to any person or persons (including the settlor and the protector) whether exercisable alone, personally, jointly by majority of persons or by reference to a casting vote or to persons in order of priority.

(2) If a trust provides for the giving of prescribed directions, the trustee is not:

(a) under any duty to preserve or enhance the value of the trust property; or

(b) under any duty to diversify the investments of the trust if prescribed directions provide otherwise; or

(c) liable to any loss in value to the trust property arising directly or indirectly as a result of the giving of prescribed directions.”

Therefore the provisions of a reserved powers trust will depend upon the legislation of the governing law of the trust. There can and should be power for the trustee to change the governing law of the trust and this may help to provide future certainty for the provision and exercise of reserved powers.

3.2 **Annexure 2 to this Unit 9, Module 14** provides an example of provisions for reserved powers for a trust governed by the law of Hong Kong.

3.3 If the governing law of the trust is the law of UK, Singapore, Hong Kong or Samoa, the statutory duty of care applies to the exercise of certain powers by the trustee, unless and to the extent that that the trust provides for contracting out of the exercise of these powers. Consideration will need to be given to this.

- 3.4 It is almost certain the trustee will hold the shares of a holding company, which will in turn hold the assets of the trust. This brings into focus the liability of the trustee. The governing law of the trust will determine the extent to which the trust deed may generally exculpate the trustee from liability. This is likely to mean that a trustee is both by the law and by the terms of the trust deed not liable except for its own fraud, willful misconduct or willful default and gross negligence. This still leaves the difficulty of overcoming the decision in:

Bartlett v Barclays Bank Trust Company Ltd. [1980 1 AE 139]

[The Trust Company was the Trustee of a trust, which held the controlling shareholding in a company. It received all relevant information about the company. The directors of the company invested in two property development schemes, one of which went badly wrong. A Beneficiary sued the Trustees for negligence. It was held that the Trustee, as a professional Trustee, owed a high duty of care to the Beneficiaries. It should have properly considered the proposed investments. It should have intervened to prevent the disaster. It should have considered the diversification of the trust's investments. It was in breach of trust having not properly exercised the Trustee's power of investment.]

Not surprisingly the Courts have started to react against anti-Bartlett Clauses on the basis that the Trustees should not ignore a core duty of their role:

Appleby Corporate Services (BVI) Limited v Citco trustees (BVI) Limited

[Claim No. BVIHC (Com) 156 of 2011]

["I do not think that this provision" (the anti-Bartlett clause) "is engaged. It did not relieve" (the Trustee) "of the duty to satisfy itself from time to time that nothing untoward was affecting the value of the shares" (of the Holding Company of the trust)].

This means that the trust may include an anti-Bartlett Clause and an example of such a clause is set out in **Annexure 3 to this Unit 9, Module 14.**

- 3.5 The Memorandum and Articles of the holding company of the trust will need to enable that company to grant a limited power of attorney to the person(s) with the reserved powers (probably the settlor or the protector or an investment manager) to exercise powers probably of investment or asset management.

4. THE USUAL PROVISIONS DRAFTING A VISTA/LST/SISTA:

- 4.1 This section of this Module relates to three types of trust in the following three jurisdictions:-

British Virgin Islands – VISTA (Virgin Islands Special Trusts Act);

Labuan – LST (Labuan Special Trust); and

Samoa – SISTA (Samoa International Special Trust Arrangement)

The objective of these three similar types of trust is to circumvent the Bartlett problem. If the trust meets the conditions and if and while the trust so directs, the primary purpose of the trust will be for the trustee to indefinitely retain the shares of a company and so that the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee.

- 4.2 The trust should refer to the conditions, specify that these are met and direct that the conditions apply to all the shares in the trust fund of the trust or to the shares in the trust fund which are specified in the direction. The shares have to be in a company incorporated in the same jurisdiction as the governing law of the trust and those shares, which are subject to the direction, are called “designated shares”.

The conditions are as follows:-

- 4.2.1 the trust is created by Will or by a trust instrument created by the settlor during his lifetime;
- 4.2.2 at least one of the trustees is a “designated trustee” at the time when the direction takes effect;
- 4.2.3 the provisions of the trust require that, as long as the direction has effect, one of the trustees will be a “designated trustee”;
- 4.2.4 the trust is not created by the exercise of a power under the terms of another trust, unless either
 - 4.2.4.1 that power expressly permits this at the time that the power is exercised; or
 - 4.2.4.2 the other trust has the same governing law and the trustee of the other trust, or one of the trustees of the other trust, is a “designated trustee.”

“Designated trustee” is defined in the law of each of the relevant jurisdictions to mean a trust company registered and licensed in the jurisdiction of the governing law and may have a wider definition depending on the jurisdiction.

The hallmark of these types of trust is that the designated trustee, the company which issues the “designated shares” and the trust must all be governed by the same law, being the law of one of the jurisdictions mentioned.

- 4.5 A direction concerning “designated shares” can specify the date on which or an event on the occurrence of which or circumstances in which the direction will take effect or cease to have effect. Such a direction is called a “trigger direction” and the trust may also specify a requirement for a person or committee (none of whom can be a trustee of the trust) to serve a notice on the trustee to trigger the start or the end of the direction. The trust should state whether or not the decision to give or not to give the trigger direction

is a fiduciary duty and, if this is not stated, it is presumed that the duty is fiduciary.

