

Settlor's Reserved Powers Trust in Singapore

The term «Settlor's Reserved Powers Trust», whilst not a legal term, defines a trust under which a settlor has retained one or more powers regarding the trust or the trust property to either direct the trustees or to restrict the exercise of any discretions vested in them by the trust deed.

Under any trust relationship, ownership and complete control of the trust assets must pass over to the trustees, subject to the terms of the trust. Care has to be taken when drafting a trust instrument to ensure that the settlor does not retain so much power that the trustees do not in fact have sufficient control of the assets for there to be a valid trust relationship.

Nevertheless, for many years, it has been the practice for settlors to reserve for themselves certain powers in relation to the investment of the trust assets, despite the fact that there could be dire consequences for overstepping the boundary (for example, under common law, the validity of the trust may be questioned or in a worst case scenario, the trust could be set aside as being a sham). This desire of settlors to be actively involved in investment decisions is a natural consequence of private investors becoming more knowledgeable and sophisticated. For example, settlors may wish to invest in some higher risk products offered by banks or leverage part of the trust fund in order to generate higher returns. This goes against the natural conservative nature of the trustees who have a duty to invest trust property in a prudent manner, ensuring adequate diversification and the avoidance of speculation. Trustees would have a potential liability to beneficiaries for losses to the trust fund should they fail to carry out their duties.

Settlors from certain jurisdictions, particularly in Asia, may also be reluctant to give up total control of their hard earned assets to a third party with whom they may have had very little contact.

When revising its trust law in 2004, Singapore introduced legislation which provides some legal certainty on this otherwise grey area. Section 90(5) of the Trustees Act 2004 states that *«No trust or settlement of any property on trust shall be invalid by reason only of the person creating the trust or making the settlement reserving to himself any or all powers of investment or asset management functions under the trust or settlement»*. The legislation also allows the settlor to delegate this power to a third party during his lifetime, however upon the death of the settlor the assets need to be administered professionally. This, in effect, allows the settlor to «have their cake and eat it» by retaining a degree of control over the management of the trust assets during their lifetime. The trustee can issue the settlor with a power of attorney, which allows the settlor to liaise directly with his private banker or asset manager, with whom he may have a great deal of trust and faith, in relation to the trust assets. A settlor can therefore choose to follow an investment strategy that the trustees may not have considered in the best interests of the beneficiaries.

Despite the settlor having the power to invest the trust assets, it has been mentioned by some commentators that the trustee still has some fiduciary duty or obligation to oversee how the settlor is investing the trust funds. This is particularly so if the settlor has no professional investment experience. However, there is very little case law in Singapore on this subject and, therefore, it remains to be seen whether or not the trustee may have a duty to intervene or not comply with a direction given by a settlor.

In summary, a Settlor's Reserved Powers trust constituted in Singapore will offer the settlor all of the benefits of a standard trust (including estate planning, asset protection, confidentiality and consolidation of assets) as well as providing the Settlor with a continued active involvement in decisions relating to the investment and management of the trusts assets.

Singapore to criminalise the laundering of proceeds of tax evasion by 1st July 2013

Singapore has made it clear that it is fully committed to safeguarding its financial system from being used to harbour the proceeds from tax crimes.

Already on 6th September 2011, the Monetary Authority of Singapore («MAS») sent a notice to all financial institutions in Singapore to remain vigilant against suspicious money inflows in anticipation of agreements between foreign jurisdictions to resolve outstanding tax issues. A short time afterwards, on 27th October 2011, the managing director of MAS made clear at a keynote speech their policy intent to criminalise the laundering of proceeds from serious tax offences.

Following the revision of the Financial Action Task Force (FATF) Recommendations in February 2012, Singapore reiterated its commitment to fully align its legal and policy regime with the new FATF requirements, including the designation of tax crimes as a money laundering offence. On 9th October 2012, the MAS issued a consultation paper on the designation of tax crimes as monetary laundering predicative offences in Singapore.

