

Wednesday 24 March 2021

HONG KONG AND GUERNSEY WORKING TOGETHER

STRUCTURES FOR THE FUTURE

Peter Hodson – Guernsey Licensed Personal Fiduciary
and Consultant, Private Wealth,
Stephenson Harwood, Hong Kong



Key Wealth Drivers (1) - The New Economy

- Benefits of economic integration from within the Greater Bay Area (GBA)
- Reforms of Hong Kong listing rules have stimulated IPO market for '*new economy*' companies
- Funds raised from IPO main and secondary listings – Kuaishou – largest tech IPO since Uber in 2019
- Particularly listings of biotech and technology companies – further 120 – 130 expected in 2021
- Expanded stock connect scheme between mainland and HK
- Listings on Growth Enterprise Market for growth companies not fulfilling profitability requirements
- Significant increase in stock trading 'Nasdaq of Asia'



Key Wealth Drivers (2) - Technology and Innovation

- Maximising opportunities from GBA plan to economically integrate Hong Kong, Macau and nine cities in Guangdong's Pearl River Delta
- Leading technology companies and academic institutions already connected with mainland counterparts
- Listing of biotech and healthcare companies largely fuelled in response to Covid 19 pandemic
- Launch of Hang Seng Tech Index driving mainland Chinese technology companies to list on HKSE i.e. Tencent Holdings
- Hong Kong well positioned to leverage as centre for investment, financing and capital raising under internationally recognised legal system

China's Greater Bay Area

GDP of cities, Hong Kong and Macau



Source: HSBC Research

BBC

Key Wealth Drivers (3) - Protecting and Enhancing Wealth



*"I'm perfectly willing to suffer the slings and arrows
as long as I can keep the outrageous fortune."*

CartoonStock.com

- Developing Hong Kong as regional hub for family offices – proposed introduction of tax incentives by Hong Kong Government
- Sustainable structures to protect wealth generated in the long term
- Key considerations for entrepreneurs is preservation of control
- Requirement for flexibility of structures to address changing circumstances, access to funds and offshore alternative structures not available in Hong Kong
- Avoiding future attacks by creditors, beneficiaries and spouses on divorce
- Alternatives to dispute resolution outside of the public eye

Key Wealth Drivers (4) - Structures to Protect Wealth

- **Hong Kong and Guernsey have modern trust and company laws within a legislative framework and supported by an independent judiciary**
- **Trusts, companies, partnerships and private trust foundations are popular vehicles in private wealth management structures**
- **Certainty, continuity and flexibility are essential components to maintain client confidence**
- **Guernsey governing law can be selected for trusts to determine the rights and obligations of the parties and as to validity itself**
- **Guernsey is supported by the independent Royal Court of Guernsey to hear trust and commercial disputes with final appeal to the Privy Council in London**



