

**C L I F F O R D**  
**C H A N C E**

# **TRUSTEE'S DUTIES AND TRUST DISPUTES**

**ANGELA LAW**  
**13 JUNE 2018**

# INTRODUCTION

## ❑ Trusts are often used by high net worth individuals for:

- the purposes of estate and succession planning, asset management/protection, estate duty planning and preservation of confidentiality

## ❑ Discretionary trusts are more commonly used

## ❑ Trustee's role is critical in the administration of trusts

## ❑ Important for trustees to understand their duties and their powers

## ❑ This presentation:

- (i) the duties (vs powers) of a trustee (in the context of a discretionary trust);
- (ii) the rights of a discretionary beneficiary;
- (iii) how should a trustee exercise its discretion;
- (iv) how should a trustee act when some beneficiaries support and some beneficiaries disagree with its decision; and
- (v) how to handle disputes with beneficiaries.

# WHAT IS A DISCRETIONARY TRUST

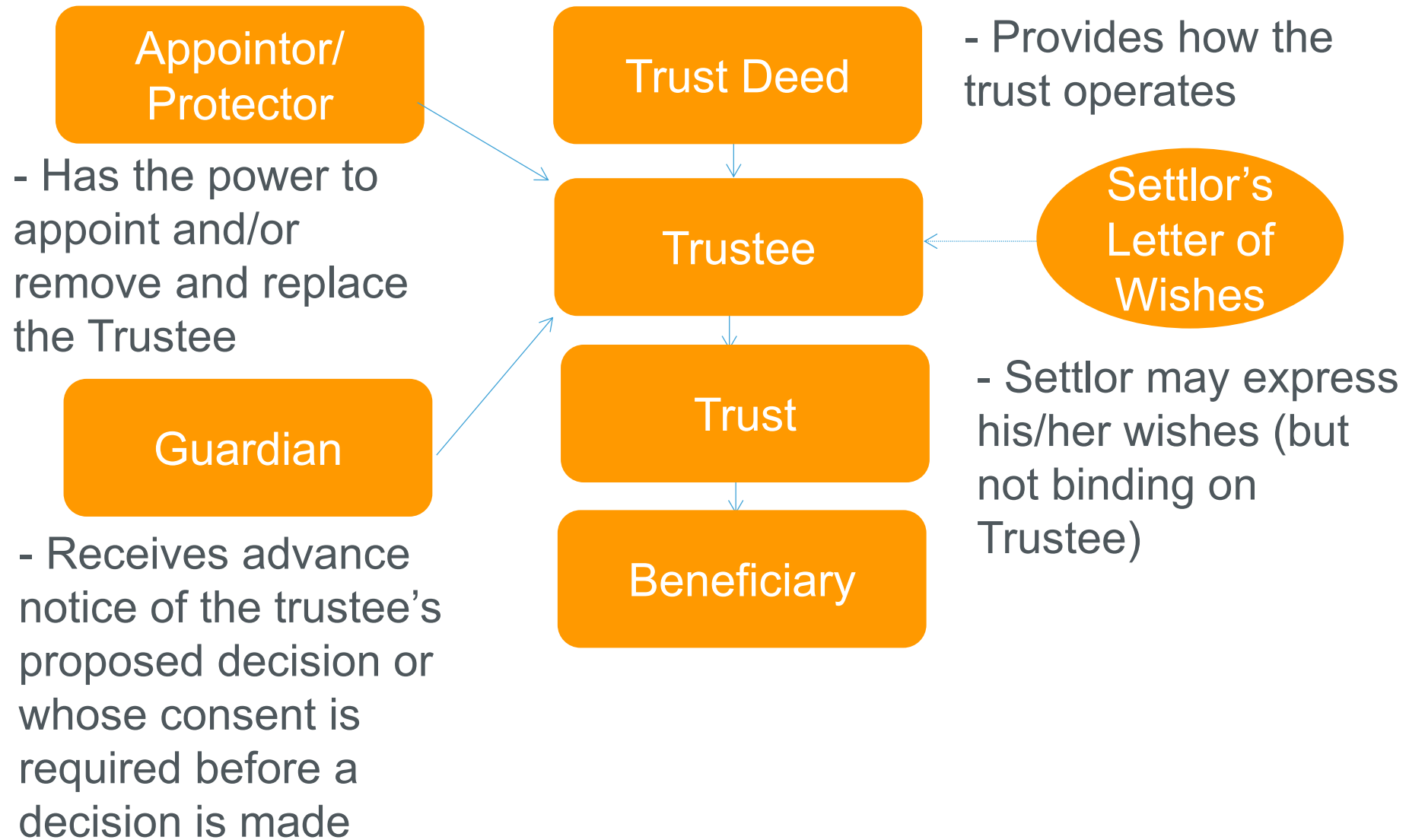
## □ A discretionary trust is one where the trustee retains an autonomous choice to determine:

- when any payment from the trust fund will be made;
- to which beneficiary or definite class of beneficiaries it will be made; and
- the amount of payment.

