

TRUST TRAINING CERTIFICATE (“TTC”)

UNIT 5 – MODULE 9

TRUSTS COMPARED WITH OTHER ESTATE PLANNING VEHICLES

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Trusts:
 - Unregistered arrangements.
 - Settlor – Trustee – Beneficiaries.
 - Depending on the governing law may be for persons, charitable purposes or non-charitable purposes or any of them.
 - Trustees responsible for management and control of trust property.
 - Sometimes there are reserved powers to others than the Trustee.

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Trusts: (para1.1)
 - Protector – watch-dog for the Beneficiaries.
 - Trustee exercises powers for the benefit of the Beneficiaries.
 - Trustee owes fiduciary duties to the Beneficiaries.
 - Protector may owe fiduciary duties to the Beneficiaries.
 - Usually a Trust Deed evidences a trust.
 - There are differences between jurisdictions as to how long a trust may continue.
 - Subject to exculpation, a Trustee is liable for breach of trust.

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Foundation: (para 1.2)
 - Registered legal entity.
 - Founder – Council – Officers – no Shareholders.
 - Must have a purpose.
 - Council is responsible for the management and control of the foundation to achieve the purpose.
 - Sometimes there are reserved powers to the Founder and to others.

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Foundation:
 - Sometimes a Supervisory Person to supervise the Council (contrast with Protector).
 - The purpose may include people as Beneficiaries but they are not usually entitled until the Council so decides.
 - Foundations continue until wound up.
 - Foundation is governed by its Charter and Articles/Rules.
 - Foundation owns its assets.
 - Liability of a foundation is limited to the value of its assets.

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Private Company: (para 1.3)
 - Registered legal entity.
 - Shareholders are owners.
 - Directors have management and control.
 - Governed by Memorandum and Articles of Association.
 - Private company owns its assets.
 - Private company continues until wound up.
 - Private Company's liability is limited to the value of its assets.
 - Private trust company can be limited by shares or limited by guarantee.

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Special Purpose International Company (“SPIC”): (para 1.4)
 - Registered legal entity.
 - Founder – Directors – no Shareholders.
 - Directors have management and control.
 - Governed by Memorandum and Articles of Association.
 - Reserved powers to Holder of Founder’s Rights Certificate – registered/licensed Trustee Company.
 - While in existence can carry out any lawful business.
 - When it terminates it must benefit charity

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

SPIC (cont'd):

- Continues until wound up.
- Holds its own assets.
- Liability limited to the value of its assets.

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Partnerships: (para 1.4)
 - Unregistered arrangement.
 - Partners.
 - Governed by a Partnership Agreement, which sets out the rights powers and interests of the Partners, who share profits and losses.
 - Partners hold the assets.
 - Partners are jointly and severally liable for the debts of the Partnership.
 - Continues until dissolved in accordance with the Partnership Agreement.

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Limited Partnerships: (para 1.6)
 - Special form of partnership by legislation in many jurisdictions.
 - General Partner (“GP”) (subject to unlimited liability) & Limited Partner (“LP”).
 - Invented to enable LP to invest in GP’s business but only liable, as between the Partners, to the extent of such investment.
 - Control: GP must manage and control the business and investments of the Limited Partnership.
 - Ownership: GP must hold the assets of the Limited Partnership for the Partners in the ratio of their interests.

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Segregated portfolio companies: (para 1.7)
 - Private companies that allows segregation of assets and liabilities under the segregated portfolios.
 - Management shares and participating shares.
 - Shareholders and creditors only have recourse against assets of specific segregated portfolios.
 - Control: Affairs of the SPC managed by Directors, but holders of management shares are voting rights.
 - Ownership: Holders of management shares do not have entitlement to economic interest. Holders of participating shares do.

GENERAL NATURE OF DIFFERENT STRUCTURING VEHICLES

- Executive entities: (para 1.8)
 - Executive Entities are only found in Bahamas.
 - An EE a standalone legal entity which has limited liability, no capital requirements, no shareholders and no beneficiaries.
 - It is designed specifically and solely to carry out functions and duties of an executive, administrative, supervisory, fiduciary and office-holding nature.
 - An EE is not a vehicle for directly holding assets.