- 4.6 The purpose of these types of trust is to enable the trustee to retain the designated shares and enable the director(s) of the company, in which the trustee holds the designated shares (“the Company”) to manage and control the Company without the trustee being liable. Accordingly, legislation requires the trustee not to exercise any powers of voting the designated shares or otherwise to interfere with the director(s)’ control of the Company and not to require a dividend to be paid by the Company. Restrictions on the trustee’s powers are spelt out in legislation and include the prevention of removing and appointing directors.

The impact of these necessary but harsh restrictions may be to some extent overcome by provisions in the trust called “office of director rules”. Legislation states to what the office of director rules may refer and the most recent example of this is set out in **S. 54 (1) and (2) SATA which provides as follows:**

“54. Provisions relating to directors-

(1) The trust instrument may:

(a) contain rules for determining the manner in which the power of voting and other powers attributable to designated shares may be exercised concerning the company by the trustee in relation to -

- (i) the appointment of directors;
- (ii) the removal of directors;
- (iii) the remuneration of directors; or
- (iv) any of the matters referred to in subsection (2); and

(b) provide provisions to amend the rules.

(2) The rules for the office of director may:

(a) require the trustee to ensure that a particular person holds or retains office as a director;

(b) require any person to be appointed to the office of director at a future date or upon the happening of a future event;

(c) require the removal of a director in specified circumstances;

(d) subject to the requirements of the rules the company and any written law applicable to the company, prescribe the minimum and maximum number of directors to hold office at any time;

(e) require the trustee, for the appointment and removal of directors, to act generally or in any specified circumstances on the decision of a third person or a committee;

(f) provide for the conferral of fiduciary duties on a person or a committee referred to in paragraph (e);

(g) provide for the establishment, continuance, and procedures of a committee referred to in paragraph (e); or

(h) provide for the remuneration of the person or committee referred to in paragraph (e) to be paid from the trust fund of the trust.”

Many settlors will want the trust to contain office of director rules.

- 4.7 So these types of trust protect the trustee from liability which may arise because of acts or omissions of the director(s) of the Company but what about the protection of the beneficiaries of the trust?

This can be achieved through an “intervention call”, which means that, if there is a ground of complaint against the director(s), either an “interested person” or someone called an “appointed enquirer” (who is appointed for the purpose) can give written notice to the trustee, who must then look into the complaint and, if necessary, take action.

The most recent definition of “interested person” is set out in **S. 49 SATA, which provides as follows:-**

“interested person”, for a trust, means:

- (a) a beneficiary of the trust;
- (b) an object of a discretionary trust over any of the capital or income of the trust;
- (c) a parent or legal guardian of any minor falling within paragraph (a) or (b);
- (d) an enforcer;
- (e) a protector, unless the trust provides otherwise;
- (f) an appointed enquirer;
- (g) where any of the purposes of the trust are exclusively charitable, the Attorney General; and
- (h) any beneficiary or other person so designated under the provisions of the trust.

Therefore, instructions are needed as to whether there is to be an appointed enquirer and, if so, who, whether or not the appointed enquirer is to be paid and what grounds of complaint for an intervention call should be specified. All these are appropriate drafting considerations for the trust.

- 4.8 Since the primary purpose of the trust is that the trustee should retain the “designated shares”, there still could be circumstances in which the trustee would properly wish to sell or dispose of the “designated shares”. Subject to the terms of the trust, the trustee will have a power to do this. However, unless the trust provides otherwise, the consent of the director or of a majority of the directors of the Company will be needed and also the consent of any other person, whose consent is prescribed by the trust.
- 4.9 Obviously, since the intention is for the trustee to retain the designated shares, this would be negated if all the beneficiaries, who are of full age and

capacity, can terminate the trust (which is the decision in *Saunders v Vautier*).

Therefore, it is provided by **S. 59 SATA** that if the terms of the trust exclude this right, it will not apply.

5. THE USUAL PROVISIONS WHEN DRAFTING A TRUST COMBINED WITH A LIMITED PARTNERSHIP:

- 5.1 This solution leaves the day to day control of the Limited Partnership's business and investments with the general partner, with a very small percentage interest in the limited partnership. The substantial percentage interest of the limited partner in the limited partnership is the asset of the trust.

The trust can be any type of trust but is likely to be a standard discretionary trust, which can be governed by the law of any jurisdiction.

Only Samoa legislates for the protection of the trustee to provide what is simply legislative certainty. This requires that the governing law of the trust be the law of Samoa but the trustee does not need to be a Samoan trustee.

See. **S. 63 SATA, which provides as follows:-**

“63. Combination of a trust with a limited partnership - If trust property of a Samoan trust is the beneficial entitlement to the interest of a limited partner in a limited partnership, whether governed by the Law or by foreign law:

(a) the trustee has no duty -

(i) to diversify the interest; or

(ii) to consider the investments or business of the limited partnership; and

(b) the powers of the trustee are subservient to those of the general partner of the limited partnership; and

(c) the trustee is not liable for any loss directly or indirectly caused to the trust property by reason of the management and control of the limited partnership by the general partner of that limited partnership.”

5.2 For this reason, the trust needs no reserved powers provisions and the Bartlett problem is avoided. As with all trusts, it is important for there to be a power for a protector to remove and appoint trustees.

5.3 The trust could contain two particular provisions:-

5.3.1 the administrative powers of the trustee are subservient to the powers of the general partner of the limited partnership while and to the extent that the asset of the trust is the interest of the limited partner in the limited partnership. The inclusion of this clause may need tax consideration; for example, this is unacceptable if the trust is a Foreign Grantor Trust; and

5.3.2 the powers of investment include the power for the trustee to invest in the interest of a limited partner in a limited partnership and retain this interest without need for diversification.