## □ Contrast with a fixed trust where the trustee follows directions. A fixed trust:

- has pre-determined beneficiaries or classes of beneficiaries;
- each beneficiary has a pre-determined share of the trust property; and
- each beneficiary may enforce his/her rights to his/her share against the trustee at the appropriate time.

# FEATURES OF A DISCRETIONARY TRUST



# FEATURES OF A DISCRETIONARY TRUST

- ❑ **The trustee has discretion on how the trust should be administered and trust properties are to be distributed**
- ❑ **The terms of the trust are set out in the trust deed**
- ❑ **Letters of wishes:**
  - The settlor may express his/her wishes by way of letters of wishes to the trustee
  - The trustee will have regard to the letters of wishes
  - Letters of wishes are not binding on the trustee
- ❑ **Discretionary trust deed usually creates two positions**
  - Appointor/Protector – person who can appoint and/or remove and replace the trustee
  - Guardian – person who is entitled to receive advance notice of the trustee's proposed decision or appointment or whose consent is required before a decision or appointment is made
  - Often the Guardian is also the Appointor/Protector

# DUTIES VS POWERS

## Duties

Those acts which the Trustee must do or refrain from doing according to the terms of the trust deed or the general law



## Powers

Those acts which the Trustee has the discretion to decide whether or not to perform as he/she thinks fit

Duties and powers of a trustee are closely linked as a duty can only be exercised by reference to the trustee's powers but also limits the exercise of that power.

# DUTIES OF A DISCRETIONARY TRUSTEE

- ❑ **Significant duties are imposed on a trustee by law:**
  - fiduciary in character
  - subject to the terms of the particular trust.
- ❑ **The terms of the relevant trust deed may:**
  - impose additional or more onerous obligations on the trustee, or
  - relieve it of certain duties altogether.
- ❑ **Utmost caution should be exercised by trustees in fulfilling the duties imposed on them**
- ❑ **Failure to do so may result in an allegation of breach of trust**
- ❑ **Care should always be taken to review and understand:**
  - the terms of the relevant trust instrument and
  - the fiduciary duties imposed by law.



# DUTIES OF A DISCRETIONARY TRUSTEE

## □ The following is a list of the duties of a trustee:

DUTY	DESCRIPTION
Duty to the terms	<ul style="list-style-type: none"><li>• Know, understand and adhere to the terms of the trust which are prescribed by the trust deed</li></ul>
Duties of a new trustee	<ul style="list-style-type: none"><li>• Ascertain what the trust properties are, their whereabouts, the identity of the beneficiaries and the extent of each beneficial interest</li><li>• Consult the trust instrument (and provisions in the Trustee Ordinance (Cap 29)) to ascertain the powers conferred on them</li><li>• Take possession of any trust property which had not been transferred to them and take steps to protect such properties</li></ul>
Duty to get in trust properties	<ul style="list-style-type: none"><li>• Take in and collect any new properties after initial appointment</li><li>• Take appropriate action to recover debts owing to the trust, including commencing legal proceedings, if appropriate</li></ul>
Duty to insure trust properties	<ul style="list-style-type: none"><li>• Statutory power to insure against loss or damage generally due to any event and pay the insurance out of the trust funds</li><li>• Take out insurance covering the trustee and its employees from personal and corporate liability</li></ul>