FACTORS OF COMPARISON

- Legal Entity: (para 2.1)
 - Private Companies , Foundations, Executive Entities, SPCs and SPICS are separate legal entities from those concerned in/with them. But not segregated portfolios.
 - Partnerships and Trusts are legal arrangements and not legal entities.
 - Some laws permit election that Limited Partnership be treated as a legal entity.
 - Legal entity owns its owns assets.
 - Legal entity's liabilities are limited to the extent of the value of its assets.

FACTORS OF COMPARISON

- Legal entity usually taxed as such.
- Taxation of trusts – arrangements not legal entities:-
 - Trustees usually taxed on income and capital gains of the Trust.
 - Residence of Trust is usually resident of the Trustees for tax but , for Canada, ***the Garron Case*** - central management and control is the relevant test for taxation of a trust.
- Partners are usually taxed on the income/profits of a Partnership but in some jurisdictions this is not so:-
- Philippines – taxed as though legal entity; and
- Australia – taxed if General Partner is managed and controlled in Australia.

FACTORS OF COMPARISON

- **Ownership:** (para 2.2)
 - The distinction between legal and beneficial ownership.
 - Trustees have legal ownership; Beneficiaries have beneficial ownership.
 - Shareholders are legal and beneficial owners of a Private Company – different classes of shares having different rights.
 - Foundations are legal owners of the foundation's assets.
 - Foundations must have a purpose and that can include persons.
 - Beneficiaries of a foundation are not owed fiduciary duties.