5.4 This structure is popular with UHNW clients holding groups of companies and accordingly it will be appropriate to consider all possible checks and balances and “back doors” in the trust to be able to meet any changes and restructuring which may be required later.

5.5 Depending on the tax status of those concerned, consideration will need to be given as to whether or not the general partner company is a “controlled foreign company”. If so, the shareholder control may be cured by the shares of the general partner being held by the trustees of a purpose trust. If so, those trustees must be entirely independent of the trustee of the discretionary trust. The purpose trust should have a protector with power to remove and appoint trustees and enforcers.

5.6 Generally, the ongoing control of the general partner will need consideration.

6. SPECIAL PROVISIONS TO BE INCLUDED IN A LIMITED PARTNERSHIP AGREEMENT TO BE COMBINED WITH A TRUST:

6.1 The limited partnership is in general a standard limited partnership but with the general partner holding a small percentage interest in the limited partnership (say 1% or 2%) and the limited partner holding the majority interest.

6.2 The provision for the term of the limited partnership should be either be similar to that of the trust with power to terminate sooner or continuing until terminated. One of the events of termination should be the giving of a notice of dissolution by one partner to the other.

6.3 There should be a provision regarding change of partners. Only general partners should be able to appoint new general partners. It should be necessary for both partners to appoint a new limited partner. Any new partner should enter into a document ancillary to the limited partnership agreement agreeing to be bound by its terms.

6.4 The limited partnership agreement should provide that it is for the general partner to prepare the accounts of the limited partnership. This is to ensure that should there be disagreement as to the accounting, then the views of the general partner shall prevail.

7. THE USUAL PROVISIONS WHEN DRAFTING A FOREIGN GRANTOR TRUST (“FGT”):

- 7.1 A fundamental decision in drafting a FGT is whether or not the trust shall be revocable by the grantor. If the trust is revocable, its fundamental provision regarding distributions will differ from the trust in irrevocable form. If the trust is revocable it will have an added taxation benefit of a “step up” (rebasement) for capital gains tax purposes. However, if the trust is revocable, asset protection will be lost.

If the trust is to be revocable, then a usual clause would meet the following factors:-

- the power to revoke the trust in whole or part so that all or part of the trust fund is returned to the grantor;
- the giving of a notice in writing by the grantor to the trustee to exercise the power;
- the revocation will not affect any amount paid, applied or set aside for any beneficiary;
- the power of revocation is personal to the grantor;
- if the grantor is incapacitated, then a guardian or similar person may exercise the power and the trustee will pay or transfer the whole or part of the trust fund to which the revocation relates to the guardian or similar person instead of to the grantor.

- 7.2 Definitions in the trust are likely to include the following:-

- “Appointor” may be defined as the following persons in the following order of priority: Protector, alternate protector, successor protector, the personal representatives of the last remaining trustee (if an

individual) or the liquidator of the last surviving trustee (if corporate and either a resolution has been passed or an order made for the voluntary winding up of the corporate trustee);

- “Code”, meaning the United States Internal Revenue Code 1986, as amended and any successor legislation;
- “incapacitated”, as medically defined and including incommunicado;
- “Independent Trustee”, meaning any corporate trustee which is not “related or subordinate” (as defined in S. 672(c) of the Code – please refer to this online) to the grantor, to the protector or to any beneficiary;
- “Support Obligation”, meaning a legal obligation of support, as described in SS. 2041 and 2514 of the Code – please refer to these online;
- “US Person”, meaning

(a) a person described as a “United States person” in S. 7701 (a) (30) of the Code – please refer to this online; and

(b) any individual who is a citizen or resident of the United States for US federal estate or gifts tax purposes pursuant to S. 2001 (a) of the Code and S. 20.01 – 1(b)(i) of the US Treasury Regulations – please refer online for these.

7.3 The principal provisions regarding the payment or application of the income of a FGT differ depending on whether the trust is revocable or irrevocable. The two forms of provision are as follows:-

For a revocable trust, the provision may be worded as follows:-

“Subject to the provisions of Clause 4 of the Trust and during the life of the Grantor or during the Trust Period (whichever shall be the shorter) while the Grantor is not Incapacitated to pay or apply the income of the Trust Fund in whole or part to such of the Beneficiaries in such amounts and in such manner as the Grantor shall from time to time in writing direct. During any period when the Grantor shall be living but Incapacitated, the Trustee shall pay or apply the income of the Trust Fund to or for the benefit of the Grantor as directed in writing by any guardian or other person who has unrestricted authority to exercise this power on behalf of the Grantor.”

For an irrevocable trust, the provision states that during the life of the grantor income shall be paid or applied for either or both of the grantor and the grantor’s spouse. This means that any benefit to others, including US beneficiaries, would have to be by subsequent gift from the grantor or the grantor’s spouse.

- 7.4 The power to remove and appoint trustees of the FGT is exercisable by the appointor. To avoid US tax problems, there will be a wide provision to ensure that any trustee must be an Independent Trustee. For example:

“No Beneficiary, Protector, Appointor, Enforcer, nor any entity or individual who is a “related or subordinated party” (as that phrase is defined in Section 672 (c) of the Code) to the Grantor, to any other grantor of the Trust, to any Beneficiary to any Protector, to any Appointor or to any Enforcer for the time being of the Trust shall be appointed or continue (as the case may be) as Trustee of the Trust to the intent that any Trustee of the Trust shall be an Independent Trustee.”

Also, for tax purposes, there will be a provision that “no US Person beneficiary shall be appointed or continue as trustee of the trust.”

- 7.5 Given the limitation on the powers of the protector, it may be that another role of “enforcer” is needed whose prior written consent is needed to carefully selected powers exercisable by the trustee.