# DUTIES OF A DISCRETIONARY TRUSTEE

DUTY	DESCRIPTION
Duty of care	<ul style="list-style-type: none"><li>• Statutory duty of care under Trustee Ordinance (Cap 29)</li><li>• Analogous to the common law duty of care in the arena of unintentional tort of negligence</li><li>• Requires trustee to exercise the care and skill that is reasonable in the circumstances</li><li>• Professional trustee should be subject to a high standard of care than an unpaid trustee</li></ul>
Duty to act personally	<ul style="list-style-type: none"><li>• A trustee should act personally in carrying out his duties and powers as the trusteeship is an office of personal confidence</li><li>• Whilst a trustee are typically permitted to engage advisers, the final decision on trust matters should be made by the trustee</li></ul>
Duty of loyalty	<ul style="list-style-type: none"><li>• Must adhere to and carry out the terms of the trust</li><li>• Must not seek to achieve any extraneous objects when carrying out the trust</li><li>• Administer the trust solely in the interest of the beneficiaries and cannot place his/her personal interest in conflict with beneficiaries</li><li>• Should not profit personally from their role as trustees other than a fee which they may receive for their trusteeship</li></ul>

# DUTIES OF A DISCRETIONARY TRUSTEE

DUTY	DESCRIPTION
Duty to consider	<ul style="list-style-type: none"> <li>Trustee must give due consideration to all relevant matters and ignore irrelevant ones</li> <li>In giving due consideration to all relevant matters, the trustee must inform itself of matters material to the decision and seeking appropriate advice where necessary</li> <li>Consider the likely consequence of a proposed exercise of power on the beneficiary and the trust fund</li> </ul>
Duty of good faith and honesty	<ul style="list-style-type: none"> <li>Trustee must act honestly and in good faith for the best interest of all the beneficiaries</li> <li>Negligence is not dishonesty</li> <li>Mere honesty is not sufficient and the duty to act honestly also encompasses the duty to act reasonably</li> </ul>
Duty to act independently and impartially between beneficiaries	<ul style="list-style-type: none"> <li>Should not blindly follow the instructions of the settlor but may give consideration to the wishes of the settlor which are not binding (unless included in the terms of the trust)</li> <li>Treat all beneficiaries equally, looking at the interest of all, rather than favour any one beneficiary or class of beneficiaries.</li> </ul>

# DUTIES OF A DISCRETIONARY TRUSTEE

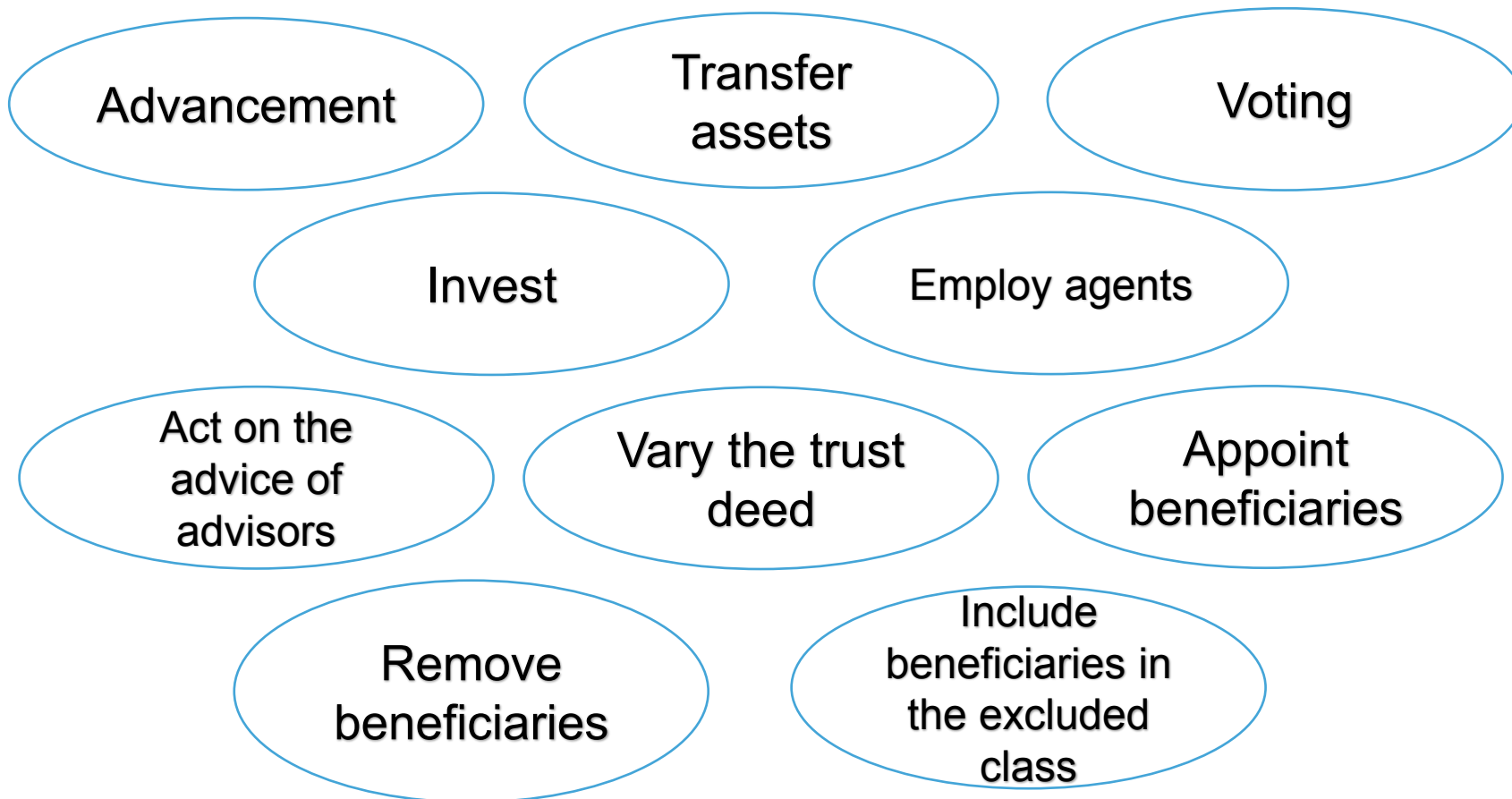
DUTY	DESCRIPTION
Duty to keep and render accounts and supply information	<ul style="list-style-type: none"><li>• Keep and render to the beneficiaries a full and proper record of their administration of the trust assets</li><li>• Involves keeping proper accounting records and preparing financial statements relating to appropriate accounting periods</li><li>• If necessary, instruct qualified accountants to keep accounting records and prepare periodic financial statements and tax returns for the trust</li><li>• Respect beneficiaries' rights to request for trust information</li></ul>
Duty to act in the best interests of the beneficiaries	<ul style="list-style-type: none"><li>• Involve balancing competing interests</li><li>• Act in an impartial and objective manner</li><li>• Must distribute any trust assets to beneficiaries strictly in accordance with the terms of the trust instrument</li></ul>