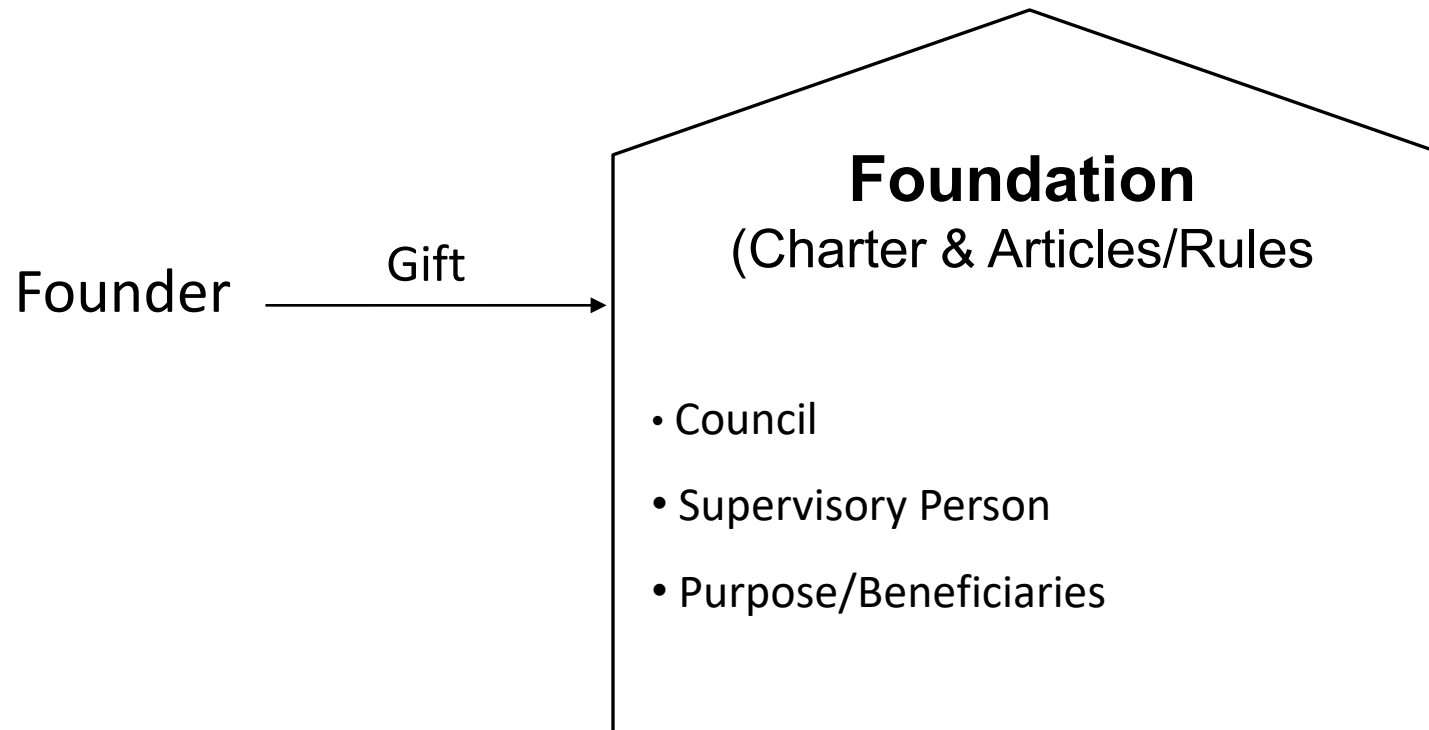
FACTORS OF COMPARISON

- Ownership:
 - SPIC is like a foundation – no shareholders with beneficial ownership. The ultimate beneficial owner of a SPIC must be charity.
 - SPC – holder of participating shares own the economic interest.
 - Both SPC and SPIC are legal entities owning their own assets.
 - Executive entities have no shareholders.
 - Partnerships are legal arrangements and legal and beneficial ownership is by the Partners.
 - Limited Partnerships: GP must hold the legal title to the assets but for the Partners of the Limited Partnership in the ratio of their respective interests in the Limited Partnership.

FACTORS OF COMPARISON

- Control: (para 2.3)
 - Private Companies: Directors – appointment, removal and resignation by reference to Articles of Association.
 - SPC – Directors and holders of management shares.
 - SPIC: Directors – no shareholders – appointment, removal and resignation by reference to Articles of Association.
 - SPIC: Holder of Founder's Rights Certificate – must be licensed and registered Samoan Trustee Company.
 - Foundation: Council - appointment, removal and resignation by reference to Charter/Articles or Rules.
 - Foundation: Reserved rights/powers to Founder/others – how far assignable?
 - Executive entities – Founder's reserved power and appointment of Council