If so, then such person should not be a US person and the following two limitations may apply:

- No person, entity or individual who is a “related or subordinated party”, as that phrase is defined in Section 672(c) of the Code, to the Protector shall be appointed or continue (as the case may be) as Enforcer of the Trust; and
- If the Enforcer of the Trust shall become Incapacitated (and while he or she shall be Incapacitated) or shall die, the Protector shall have power exercisable by deed revocable during the Trust Period or irrevocable to appoint another person, entity or individual as Enforcer of the Trust and, apart from the Protector, the person, entity or individual so appointed shall be party to the deed to accept the appointment and the Trustees shall be party to the deed to have knowledge of such appointment. If any individual acting as a Protector is a U.S. Person Beneficiary hereunder, then he may not appoint any person or entity as Enforcer who is a “related or subordinate party” to him, as that term is defined in Section 672(c) of the Code.

7.6 Again with regard to taxation issues, the general limitation on powers will be included in the trust and these refer to “Support Obligation” (see definition above):-

No Trustee or Protector or Appointor or Enforcer, or any individual to whom the powers of a Trustee or Protector or Appointor or Enforcer have been delegated pursuant to the terms of this Trust or by law, who is a citizen or a resident (as defined in Section 7701(b)(1)(A) of the Code or Section 20.0-1(b)(1) of the U.S. Treasury Regulations) of the United States (other than the Grantor) may participate in the exercise of any power granted to the Trustees in their fiduciary capacity concerning the distribution, use or application of income or principal:

- (1) for his own benefit; or
- (2) for the benefit of any person with respect to whom he has a Support Obligation.

No individual Trustee or Protector or Appointor or Enforcer, or any individual to whom the powers of a Trustee or Protector or Appointor or Enforcer have been delegated pursuant to the terms of this Trust or by law (other than the Grantor) who is a Beneficiary or who has a Support Obligation with respect to a Beneficiary shall participate in any decision or exercise any power in any manner whatever that would, but for the provisions of this clause, cause that individual to be treated as an owner of trust property for United States Federal income or transfer tax purposes or that would otherwise cause the trust property to be includible in the estate of that individual for United States Federal transfer tax purposes.

8. LIFE INSURANCE TRUSTS

In the case of a life insurance trust, the property held within the trust is a life insurance policy on the settlors life. When the trust is established, there are accompanying documents that determine how the trust will use and distribute the funds from the life insurance policy after the settlors death.

8.1 Revocability

If the trust is revocable, the terms can be changed at any time. A revocable life insurance trust offers more flexibility, but it won't save on any taxes. All of the proceeds from the life insurance policy will still become part of the settlors taxable estate after death.

A revocable trust won't protect the life insurance policy proceeds or any other assets in the trust from creditors, either before or after the settlors death.

8.2 Irrevocable Life Insurance Trust

The usual form of a life insurance trust is that it is irrevocable. Usually called an Irrevocable Life Insurance Trust (ILIT).

When such a trust is created, the terms of the trust cannot change and the settlor will no longer be able to borrow from the insurance policy.

But the key advantage is that the proceeds of the policy are protected from creditors, from estate taxes and from probate procedures.

8.3 Other provisions

Other provisions which need to be borne in mind:

When drafting the trust it is important to ensure that the named beneficiaries have “insurable interest”. That is, an ILIT can generally only be created to benefit immediate family or those persons that the settlor is financially supporting.

In some jurisdictions, the settlor must survive for a minimum period, eg least 3 years in the US, otherwise, the ILIT trust won't protect the policy from creditors or estate taxes.

REVIEW QUESTIONS:

1. What usual clauses are required for the creation of a Charitable Trust?
2. What is an order cy-pres and how can this be avoided in drafting a Charitable Trust?
3. Is it possible for the trust property to revert to the Settlor if the charitable purpose fails?
4. Is it possible for the Settlor to enforce the charitable purpose?
5. Will there be a need for a Committee to advise the Trustees of the Charitable Trust and, if so, what matters should be covered in the Charitable Trust in this respect?
6. What functions are delegable by Trustees of a Charitable Trust to which the statutory duty of care applies?
7. What needs to be considered regarding the validity of a Non-Charitable Purpose Trust ("NCPT")?
8. What is the role of an Enforcer? Is an Enforcer a fiduciary?
9. Should the Enforcer also be the Protector of a NCPT?
10. What is a STAR Trust and what are the advantages of such a Trust?
11. To whom can reserved powers be provided under a Trust depending upon the governing law of the Trust?

12. What are the usual provisions for a clause in a Trust reserving powers to someone other than the Trustee?
13. What is the problem arising by reason of the decision in ***Bartlett v Barclays Bank Trust Company Ltd.***?
14. What is an ***Anti-Bartlett Clause*** and what are the usual provisions of such a clause?
15. Are ***Anti-Bartlett Clauses*** always enforceable?
16. If, as is likely, the Trustees of the Reserved Powers Trust will hold the shares of a holding company, what is necessary for the Memorandum and Articles of that holding company to contain?
17. What is the primary purpose of a VISTA type Trust?
18. Which jurisdictions legislate for a VISTA type Trust?
19. What are the necessary conditions for the existence of a VISTA type Trust?
20. What are “office of director rules” and why are these important?
21. What is an “intervention call” and why is this important? In this respect who is an Appointed Enquirer and who are “interested persons” and what role do they play?
22. What are “designated shares” in a VISTA type Trust and how and when can they be disposed of?

