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Trust Law in Asia

Trust Law in Hong Kong

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1. Introduction

As a former British colony, Hong Kong has inherited the valuable legacy of a world-class legal system and the common law trust. Hong Kong trust law adheres closely to English and post-Commonwealth (e.g. Australia, Canada, New Zealand) case law. In subject matters pertaining mainly to trust administration, the case law is supplemented by a Trustee Ordinance that replicates the UK Trustee Act of 2000.

Trust legal principles arising from case law are applied regularly to express trusts created in Hong Kong, but it is the law relating to resulting and constructive trusts that are most commonly invoked by the courts; these latter principles are applicable to commercial and domestic transactions, and not limited to express trusts. It must be pointed out, though, that very few express trusts in Hong Kong adopt Hong Kong as the governing law. The trust industry focuses primarily on offshore trust business, and uses the laws of offshore jurisdictions like the Cayman Islands, the British Virgin Islands, Jersey, Guernsey and the Bahamas.

Recent developments in Hong Kong focus on two trends: first, refining the existing case law and modernizing the trust legislation – both involve fine tuning of already very well developed legal principles; second, putting in place offshore trust features in the Hong Kong legislation in order to attract offshore settlers to use Hong Kong trust law as the governing law of their trust. The latter is a much more controversial proposition for Hong Kong.

In light of this background, the present paper will: (1) briefly outline the main features of the common law trust and theoretical debates about some of them; (2) consider recent reform of the trust legislation and assess its impact; and (3) examine the types of trusts used in Hong Kong.

2. Main features of the common law trust in Hong Kong

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The best way to take stock of the main features of the trust is perhaps to trace through the life of the trust, from its creation, through the duties & powers generated by the trust relationship, and finally to the situation when these duties are breached and the courts need to consider applying the appropriate remedies.

2.1 Creation of the trust

In Hong Kong, as in English common law, a trust can be created orally or in writing, by: (1) a declaration of the settlor that the trustee holds the property for the benefit of a designated person or purpose; and (2) the transfer of the property to the trustee. Where the settlor declares himself to be the trustee (a self-declaration of trust), the act of transfer can be dispensed with, as the property is already in the hands of the trustee. Because the trust declaration need not take place through a contractual agreement between the settlor and the trustee, as in most Asian civil law jurisdictions, self-declaration of trust has never been seen as a conceptual exception to the trust concept. The common law does not put the trust property in a separate patrimony: trust creditors can also claim against the trustee's personal assets, just that the trustee's personal creditors cannot claim against the trust assets. Since there is no separate trust patrimony in common law, it does not matter that the trustee's creditors cannot identify it in their dealings with the trustee. Nonetheless, there is a limit to the self-declared trust, in that it is not possible for a sole trustee to be the sole beneficiary, for when the duty and its correlative right are vested in the same person, the duty is unlikely to be enforced and hence treated as having practically been released.

The nature of the beneficiary's rights, in particular whether they are *in personam* or *in rem*, has been the subject of heated debate since almost a century ago, while the trust has continued to flourish commercially and globally. A recent theory about the nature of beneficial rights put forward by Prof. McFarlane promises to offer some breakthrough in the debate, and may help tackle the conceptual difficulties faced by civil law jurisdictions.¹ The theory argues that the beneficial right is neither a personal right against the trustee nor a real right against the trust asset, but a right against the *trustee's right* (whatever that right may be) over the trust asset. It is not just a personal right, because it is enforceable beyond parties other than the trustee himself. Nor is it a real right, because it does not bind all third parties who assert a right over the assets. Rather, it is a third type of right which binds whoever that asserts a right that is derived from the right held by the trustee, such as a donee who derives his right from the trustee's right.

2.2. Duties owed by a trustee

¹ B McFarlane, *The Structure of Property Law* (Oxford and Portland, Oregon: Hart Publishing, 2008). See also B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 *Journal of Equity* 1. For criticism of the theory, see J Penner, 'Review of McFarlane (2008) *The Structure of Property Law*' (2009) 17 *Restitution Law Review* 250; P Jaffey, 'The "Persistent Right" and the Remedial Part' (2011) 2(1) *Jurisprudence* 181; L Katz, 'The Concept of Ownership and the Relativity of Title', *ibid* at 191; C Webb, 'The Double Lives of Property', *ibid* at 205.