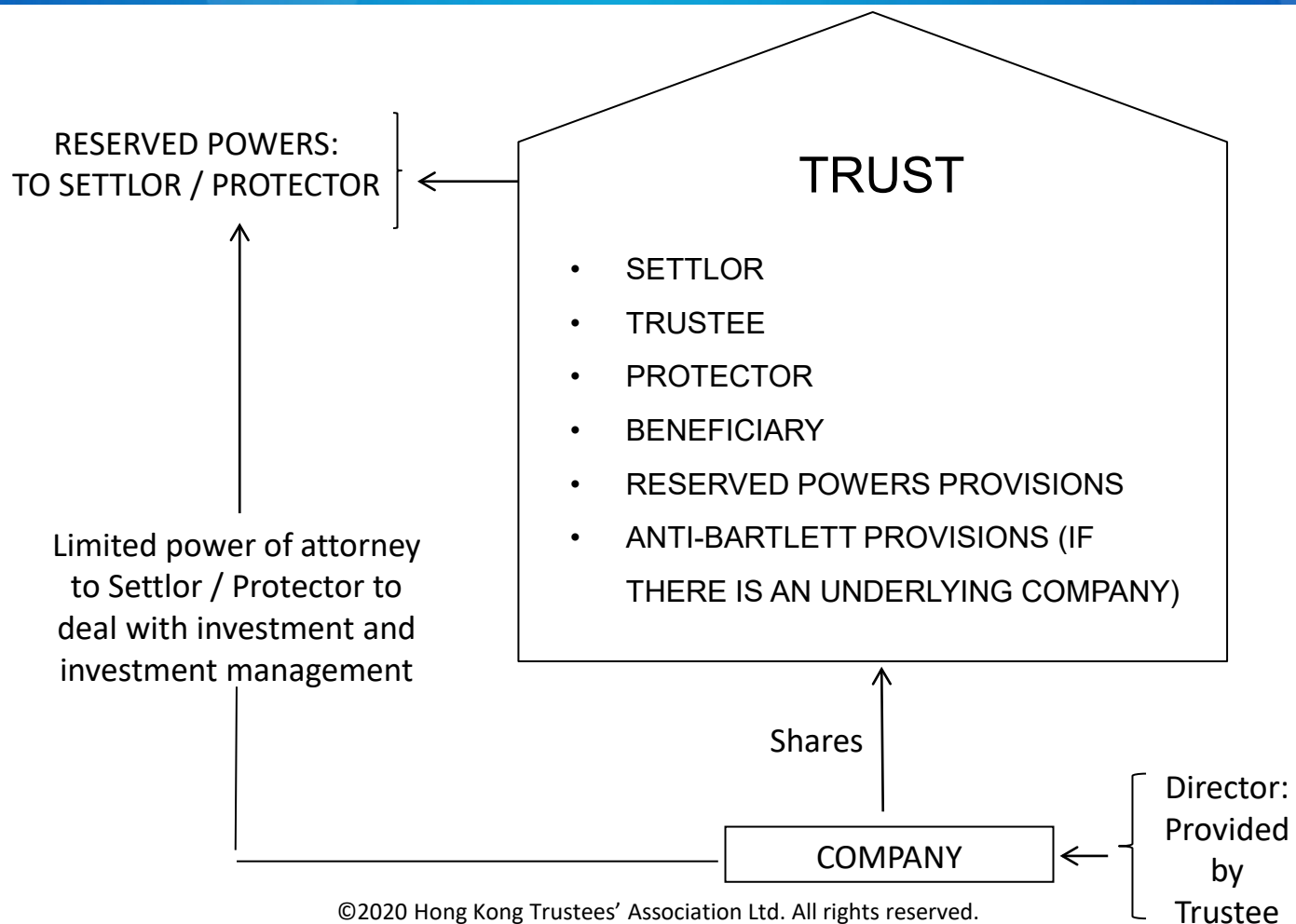
DIAGRAM OF A FOUNDATION



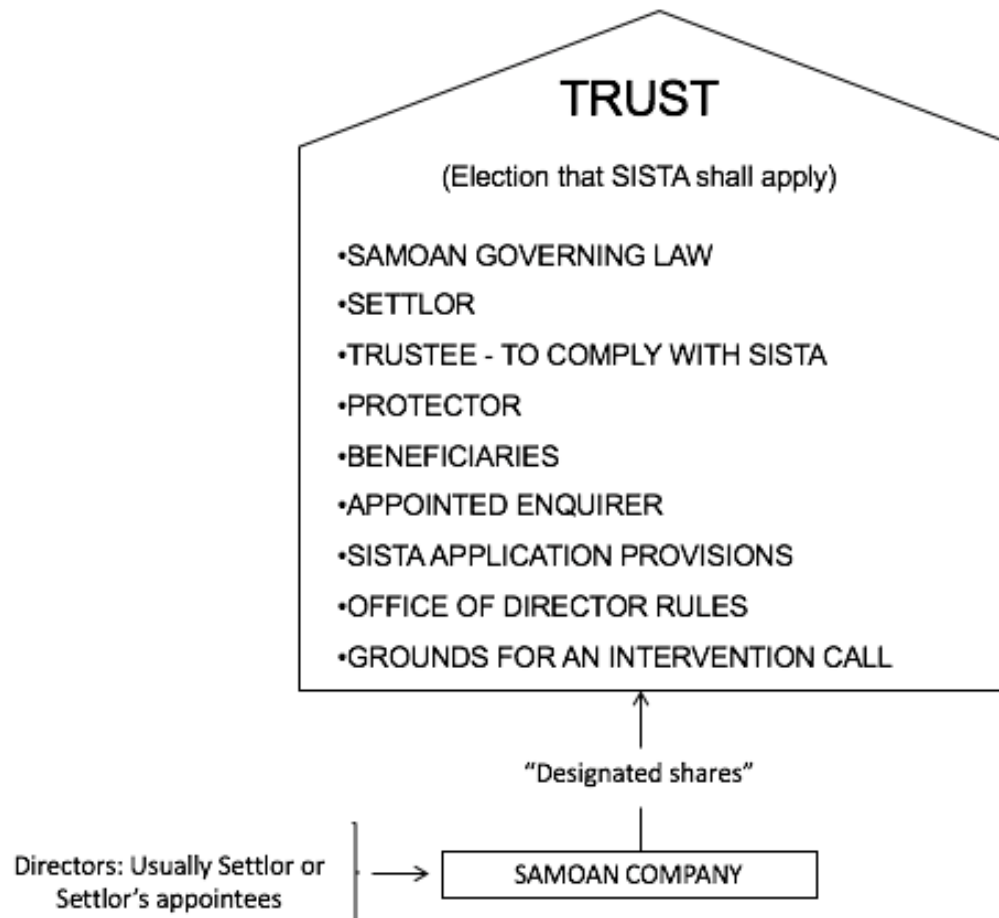
FACTORS OF COMPARISON

- Control:
 - Trust: Basic rule is control by Trustees.
 - Reserved Powers Trusts: (para 2.3.1) Reservation to Settlor or reservation to Settlor/Protector/others.
 - Reserved Powers Trusts: Problems – powers delegable or assignable - ***Bartlett v Barclays Bank Trust Company (CI) Limited*** – how far is anti-Bartlett clause valid?
 - VISTA/LST/SISTA. (para 2.3.2)
 - Trust combined with a Limited Partnership. (para 2.3.3)