Guernsey Wealth Solutions

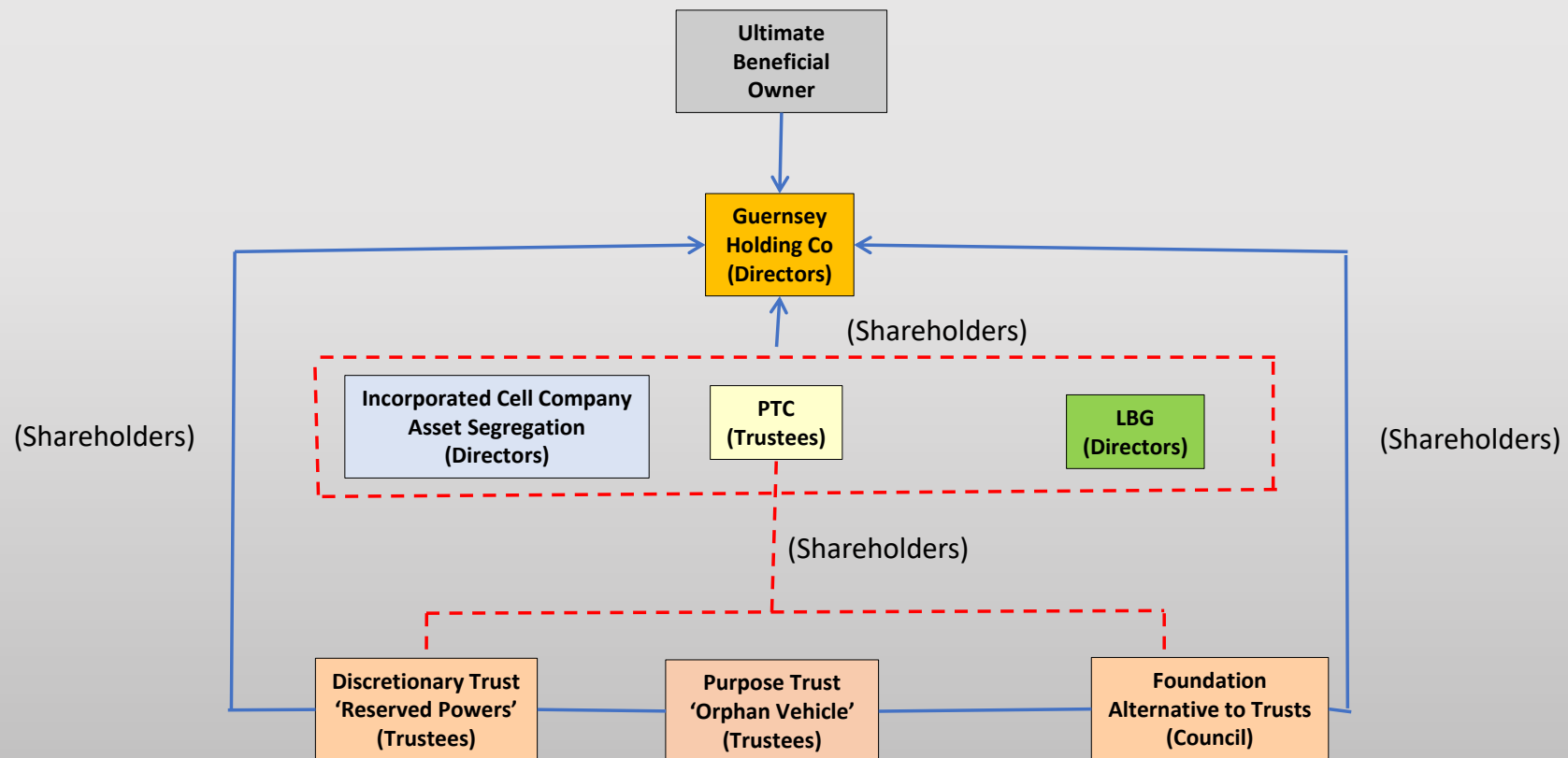


What can Guernsey offer?



- Guernsey companies - approved listing vehicles for HK IPO market by HKSE Listing Committee
- Purpose trusts - an alternative to holding shares in a PTC, family business or an investment or trading entity, or for other non-charitable purposes
- 'Reserved powers' trusts - where settlor control can extend beyond investment function to settlor 'only' under Trustee Ordinance - 'to any person'
- Private Trust Foundation - an alternative to trusts providing a legal entity framework incorporating trust features
- Offshore successor trustee arrangements – an alternative to traditional 'flee clauses'
- A variety of innovative corporate entities, investment funds, partnerships, employee benefit trusts and 'captive' insurance vehicles
- Economic benefits under the Hong Kong Guernsey Double Tax Agreement in effect since 2014

Alternative Structures



Guernsey Purpose Trusts



- Often used as an 'orphan' vehicle where there is a commercial purpose or a mixture of purposes and beneficiaries
- HK does not have purpose trusts legislation but Guernsey gives statutory recognition to a trust for non-charitable purposes and enforcement by an 'enforcer'
- Provides an offshore alternative to a Hong Kong Company LBG
- Often used to segregate assets and liabilities from operating companies
- Note use for segregating customer floats and deposits under The Payment Systems and Stored Value Facilities Ordinance (Cap 584)

Reserved Powers Trusts



- Entrepreneurs prefer to retain control and flexibility over investments, distributions, changing trustees and the proper law, as well as possibly revoking or varying trust terms
- Guernsey's TGL (S.15) validates reservation of these powers, and others, without acting in breach of trust
- Getting the balance right is key to avoid subsequent arguments of administrative sham or ineffective alienation of beneficial ownership as 'illusory'
- Common use of 'Protector' as reserved powers can be granted not only to settlor but 'to any other person'



Asset Protection Trusts (1)



- Transfers to trusts to '*disturb, delay, hinder or defraud*' creditors were void under the Statute of Elizabeth 1571
- Imported across '*all the Queen's realm and dominions*', including the US, Canada, Australia, New Zealand, Hong Kong, Singapore and other common law jurisdictions
- The Statute was construed widely to cover existing and future creditors with no limitation period on future claims
- An 'intention to defraud' was presumed unless settlor and trustees could demonstrate other dominant factors
- 'Badges of Fraud' applied by the Courts since *Twynne's Case* in 1601

Asset Protection Trusts (2)



- Hong Kong still applies the broad framework of the Statute of Elizabeth under S.60 Conveyancing and Property Ordinance
- Transfers to Hong Kong trusts with an intent to defraud creditors (existing or future creditors) can be set aside unless for valuable consideration and in good faith and no limitation period applies
- Guernsey law does not apply Statute of Elizabeth and future creditors are not protected under well established case law following confirmation by Guernsey Court of Appeal decision in 2005
- Only existing creditors at time of transfer where settlor was insolvent or rendered insolvent by such transfer are eligible creditors



"Of course I have unpaid loans, what other kind is there?"