The MAS proposes to include the definitions of tax evasion (s.96) and serious fraudulent tax evasion (s.96A) under the Income Tax Act, as well as the definitions of tax evasion (s.62) and improperly obtaining refunds (s.63) of the Goods and Services Tax Act as money laundering predicative offences. Under the Income Tax Act, the tax evasion offence applies when a person makes an omission in a return or makes false statements wilfully with the intent to

evade, whereas the serious fraudulent tax evasion offence applies when a person falsifies books of accounts and makes use of any fraud, art or contrivance wilfully with intent to evade.

Financial institutions in Singapore will have to develop and implement policies, controls and procedures to effectively detect and deter the laundering of proceeds of wilful or fraudulent tax evasion through the financial system. This includes supplementing the existing client acceptance and the ongoing transactions monitoring processes. Tax-specific red flag indicators need to be implemented and critical reviews of the existing clients will have to be performed in order to assess the tax legitimacy of the assets. When financial institutions become aware or have reasonable grounds to suspect that they are dealing with proceeds of tax evasion, they will have to file a suspicious transaction report.

With this proposed designation, the powers used to investigate and prosecute money laundering will be similarly applied to the proceeds of the designated tax crimes. From 1st July 2013 onwards foreign jurisdictions may also make requests for mutual legal assistance in order to pursue wilful or fraudulent tax evaders and their criminal proceeds.

Any comments on the consultation paper should be submitted to the MAS by 9th December 2012. From previous experience, it can be expected that there will be no major changes to the proposal and that the laws will be amended as planned, coming into force by 1st July 2013.

Trusts, Marriage Breakdowns, and Prenuptial Agreements

First Advisory Group Hong Kong recently considered the issue of whether a trust can protect a settlor's assets in the face of a marriage breakdown. The research on the common law treatment provided some key findings, which are summarized below:

A) Trust Assets

*Will the Court take into account trust assets in deciding the maintenance provisions in divorce proceedings?
The key question to ask: Is the trust a nuptial settlement?*

This is a question of fact, but there is no clear and obvious definition. A settlement is likely to be treated as «nuptial» if it was set up in contemplation of marriage, or after the marriage.

What if it is a nuptial settlement?

If it is a nuptial settlement, the Court has full authority to vary the terms of the trust, including ordering a distribution of trust funds to one of the parties to the marriage. If it is not a nuptial trust, the Court has no power to order either a financial settlement of the trust funds or to order that the trustees should act in a certain way.

What if it is a non-nuptial settlement?

Even for a non-nuptial settlement, if a spouse is to request the trustees to make trust funds available, and the trustees are likely to comply with that request, then the assets will be treated as part of the matrimonial funds.

B) Personal Assets (Assets outside of the trust)

There are clear differences in the treatment of matrimonial property and non-matrimonial property.

Matrimonial property

Matrimonial property has been held to mean «property acquired during the course of the marriage, otherwise than by inheritance or gift». It is the «financial product of the parties' common endeavor». Matrimonial property is generally subject to the principle of equal sharing not taking into account the duration of the marriage.

Non-matrimonial property

This type of property involves assets derived from a business or an investment conducted solely by one party (sometimes called «unilateral assets»).

How to draw the line

A key factor which comes into play is the duration of the marriage. It has been held that «The importance of the source of the assets will diminish over time ... As the family's personal and financial interdependence grows, it becomes harder and harder to disentangle what came from where».

So if it is a short marriage, the Court may well be inclined to regard as excludable non-matrimonial property, assets acquired by one of the parties before the marriage or acquired in the course of the marriage from some wholly external source. But after a long marriage, these factors are likely to have much less weight.

C) Can a prenuptial agreement be used to define/confine the party's entitlement? Will the Court follow the terms in the agreement?

A prenuptial agreement is a contract entered into by two people who are about to get married. This contract primarily aims to set out, in advance of the marriage, the parties' financial arrangements if the marriage should come to an end, either through divorce or death.

