

# The Hong Kong Institute of Bankers

## Trust as a Tool for Wealth Protection



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Date: 13 June 2014

# What is a Trust

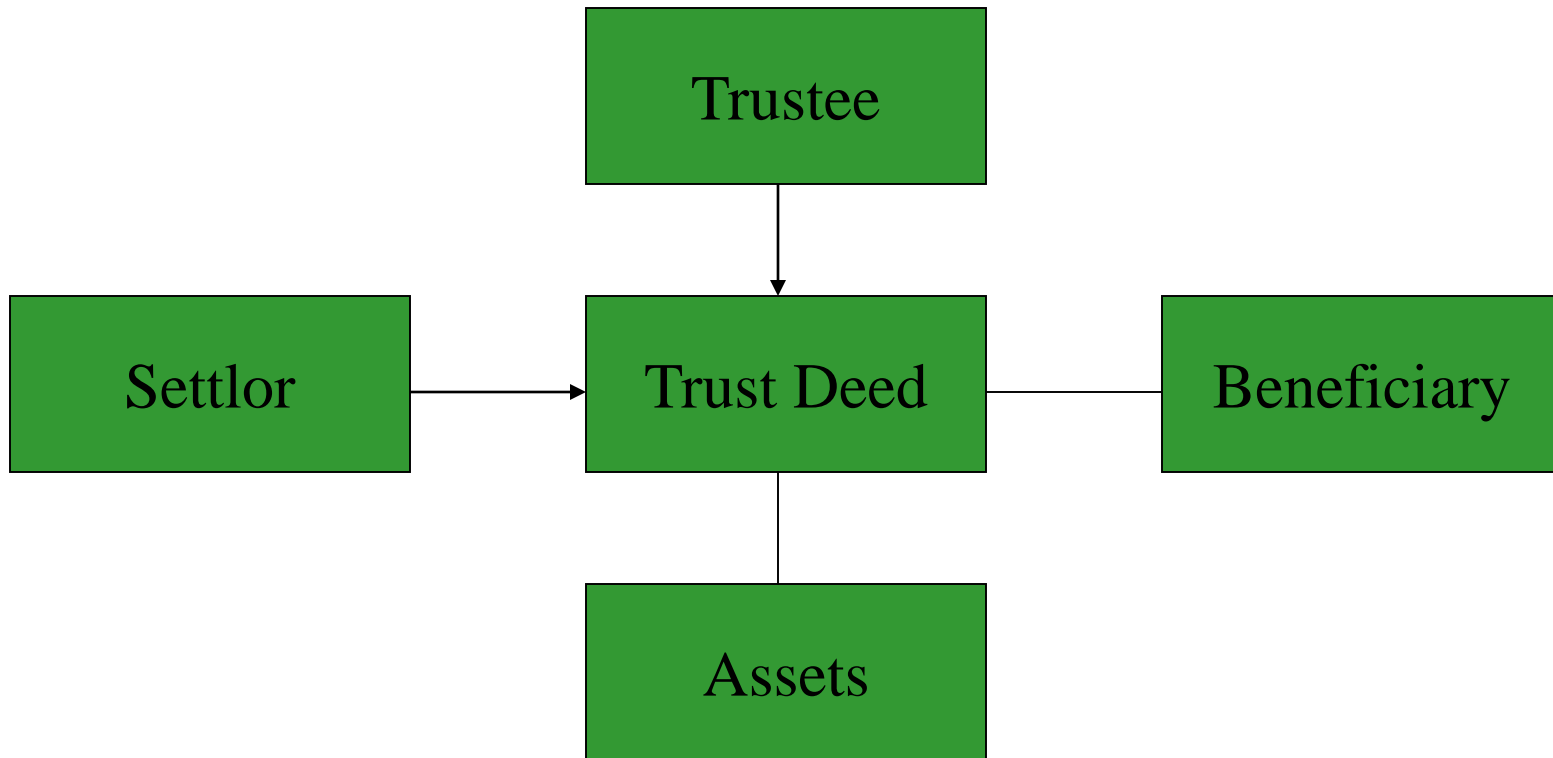
- **No prescribed structure**
- **Flexible**
- **Not an investment product**

# **I. Background**

## **A. Basic Form**

3 Basic Parties:

- **Trustee**
- **Settlor / Grantor**
- **Beneficiary**



## **B. Variations**

- **Trustee**
  - Individual / Trust Corporation
  
- **Settlor / Grantor / Protector / Governing Committee / Successor Protector**
  
- **Beneficiary**
  - Discretionary
  - Family Member
  - Charitable Organizations
  - Investors / Employees
  - and so on.

## **C. Hague Convention**

Hong Kong, a party to Hague Convention on “The Law Applicable to Trusts and on Their Recognition” since 1997.