It is trite law in Anglo-Hong Kong law that a trustee owes fiduciary duties (as captured by the no-conflict and no-profit rules), the duty of care, and duties to abide by the terms of the trust. Amongst them, fiduciary duties have captured the greatest academic attention and contention. The latest contention sees the fiduciary no-conflict rule as serving a purely prophylactic – as opposed to deterrent – function; and the purpose of the no-profit rule as attributing profits made by the trustee to the trust assets.² In this view, when a trustee makes profits, he is not seen as breaching a duty as such, but rather as making profits on behalf of the trust and merely omitting to enter them into the trust accounts. This theoretical position provides foundation for giving the beneficiary proprietary rights not just over profits unlawfully derived from the trust assets, but also those obtained unlawfully by the trustee in abusing his position, such as secret commissions. These are properties not previously owned by the beneficiary, but deemed to be obtained on their behalf the moment they are received. In contrast, in civil law jurisdictions, at least under Chinese Trust Law, such commissions are not recoverable as trust property.

2.3 Remedies for breach of trust

Broadly speaking, a defaulting trustee who causes loss to the trust fund needs to reconstitute the trust fund. In civil law trusts, remedial principles in contract law can be used to determine remedial recovery for breach of trust contracts. In common law trust, the legal mechanism for achieving this purpose, called the taking of accounts in the common form, is archaic and artificial; under this accounting process, typical considerations of causation, remoteness and *novus actus interveniens* are inapplicable. While this has served well in traditional family trusts, where there are good policy reasons for adopting a tougher remedial stance against the defaulting trustee, such an approach has given rise to concerns where the trust obligation stems from a contractual relationship. Anglo-Hong Kong case law is beginning to show sympathy in developing new causative rules for such trusts as used in commercial transactions.³

3. Recent reform of the trust legislation

Unlike civil law jurisdictions where the principles of trust law are almost exclusively set forth in a trust statute, the bulk of Hong Kong trust law is contained in judicial decisions. The trust legislation only plays a supplementary role in providing default powers and rules primarily in relation to the administration of trust. The legislation was drawn from the English Trustee Act 1925, and has not been updated until 2013.

The impetus for 2013 reform came from the reform of the Singaporean Trustees Act in 2004 and the perceived need for Hong Kong to keep up with the

² L Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' in (2013) 7 Journal of Equity 87.

³ See the latest UK Supreme Court decision in *AIB Group v Mark Redler* [2014] UKSC 54.

times, if not lead the pack in attracting offshore trust business.⁴ The reform was sparked off by a proposal of the trust professional bodies in 2007, and after rounds of consultation the efforts culminated in the Trust Law (Amendment) Ordinance 2013.⁵

The amendments can be classified into two categories:

- (1) amendments that aim to attract offshore trust business to Hong Kong;
- (2) amendments to bring the Trustee Ordinance in line with modern trust statutes in onshore common law jurisdictions.

3.1 Attracting offshore business

High expectations have been cast on three major – relatively ground-breaking – reforms in Hong Kong law. They were introduced to enhance Hong Kong’s competitiveness vis-à-vis Singapore in attracting offshore trust business.

Abolition of the rules against perpetuities and excessive accumulations of income: while the UK and Singapore have extended the perpetuities rules to a much longer statutory period than the former, complicated rules, Hong Kong has gone the whole hog by abolishing them although in so far as non-charitable trusts are concerned.

Settlors’ reserved powers: as a result of the reform, Hong Kong is now on par with Singapore in stipulating that no trust shall be ‘invalid by reason only of the [settlor] reserving to himself any or all powers of investment or asset management functions under the trust or settlement’.⁶ While it is a legal truism to say that reserved powers do not by themselves invalidate (nor validate) the trust, it is a nice thing to have in assuring client confidence in the trust law, and hence a good marketing tool.

