

Trustees and the Sisyphean Task

OPENING ADDRESS



Edmund Leow, S.C. ChT

President, Singapore Trustees Association

Senior Partner, Dentons Rodyk



Trustees and the Sisyphean Task

IVANISHVILI, BIDZINA AND OTHERS V CREDIT SUISSE TRUST LTD.



Sim Bock Eng

Head – Specialist & Private Client Disputes Practice

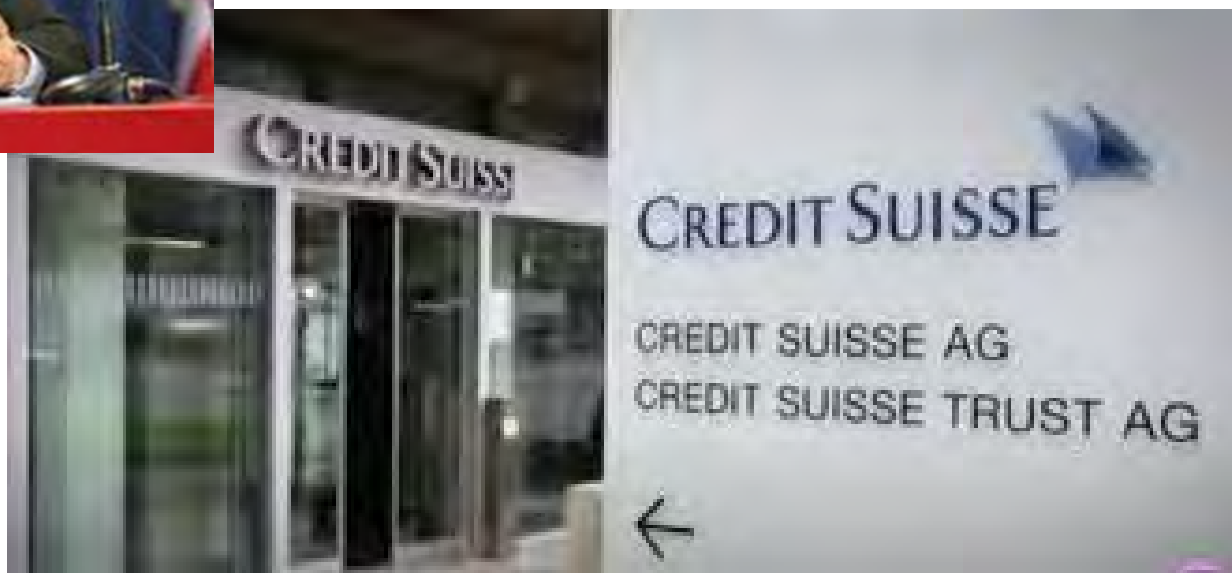
WongPartnership

Bidzina, Ivanishvili v Credit Suisse Trust Ltd [2023] SGHC(I) 9

Sim Bock Eng

October 2023

ASEAN | CHINA | MIDDLE EAST



The Mandalay Trust

Settlor:

Bidzina Ivanishvili

Beneficiaries:

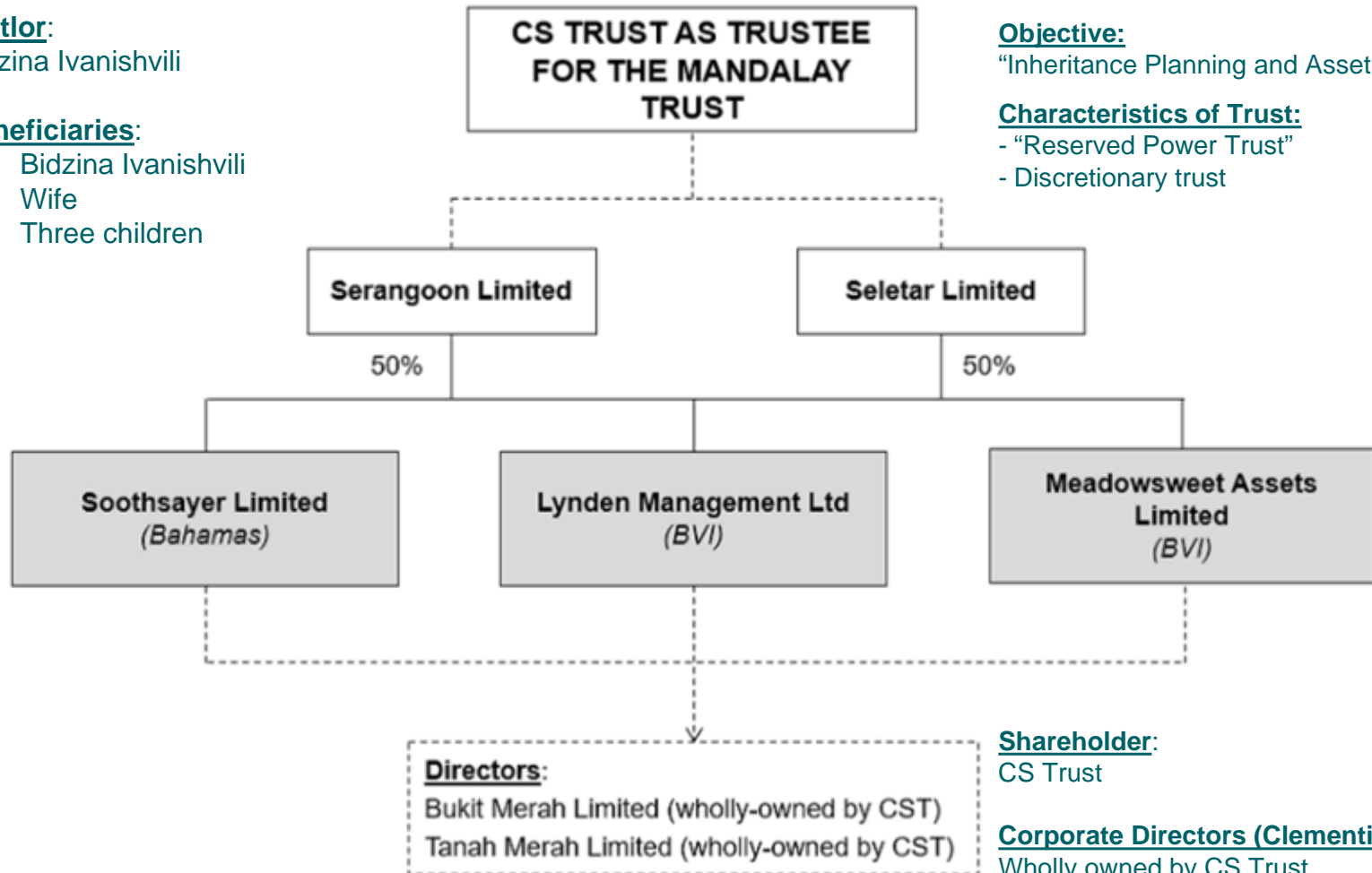
1. Bidzina Ivanishvili
2. Wife
3. Three children