## ❑ Commons issues arising in relation to:

- Duty to consider
- Duty to keep and render accounts and supply information

# POWERS OF A DISCRETIONARY TRUSTEE


- A discretionary trustee would typically have the following powers:



- Note that some powers may be restricted powers and require service of notice to the appointors

# RIGHTS OF A DISCRETIONARY BENEFICIARY

- 
- **No Proprietary Right on Trust Property (unless and until the discretion is exercised)**

- 
- **Compel Due Administration of Trust:**
    - **Challenge improper exercise of discretion**
    - **Prevent distribution to others outside the class of beneficiaries in breach of trust**

- 
- **Right to Compel Disclosure of Trust Documents**
    - **No proprietary rights in documents but can apply to Court on basis of inherent jurisdiction**



# RIGHTS OF A DISCRETIONARY BENEFICIARY

## □ In deciding whether or not to order disclosure, the Court will consider:

- whether the discretionary beneficiary has more than a theoretical possibility of benefiting from the trust (not having a remote or peripheral interest);
- what classes of documents should be disclosed, either completely or in redacted form; and
- what safeguards should be imposed to limit the use of the documents or information disclosed under court order (e.g. undertakings to the Court or professional inspection).

# EXERCISE OF DISCRETION

- ❑ **A trustee often has the discretion to exercise certain powers given to them under the trust deed**
- ❑ **How should a trustee exercise its discretion?**
  - Must exercise a sound, proper, honest and reasonable discretion
  - Must not act in bad faith, arbitrarily, unreasonably, capriciously or irresponsibly
  - Must exercise its discretion personally and independently
  - No requirement to give the beneficiary a reasonable opportunity to be heard or to make representations before reaching its decision (but it would be prudent to do so as a beneficiary's views may be a relevant consideration)
- ❑ **A trustee is not obliged to give reasons for its decision**
- ❑ **Must consider from time to time whether to exercise its powers and such consideration must be sufficiently detailed**