**30. CONVENTION ON THE LAW APPLICABLE  
TO TRUSTS AND ON THEIR RECOGNITION<sup>1</sup>**

*(Concluded 1 July 1985)*

The States signatory to the present Convention,  
Considering that the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution,  
Desiring to establish common provisions on the law applicable to trusts and to deal with the most important issues concerning the recognition of trusts,  
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE

Article 1

This Convention specifies the law applicable to trusts and governs their recognition.

## Article 2

For the purposes of this Convention, the term "trust" refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics –

- a) the assets constitute a separate fund and are not a part of the trustee's own estate;
- b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

## Article 3

The Convention applies only to trusts created voluntarily and evidenced in writing.

## Article 4

The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

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<sup>1</sup> This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law ([www.hcch.net](http://www.hcch.net)), under "Conventions". For the full history of the Convention, see Hague Conference on Private International Law, *Proceedings of the Fifteenth Session (1984)*, Tome II, *Trusts – applicable law and recognition* (ISBN 90 12 04930 X, 423 pp.).



## **D. Trust Law (Amendment)** **Ordinance**

- passed on 17 July 2013
- effective 1 December 2013
  
- **Trustee Ordinance (Cap 29)**
  
- **Perpetuities and Accumulations Ordinance (Cap 257)**

# Trustee Ordinance (Cap. 29)

## - Current Position

Part II. Investment

Part III. General Power of Trustee and Personal Representations

Part IV. Appointment and Discharge of Trustee

Part V. Power of Court

# Trustee Ordinance (Cap. 29)

## - Current Position

Part VI. Judicial Trustee

Part VII. Official Trustee

Part VIII. Trust Companies

S.97 “every person employed by the company to discharge any duties of such office shall be personally liable”

## **E. Amendments**

- Imposing statutory control on exemption clauses which limit trustees' liability.
- Free from forced heirship rules.
- Enhances trustees' default powers and duties.

# Reserved Powers

Reserving power to settlor relating to investment.

## Forced Heirship

Foreign forced heirship rules will not affect the validity of a lifetime transfer of assets to a trust expressly governed by Hong Kong law.

# Trustees' Default Powers

- Delegate the management of investments to suitable fund managers.
- Powers to insure trust property will be extended

# Trustees' Remuneration

Professional trustees may now receive reasonable remuneration in the absence of an express provision in the trust deed.



# Change of Trustee

- Beneficiaries of full age and capacity.
- Absolutely entitled under the trust.

## **II. Types of Trustee**

- **Individual**
- **Trustee Company**
  - Subsidiary of Bank
  - Subsidiary of Insurance Company
- **Independent Trustee Companies**
  - Foreign
  - Local

## **III. Use of Trust**

### **Individual Clients**

1. Trustee of Discretionary Trust
2. Trustee of Family Trust
3. Acting as Executor and Trustee of a Will
4. Acting as Attorney of Enduring Power of Attorney

# Use of Trust

## Individual Clients

5. Trustee for holding assets, e.g. in divorce cases
6. Trustee of Single Premium Life Policy
7. Trustee of Juvenile Life Policy
8. Trustee of Business Succession Plan