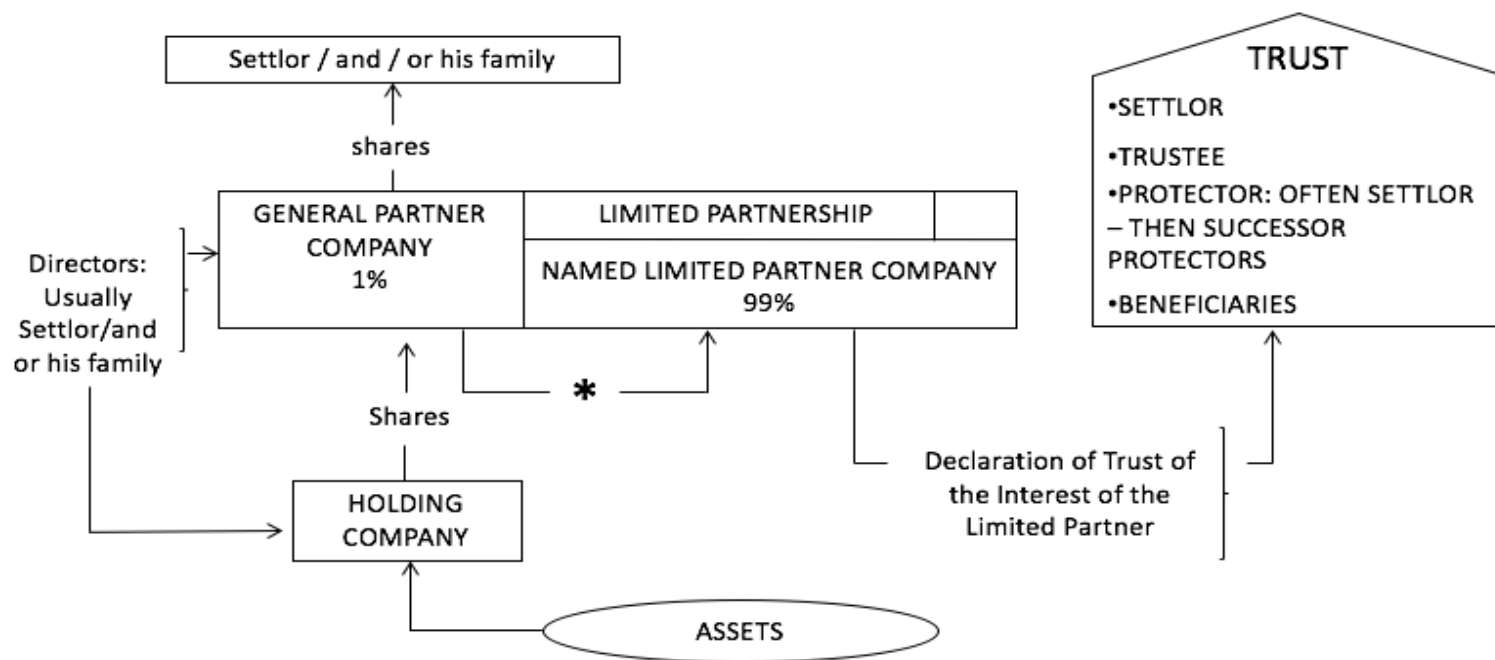
RESERVED POWERS TRUSTS



SPECIAL TYPES OF TRUST



TRUST COMBINED WITH A LIMITED PARTNERSHIP



* Declaration of Trust by the General Partner that it holds the shares of the Holding Company upon trust for the Partners of the Limited Partnership in the ratio in which they share the capital of the Limited Partnership

FACTORS OF COMPARISON

- Oversight: (para 2.4)
 - Trust: Protector – proactive powers – reactive powers.
 - VISTA/LST/SISTA: Intervention call – interested persons - Appointed Enquirer.
 - Non-Charitable Purpose Trust: Enforcer.
 - Foundation : Supervisory Person/Guardian
 - Private Company : No such person