Objective:

“Inheritance Planning and Asset Holding”

Characteristics of Trust:

- “Reserved Power Trust”
- Discretionary trust



Shareholder:

CS Trust

Corporate Directors (Clementi Limited)

Wholly owned by CS Trust

Adapted from [67] of Judgment

Chronology

Date	Description
2005	<u>Set up of Mandalay Trust</u> <ul style="list-style-type: none">• Trust Deed• Letter of Appointment• Memorandum of Wishes
March/ April 2005	<ul style="list-style-type: none">• Meadowsweet and Soothsayer – entered into discretionary portfolio management agreements with Bank
2006	<ul style="list-style-type: none">• Trust acquired Lynden Management Ltd (for artworks)
June 2006	<ul style="list-style-type: none">• RM - Mr Patrice Lescaudron (until Sept 2015)
November 2006 & after	<ul style="list-style-type: none">• Made Unauthorised Payments Away (“UPAs”)• Overvalue misappropriations
2013	<ul style="list-style-type: none">• Amendment and Restatement of Trust Deed
2015	<ul style="list-style-type: none">• Mr Lescaudron’s fraud was exposed; found guilty by Swiss court

Issues

- Power to Vary
- A Power Reserved Trust
- Effectiveness of Anti-Bartlett Clauses
- Liability of the trustee
- Defendant's claim of contributory negligence

Power to Vary

- Validity of Deed of Amendment and Restatement

- Reason for Variation
 - To specify that the trustee had no investment or asset management functions in respect of the artwork
 - Also provided, the trustee had no investment or asset management functions
- Clause 19 of trust deed
 - trustee had “absolute and uncontrolled discretion” to vary “all or any of the trust powers and provisions” of the Trust Deed “if the trustee consider the same to be in the interests of the Beneficiaries or one or more of them”
- Judge
 - Defendant could not exercise the power of vary the Trust Deed if it conferred a benefit on itself
 - Void and/or unenforceable

Query – Where trust deed provides for absolute discretion in trustee to vary?

A “Reserved Power Trust”?

- Concept of a shared arrangement re investment
 - The label is not the driver for the structure.
 - Section 90(5) of the Trustees Act 1967

90(5) No trust or settlement of any property on trust is invalid by reason only of the person creating the trust or making the settlement reserving to the person all or any powers of investment or asset management functions under the trust or settlement.
(emphasis added)

It is necessary to determine in each case:

- The extent of the reservation
- The consequences of that reservation

Effectiveness of provisions in Trust Deed

- Clause 10(b) – “... the Trustee shall not in any circumstances be liable for any loss, damage, depreciation to those assets which may result from any action or inaction of the Trustees by virtue of the inability of the Trustees to have full control of the investment of those assets...”
- Fourth Schedule, paragraphs 4 and 5 – Anti-Bartlett Clauses (a la Zhang Hong Li v. DBS Bank [2019] HKCFA 45)

The Anti-Bartlett Provisions

- No duty to exercise any control, interfere in or become involved in the administration management and conduct of underlying company
- Trustee shall leave the administration management and conduct of the business and affairs of the underlying company to its directors unless Trustee have knowledge of dishonesty
- Trustee shall assume that the business of the underlying company was being carried out competently honestly diligently and in the best interests of shareholders; no duty on Trustee to ascertain whether assumption was correct
- Trustee not liable for any loss to Trust Fund or underlying company
- No duty to obtain information regarding underlying company and if received shall assume such information to be accurate and truthful

Effectiveness of Anti-Bartlett Clauses

- “... it will afford no protection if the trustee does not stand aloof from the company. A corporate trustee which supplies employees and directors of a company held by the trust will have chosen to conduct its affairs and may be liable accordingly...” (emphasis added)
- Is there a residual of high-level duty to act in circumstances when no reasonable trustee would refrain from doing so?

Duty in question:

- CS Trust admitted that by 31 December 2008, it had acted in breach of its duty as a trustee to safeguard the Trust Assets
- Cf, duty to manage assets

Difference from Zhang Hong Li's case

Zhang Hong Li	BI
Letter of wishes <ul style="list-style-type: none"> - Should always consult IM - Recommendation is final 	Letter of wishes <ul style="list-style-type: none"> - May consider the recommendation
Investment Advisor – Ji Zheng Rong (settlor)	Appointment of BI as investment advisor (not notified to BI) Discretionary portfolio management arranged by Trustee Dealings by RM
Control <ul style="list-style-type: none"> - Corporate director - Signatory of bank accounts – IA 	Control <ul style="list-style-type: none"> - Corporate director - Signatory of bank accounts – trustee's control
Assets did not leave trust	Fraud and theft
No high level supervisory duty over the wisdom of investment	Query – high level supervisory duty over safety of trust assets?