CartoonStock.com

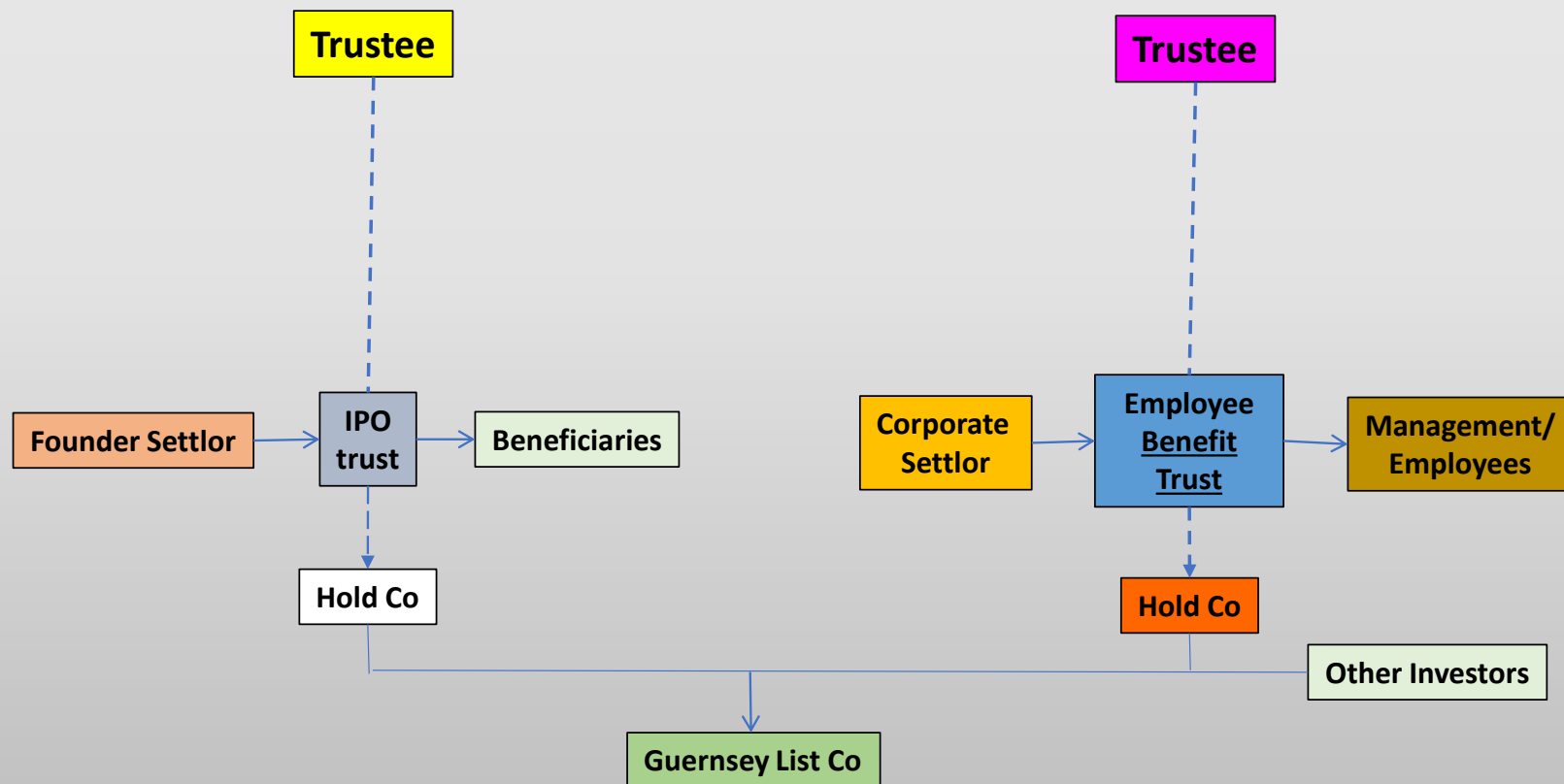
Pre-IPO Estate Planning Structure (1)



CartoonStock.com

- Trusts can be used to capture the pre-IPO value of the founder(s) stock interests
- Mitigate risks associated with liquidity post-IPO such as income taxes, estate and gift taxes otherwise attributable to the founder(s)
- Also risks against hostile bidders, activist shareholders or adverse media and other adverse events such as divorce, incapacity or death
- Avoids potential dilution of holdings by concentrating shareholder control under the Trustee
- Passing on stock appreciation to future generations of beneficiaries including for philanthropic or sustainability investing