23. What is the rule in *Saunders v Vautier* and does this rule apply where there is a VISTA type Trust?
24. What is the reason for and benefits of a Trust combined with a Limited Partnership?
25. What trust clauses will be needed if such a Trust is to be combined with a Limited Partnership?
26. What are the main provisions of a Limited Partnership which need to be considered if the Limited Partnership is to be combined with a Trust?
27. What is a Foreign Grantor Trust and why is such a Trust important?
28. What forms can a Foreign Grantor Trust take?
29. What are the usual provisions to be included in a Foreign Grantor Trust?
30. What advantages are there in creating an ILIT?

ANNEXURE 1

UNIT 9, MODULE 14

CAYMAN SPECIAL TRUSTS – STAR TRUSTS

Part VIII, Sections 95 to 109 Cayman Islands Trusts Law 2018

95.

(1) In this Part –

“beneficiary” means a person who will or may derive a benefit or advantage, directly or indirectly, from the execution of a special trust;

“enforcer” means a person who has standing to enforce a special trust;

“ordinary”, in reference to a trust or power, signifies that it is a trust or power which is not subject to this Part;

“power” includes an administrative power as well as a dispositive power;

“special”, in reference to a trust or power, signifies that it is a trust or power which is subject to this Part;

“standing to enforce” means the right or duty to bring an action for the enforcement of a special trust; and

“trust” includes a trust of a power, as well as a trust of property, and “trustee” has a correspondingly extended meaning.

(2) In this Part, a power is said to be held in trust if granted or reserved subject to any duty, expressed or implied, qualified or unqualified, to exercise the power or to consider its exercise.

(3) Except as provided in subsections (1) and (2), terms and expressions defined in section 2 have the same meanings in this Part.

96.

(1) A trust or power is subject to this Part, and is described as special, if –

(a) it is created by or on the terms of a written instrument, testamentary or *inter vivos*; and

(b) the instrument contains a declaration to the effect that this Part is to apply.

(2) If a trust or power is created by written instrument in exercise of a special power, and the instrument contains no declaration as to the application of this Part, this Part shall, subject to evidence of a contrary intention, be deemed to be intended to apply; and for the purpose of subsection (1) the instrument shall be deemed to contain a declaration to that effect.

(3) A trust or power which does not meet the requirements of subsection (1), and is not deemed to do so by virtue of subsection (2), is an ordinary trust or power and is not subject to this Part.

97.

Nothing in this Part affects an ordinary trust or power directly or by inference.

98.

The law relating to special trusts and powers is the same in every respect as the law relating to ordinary trusts and powers, save as provided in this Part.

99.

(1) The objects of a special trust or power may be persons or purposes or both.

(2) The persons may be of any number.

(3) The purposes may be of any number or kind, charitable or non-charitable, provided that they are lawful and not contrary to public policy.

100.

(1) A beneficiary of a special trust does not, as such, have standing to enforce the trust, or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property.

(2) The only persons who have standing to enforce a special trust are such persons, whether or not beneficiaries, as are appointed to be enforcers –

(a) by or pursuant to the terms of the trust; or

(b) by order of the court.

(3) A right or duty to enforce a trust is presumed, subject to evidence of a contrary intention, to extend to every trust which is created by or on the terms of the same instrument, or pursuant to a power so created.

(4) The court may, on the application of a trustee or an enforcer, appoint an enforcer –

- (a) if the terms of the trust require the appointment of an enforcer but –
 - (i) it is impossible to make the appointment without the court's assistance; or
 - (ii) it is difficult or inexpedient to make the appointment without the court's assistance;

(b) if an enforcer with a duty to enforce is unable, unwilling or unfit to do so; or

(c) if there is no enforcer who is of full capacity and who –

- (i) is a beneficiary; or
- (ii) has a duty to enforce and is fit and willing to do so.

(5) In the circumstances described in paragraph (c) of subsection (4), the trustee shall, within thirty days apply, to the court for the appointment of an enforcer, or for the administration of the special trust under the direction of the court, or for such other order as the court shall think fit and, if a trustee knowingly fails to do so, he commits an offence and is liable on summary conviction to a fine of ten thousand dollars.

(6) Subsections (1) to (5) do not affect –

(a) the enforcement, by a trustee, an enforcer or any other person involved in the administration of a trust, of a right to remuneration or indemnity; or

(b) the enforcement of a trustee's duties by a co-trustee or a successor trustee.

(7) Section 83 does not apply to special trusts.

101.

(1) Standing to enforce a special trust may be granted or reserved as a right or as a duty.

(2) Subject to evidence of a contrary intention, an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust.

(3) A trustee or another enforcer, or any person expressly authorised by the terms of the special trust has standing to bring an action for the enforcement of the duty, if any, of an enforcer.

102.

Subject to the terms of his appointment –

(a) an enforcer has the same rights as a beneficiary of an ordinary trust –

- (i) to bring administrative and other actions, and make applications to the court, concerning the trust; and
- (ii) to be informed of the terms of the trust, to receive information concerning the trust and its administration from the trustee, and to inspect and take copies of trust documents;

(b) in the performance of his duties, if any, an enforcer has the rights of a trustee of an ordinary trust to protection and indemnity and to make applications to the court for an opinion, advice or direction or for relief from personal liability; and

(c) in the event of a breach of trust an enforcer has, on behalf of the trust, the same personal and proprietary remedies against the trustee and against third parties as a beneficiary of an ordinary trust.

103.

(1) Subject to subsection (4), a special trust is not rendered void by uncertainty as to its objects or mode of execution.

(2) The terms of a special trust may give the trustee or any other person power to resolve an uncertainty as to its objects or mode of execution.