Date of breach of duty

Date	Amount	Details	Bank/ Trustee's response
Nov 2006	USD35.412 m	To third party entities 6 debits	USD60 mil from other client's account Emails from Ms Sim and Mr Low, Mr Ditrich RM's boss – "will not happen again; RM did "tremendous job under huge pressure"
May 2007	USD46.6 m	3 payments in one day To "Third Party"	
Jun 2007		Invested in shares in Carpathian and Copernic Global Fund	
Jul 2007	USD100 m	Transferred to new account – "churning"; "day trader"	
Oct 2007	Overvalue Misappropriations	Used of forged letters of instructions	Did not ask for original letters of instructions Did not verify that recipient was business partner
Mar 2008	EUR10.272 m USD7.731 m	Over 2 days close to each other – 9 transactions	
October 2008		Cancelled discretionary mandate	
Nov 2008	EUR5.729 m USD4.396 m	12 transactions in one day	
2010		Purchase of shares in Raptor Pharmaceutical	

Liability for Consequences of Breach

- Clause 10(b)
- AB clause
 - Trustee need to be “aloof”
 - Protect Trustee from liability for any losses suffered in respect of investments of which BI was managing
- Loss
 - Admitted – should have told BI by 31 December 2008 (Court: 30 March 2008)
 - Difference between value of portfolio:
 - that was not affected by fraud and managed by a professional and competent trustee; and
 - Managed by trustee

Contributory negligence

- BI's failure to monitor and manage the investment of the Trust Assets
 - Chose to rely on excel spreadsheets prepared by RM
 - Delegation of management and monitoring to RM
 - Payment of bonus to RM
- Trustee's core and equitable duty – to safeguard the Trust Assets.
 - Failure to do so is breach of trust
 - Breach of equitable duty to beneficiaries
 - Not breach of duty of care in tort
- Defence of contributory negligence is not available

Thank you



SIM Bock Eng

Head – Specialist & Private Client
Disputes

d +65 6416 8108

f +65 6532 5722

e bockeng.sim@wongpartnership.com



Trustees and the Sisyphean Task

GRAND VIEW PRIVATE TRUST COMPANY V. WONG ET. AL.



Professor Tang Hang Wu

Lee Kong Chian Professor

Yong Pung How School of Law, SMU

Grand View Private Trust Company v Wong

Tang Hang Wu

Lee Kong Chian Professor

Yong Pung How School of Law

Singapore Management University

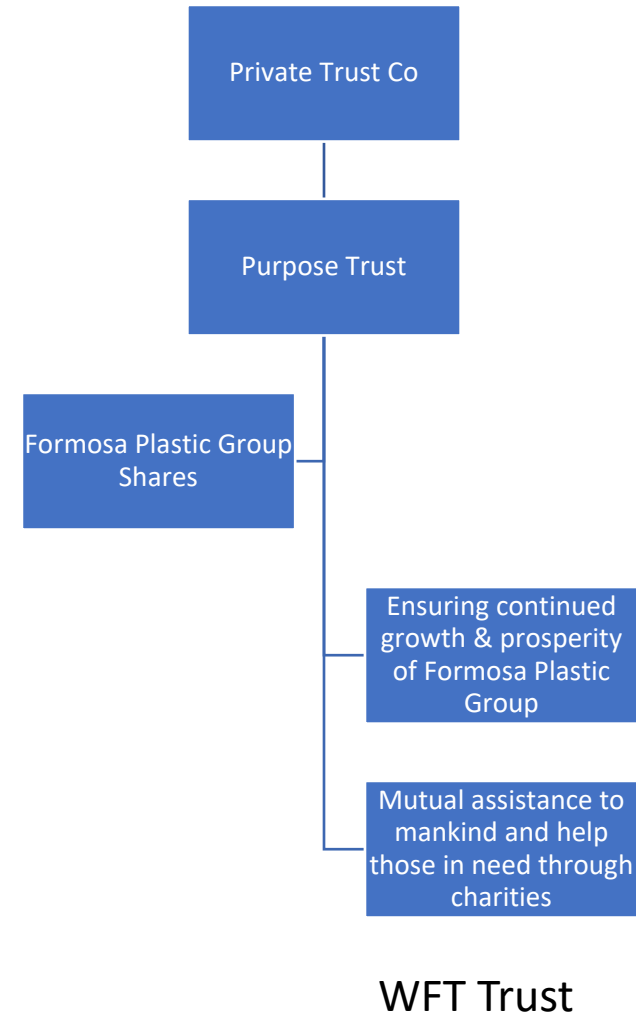
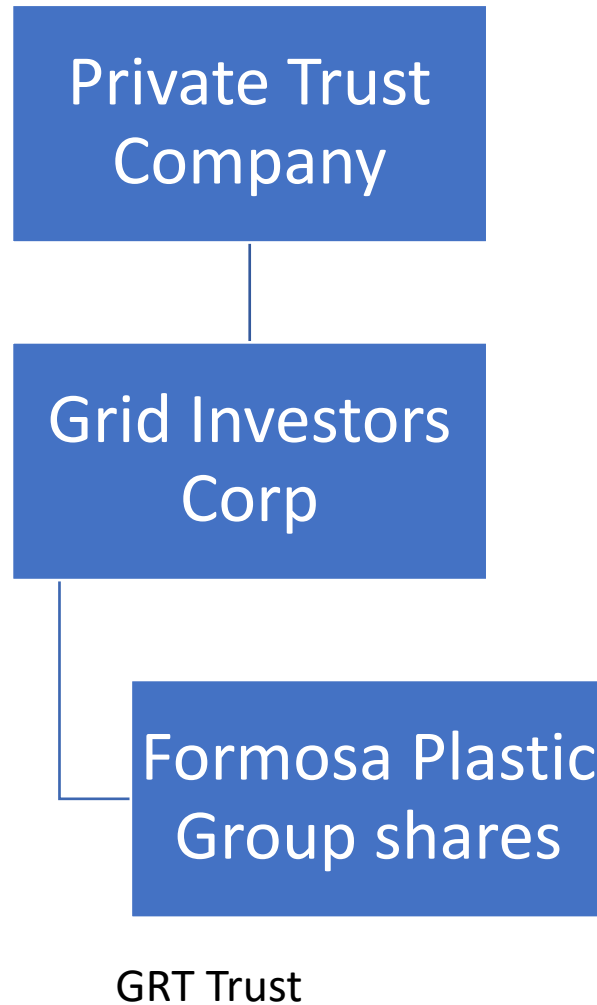