FACTORS OF COMPARISON

- Powers: (para 2.5)
 - Trusts: Powers of Trustees - dispositive – administrative .
 - Trusts: What are the problems of powers reserved to the Settlor?
 - Trusts: Powers of Protectors.
 - Trusts: What are the problems of powers reserved to Protectors.
 - Non-charitable Purpose Trust: Enforcer

FACTORS OF COMPARISON

- Powers (cont'd): (para 2.5)
 - Foundation: Council/Supervisory Person/Guardian
 - Foundation: Reserved powers to the Founder/others.
 - Foundation: Can the Council act “ultra vires”?
 - SPIC: Directors/Holder of the Founder’s Rights Certificate.
 - Private Companies: Directors.
 - Private Company: Can directors act “ultra vires”?
 - Partnership: Partners.
 - Limited Partnership: GP.

FACTORS OF COMPARISON

- Duties: (para 2.6)
 - Trust: Fiduciary duties of Trustees.
 - Trust: Do Protectors owe fiduciary duties?
 - Trust: Do Enforcers owe fiduciary duties?
 - Foundation: When does a Foundation owe a fiduciary duty to a Beneficiary who is within the purpose of the foundation?
 - Private Company: Duties of directors to the company.
 - Private Company: When do the directors owe a fiduciary duty to the shareholders?
 - Partnership : Duties of Partners.

FACTORS OF COMPARISON

- Duties: (para 2.6)
 - Executive Entity: can perform only executive functions.
 - Executive functions are defined as:
 - (a) any powers and duties of an executive, administrative, supervisory, fiduciary and office holding nature including, amongst other things the powers and duties of:
 - (i) an enforcer, protector or investment advisor of a trust, and
 - (ii) the holder of any office of any legal person; and
 - (b) the ownership, management and holding of executive entity assets (although note that an EE may only hold such assets as are necessary to meet the expenses of carrying out its executive functions).

FACTORS OF COMPARISON

- Liability and Protection:
 - Trusts: Liability of Trustees – Extent of liability – ***Armitage v Nurse*** .
 - Trusts: Protection of Trustees – Extent of exculpation – protection by the Court – Protection from Beneficiaries.
 - Trusts: How far is a Protector protected?
 - Trusts – How far is an Enforcer protected?

FACTORS OF COMPARISON

- Liability and Protection: (para 2.7)
 - Foundation and Executive Entity: Liability limited to the value of their assets.
 - Private Company: Liability limited to the value of its assets.
 - Partnership: Personal liability of Partners jointly and severally.
 - Limited Partnership: Liability of LP, as between the Partners, limited to the extent of the LP's investment – In some jurisdictions jurisdiction of control of GP determines the tax liability of the Limited Partnership.

FACTORS OF COMPARISON

- **Continuity:** (para 2.8)
 - Trusts: Depending on governing law – fixed period - indefinite period – total flexibility.
 - Foundations & Private Companies: Usually continue until wound up.
 - Partnerships: Usually continue until dissolved in accordance with the provisions of the Partnership Agreement.
 - Executive Entity: Can last for a definite or indefinite period.

BENEFITS AND SHORTCOMINGS

- Trusts – Benefits: (para 3.1)
 - Unregistered solution (but see move towards registration):
Therefore limited privacy bearing in mind reporting.
 - Family succession.
 - Asset protection .
 - Non-enforcement of foreign judgments and anti-forced heirship.

BENEFITS AND SHORTCOMINGS

- Trusts – Benefits
 - Creating a trust and still retaining control:- (para 3.1.6)
 - Reserved powers Trust;
 - VISTA, LST & SISTA;
 - Private Trust Company; and
 - Trust combined with a Limited Partnership.
 - The supervisory role of the Protector

BENEFITS AND SHORTCOMINGS

- Trusts - Benefits
 - Flexibility of powers:- (para 3.1.7)
 - to remove and appoint Trustees;
 - to add to and remove from the Beneficiaries;
 - to create Excluded Persons;
 - to change the governing law of the trust and the forum of administration of the trust; and
 - to add to, vary or amend the provisions of the trust.
 - A shield against death duties.