(3) If a special trust has multiple objects and there is no allocation of the trust property between them, the trustee, subject to evidence of contrary intention, has discretion to allocate the trust property.

(4) If an uncertainty as to the objects or mode of execution of a special trust cannot be resolved, or has not been resolved pursuant to the terms of the trust, the court –

(a) may resolve the uncertainty -

(i) by reforming the trust;

(ii) by settling a plan for its administration; or

(iii) in any other way which the court deems appropriate; or

(b) insofar as the objects of the trust are uncertain and the general intent of the trust cannot be found from the admissible evidence as a matter of probability, may declare the trust void.

(5) This section applies to powers as to trusts.

104.

(1) If the execution of a special trust in accordance with its terms is or becomes in whole or in part –

(a) impossible or impracticable;

(b) unlawful or contrary to public policy; or

(c) obsolete in that, by reason of changed circumstances, it fails to achieve the general intent of the special trust,

the trustee shall, unless the trust is reformed pursuant to its own terms, apply to the court to reform the trust *cy-près* or, if or insofar as the court is of the opinion that it cannot be reformed consistently with the general intent of the trust, the trustees shall dispose of the trust property as though the trust or the relevant part of it has failed.

(2) Section 72 does not apply to special trusts.

105.

(1) Except as authorised by an order of the court, or permitted by or pursuant to this section –

(a) the trustee of a special trust shall be, or include, a trust corporation; and

(b) the trustee shall keep in the Islands at the office of the trust corporation a documentary record of –

(i) the terms of the special trust;

(ii) the identity of the trustee and the enforcers;

(iii) all settlements of the property upon the special trust and the identity of the settlors;

(iv) the property subject to the special trust at the end of each of its accounting years; and

(v) all distributions or applications of the trust property.

(2) In this section –

“trust corporation” means a body corporate licensed to conduct trust business, with or without restriction, under the Banks and Trust Companies Law (2018 Revision) or registered under that Law as a controlled subsidiary or private trust company.

(3) The court may authorise non-compliance with subsection (1) on such terms as it thinks fit if it is satisfied that the execution of the trust will not be prejudiced.

(4) A person who, in the Islands or elsewhere, knowingly administers a special trust while there is a breach of paragraph (a) of subsection (1), apart from –

(a) actions intended to bring the trust into compliance with paragraph (a) of subsection (1) as soon as possible; and

(b) actions intended to preserve the trust property pending compliance with paragraph (a) of subsection (1)

commits an offence and is liable on summary conviction to a fine of ten thousand dollars and to imprisonment for one year, and on conviction on indictment, to a fine of one hundred thousand dollars and to imprisonment for five years.

(5) A trustee who knowingly fails to comply with paragraph (b) of subsection (1) commits an offence and is liable on summary conviction to a fine of ten thousand dollars.

(6) This section does not apply to the holder of a power which is granted or reserved by the terms of a special trust to a person other than the trustee of the special trust, even though the power is held in trust.

(7) This section does not apply (except as regards any antecedent offence) if the governing law of the trust has been changed from the law of the Islands.

(8) The Cabinet may make regulations subject to affirmative resolution restricting the application of subsection (1).

106.

(1) Section 239(1) of the Penal Code (2018 Revision) does not apply in relation to special trusts.

(2) For the purpose of the Penal Code (2018 Revision) property held upon a special trust shall be regarded, as against the trustee of the property or of any power in relation to the trust, and against any enforcer of the trust, as belonging to others (except to the extent of the beneficial interest, if any, of the trustee or enforcer under the terms of the trust), and an intention on the part of any such trustee or enforcer to defeat the trust shall be regarded accordingly as an intention to deprive others of their property.

107.

A person who, as trustee, accepts a settlement of property upon a special trust without taking steps to ensure that the settlor, or the person making the settlement on his behalf, understands who will have standing to enforce the trust commits an offence and is liable on summary conviction to a fine of ten thousand dollars and to imprisonment for one year, and on conviction on indictment to a fine of one hundred thousand dollars and to imprisonment for five years.

108.

Part VI of this Law applies to special trusts but as though paragraph (b) of section 89(4) were repealed and the following substituted -

“(b) in the case of a change from the law of the Islands, the new governing law would recognise the validity of the trust (without any material effect on its objects) and the standing of the enforcers to enforce the trust.”.

109.

No land nor any interest in land in the Islands shall be subject, directly or indirectly, to a special trust, but a special trust may hold an interest in a company, partnership or other entity which holds land in the Islands, or an interest in such land for the purposes of its business.