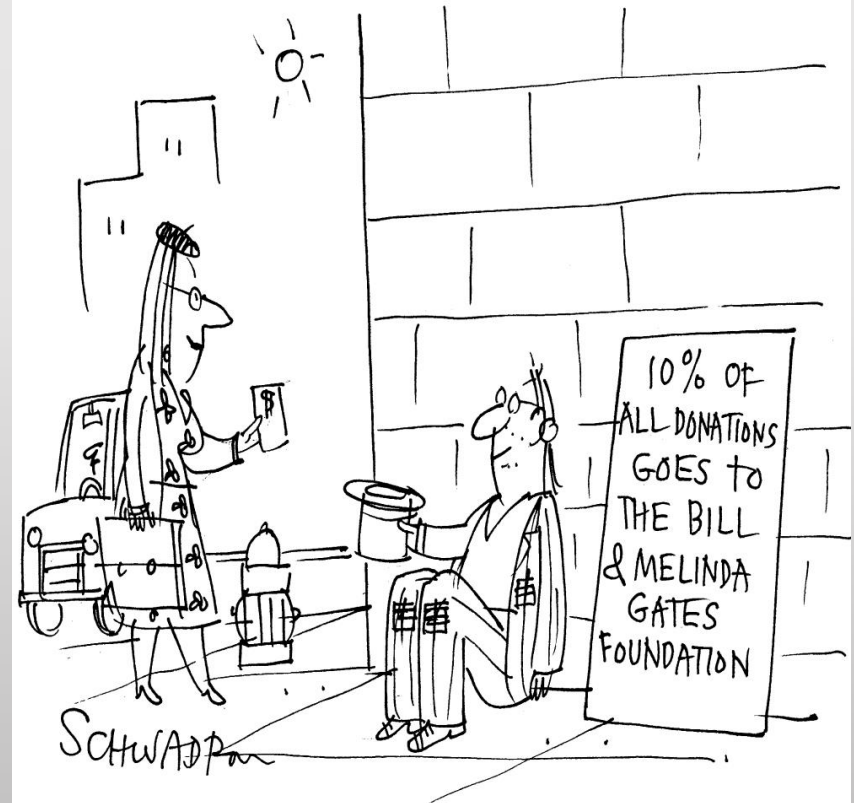
Pre-IPO Estate Planning Trust Structure (2)



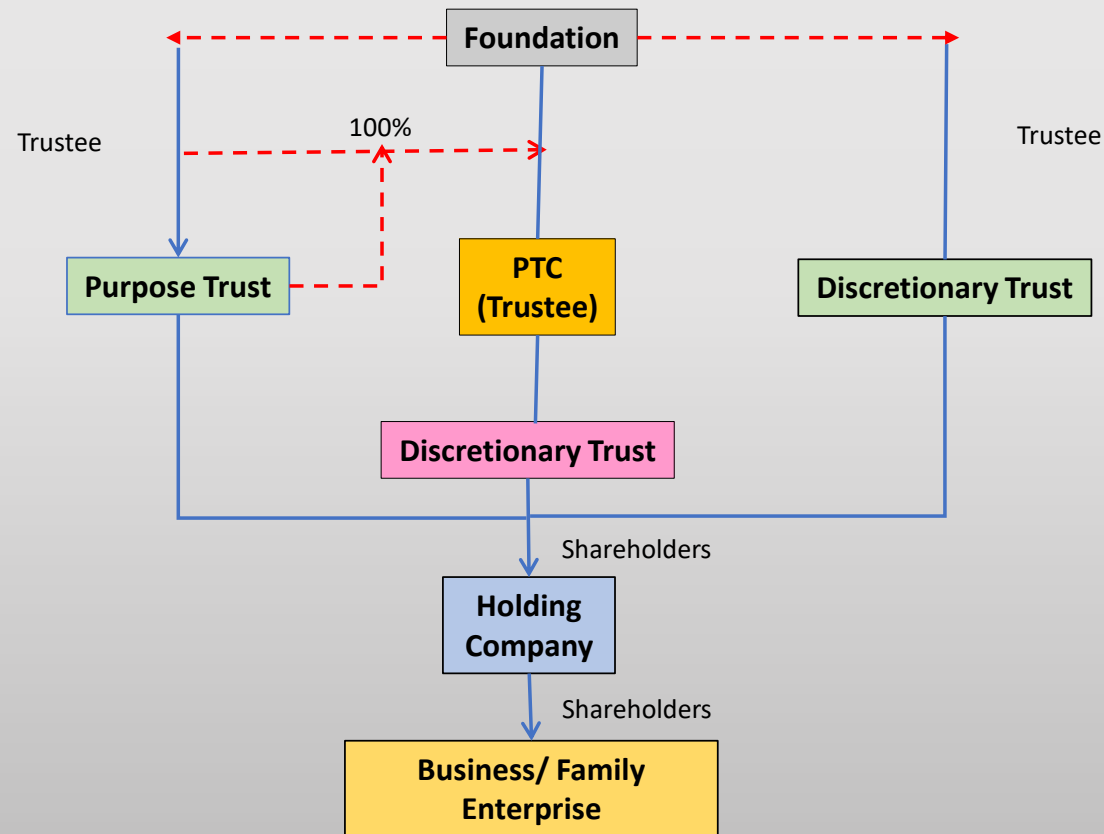
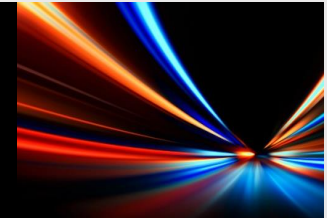
Guernsey Private Trust Foundation (1)