Provisions against forced heirship: again, for ‘marketing’ reasons, Hong Kong has followed Singapore in providing that the validity of lifetime transfers of movable assets offshore into trusts governed by Hong Kong law will be determined, *inter alia*, by Hong Kong law. The intended effect is that forced heirship rules in civil law will not determine the validity of such transfers (or the ‘rocket-launching’ of the trust). During the legislative process, the Hong Kong government explicitly justified this provision as a measure to attract offshore trust business.

⁴ The Hong Kong branch of STEP and the Hong Kong Trustees Association established a Joint Committee on Trust Law Reform (JCTLR) to urge for wide-ranging reforms of the Trustee Ordinance. ‘Trust Laws for the 21st Century’, JCTLR, August 2007, available at www.hktrustees.com/home.htm. This led to a review of the law and the publication of a Consultation Paper by the Financial Services and the Treasury Bureau (FSTB) of the Hong Kong government in June 2009: *Review of the Trustee Ordinance and Related Matters*, Consultation Paper, The Financial Services and the Treasury Bureau, June 2009 (hereafter ‘Consultation Paper’). The Consultation ended on September 21, 2009

⁵ The Ordinance came into effect on 1 December 2013 except that statutory controls on trustee exemption clauses for pre-existing trusts took effect on 1 December 2014.

⁶ Section 41X, Trustee Ordinance.

The industry had urged that Hong Kong go further than Singapore, in enacting statutory provisions on the beneficiaries' rights to information, private purpose trusts, protectors, and flexibility in changing the governing law. These were not taken up by the government, at least not yet.

3.2 Modernising the Trustee Ordinance

Most of the uncontroversial updates in the Hong Kong trust reform have long taken place in onshore, domestic trust jurisdictions. These include:

1. employment of agents, nominees and custodians;
2. power to insure;
3. statutory charging clause for professional trustees;
4. scope of authorised investments;
5. removal of trustees; and
6. individual delegation of powers.

These amendments enhance the trustee's default powers to facilitate the management of trust in the sophisticated business environment of the modern world, and at the same time put in place checks and balances for these new powers.

3.2.1 Enhancing trustees' management powers

Collective delegation of trustee functions: Previously, trustees were allowed to delegate ministerial tasks only when necessary, and in any event never to delegate any fiduciary discretion. The new sections 41A to 41P abandon the distinction between the delegation of ministerial and discretionary powers, and grant trustees default powers to appoint agents, nominees and custodians except for dispositive powers, the power to appropriate assets between income and capital, the power to appoint trustees, and the power to appoint agents, nominees or custodians.⁷ Safeguards are introduced by requiring the trustee to review the arrangement, consider to intervene in appropriate circumstances, and exercise the power of intervention if necessary.⁸ Needless to say, the trustee's review and management of agents, nominees and custodians are subject to the new statutory duty of care.⁹

Individual delegation: the new Ordinance also rectifies a previous inadequacy pertaining to delegation by an individual trustee who needs temporary relief from his duties, whereby as a result of co-trustees delegating to the same agent or co-trustee, the trust may end up with only a sole trustee. This is addressed by including a rider, that delegation must not result in the trust having only one donee under a power of attorney or one trustee administering the trust, unless the donee or trustee is a trust corporation.

⁷ Section 41B, Trustee Ordinance.

⁸ Section 41M, Trustee Ordinance.

⁹ Section 3A, Trustee Ordinance.

Power to insure the trust property: the amending Ordinance rightly, albeit belatedly empowers trustees to insure any trust property against loss by any event, not just fire or typhoon as was previously the case.¹⁰

Statutory charging clause: the reform also replaced the common law rule that trustees are not entitled to remuneration unless so authorised by the trust instrument or by court or consent of the beneficiaries. The new statutory provisions stipulate for reasonable remuneration for services provided by a trustee acting in a business or profession even if the trust instrument is silent.