BENEFITS AND SHORTCOMINGS

- Trusts – Shortcomings:
 - Unlimited liability of Trustees – The extent of exculpation permitted by the governing law - Thus the use of a holding company. (para 3.1.2)
 - Sham, nominee arrangements and results of excessive control. (para 3.1.6)
 - Are reserved powers personal or fiduciary – can they only be delegated or can they be assigned? (para 3.1.6)
 - Trustees liability for underlying companies of the trust – ***Bartlett v Barclays Bank Trust Company (CI) Limited.***

BENEFITS AND SHORTCOMINGS

- Trusts – Shortcomings:
 - Cost of transfer of assets into the trust. (para 3.1.9)
 - Taxation on transfer of assets into the trust. (para 3.1.9)
 - Taxation of Trustees, the Settlor and the Beneficiaries during the Trust Period. (para 3.1.9)
 - Depending on the governing law, possibly a fixed perpetuity period. (para 3.10)
 - Beneficiary's right to information may depend on the decision of the Court – ***Schmidt v Rosewood Trust Limited***. (para 3.1.11)

BENEFITS AND SHORTCOMINGS

- Foundations – Benefits:
 - Must have a purpose – the purpose can include persons as Beneficiaries [compare with trusts]. (para 3.2.1)
 - Does not owe fiduciary duty to a Beneficiary until the Council decides the entitlement of that Beneficiary [contrast with trusts]. (para 3.2.2)
 - Liability of the foundation to its creditors is limited to the value of the assets of the foundation [contrast with trusts]. (para 3.2.2)
 - Asset protection [often now similar rules as for trusts]. (para 3.2.4)
 - Non-enforcement of foreign judgments and anti-forced heirship [compare with trusts]. (para 3.2.5)

BENEFITS AND SHORTCOMINGS

- Foundations – Benefits:
 - Family succession [compare with trusts]. (para 3.2.3)
 - Beneficiaries may be “notifiable” and “non-notifiable” as regards information [contrast with trusts]. (para 3.2.10)
 - Retention of control: Retention of rights and powers to the Founder/others – how far are such rights and powers assignable [compare with trusts]? (para 3.2.6)
 - Retention of control may avoid the problems with reserved powers trusts [contrast with trusts].
 - Supervision of the Council by Supervisory Person/Guardian [compare with Protector for a trust]. (para 3.2.8)

BENEFITS AND SHORTCOMINGS

- Foundations – Benefits:
 - Flexible and clear rules for change of purpose [compare with trusts]. (para 3.2.7)
 - Flexible and clear rules for changing members of the Council, Supervisory Person and Guardian [compare with trusts]. (para 3.2.8)
 - Continuity: Foundations continue until wound up by the Council or by the Court [compare with trusts]. (para 3.2.10)

BENEFITS AND SHORTCOMINGS

- Foundations – Shortcomings:
 - Registered legal entity but without shareholders: Lack of visible immediate ultimate beneficial owners can cause difficulties for reporting and with opening bank accounts. (para 3.2.1)
 - Because a Beneficiary has no entitlement until given it and is owed no fiduciary duty until then, less attractive for Beneficiaries. (para 3.2.2)
 - Sometimes difficulties of recognition in common law jurisdictions.
 - More time and cost to re-domicile than a trust. (para 3.2.12)

BENEFITS AND SHORTCOMINGS

- Private Company – Benefits:
 - Simplicity of ownership through shareholders. (para 3.3.2)
 - Well-established control through directors, who can be appointed and removed by shareholders. (para 3.3.4)
 - Liability limited to the value of its assets. (para 3.3.3)
 - Directors must provide clear and proper information to shareholders. (para 3.3.5)

BENEFITS AND SHORTCOMINGS

- Private Company – Benefits:
 - Continuity: Continues until wound up [compare with foundations]. (para 3.3.7)
 - Residence: Where its central management and control is situated. (para 3.3.9)
 - Easy and inexpensive to establish and run. (para 3.3.6)

BENEFITS AND SHORTCOMINGS

- Private Companies – Shortcomings:
 - Lack of privacy: Increasing requirements for registers and transparency (compare and contrast with trusts and foundations). (para 3.3.1)
 - Shareholders do not have the benefit of (para 3.3.2)
 - asset protection;
 - non-enforcement of foreign judgments and anti-forced heirship;
 - family succession; and
 - avoidance of Probate.