# Use of Trust

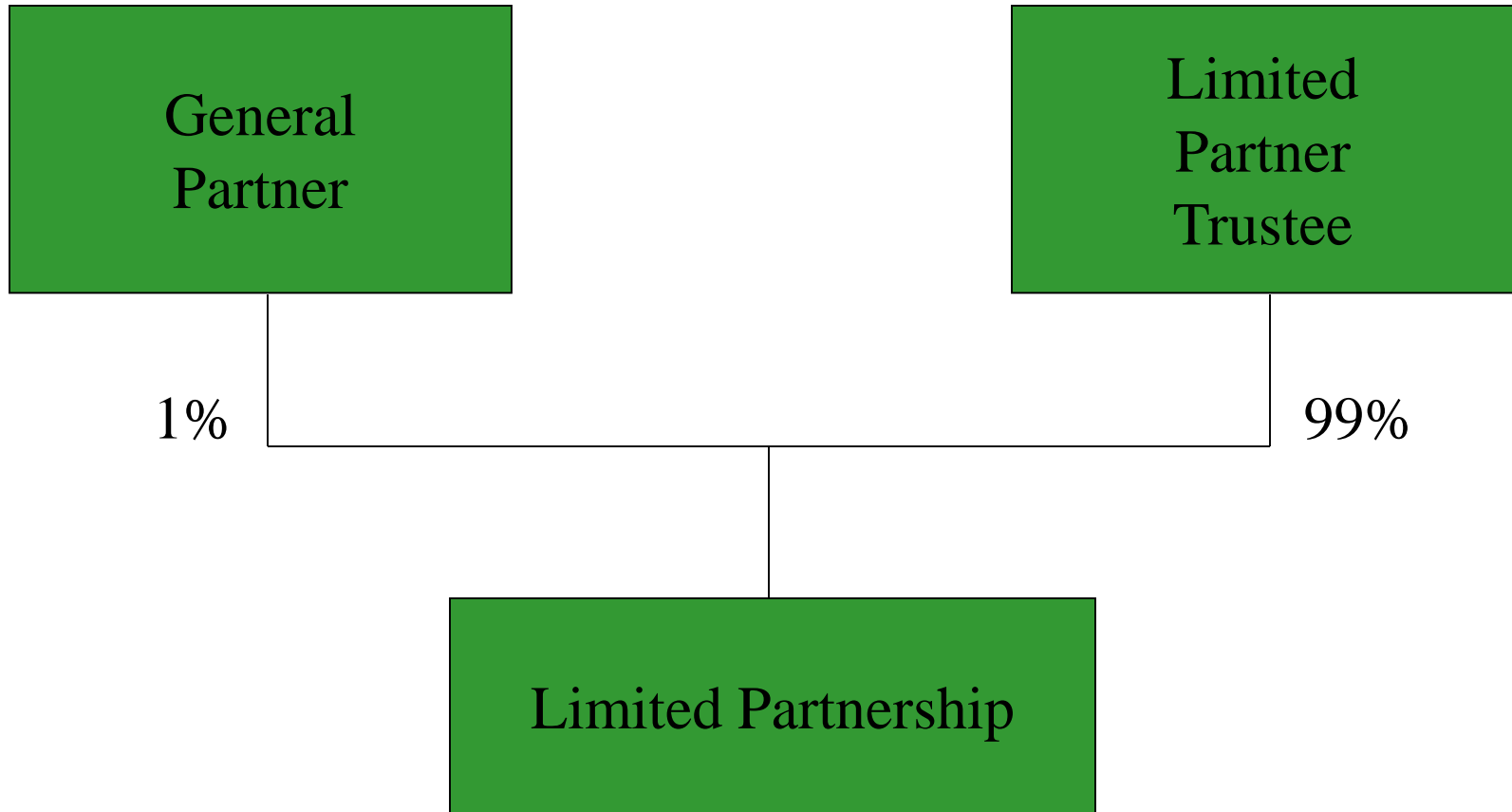
## Corporate Clients

1. Trustee for Charitable Foundation
2. Trustee for Retirement Fund  
(MPF and ORSO Scheme)
3. Trustee for Investment Fund and Private  
Equity Fund
4. Trustee for Share Incentive Scheme
5. REIT

## **IV. Constitutive Document**

- Trust Deed
- LLP – Limited Partner / General Partner
- Declaration of Trust
- Master Trust Scheme (for MPF)
- REITs
- Code on Unit Trusts and Mutual Funds
- Family Trust

# LLP



## **V. Powers and Duties of a Trustee**

### **Existing T. O. :**

- Extensive powers of trustee (Part II and III)
- Investment power and Misc
- No Duties

### **New T. O. :**

- Statutory Duties of Care  
(see MPFSO attachment 2)



# Powers and Duties of a Trustee

## Duties:

- Trust Deed  
MPFSO (Cap. 485)
- MPFSO (General Regulation)

# VI. Types of Trust and Trustee

## Types of Trust

- **Express Trust**
- **Implied Trust**
  - Constructive Trust
    - Trust arise by operation of law, regardless of intention of parties
  - Resulting Trust
    - Contributor subjectively believes he retains the beneficial interest

## **VII. Types of Trust and Trustee**

### **Types of Trustee**

- **Individual**
- **Trustee Company**
  - Subsidiary of Bank
  - Subsidiary of Insurance Company
- **Independent Trustee Companies**

## **VIII. For Wealth Management**

### **Traditional Use**

- Succession – Family Trust e.g.
- Asset Protection – Divorce, Creditor, Discretionary Trust
- Avoid Probate (particularly multi-jurisdiction)
- Tax – Planning, Estate Duty, Stamp Duty
- Avoid Risk - Bankruptcy
- Confidentiality
- All of the above

# For Wealth Management

## Use in Insurance Related Products

- For Business Succession
- For Juvenile Policy
- For Premium Finance

## Trust Compare to:

- **Will**
  - Effective upon death
- **Enduring Power of Attorney**
  - Effective on a date to be fixed or become incapable

## Trust

- Effective now
- Effective upon death

# Client's Concern

- **Fee**
- **Service**
- **Multi-jurisdictional Assets**
- **Risk**

# Should the Trust have a Protector?

- **Protector**
- **Guardian**
- **Supervising Committee etc.**



# Offshore Trust v. Local Trust

- **HK v. Singapore v. Switzerland v. VISTA, LST, SISTA, STAR**



# Practical Problems

# Q & A

## 問題討論



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## **PLEASE NOTE**

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

## **請注意**

本題目之法律及程序十分專門。此文章只屬一般性之解釋，供你參考，而不應被依賴為關於任何特定事件之法律意見。如需法律意見，請與我所律師聯絡。

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