Scope of authorised investments: one aspect where the Hong Kong trust reform departs from its UK or Singaporean counterparts is in not giving the trustee a general power of investment *by way of default*,¹¹ but rather retains the previous, long-established approach of adopting a list of authorized investments set forth in the Second Schedule of the Trustee Ordinance.¹² Since the consultation process kicked off immediately after the worldwide financial crisis and the Lehman mini-bond incident, it was thought prudent to maintain a list of pre-approved financial products, instead of giving the trustee a broad discretion to choose from the products available in the market.

3.2.2 Checks and balances

The mechanisms for monitoring trustee performance are also reinforced alongside the augmentation of trustees' powers.

Statutory duty of care: Hong Kong belatedly took on board the statutory duty of care laid down by the UK and Singaporean trust legislation. It now provides for a duty to exercise reasonable care, bearing in mind the special knowledge or experience that the trustee has, and is expected of people in his profession.

Removal of trustee: the trust reform has also simplified the law by permitting the removal of the trustee at the request of the consent of all *sui juris* beneficiaries who as a group are absolutely entitled to the trust property. This means that where the rule in *Saunders v Vautier*¹³ applies, the beneficiaries can just remove the trustee, and do not need to terminate the trust and re-settle the trust fund with a new trustee.¹⁴

Control of trustee exemption clauses: by far, the most interesting reform must be the statutory prohibition on paid professional trustee from exempting liability arising from fraud, wilful misconduct and *gross negligence*.¹⁵ This goes beyond

¹⁰ Section 21, Trustee Ordinance.

¹¹ Ss 3-7, Trustee Act 2000 (UK); ss 4-6, Singapore Trustees Act.

¹² The restrictiveness of this pre-approved approach was relaxed somewhat by lowering the market capitalization of shares from HK\$10 billion to HK\$5 billion, and the dividend requirement from 5 to 3 years.

¹³ (1841) Cr & Ph 240.

¹⁴ Section 40A, Trustee Ordinance, reiterating sections 19 and 20, Trusts of Land and Appointment of Trustees Act 1996 (UK).

¹⁵ Section 41W, Trustee Ordinance.

the English rule stated in *Armitage v Nurse*,¹⁶ in that paid professional trustees are not allowed to exempt liability from gross negligence. Opinions expressed at the consultation felt that this would enhance the confidence placed on professional trustees, who are in any event unlikely to count on taking refuge in a rule that condones gross negligence. Difficulties in defining gross negligence are also thought not insuperable, as case law can be established as and when the opportunity arises.

3.3 Reform of the Trustee Ordinance and Its Impact

Around the time of the reform and shortly after it, interest in using Hong Kong law as the governing law had stepped up somewhat. Some international trust companies set up trust companies in Hong Kong with a view to demonstrating their commitment in establishing a permanent base of operation from Hong Kong, and also in offering Hong Kong trust law services. Anecdotal evidence from trust practitioners also confirms an increase in enquiries – particularly from Europe – about establishing family trusts governed by Hong Kong law. The competence and independence of the Hong Kong judiciary, the restraint exercised by China in respecting the legal and judicial systems in Hong Kong, the accessibility of Hong Kong to China and the rest of the Asia, the availability of investment opportunities provided by one of the three largest stock markets in the world and also to the Chinese stock market (recently made available through the Shanghai-Hong Kong Stock Connect), and the diverse demography and cosmopolitan nature of the society may have made Hong Kong an attractive proper law centre.

This new interest remains volatile, however, and depends heavily on settlors' perception about the continued stability of Hong Kong's legal and political system. As Hong Kong was enwrapped in the Occupy Movement in October 2014, where thousands of students occupied the main highways in Hong Kong for over two months to protest against China's refusal to introduce genuine democracy in the election of the Chief Executive in Hong Kong, worries about drastic intervention by China and political uncertainty loomed large again. Most trust advisors called off their plans and adopted a 'wait-and-see' approach. These broader issues of legal and political systems will need to be addressed to inspire further confidence in Hong Kong as a proper law centre.