Yung-Tsai Wang – died 2014



Yung-Ching Wang – died 2008

Two Trusts Settled on the Same Day – GRT & WFT



The Main Players



Susan Wang – daughter of third wife of YC Wang



Winston Wong- Eldest son of YC Wang from first wife who fell out

Relevant Clauses & Challenged Decision in the GRT trust

- Relevant Clauses:
 - Recital describes this as a private express trust.
 - Discretionary beneficiaries defined in the **trust deed** as children & remoter issue of YC and YT Wang.
 - Trustees given the power to add or exclude beneficiaries.
 - In default of exercise, trust fund divided to children of YC and YT Wang and remoter issue.
- Challenged decision:
 - Exclude all named discretionary beneficiaries.
 - Appoint WFT and transfer all assets.
 - Susan Wang gave all the evidence [no written documentation] – this was the settlor's wishes.
 - Susan Wang and her family members were in control of both the private trust companies.

Lord Richards – *Grand View Private Trust* (the law)

- the proper purpose is “to be determined as at the date of the instrument conferring the power and is to be objectively determined”
- “it is a question of determining objectively the intention of the settlor”;
- documents which objectively inform the context of the instrument such as the WFT trust deed are admissible and substantially contemporaneous documents which are intended to be read with the trust deed such as the letter of wishes
- the parties proceeded on the common ground that while trustees could legitimately have regard to wishes later expressed by the settlor as to how the trustees should exercise their dispositive powers, such wishes were not admissible in determining the purpose of those powers
- “the intention of settlor in conferring a power is to be ascertained by applying ordinary rules of construction to the trust deed and in light of the admissible factual matrix

Lord Richards – *Grand View Private Trust* (the application) – cannot appoint WFT

- objects of the discretionary dispositive powers are the settlors' children and remoter issue.
- the ultimate beneficiaries were the settlors' descendants.
- the recital refers to the GRT as a “a private express trust”,
- the trustee's remuneration clause envisages remuneration to be agreed with the trustee and adult beneficiaries.
- clause 19, which excludes community property rules, serves to emphasise the nature of GRT being for the benefit of individuals.

Alternative Narrative : Internecine Power Struggle or Filial Daughter Carrying out Father's Wishes

- Internecine Power Struggle
 - YC and YT Wang were in their eighties and did not understand English.
 - All evidence given by Susan Wang
 - No written evidence of wishes.
 - FPG under fire from Taiwanese lawmakers for using trust structures to avoid paying taxes and paying out little in charity.
 - WFT was for *inter alia* the perpetuation of FPG.
 - Whoever controlled WFT will wield significant influence in FPG.
- Susan Wang was dutiful daughter chosen to carry out the father's last wishes.

Ramifications of this Case

- Many discretionary trusts with similar features are subject proper purpose doctrine.
 - Subsequent letters of wishes are not admissible to construe proper purpose.
 - Power to add and exclude beneficiaries may be circumscribed.
- Should trustees draft around Grand View Private Trust?
 - This decision to draft around the case should be brought to the settlor's attention before declaring a trust.
- Litigants should be aware that taking on board settlor's wishes may be challenged on the ground of undue influence.
 - See *In the Matter of the Poulton Family Trust* from Cayman Islands in 2022