# DISAGREEMENTS AMONGST BENEFICIARIES

## ❑ Beneficiaries may express different views on how the Trustee should:

- administer the Trust
- exercise a particular power

## ❑ Common areas of disagreement amongst beneficiaries:

- **Control:** A particular beneficiary may want more say in how trust assets are invested
- **Investment:** Beneficiaries may disagree on how trust funds should be invested (e.g. beneficiaries may wish to invest in products with higher returns)
- **Management:** Beneficiaries may disagree on how trust assets are being managed (e.g. some beneficiaries may not wish to incur too much expenses on maintenance of real properties)
- **Distribution:** Beneficiaries may disagree on how and when trust money should be distributed



# DISAGREEMENTS AMONGST BENEFICIARIES

- ❑ **Not uncommon for some beneficiaries to support and some beneficiaries to disagree with the Trustee's decisions**
- ❑ **Who should the Trustee listen to?**
  - The Trustee should be independent and impartial
  - Not be dictated by the views of the settlor or a particular beneficiary
- ❑ **What steps should the Trustee take?**
- ❑ **Review the trust deed**
  - to ensure it understands of its powers and obligations
  - if the exercise of certain powers require notice to the appointors, ensure that such notices are served within the requisite time period
- ❑ **Engage in consultation with the beneficiaries**
  - to understand their views and ascertain their wishes
- ❑ **Keep file notes of discussions with beneficiaries**
  - To ensure there is a proper record of discussions, in the event it is needed for any application for directions to the Court

# DISAGREEMENTS AMONGST BENEFICIARIES

## ❑ Discharge its fiduciary duties, in particular:

- Duty to consider all relevant matters and ignore irrelevant ones
- Duty to act independently and impartially between beneficiaries
- Duty to act in the best interests of the beneficiaries and of the Trust as a whole

## ❑ Respect and observe the rights of the beneficiaries:

- Right to access trust documents and/or accounts

## ❑ Beware of possible allegations of:

- Bias or favouritism
- Conflict of interest
- Breach of duty



# DISPUTES WITH BENEFICIARIES

## ❑ Disagreements amongst beneficiaries:

- The Trustee may find itself “caught in the middle”
- The Trustee’s decision making process may be prolonged and any decision making may be difficult
- Certain beneficiaries may raise challenges to decisions made by the Trustee
- Allegations may be made against the Trustee

## ❑ How to handle disputes with beneficiaries?

- Observe warning signs of impending disputes
- Resolve disagreements over the administration of a trust as early as possible
- Meet with beneficiaries regularly and keep lines of communication with beneficiaries open
- Attempt to resolve matters amicably through discussions, if necessary, with the assistance of a mediator
- Litigation should be a last resort

# DISPUTES WITH BENEFICIARIES

## ❑ O.85 application:

- If no agreement can be reached amongst the beneficiaries, the Trustee may seek the Court's directions under Order 85 of the Rules of the High Court
- Commenced by an originating summons together with a supporting affidavit

## ❑ Principle:

- *"A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court. If, however, he seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court, he has always to bear in mind that it is of the highest importance that the court should be put into possession of all the materials necessary to enable that discretion to be exercise..."*

*Secondly, it should be borne in mind that in exercising its jurisdiction to give directions on a trustee's application, the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties."*

(Lord Oliver, in *Marley v Mutual Security Merchant Bank & Trust Co. Ltd* [1991] 3 All E.R. 198 at 201)

# DISPUTES WITH BENEFICIARIES

## ❑ O.85 application:

- Four categories of questions are usually raised by applicants under the Order 85 jurisdiction:
  - a) whether some proposed action was within the trustee's powers
  - b) whether the proposed course of action was a proper exercise of the trustees' powers where there was no real doubt as to the nature of the trustees' powers and they had decided how they wanted to exercise them
  - c) the surrender of discretion properly so called
  - d) where the trustees had actually taken action, and that action was attacked either as being outside their powers or an improper exercise of their powers
- For category (b), it is for the trustees to demonstrate they had considered the issues that they have placed before the court fully and having considered how best to exercise their discretion and demonstrated to the court's satisfaction that they intended, subject to the court's approval, forthwith to act on that conclusion.

## ❑ Issues of confidentiality



# QUESTIONS



# **C L I F F O R D**

# **C H A N C E**

Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong  
© Clifford Chance 2018  
Clifford Chance

**[WWW.CLIFFORDCHANCE.COM](http://WWW.CLIFFORDCHANCE.COM)**