4. Types of trusts in Hong Kong

The trust industry in Hong Kong provides a broad spectrum of services. These include, in the order of the share of the industry: pension funds (35%); corporate trust services such as unit trusts, REITs and commercial trusts (25%); private family trusts (22%) and charitable trusts (13%). The overwhelming bulk of work in private family trusts lies in the provision of advice and service on the establishment of offshore family trusts, which may sometimes also include

¹⁶ [1998] Ch 241.

charitable trusts. Onshore family trusts, whether established during the lifetime of the settlor or on his death as testamentary trusts, take up a very small portion of private family trust business. In fact, the primary users of Hong Kong trust law are small-scale charitable or family trusts. They typically involve lay gratuitous trustees who are relatives or close friends of the settlor. To illustrate the contrast between the onshore and offshore family trusts, a brief description of their typical structures is now in order.

4.1 Examples of trusts and their development

4.1.1 Inter vivos family trusts – a typical structure

One may begin by using the trust established by Anita Mui, a canto-pop singer who passed away in 2003, as an illustration. The terms of the trust are open to the public eye only because sadly, the primary beneficiary (Mui's mother) has been litigating with the trustee over the past decade.¹⁷ The trust, named the Karen trust to conceal the identity of the true settlor, was established just one month before Ms Mui passed away from cancer. It was an inter vivos trust established with an initial settled sum of HKD1,000 (about ¥15,000). As is typically the case, in order to conceal the size of the trust fund, further assets were then added into the trust subsequently.

The terms of the trust deed (ie. the trust document) give the trustee, HSBC International Trust Ltd, 'absolute and uncontrolled discretion' to appoint anyone (except an excluded group of persons) as beneficiary, and to distribute any or all parts of the trust fund to any or all of the beneficiaries. This is a classic discretionary trust because of the wide discretion granted to the trustee to distribute trust assets. The trust deed was then accompanied by a memorandum of wishes signed by the trustee, and recorded non-binding suggestions of the client. In Ms Mui's case, her wishes were, among other things: (1) to set aside an amount to pay for the education expenses of her four nephews and nieces; (2) to pay a monthly stipend to Ms Mui's mother until she passes away; and (3) thereafter to pay the residue to a charitable institution.

The combination of the discretionary trust and memorandum of wishes represents a carefully crafted arrangement. First, because the terms of the discretionary trust are broad and general, they allow trust companies to use a standard form trust deed that can quickly be pulled off the shelf for the use of any client. The true wishes are set forth in a non-binding and private memorandum signed by the trustee alone. This arrangement helps save legal and other expenses in tailoring the documents for every client. Subsequent amendments to the memorandum can also be done informally and efficiently by replacing it as and when the client wishes.

Secondly, the trust is extremely effective in ring-fencing the assets from the personal creditors of the parties to the trust. Specifically, since the real

¹⁷ *Tam Mei Kam v HSBC International Trust Ltd* (2011) 14 HKCFAR 512.

settlor has already transferred trust assets to the trustee during his lifetime, he no longer *owns* such assets. Unless he establishes the trust with the intention to defraud his creditors, the assets are therefore immune from the claims of his creditors (and divorced spouses). Likewise, since neither the identity nor the share of the beneficiary is fixed in advance, no beneficiary can be said to have any ownership interest in the trust fund. They are therefore not liable for tax payable on such ownership; nor can their divorced spouses or creditors assert any claims over such assets.

Thirdly, by detaching the settlor and intended beneficiaries from ownership rights over the assets, tax liability can be significantly mitigated. Since the assets no longer belong to the real settlor at the time of his death, they do not pass to his heirs *on his death* and hence do not attract inheritance tax. If the trustee who now owns the trust assets is an offshore trust company registered in a tax haven, liability for profits or other taxes may also be mitigated significantly.