Annexure 2

UNIT 9 - Module 14

Example of reserved powers of investment and investment management

1. Notwithstanding any other provisions of the Trust, the powers and functions of investment and of investment management shall be carried out by the Settlor or the Protector, if the Proper Law for the time being of the Trust permits, ("such Protector") or the investment manager appointed in accordance with the provisions of this Schedule of the Trust ("Investment Manager") provided that, if the Trustees shall exercise either of the powers set out in paragraph 7.2 and 7.3 of this Schedule of the Trust, the provisions of Schedule of the Trust as regards investment and investment management shall apply instead of the provisions of paragraph 2 of this Schedule of the Trust.
2. Notwithstanding the provisions of this Schedule of the Trust and while the provisions of paragraph 1 of this Schedule of the Trust shall apply, the Settlor or such Protector or the Investment Manager shall have all the powers of investment and of investment management in relation to the Trust Fund of the Trust and in relation to all the assets and investments of any Investment Holding Company (as defined in paragraph 14 of this Schedule of the Trust) as if they or any of them were the absolute beneficial owners of such assets and investments.
3. The Settlor or such Protector (in that order of priority) may, from time to time, by instrument in writing delivered to the Trustees, appoint any person as an Investment Manager for the Trust.
4. The Settlor or such Protector (in that order of priority) may by instrument in writing delivered to the Trustees remove any Investment Manager and may by instrument in writing delivered to the Trustees appoint any person as Investment Manager to replace the Investment Manager so removed.
5. In the event both the Settlor and such Protector are no longer alive or are both incapable, the power to appoint and remove the Investment Manager under paragraph 3 and 4 of this Schedule of the Trust shall be exercisable by the Protector.
6. For so long as the Settlor is alive or there is such Protector or there is an Investment Manager duly appointed and capable of exercising the investment and asset management functions in relation to the Trust, the Trustees shall not be under any duty or responsibility in relation to any investment or asset management functions for the Trust and the Trustees shall not be liable or responsible for any loss or damage arising

from or in relation to mismanagement default or omission in the exercise or non-exercise of the investment and asset management functions for the Trust. The investment and asset management functions in relation to the Trust shall be exercised by the Settlor or such Protector (in that order of priority) or the duly appointed Investment Manager.

7. Subject to paragraph 5 of this Schedule of the Trust, if there is no Settlor, no such Protector and no Investment Manager able and willing to exercise the investment and asset management functions in respect of the Trust, the Trustees shall have the option, in their absolute discretion, to either:
 - 7.1 terminate the Trust by deed whereupon the Trust Fund will be distributed in the manner set out in Clause [] of the Trust, as if the Trust Period had expired on the date the power to terminate the Trust under this sub-paragraph is exercised by the Trustee; or
 - 7.2 by instrument in writing, appoint an Investment Manager to exercise the investment and asset management functions in respect of the Trust; or
 - 7.3 themselves undertake the investment and asset management functions for the Trust.
8. In the event the Trustees appoint an Investment Manager pursuant to paragraph 7.2 of this Schedule of the Trust, the Trustees shall not have any investment functions, responsibilities, powers or duties in relation to the Trust, all of which shall be vested in the Investment Manager appointed by the Trustees. The Trustees shall not be responsible for any actions, omissions, defaults or negligence on the part of the Investment Manager unless such actions, omissions, defaults or negligence are caused by or arise from the Trustees lack of due care in the selection of the Investment Manager.
9. The Trustees may, by instrument in writing, remove any Investment Manager appointed pursuant to paragraph 7.2 of this Schedule of the Trust and may, by instrument in writing, appoint any person as Investment Manager to replace the Investment Manager so removed.
10. Subject to paragraph 11.1 of this Schedule of the Trust, the Trustees shall comply with all written directions from the Settlor or of such Protector or of the Investment Manager in relation to the investment and asset management of the Trust Fund and the income of it or any part of it ("Investment Instruction").
11. The Trustees may, in their discretion, refuse to execute any Investment Instruction, if either:

- 11.1 the Trustees consider that such execution would or might make the Trustees subject to any criminal sanction or civil liability; or
- 11.2 the Investment Instruction involves an investment or transaction which the Trustees consider could have an adverse impact on their reputation, including where the underlying business activity invested in would or might be considered to be unlawful, immoral, unethical or otherwise highly controversial.
12. Where the investment and asset management functions of the Trust are undertaken by the Settlor or such Protector or the Investment Manager, the Trustees shall not be responsible or liable in any way for the performance of the investments or other assets ultimately comprised within the Trust Fund. The Trustees shall have no duty to ensure the diversification of the assets of the Trust or to give any directions or suggestions or warnings in relation to investment matters, whether generally or in relation to particular assets or to intervene, in particular where no action is being taken by the Settlor or such Protector or the Investment Manager in relation to assets which are falling in value. Nor shall the Trustees have any duty to enquire at any point whether the Settlor or such Protector or the Investment Manager is acting in bad faith, unless they have actual knowledge of circumstances which strongly indicate that the Settlor or Investment Manager is actually acting in bad faith.
13. To the extent permitted by law, the Trustees shall not be liable for any loss or loss of profit resulting directly or indirectly from compliance with any Investment Instruction given (or appearing or purporting to be given) by the Settlor or such Protector or the Investment Manager or for otherwise complying with the terms of this Schedule of the Trust. In addition, the Trustees shall not be liable for refusing or delaying to execute any direction which they bona fide consider may not be a valid Investment Instruction under this Schedule of the Trust except in the event of their own fraud, willful misconduct or gross negligence.
14. Without prejudice to the provisions of this Schedule of the Trust, where the Trustees are able to exercise control over the management of any company which holds assets comprising part of the Trust Fund ("Investment Holding Company"), the Trustees shall use their best endeavours to procure that the relevant Investment Holding Company complies with any Investment Instruction issued by the Settlor or such Protector or the Investment Manager.
15. The Trustees shall, upon request by the Settlor or such Protector or the Investment Manager, procure that an Investment Holding Company issues to the Settlor or such Protector or the Investment Manager (as the case may be) a Limited Power of Attorney ("a Power") enabling him, as attorney, to give instructions directly to banks, brokers and other financial institutions or intermediaries for the execution of transactions on the accounts of the Investment Holding Company with such banks, broker or other financial

institutions or intermediaries. However, any Power shall not permit the holder of the Power to add to or withdraw from the accounts of the Investment Holding Company.