- A unique hybrid of a legal entity incorporating trust features not available in Hong Kong
- Versatility as a stand alone vehicle, holding shares in a PTC or acting as a trustee of a trust
- Beneficiaries can be '*disenfranchised*' from traditional rights to information and accounts
- Ideal vehicle for entrepreneurs wishing to provide continuity of a business enterprise
- More robust than trusts facing challenges over validity issues and winding up by '*sui juris*' beneficiaries under *Saunders v Vautier* principles



Guernsey Private Trust Foundation (2)

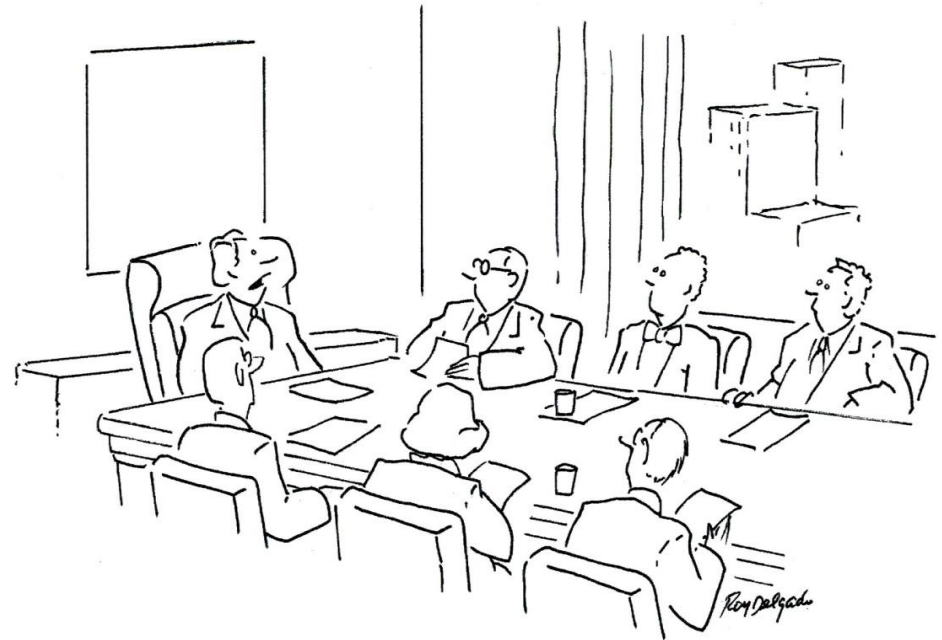


Guernsey Private Trust Foundation (3)

Common Control Features



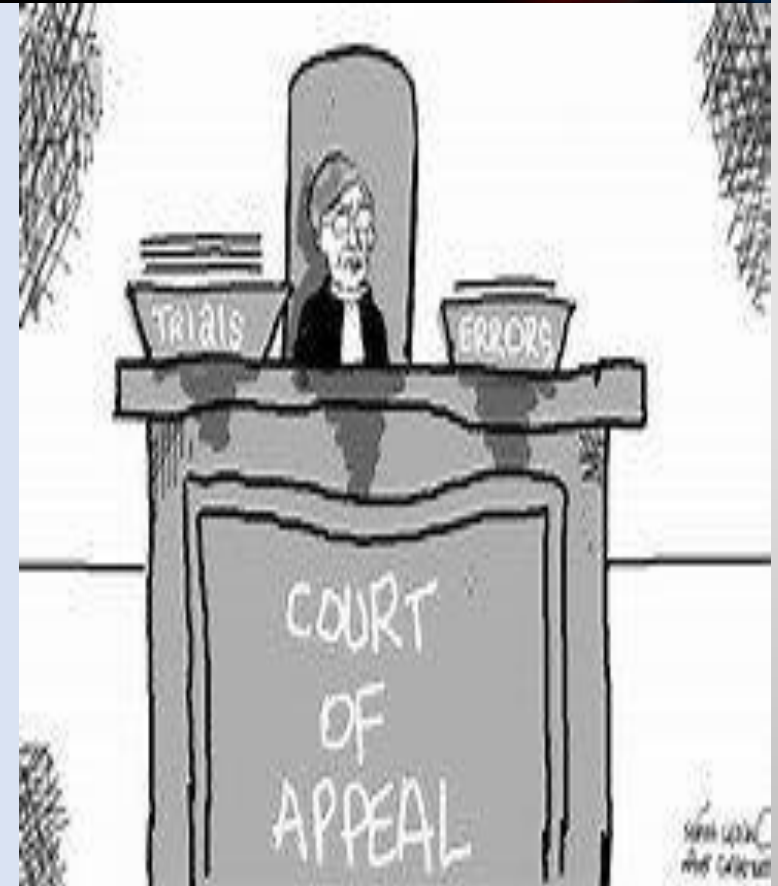
- Founder can retain considerable administrative powers and amend, revoke or vary constitution documents
- Appointing or removing foundation officials
- Founder can be a natural person, legal entity or a separate foundation
- No restrictions on who or where Founder is located
- No restriction on who or where Guardian is located
- No restriction on who or where Councillors are located
- If no foundation officials are Guernsey licensed fiduciaries then a resident agent who is a licensed fiduciary must be appointed



" I wanted to get your opinions before I go ahead and do what I want to do. "

Guernsey Private Trust Foundation (4)

- Guardian required where either 'disenfranchised' beneficiaries or for purposes with no individual beneficiaries
- Fiduciary duties to the Founder and Beneficiaries to act '*en bon pere de famille*'
- Founder can be Guardian but not if a Councillor
- Councillors owe fiduciary duties to Foundation
- If none of Councillors or Guardian is a licensed fiduciary then Resident Agent to maintain foundation records in Guernsey



Alternative Dispute Resolution in Guernsey



“Let’s talk about you and me,
formerly known as ‘us’.”