Fourthly, since a trust is to last for decades, the discretionary trust allows for flexible adjustments in response to changing tax and regulatory environments as well as family situations. For example, the family of Sun Hung Kei Properties Ltd, a multi-billion dollar property conglomerate in Hong Kong, owns their majority shareholding in this listed company through an offshore trust. When the eldest son and former chairman of the board of directors turned hostile to the family, the trustee exercised its power in the trust deed to exclude him from the class of beneficiaries.¹⁸ Wealth is thus preserved within the family.

Fifthly, the arrangement preserves confidentiality both within the family and from the public. It is not possible to extract any meaningful information about the trust from the trust deed, the main legal document that beneficiaries normally have the right to see. This is because the person named as the settlor is often but a clerk in the trust company – he is a ‘dummy settlor’ used to conceal the true identity of the settlor. The initial settled amount is a nominal figure and does not reveal the size of the trust fund. The terms of all such trusts, whether onshore or offshore, are almost identical, in giving the trustee absolute discretion to distribute the trust fund and appointing the beneficiary as and when necessary. Since the common law trust is enforced solely by the beneficiaries of the trust; the later their appointment is made, the harder it is for disgruntled children of the genuine settlor to enforce any claims over the trust fund, let alone obtain information about the actual terms of the trust.

Last but not least, because the memorandum is not legally binding, such trusts only impose legally enforceable obligations on trustees to exercise their discretion properly; they cannot compel them to specifically carry out the wishes stated in the memorandum. Nonetheless, the fear of loss of business is a sufficient deterrent to trust companies. If anything, they are at greater risks in

¹⁸ South China Morning Post, ‘SHKP share sale seen as move towards succession’ (6 December 2013).

being overly compliant with the settlors' wishes and having the trust declared sham for failing to exercise their discretion independently.¹⁹

4.1.2 Testamentary trusts

Before the rise of the offshore trust outlined above, the testamentary trust was a common mechanism for preserving wealth across generations within the family. They still are used in Hong Kong, albeit primarily for domestic, small-scale succession in simple family situations. If the testator dies intestate, that is without a will, the Intestates' Estates Ordinance of Hong Kong²⁰ imposes a statutory trust on the administrators of the trust estate to distribute the estate to those entitled under the rules of statutory succession. If the testator has executed a will during his lifetime, which will can be revoked and replaced by any number of codicils up to his death, his estate will be distributed in accordance with the terms of the will. The will typically provides for the establishment of a trust, which arises after the death of the testator, when the administrator or executor assumes ownership over the estate following the grant of probate.

As compared to the *inter vivos* trust, the testamentary trust offers less flexibility and continuity in the management of the decedent's property. For example, there is an inevitable lapse of time between the death of a testator and the grant of probate by the court. During this period, the estate is frozen and cannot be sold or traded. Probate is also most undesirable for testators who put a high premium on privacy, as it is a public court process whereby the will can be inspected by any member of the public. Furthermore, because the testamentary trust does not arise until after the death of the testator, even if he has executed a will, he cannot ring-fence his assets by the will alone. It remains open for his property to be depleted by his divorcing spouse or creditors. This happened to the late Mr. Chan Din-hwa, a Hong Kong property tycoon who had executed a will. At 87 years old when he was suffering from Alzheimer's Disease, his 86-year-old wife filed for divorce, apparently as a strategy to remove a significant part of his wealth from the beneficiaries of his will. The wife sided with one of her daughters against the other.²¹

Notwithstanding these constraints, the will remains an effective tool where the above concerns are not relevant. This is typically so in relation to smaller estates that may not justify paying the fees for professional trust service. In this context, one might note that the legal fee charged by lawyers in Hong Kong for a simple will is relatively reasonable at around HK\$1,000-3,000 (¥15,000 – 45,000).

4.1.3 Charitable trusts

Although not private trusts strictly speaking, charitable trusts form an important component in the planning of private family trusts, whether they are *inter vivos*

¹⁹ *Abdel Rahman v Chase Bank (CI) Trust Company Limited and others* [1991] JLR 103.

²⁰ Cap 73, Laws of Hong Kong.