Annexure 3

UNIT 9 - Module 14

Example of wide anti-Bartlett provisions

1. The Trustees may in their absolute and uncontrolled discretion retain all or any of the shares or any other rights or interests in or over any proprietary or private company the stocks shares or debentures of which shall at any time or from time to time form part of the Trust Fund (hereinafter in this Schedule called "the Company" which expression shall include the Company, any other company controlled by the company, any company with which the Company is merged or amalgamated and any other company which is controlled by such company) for so long as the Trustee may think fit notwithstanding any professional advice to the contrary.
2. Regardless of whether the Trustees are or are not responsible for exercising the investment and asset management functions in relation to this Trust:
 - 2.1 The Trustees shall not be bound or required to exercise any control the Trustees may have over or to interfere in or become involved in the administration management or conduct of the business or affairs of the Company and in particular (but without prejudice to the generality of the foregoing) the Trustees shall not be bound or required to exercise any voting powers or rights of representation or intervention conferred on the Trustees by any of the shares in respect of the Company.
 - 2.2 The Trustees shall leave the administration management and conduct of the business and affairs of the Company to the directors, officers and other persons authorised to take part in the administration management or conduct thereof and the Trustees shall not be bound or required to supervise such directors, officers or other persons so long as the Trustees shall not have actual knowledge of any dishonesty relating to such business and affairs on the part of any of them.
 - 2.3 The Trustees shall assume at all times that the administration management and conduct of the business and affairs of the Company is being carried on competently honestly diligently and in the best interests of the Trustees in their capacity as shareholder or howsoever they are interested therein. The Trustees shall also assume until such time as they have actual knowledge to the contrary that persons appearing to be or who act as the directors officers and other

persons authorised to take part in the aforesaid administration management and conduct are duly appointed and authorised.

- 2.4 The Trustees shall not be bound or required at any time to take any steps at all to ascertain whether or not the assumptions contained in Clause 2.3 of this Schedule of the Trust.
- 2.5 Without prejudice to the generality of the foregoing the Trustees shall not be bound or required to:
 - 2.5.1 exercise any rights or powers (whether as a shareholder debenture holder or otherwise howsoever) enabling them to appoint or elect or to remove a director officer or other person authorised to take part in the administration management or conduct of the business or affairs of the Company and in particular shall not be bound to take any steps to see that any of the Trustees or any officers or nominees of the Trustees become a director or other officer of the Company;
 - 2.5.2 exercise any power to require the payment of a dividend or other distribution of profit and whether of an income or capital nature.
- 2.6 No Beneficiary or person who may be entitled hereunder shall be entitled in any way whatsoever to compel control or forbid the exercise or the exercise in any particular manner of any powers discretions or privileges (including any voting rights) conferred on the Trustees by reason of any shares or other rights of whatsoever nature in or over the Company.
- 2.7 The Trustees shall not be liable in any way whatsoever for any loss to the Company or the Trust Fund or the income thereof arising from any act or omission of the directors officers or other persons taking part (whether or not authorised) in the administration management and conduct of the business or affairs of the Company (whether or not any such act or omission by any such foregoing persons shall be dishonest fraudulent or negligent).
- 2.8 Without prejudice to the generality of paragraph 2.7 of this Schedule of the Trust the Trustees shall not be rendered responsible in any way whatsoever for any default or other act or omission by the directors officers or other persons referred to in paragraph 2.7 of this Schedule of the Trust by any express notice or intimation of such default or other act or omission and the Trustees shall not be obliged or required to make and enforce any claim in respect of such a default or other act or omission and no person who is or may become entitled hereunder shall be entitled to compel the making of such a claim but the Trustees may be required to lend their name for the purpose of proceedings

brought by a Beneficiary in respect of any such default act or omission upon being given a full and sufficient indemnity against all costs and expenses of such proceedings.

- 2.9 The provisions contained in this paragraph 2 of this Schedule of the Trust shall apply equally to any shares or participations in or over the Company which are comprised at any time in the Trust Fund.
3. Regardless of whether the Trustees are or are not responsible for exercising the investment and asset management functions in relation to this Trust:
- 3.1 The Trustees shall not be bound or required to obtain or to seek in any way whatsoever any information regarding the administration management or conduct of the business or affairs of the Company from the persons involved in the administration management or conduct or from the shareholders or other persons interested therein or any other matter relating to the Company referred to herein.
- 3.2 The Trustees shall assume that such information as is supplied to them by any person relating to the Company is accurate and truthful unless the Trustees shall have actual knowledge to the contrary and the Trustees shall not be bound or required at any time to take any steps at all to ascertain whether or not the information is accurate and truthful.
- 3.3 The Trustees shall not be liable in any way whatsoever for any loss sustained by the Trust Fund or the income thereof arising from the Trustees not taking all or any possible steps to obtain any information referred to in paragraph 3.1 of this Schedule of the Trust or to verify the accuracy and truthfulness of such information as is supplied to the Trustees.
- 3.4 No Beneficiary or person who may become entitled hereunder shall be entitled to compel the Trustees to take any steps to obtain any information referred to in paragraph 3.1 of this Schedule of the Trust or to verify the accuracy and truthfulness of such information as is supplied to the Trustees.
4. The provisions of this Schedule shall apply to any fixed flexible private or public unit trust or the units or sub-units which shall at any time or from time to time form part of the Trust Fund and any reference in this Schedule to:
- 4.1 "shares" or to "stocks shares or debentures" shall be interpreted as including a reference to "units or sub units in a unit trust";
- 4.2 "Company" shall be interpreted as including a reference to "unit trust"; and

- 4.3 the directors or officers of a Company shall be interpreted as including a reference to the directors or officers of the corporate trustee of a unit trust.