- Arbitration or mediation clauses in trust instruments are recognised in Guernsey
- Specific provisions in the Guernsey Trust Law validate settlements of breaches of trust claims against trustee by ADR to be binding on all beneficiaries
- ADR extends to conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration
- *Saunders v Vautier* is given statutory recognition in Guernsey Trust Law
- Note Arbitration (Guernsey) Law 2016

Offshore Successor Trustee Arrangements



- Guernsey recognises adoption of its governing law irrespective of the location of the trustee or administration of the trust
- Guernsey can act as the original Trustee or as a Successor Trustee under regulations and supervision by the GFSC
- Avoid traditional ‘flee clauses’ which may be ‘automatically’ triggered inadvertently
- If emergency situations arise which require a change of trustee and place of administration Guernsey has the infrastructure and expertise to provide continuity and ongoing protection for beneficiaries – forward planning is key

Choice of Innovative Corporate Entities



- Protected and Incorporated Cell Companies for investment funds and 'captive' insurance schemes
- ILS Hybrid a first in Guernsey – insurance linked securities industry
- Limited Partnerships for investment funds, private equity and venture capital
- Guernsey PTC to act as a dedicated trustee
- Proposed introduction of the Family Business Company
- Pension and Employee Benefit Trusts
- Flexible Guernsey Company as an SPV – no stamp duty on issue, transfer or redemption of shares – sole corporate director permitted



Conclusion



- **Wealth creation largely driven by the ‘New Economy’**
- **Opportunities from GBA Plan**
- **Hong Kong’s current legal system not yet settled beyond 2047**
- **Guernsey can supplement and provide alternative wealth planning solutions**
- **Providing a safe, secure and stable political and economic platform**
- **With an arsenal of innovative wealth protection solutions and structures**