There are different views, depending on the relevant jurisdiction.

The English position

Prenuptial agreements are regarded as one of the factors to consider and might have «decisive weight» in a divorce case. However, a prenuptial agreement is not automatically enforceable. The Matrimonial Causes Act of England imposes on the Court the duty to assess «the conduct of the parties and all the circumstances of the case». Prenuptial agreements can be relevant under these factors.

The Hong Kong position

Court decisions in England are highly persuasive, but are not legally binding on courts in Hong Kong. It is likely that Hong Kong Courts will follow approaches adopted by the English Courts given the historic ties, and continued close relations between Hong Kong and English matrimonial law.

The U.S. position

As divorce and remarriage have become more prevalent, and with more equality between the sexes, most U.S. Courts now take the general position that prenuptial agreements are enforceable, if they meet certain formal procedural requirements and are otherwise valid contracts under general contract principles.

«CIES: Hong Kong investment migration made easy»

What makes Hong Kong attractive as an immigration destination?

Situated at the geographical heart of East Asia, Hong Kong is positioned at the crossroads between East and West in one of the most dynamic economic regions in the world. Hong Kong is a «City-State» which covers just over 1,000 sq kms, and is home to nearly 8,000,000 people.

Hong Kong has developed into a high quality services economy, and a particularly advantageous place to live for many reasons. It has legal stability, as forming a part of China since 1997, it has

had a «One Country – Two Systems» policy where it retains its own legal system and separate institutions which have «checks and balances», reflecting its British colonial heritage. It has a low personal income tax rate (15%), free economy and a sound education system.

It has achieved impressive world rankings in the following sectors:

- economic freedom index #1
- global competitiveness #4
- highest life expectancy #2

- lowest inflation #13
- highest energy efficiency #1
- largest stock market, by traded value #5
- busiest cargo airport #2

Source: *The Economist – World in Figures 2011-12*

What is the Capital Investment Entrant Scheme («CIES»)?

CIES was an initiative of the Hong Kong SAR Government commenced in October 2003 aiming to achieve the following:

- enabling entry for official residence in Hong Kong by capital investment entrants; and
- entrants are allowed to make a choice of Hong Kong investments from a range of permissible assets, without the need to establish or join in a local business.

How does CIES work?

- investment of HK\$10 million (US\$1.3 million) (net of any initial charges) into a qualifying account based in Hong Kong
- the qualifying CIES account will provide access to a number of approved Hong Kong equity funds
- the account can be administered by a Hong Kong Securities and Futures Commission authorised investment advisor or asset management company which can provide a discretionary management service so that the funds and the managers are regularly monitored, and switched if necessary. In practice, these administration requirements can be met by the Hong Kong branch office of the Private Bank with whom you may already have a business relationship.
- The investment advisor will also report annually on the account to the Hong Kong Immigration Department

Who is eligible for CIES?

The range of eligible persons and criteria is wide, and includes the following:

- Foreign nationals (except nationals of Afghanistan, Albania, Cuba and Democratic People's Republic of Korea);
- Macao SAR residents;
- Chinese nationals who have obtained permanent resident status in a foreign country;
- Stateless persons who have obtained permanent resident status in a foreign country with proven re-entry facilities;
- Taiwan residents; and
- Any person who invests no less than HK\$10,000,000 (net) in a permissible assets classes including Financial Assets – Equities, Debt securities, Certificates of Deposits, Subordinated Debt & Eligible Collective Investment Schemes (i.e. authorised Unit Trusts). The HK\$10,000,000 threshold will be reviewed every 3 years. Real Estate as a possible class for asset investment has been temporarily suspended.

In summary, given the broad eligibility and streamlined application process, a CIES application would be one of the value-added family office services which we would recommend if a client was considering a realignment of their investment portfolio towards Asia. Hong Kong has no prohibitions against dual nationality, and through investment programs such as CIES it is no surprise that the city is developing a reputation as a destination and residence in Asia for entrepreneurs and high net worth individuals from around the globe.