Trustees and the Sisyphean Task

LA DOLCE VITA FINE DINING COMPANY LTD V ZHANG LAN



Kelvin Koh

Partner, TSMP Law Corporation

La Dolce Vita Fine Dining Co Ltd v Zhang Lan

Kelvin Koh

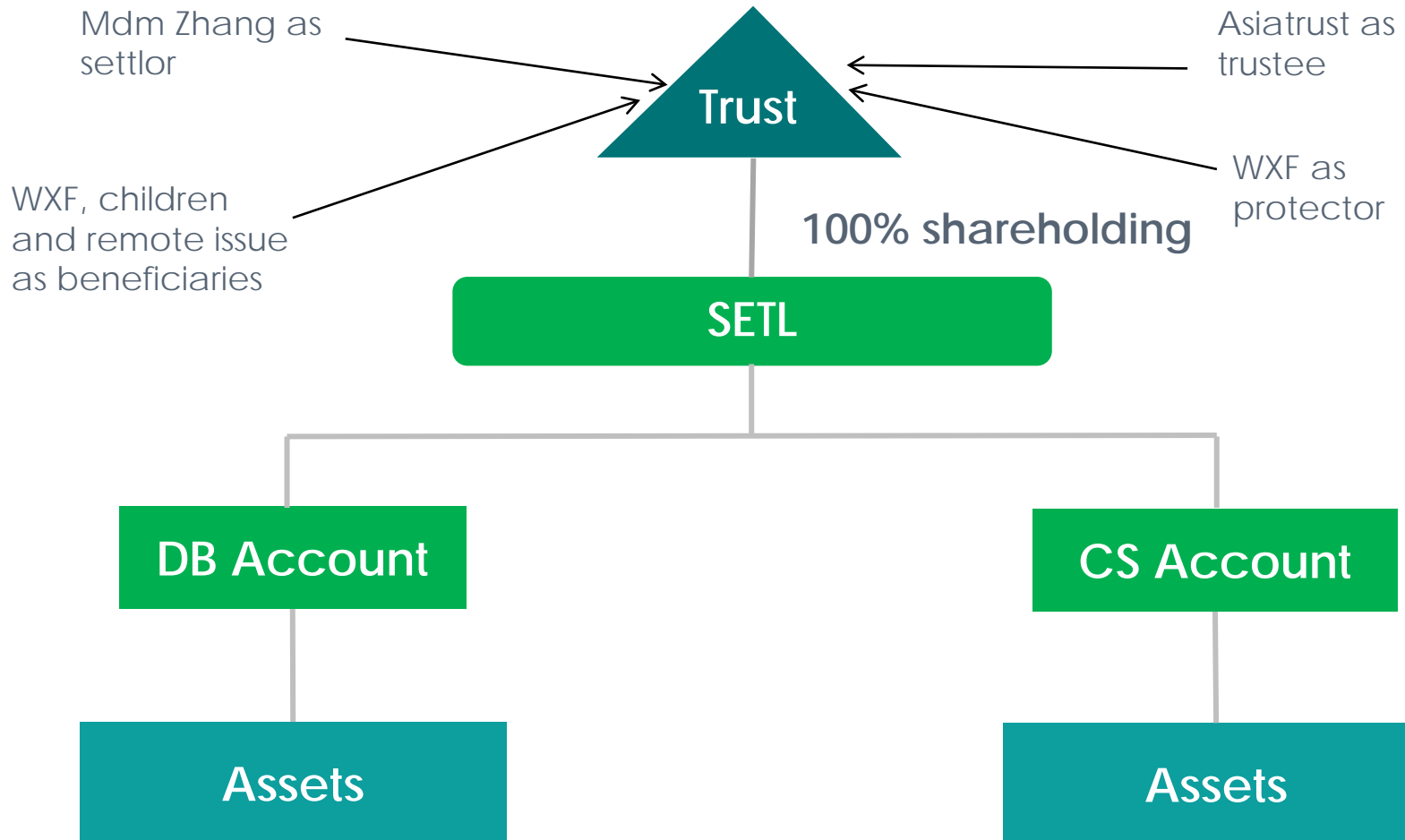
TSMP Law Corporation



Background Facts

- 2013 – LDV acquired shares from Mdm Zhang in companies which ultimately held the South Beauty chain of restaurants in mainland China.
- Jan 2014 – Mdm Zhang incorporated Success Elegant Trading Limited (SETL) in BVI as the sole shareholder and director.
- March 2014 – SETL opened accounts with Credit Suisse (CS) and Deutsche Bank (DB) in Singapore.
- Mar to Nov 2014 – US\$142 million was transferred from an account from Bank Safr Sarasin Hong Kong to SETL's CS account. US\$85 million was then transferred from the CS account to the DB account.
- June 2014 – Mdm Zhang set up a Cook Islands family trust named the Success Elegant Trust for the benefit of her son (WXF) his children and remoter issue. Mdm Zhang transferred the sole share in SETL to AsiaTrust Limited as trustee of the Trust. She retained sole signatory rights over the accounts until late March 2015.

Success Elegant Trust Structure



Funds Transfers

Date	Sum	Recipient	Mdm Zhang's Explanations
12 Jun 2014	USD 12,057,000	WXF	For benefit of WXF
7 Aug 2014	USD 12,057,000	WXF	For benefit of WXF
22 Sep 2014	USD 3,000,000	Mdm Zhang	Unable to locate documents and information
29 Sep 2014	USD 5,000,000	WXF	For benefit of WXF
19 Jan 2015	USD 100,000	Mdm Zhang	Purchase Tiffany jewellery for WXF
10 Feb 2015	JPY 3,000,000	Mdm Zhang	Unable to locate documents and information
11 Feb 2015	USD 114,478.93	Mdm Zhang	Onward payment to Stephen Sills Associates LLC for benefit of WXF to acquire property

Funds Transfers

Date	Sum	Recipient
3 Mar 2015	USD 6,037,505	Manufacturers Life Insurance Company
3 Mar 2015	USD 9,902,257	
4 Mar 2015	USD 14,878,868.40	Transamerica Life (Bermuda) Ltd
4 Mar 2015	USD 13,957.50	Asiaciti Trust Hong Kong Ltd
4 Mar 2015	USD 3,000,000	Metro Joy International Ltd
4 Mar 2015	USD 2,000,020	Joy Grain Group Ltd

Decision of Appellate Division

The Court held found that Mdm Zhang had retained beneficial ownership in the assets in the bank accounts.

The Court assessed the intention of Mdm Zhang based on the following two aspects:

1. Construction of the trust documents
2. Assessment of the events subsequent to the execution of the trust documents

The Trust Documents

I. Trust Deed

- a. The “Trust Fund” comprised a nominal sum of US\$10.
- b. Mdm Zhang as settlor did not retain any residual powers under the Trust Deed except to terminate the protector of the trust.

2. Deed of Addition of Trust Assets

- a. The Deed of Addition relates to the transfer of the sole share in SETL.
- b. The trust documents do not expressly relate to a transfer of the Assets.

Events Subsequent to the Execution of the Trust

- I. Jun 2014 – Feb 2015: 4 transfers were made to Mdm Zhang from CS account
 - a. Mdm Zhang was unable to account for two transfers other than she was unable to locate the documents or recall the purposes.
 - b. No documentation on changes to the assets of the trust maintained by the professional trustee.
 - c. No evidence to show that the trustee had directed Mdm Zhang to make the transfers.

Events Subsequent to the Execution of the Trust

2. Mar 2015 – Transfers made from DB account

- a. The payment instructions were marked “TOP URGENT” for the 4 March 2015 transfers. Urgency showed Mdm Zhang’s concerns that assets will be frozen.
- b. While there was evidence of prior trustee approval and SETL authorisation for some transfers, there was no documentary evidence of approval or ratification 2 transfers.
- c. Mdm Zhang’s ability to deal freely with assets, viewed with her limited if not virtually non-existent role in the Trust, showed her subjective intention to retain beneficial ownership over assets.

Events Subsequent to the Execution of the Trust

3. Lack of action by SETL after assets in bank accounts were frozen in 7 years. Reasons given by SETL in 2015/2016 unconvincing.
 - a. No reason for SETL to leave it to Mdm Zhang to object to the Singapore freezing orders.
 - b. SETL's evidence that there was no urgency inconsistent with request to withdraw funds in 2021 to meet operational expenses.

Events Subsequent to the Execution of the Trust

4. Letter from Reed Smith (HK)

- a. 5 March 2015: LDV commenced arbitration against Mdm Zhang.
- b. 6 March 2015: Reed Smith (HK) sent a letter on behalf of Mdm Zhang to DB stating that the DB account was “maintained” by her.
- c. Inference that Mdm Zhang saw the money in DB account as her own.
- d. SETL’s solicitors only wrote to claim that DB account belonged to SETL more than 3 weeks later.