Guernsey – Our Place in the World

Gilly Kennedy-Smith & Paul Christopher
24 March 2021



The Hong Kong and Greater Bay Angle

1. Asia wealth landscape

2. Culture

Succession

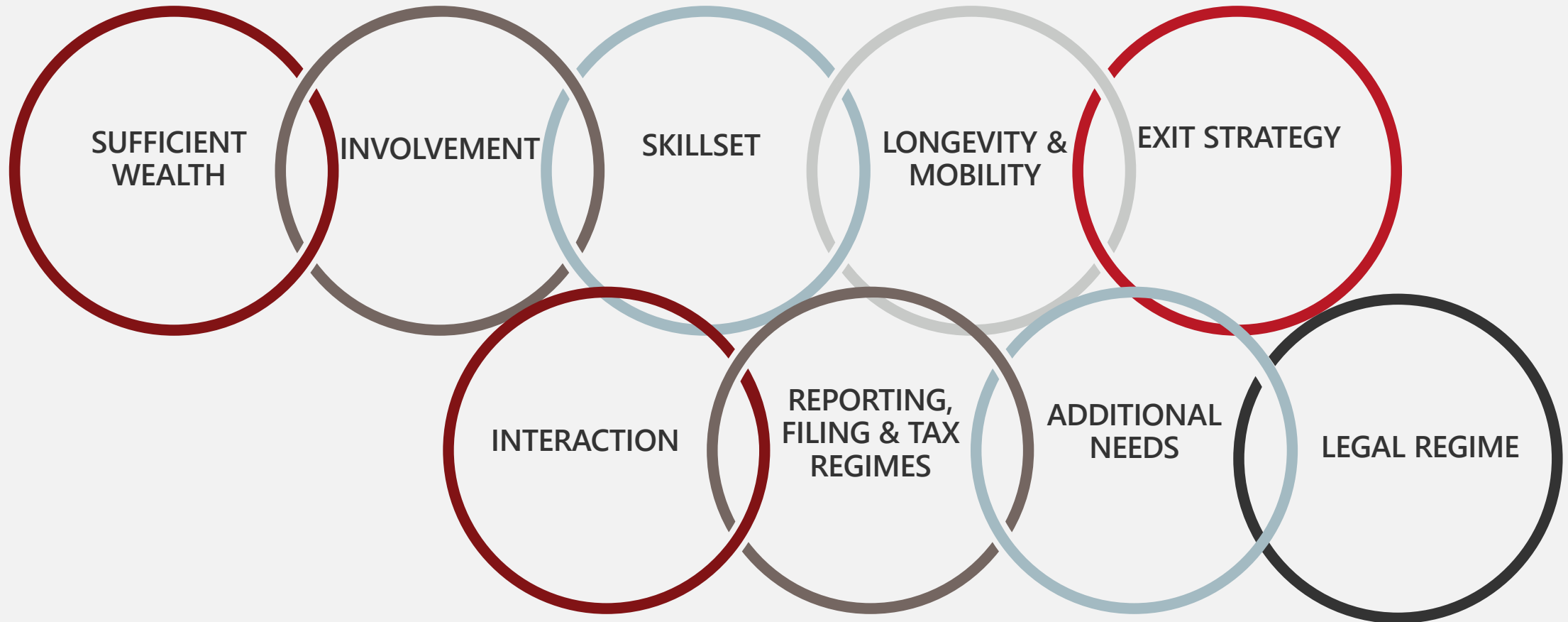
Investment

3. Geographical risk

4. Covid



Considerations between choosing trusts or family offices



History & creation



History

Legal Personality

Governing Laws

Our Focus Today

Who's in charge

- Duties
- Residence
- Making changes to those in office
- Protections (indemnities and liens)



Other people involved



Protectors and similar office holders



Delegation of powers

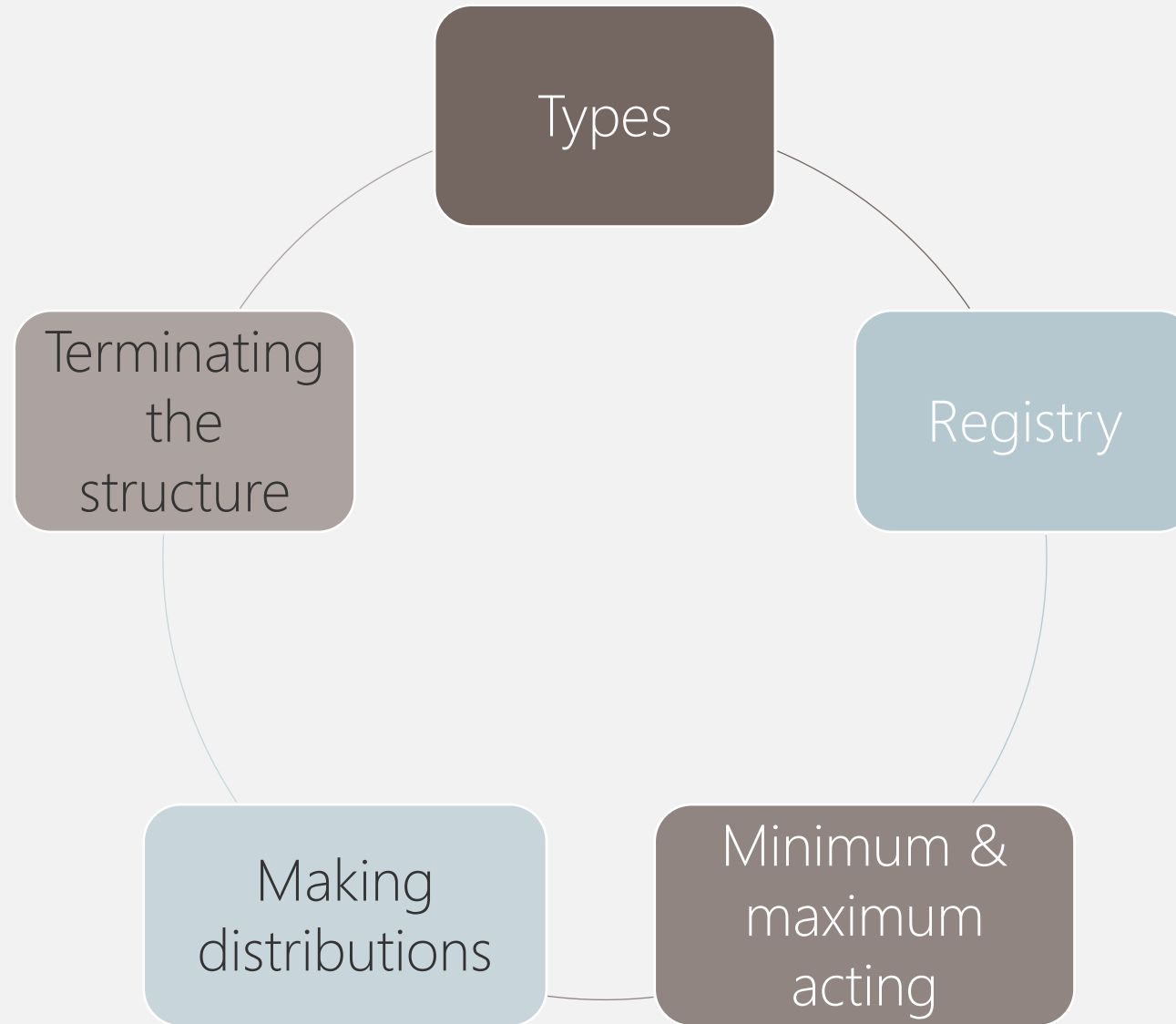


Protections



Reservation of powers

Formalities



Power of the Guernsey Court



Other points of note

- Points of interest
- Taxation



The Mourant presentation team

If you have any questions please do not hesitate to contact either of us after this talk.