[Other estate planning steps need to be taken]

BENEFITS AND SHORTCOMINGS

- Private Companies – Shortcomings:
 - Shareholders are not owed a fiduciary duty by directors [contrast fiduciary duty owed by Trustees to Beneficiaries].
(para 3.3.5)
 - Harder to re-domicile than a trust [compare foundations].
(para 3.3.8)
 - Controlled Foreign Companies' tax disadvantage.
(para 3.3.9)
 - Disadvantage of quasi-director rules. (para 3.3.9)

BENEFITS AND SHORTCOMINGS

- SPIC – Benefits:
 - Hybrid of a company and a foundation. (para 3.4.1)
 - Must ultimately benefit charity and a useful vehicle for charitable purposes. (para 3.4.3)
 - Holding vehicle ; for example for shares of a Trust Company or for the operation of a business for a short and definite period.
(para 3.4.4)
 - Control through the Holder of the Founder's Rights Certificate.
(para 3.4.5)

BENEFITS AND SHORTCOMINGS

- SPIC – Shortcomings:
 - Registered legal entity without shareholders – difficulty of having no identifiable ultimate beneficial owners [compare with foundations].
 - The Holder of the Founder's Rights Certificate has to be a Samoan licensed registered Trustee Company. (para 3.4.5)
 - No purpose which can include persons [contrast foundations].
 - Difficulties of extracting profits during the continuation of the SPIC.

BENEFITS AND SHORTCOMINGS

- Partnerships – Benefits:
 - Flexible legal arrangement between Partners. (para 3.5.2)
 - Protection of liability of Partners through ownership of a holding company.
 - Control remains with the Partners.
 - Can be dissolved in accordance with the terms of the Partnership Agreement. (para 3.5.6)

BENEFITS AND SHORTCOMINGS

- Partnership – Shortcomings:
 - Partners and personally liable for the debts of the Partnership in accordance with the ratio of their interests in the Partnership. (para 3.5.1)
 - Partners are personally liable for taxation by reference to their interests in the Partnership. (para 3.5.3)

BENEFITS AND SHORTCOMINGS

- Limited Partnership – Benefits:
 - Control remains with the General Partner. (para 3.6.3)
 - As between the Partners, the Limited Partner is only liable up to the value of that Limited Partner's interest. (para 3.6.2)
 - Assets must be held by the General Partner for the Partners of the Limited Partnership in the ratio of their interests. (para 3.6.4)
 - Trust combined with a Limited Partnership. (para 3.6.5)
 - If the shareholder and director control of the General Partner company is correctly established, there may be tax deferral (example – China). (para 3.6.6)

BENEFITS AND SHORTCOMINGS

- Limited Partnership – Shortcomings:
 - Registered arrangement – not usually a legal entity.
(para 3.6.1)
 - Management and control of the General Partner should not be in a jurisdiction which gives rise to the taxation of all the profits of the Limited Partnership in that jurisdiction (example – Australia). (para 3.6.7)

BENEFITS AND SHORTCOMINGS

- Segregated Portfolio Companies – Benefits:
 - Segregated of assets and liabilities of each segregated portfolio.
 - Quick to add segregated portfolio and cost effective.
(para 3.7.1)
 - Compared to companies with different classes of shares.
(para 3.7.2)

BENEFITS AND SHORTCOMINGS

- Segregated Portfolio Company – Shortcomings:
 - Very hard to migrate to a new jurisdiction compared to a regular private company.
(para 3.7.3)
 - Foreign recognition of the segregation principle?
(para 3.7.4)

BENEFITS AND SHORTCOMINGS

- Executive Entity – Benefits:
 - able to own its own assets and having liability limited to the extent of the value of its assets.
(para 3.8.1)
 - Names of the founder and Council of an Executive Entity are not public documents and whether the Charter and Articles are to be filed is still optional. There is also no annual filing requirement.
(para 3.8.2)
 - No shareholders are required for the Executive Entity to exist and rotation of members of the Council and/or other officers does not disrupt the continuity of the Executive Entity. No probate issues.
(para 3.8.3)

BENEFITS AND SHORTCOMINGS

- Executive Entity – Shortcomings:
 - The application of an EE, however, is comparatively restricted.
 - It can only perform one or more “executive functions” and cannot be used to hold assets directly.
 - It can act as holder of voting shares of a company but can only hold shares in another entity which also carries out executive functions (e.g. a PTC or protector/enforcer/investment advisory company, but not a trading company).(para 3.8.4)

Supplementary note

“An Integral Approach to the Family Office”

[https://www.squirepattonboggs.com/-
/media/files/insights/publications/2019/11/family-office-insights-an-integral-
approach-to-family-office/an integral approach family office.pdf](https://www.squirepattonboggs.com/-/media/files/insights/publications/2019/11/family-office-insights-an-integral-approach-to-family-office/an%20integral%20approach%20family%20office.pdf)

Q&A