Events Subsequent to the Execution of the Trust

5. Bank Documentation

- CS Account Opening:
 - Mdm Zhang was named in the CS account opening records as the beneficial owner of the “**assets in the account**”.
 - “Beneficial owner” defined as person who:
 - “**exercises ultimate effective control** over and/or takes decisions about the assets and gives instructions to the account holder, where that account holder is a legal person (such as a partnership, corporation, etc.)”
 - “where the account holder is held by a trust, was **the settlor/economic founder/asset contributor** of the trust”.
 - Not open to SETL to indicate itself as beneficial owner in the account opening form.
 - Court held that document supported inference that Mdm Zhang retained beneficial interest in assets.
 - At best, equivocal to the issue of beneficial ownership.

Events Subsequent to the Execution of the Trust

- DB Account Opening:
 - Mdm Zhang's role in account stated to be "*Authorised Signer*", "*Shareholder*" and "*Beneficial Owner*".
 - Mdm Zhang declared to be the beneficial owner of the "**corporation**".
 - Court held document not inconsistent with view that Mdm Zhang was the beneficial owner of the DB account.
- W-8BEN Form:
 - SETL was declared the "beneficial owner" of the income of the CS account.
 - Court found document to support argument that Mdm Zhang intended to part with beneficial interest in assets.
 - However, evidence outweighed by relevant material events after sole share in SETL was transferred on 4 June 2014.

Practical Implications

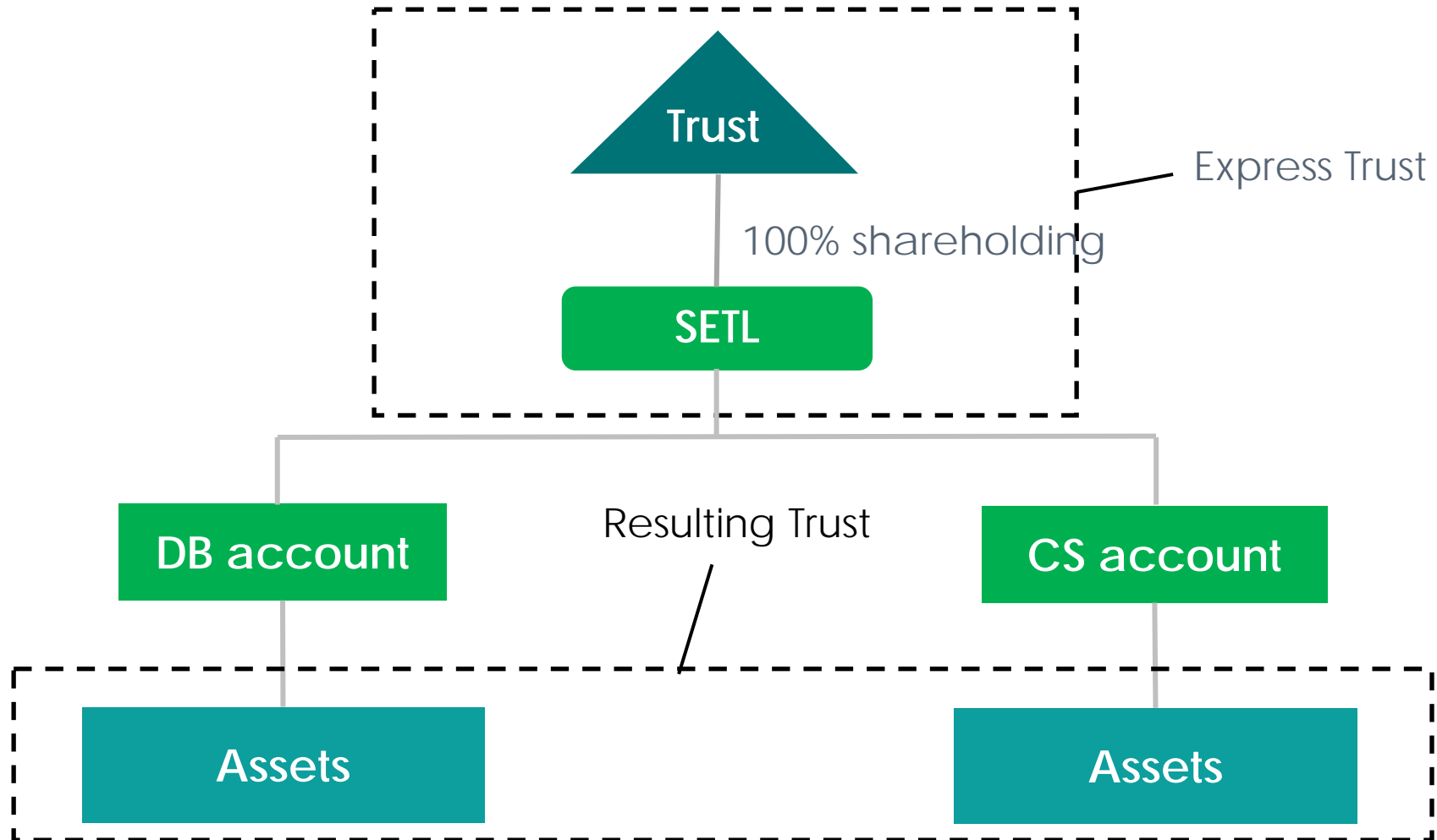
- A basic proposition arising from the case is that the effectiveness of asset protection function of the trust is affected by the extent of control retained by the settlor.
- Validity of the trust was not subject to challenge (i.e. no allegations of sham trust).
- Crux was whether the disputed asset was properly injected into the trust.

Practical Implications

The Appellate Division in *La Dolce Vita*:

“Where there is an express trust over a property, the court generally cannot impose an implied trust unless there are vitiating factors such as fraud, or where the express trust is proven to be a sham. In such cases, the express trust is set aside, and it is open for the court to impose an implied trust over the property: Pankhania v Chandegra [2012] EWCA Civ 1438 (“Pankhania”); Lynton Tucker, Nicholas Le Poidevin & James Brightwell, Lewin on Trusts (Sweet & Maxwell, 20th Ed, 2020) at paras 5-034 and 5-035.”