Thank you for your time.



Paul Christopher

Managing Partner in Hong Kong

+852 3995 5700

Paul.Christopher@mourant.com



Gilly Kennedy-Smith

Mourant LP Partner in Guernsey

+44 (0)1481 739397

Gilly.Kennedy-Smith@mourant.com

TRUSTEES IN DIVORCE AND TRUST CASES – GUERNSEY AND ELSEWHERE

Marcus Dearle

Miles Preston & Co London (practising E&W and Hong Kong law)

Chair, IBA Family Law Committee

Miles Preston Family law

FAMILY LAW RISK ADVISORY

BACKGROUND

- Similar fact patterns appearing in English and Hong Kong divorce cases
- The importance of managing expectations – realistically
- Need to hear rather than what you want to hear
- Experience
- Otto Poon 2014 Hong Kong Court of Final Appeal
- Judge v Judge 2001 London: Guernsey Trust – Wilson LJ said trustees had been ‘properly defensive’
- Advising trustees in major HNW cases in Hong Kong and London

INTRODUCING THE RED TRUST OR THE GREEN TRUST BASED IN GUERNSEY

- 20 year marriage – married in 2000: H and W reside partially in Beijing but mainly in Hong Kong and London
- One significant asset Boeing aircraft owned by the trust worth HK\$500 million
- 2012 Guernsey revocable discretionary trust settled by husband (H) with aircraft purchased in 2012 with funds earned during the marriage. H is prime beneficiary. W is not a beneficiary.
- W files for divorce in London/Hong Kong 2020
- Approach of Red Trust v Green Trust

RED TRUST

- H says his trustees really cheap, that's priority for him
- He's very happy with his trustees and his discretionary trust
- He's told that his trust is safe from attack
- It's based in Guernsey isn't it, surely that's ok?
- Aircraft regularly parked at London Heathrow/Hong Kong airport
- Turned down the opportunity to enter into a postnuptial agreement in 2014: those solicitors wanted to charge me HK\$100,000 – 'daylight robbery' he says

RED TRUST

- 2019 W files for divorce London/Hong Kong
- H immediately cuts the funding for the wife down to an unrealistically low level below the level of her everyday needs. He refuses even to contribute to her legal fees
- Trustee sends H a bill because it does not hold money to pay its fees: trustees agree to allow H to sell the jet for HK\$300 million. Purchaser pays HK\$50m directly to H and the remainder to the trustee's bank account in HK
- He instructs his trustees immediately to dissolve the trust and put the ownership of the trust into a BVI Company. H's two sisters (resident in HK) are each 50% shareholders in the Company

RED TRUST

- H is very pleased with his strategy
- But should he be?
- No
- Freezing order? Set aside order?
- Trustees allowing him to sell asset himself and pocket significant amount of proceeds was major error: as V's legal team will argue that H has unrestricted access to the trust funds
- Higher award for V and significantly higher legal fees for H

GREEN TRUST

- Wind the clock back to 2012
- A 'sliding doors moment' now with a different fact pattern
- H in 2012 has lunch with a friend in the Hong Kong club
- But he listens to his friend
- His friend tells him 'obtain expert legal advice. It will cost you at the outset, but may well save you millions in the long-run'. His friend said, 'I wish I'd done that 20 years ago. If I hadn't done, I wouldn't have been taken to the cleaners as I was in my divorce'

GREEN TRUST

- 'HOW much?' says H rather grumpily to his new lawyer (recommended by his friend) for the money he's asked to pay as money on account
- Trust is set up. Same set-up as in Red Trust. He is warned that the discretionary trust is likely to be treated as a resource: the trust fund – again the aircraft – is held in a corporate wrapper within the trust. H majority shareholder
- He is advised about a postnuptial agreement, but decides against it
- However, he purchases a cheaper aircraft for HK\$400m, puts that into the trust and keeps HK\$100m outside the trust, part of which he uses to purchase a home in the joint names of W

GREEN TRUST

- The marriage breaks down
- H does not cut off W completely
- He does not dissolve the trust: he makes no changes to it
- The trustee appoints separate solicitors
- H's solicitors ask trustees to answer the Otto Poon likelihood test
- Trustees wish to raise funds. They value and sell the aircraft. H is not involved at all
- Crucial that H keeps his distance from the trust

GREEN TRUST

- He avoids set aside proceedings under s17 MPPPO in HK/s37 MCA E&W
- Otherwise he would be automatically on the back foot with the court – avoiding a more generous judgment for W than would otherwise be awarded
- Without a postnuptial or prenuptial agreement he still faces an award with 50% of the assets: subject to the trustee's answer to the likelihood test.