²¹ *Mrs A v A* [2010] HKCFI 1072.

or testamentary. For wealthy families, this is mainly because of the attractiveness of philanthropy in educating younger generations in the family and holding family members together in pursuit of a common goal.

Charitable tax incentives in Hong Kong are relatively simple and limited. Only *cash* (as opposed to share or property) donations exceeding HKD100 (about ¥1,500) can be used to deduct the taxable amount for the purposes of income and profits tax. Registered charities are also exempt from profits, stamp and property taxes in so far as the relevant activities fall within the purposes of the charities. Charities in Hong Kong can also take the form of companies limited by guarantee or trusts. While the company form is most common for charities with operational activities, the trust form is typically used for grant-making bodies or foundations.

Philanthropy amongst wealthy families in Hong Kong usually takes place through privately-funded family foundations, a considerable number of which are grant-making trusts with funds injected from the family business. Properly structured, they can play a significant part in domestic and global tax and wealth planning for these families.

4.2 The development of the private (*inter vivos* and testamentary) trusts in Hong Kong

As an immigrant society that only began accumulating its first-generation wealth in the 1980s, Hong Kong witnessed the emergence of the private family trust only in the past three decades or so. In the 1980s and early 1990s, most trust work focused on the establishment of offshore family trusts for local tycoons. The main motivation was to mitigate estate duties, albeit the prospect of 1997 also provided incentives for clients to relocate family companies and assets offshore. The market was niche and highly specialised. Most of the advice and services on wealth planning was provided by family accountants and solicitors in a discreet manner.

From the beginning of the current century, however, the scene has begun to stir. Hong Kong has gradually become one of two main service centres for Asian (in particular mainland Chinese) clients to establish offshore family trusts. For these clients from jurisdictions of high tax rates, foreign exchange control and unstable political situations, the use of the offshore trust and corporate entities is particularly effective. Hong Kong has become a significant client management and service centre in this respect. For example, a common use of the offshore trust in Hong Kong is in pre-IPO tax planning for mainland clients, especially those who are exposed to US tax liability. Typically, the settlor transfers his pre-IPO company interest of no more than the exempted amount of US\$5 million for US gift and estate taxes into an offshore trust. As the trust already holds his pre-IPO interest as exempted assets, any attractive returns to such interest that the IPO brings about will be shielded from the settlor's gift and estate tax liabilities. The trust may be structured as a grantor trust subject to the settlor's right to annuity in order to mitigate gift tax liability. The assets may

also comprise an irrevocable life insurance policy issued directly in favour of the trust and at a value below the exemption threshold, so that much more valuable policy proceeds can pass to the beneficiaries without attracting estate and gift taxes.

Such trust structures may also mitigate PRC tax liability, by having the trust hold the ultimate PRC-based business or assets through multiple holding companies in low-tax jurisdictions such as the BVI or also in Hong Kong. Profits made from the Chinese operating business are to be dispatched to the offshore entities to mitigate Chinese enterprise income tax of the company, withholding tax for dividends, and individual income tax of the Chinese resident owner.

As to testamentary trusts, the market is onshore and of a much more limited scale. There are several reasons for this phenomenon. Tycoons who could afford wealth planners found the offshore trust much more tax efficient. Besides, in general Chinese people are unwilling to execute wills due to the taboo in about matters related to death. In any event, the default statutory rules on succession generally reflect the wishes of most testators.

5. Conclusion

There is a bifurcation in the trust scene in Hong Kong. Domestic trust law, which is primarily based on judge-made law, closely resembles English trust law. Its main contours are already very well settled, and current debates focus on new frontiers and refinement of trust remedies. Because trust is used widely in the commercial context, these trust principles infiltrate into commercial transactions. They are also applicable to domestic trusts, which are found largely in wills and charitable trusts. In contrast, the primary clientele of the trust industry and the private family trusts they set up are almost exclusively offshore. While Hong Kong has reformed its trust legislation to incorporate features aimed at attracting offshore settlors to set up trusts under Hong Kong law, any significant buy-ins will depend on the industry's perception of the continued stability of the legal and judicial system in Hong Kong.