Success Elegant Trust Structure



Practical Implications

- Ambiguity in what constitutes trust assets?
 - “It may well be that in the ordinary case, a trust constituted over the *shares* of the company also extends to its *assets*.” - Appellate Division in *La Dolce Vita*
 - “It is common for trustees of offshore settlements to hold trust assets through holding companies: the holding company is administered by the trustee, its directors being officers and employees of the trustee”. – High Court in *Credit Suisse*
 - Cf. “A beneficial interest in a company’s shares does not imply a beneficial interest in the company’s assets... shareholders qua shareholders have no proprietary interest in the company’s assets.” – Court of Appeal in *Ernest Ferdinand Perez De La Sala* dispute

Practical Implications

- Importance of maintaining records of **trust assets**
 - Do the shares of the company or the assets held under the company constitute the trust assets?
 - How are transfers of assets documented?
 - Settlement under Trust Deed
 - Capitalisation
 - Loan
 - Gift
 - Importance of maintaining trust accounts and company accounts.

Practical Implications

- Significance of bank documentation
 - There are limits to banking secrecy.
 - Under Evidence Act 1893, Courts can only order disclosure of banker's books, which is defined as transactional records concerning a customer.
 - Account opening forms are not banker's books.
 - However, declaration of beneficial ownership is a transactional fact that forms part of banker's books.

Practical Implications

- Significance of bank documentation
 - Courts may not readily accept the distinction between a declaration of beneficial ownership for AML/KYC compliance purpose and beneficial ownership at law
 - Complications may arise since banks would require settlors as economic contributors to be named as beneficial owners.
 - Consider whether to provide further details as to basis of declaration of beneficial ownership or to maintain a contemporaneous file record as to such basis.

Practical Implications

- Circumstances under which bank documentation was completed may not be fully appreciated in legal proceedings.
 - Court did not appear to have considered relevance that the declarations of beneficial ownership were made prior to setting up of the trust.
- Courts may give less consideration to standard terms and conditions compared to completed forms.
 - DB account opening standard terms and conditions had a clause that confirms that the account holder is the beneficial owner of the assets. Court did not appear to consider this as relevant to its analysis.

Panel Discussion



Trustees and the Sisyphean Task

REPRESENTATION OF G.B. TRUSTEES



Nancy Chien

Partner, Bedell Cristin Jersey Partnership

Representation of GB Trustees

[2021] JRC048

By Nancy Chien, October 2023



Bedell Cristin is a global, full-service offshore law firm, providing corporate, institutional and private clients with straight-talking legal advice.

One independent team advising in BVI, Cayman Islands, Guernsey and Jersey law – with additional offices in London and Singapore.

Sound judgement, pragmatically applied – giving you confidence and clarity in a complex world.

“

They are pragmatic, commercially aware — absolutely outstanding performance, focused, efficient and successful.

CHAMBERS AND PARTNERS



Background

- Complex and lengthy litigation history
- **John William Dick I ("John")** is a retired Canadian property developer
- John has two children from his first marriage, **Tanya** and **John II**
- John is the economic settlor of two Jersey law trusts
- The trustee of both trusts was G.B. Trustees Limited (the “**Trustee**”)
- Both trusts gave the trustee the power to add and remove beneficiaries



THE RUSSIAN TRUST

Settled by deed dated 20 April 1974

John, Tanya and their respective issue were added as Primary Beneficiaries on 25 April 1989

Other persons were appointed as Secondary Beneficiaries

Principal asset of the Trust Fund was a vacant flat in St Petersburg owned via Lilianfeld Holdings Limited



THE MANOR HOUSE TRUST

Settled by deed dated 15 May 1980

John, Tanya and their respective issue were added as Primary Beneficiaries on 25 April 1989

Other persons were appointed as Secondary Beneficiaries

Principal asset of the Trust Fund was St. John's Manor, Jersey



St John's Manor

Trustee decisions and blessing applications

5

- The Trustee applied to the Royal Court of Jersey to bless the two decisions made by the Trustee.
- Common way for trustees to gain approval from the court for momentous decisions before taking certain actions.

1

Excluding Tanya as a beneficiary of both trusts

Due to her "hostile conduct" which the Trustee feared would continue until the Trust Fund is exhausted, including:

- issuing proceedings (including in contravention of an injunction by the Royal Court of Jersey) in Cyprus, the US and Russia relating to trust property
- contempt of orders of the Royal Court of Jersey
- refusal to pay costs orders and her own legal fees
- her husband's "frivolous and vexatious" debt claims relating to the Manor House Trust
- arranging for disparaging material to be published about John, the Trustee and the Jersey legal system, etc

2

Not litigating to recover losses from alleged fraud and breaches of trust

Contrary to Tanya's wishes, the Trustee decided not to issue proceedings against John and former trustees for alleged breaches of trust, fraud and other claims because:

- John did not want to use the Trust Fund for litigation
- Tanya was unwilling to fund the litigation herself
- the high cost of litigation would put the remaining trust assets at risk
- a settlement agreement had already been signed in 2016 between the parties which likely prevented them from pursuing such claims

Significant media coverage of high-profile case

6

Institutional Investor

Portfolio Corner Office Culture Premium Opinion Research Video Innovation

Subscribe Sign In Register

THE HEIRESS, THE QUEEN, AND THE TRILLION-DOLLAR TAX SHELTER



Illustration by Clay Roddy

An ugly family battle on the island of Jersey spills into the open.

By Linda Richards Goodman March 6, 2021

Liberty Global stands by board member John Dick despite daughter's theft claims

PUBLISHED FRI, JAN 7 2022 7:00 AM EST | UPDATED FRI, JAN 7 2022 9:08 AM EST



Damon Javers
@DAMONJAVERS

SHARE f t in e

KEY POINTS

- Liberty Global, the largest international TV and broadband company, is standing by embattled board member John W. Dick, saying he serves in good standing.
- Dick has become embroiled in a dispute over allegedly stolen assets that has generated headlines around the world as his daughter has accused him of theft and of looting assets from family trusts.
- Dick has denied wrongdoing. When CNBC reached him by telephone, he said: "I don't wish to answer your questions. This case has been reported on many times. You have all the information you need. I don't want to get involved in it. But I appreciate your call."



TV

Squawk Box

UP NEXT | Squawk on the Street
09:00 am ET



Jersey News

TRENDING NOW



Target
nine
cite
thef



This
grou
coul
100'



'Kill
com
alive
Bela



FOCUS: The daughter, the Seigneur and the feud over family wealth

Wednesday 24 March 2021

"I have lost count of the number of phone calls I've made, the complaints I have written, the number of emails and letters that have gone out, the binders of documented timelines, organised evidence that I have provided them on a silver platter, going please help me, I am being robbed and they just wouldn't do anything!"

"It's a horrible thing to find out that your father is a bad man... my father is a sociopath, he is a brilliant sociopath."



Trustees' duties

01

Powers of exclusion

Trusts (Jersey) Law 1984

- Under Jersey law, a trustee is allowed to exclude a beneficiary of a trust.
- Article 10(2) – *"the terms of a trust may provide for the addition of a person as a beneficiary or the exclusion of a beneficiary from benefit."*

Trust Deed

- The terms of the trust deed for each trust allowed the trustee to exclude Tanya as a beneficiary.
- Clause 9(a) – the Trustees may revocably or irrevocably declare that a person who is a beneficiary to be wholly or partially excluded from future benefit, cease to be a beneficiary or be an Excluded Person .
- Clause 22 – no Excluded Person shall be capable of taking any benefit of any kind from the trust.

Trustees' duties when excluding beneficiaries

10

- Consider trustees' duties when exercising the power to remove or exclude a beneficiary.
- Settlor's view is always a relevant consideration.
- However, the trustee is obliged to "*guard against the possibility that a particular settlor's wishes are based upon an unreasonable animus against a particular beneficiary*" in which case their view should not be given much weight.
- Key factor is the position of the other beneficiaries.
- John II had genuine fears that the trust fund would be "*eaten up in legal fees*" due to Tanya's "*abusive and unreasonable conduct both towards him, his father and the trusts*".
- **Lewin on Trusts:**
 - Court's function is to ensure that the proposed exercise of a trustee's powers is lawful, within the scope of the power and does not infringe on their duty to act as a reasonable and prudent trustee.
 - Only need to be satisfied that the trustee can properly determine that it is for the benefit of the beneficiaries or trust estate.
 - Court acts with caution because a beneficiary cannot bring a breach of trust claim later if the court gives its blessing.

Court's blessing of momentous decisions

02

Considerations for blessing a trustee's decision

12

- Where the decision to remove a beneficiary could be at risk of being challenged, the trustee should first seek the blessing of the court.
- The court would apply the ***Re S Settlement* [2001] JRC 154** test for determining whether to give a blessing:
 1. Has the trustee's decision been formed in good faith?
 2. Was the decision one of a reasonable trustee?
 3. Has the decision been vitiated by any actual or potential conflict of interest?
- The facts of each case must be considered carefully
- Whether or not a decision is one that a reasonable trustee would make is subjective
- Look at the purpose for why the trust was created – in this case, to benefit the settlor's children
- The power to remove a beneficiary is an unusual power because it is not being exercised for the benefit of the object (except in the context of tax) – instead, it removes benefits from the object.
- If the court does not give its blessing, the trustee can still decide to act but they should proceed with caution.

The Royal Court of Jersey gave its blessing based on the following factors:

1. The Trustee made the decision to exclude Tanya in good faith and in the interests of the trust estates
2. It was a decision that a reasonable trustee could have arrived at
3. It was made carefully after receiving advice and consulting the beneficiaries
4. It benefits the other beneficiaries by preserving the value of the trust fund
5. Tanya's behaviour was detrimental to the trusts – she was not simply exercising her legal rights as a beneficiary
6. Tanya's claims lacked merit
7. Moreover, Tanya had already substantially benefitted from the trusts

"There is a genuine need to protect what is left of the trust assets from further depletion by a beneficiary who has a significant history of conducting litigation against the trustees that is without merit and who has benefited substantially in the past."



Other cases involving exclusion of beneficiaries

15

***Representation of Otto Poon Trust* [2015] JCA 109**

- The trustees' exercise of the power to remove the widow as a beneficiary was reasonable.
- The widow had received a large settlement from the trust fund so she should not benefit in future.
- Court gave its blessing

***In the Representation of the V Trust, W Trust and X Trust* [2021] JRC 208**

- Not satisfied that the proposed exclusion of spouses, widows and widowers was a decision that a reasonable trustee would make.
- Court declined to give its blessing

***In the Matter of the C Trust* [2012] JRC 0863**

- The Court concluded that no reasonable trustee would have excluded the grandchildren as beneficiaries in the circumstances
- Court declined to give its blessing

Key takeaways

- One should be careful about including persons in the beneficial class whom the settlor and/or trustee might want to remove later.
- Preferable to have a narrower beneficial class at the outset.
- Similarly, need to exercise caution when deciding whether to exclude a beneficiary of a trust and in what circumstances.
- Trustees must exercise an element of caution where a breakdown in relationships has occurred with "*feelings running deep on both sides*" between the settlor/trustee and the beneficiary
- In a matrimonial context, if the husband and wife settle a trust jointly, would the removal of a spouse be justified?
- Arguably not because this would change the purpose of the trust.
- Removal was upheld in ***Otto Poon*** because the widow had received a significant settlement already.



Thanks



Nancy Chien
Partner | Head of Department
nancy.chien@bedellcristin.com

Trustees and the Sisyphean Task



Matthias Lee, ChT
CEO
UBS Trustees (S) Ltd.



Kelvin Koh
Partner
TMSP Law Corporation



Nancy Chien
Partner
Bedell Cristin
Jersey Partnership



Sim Bock Eng
Partner
WongPartnership



Prof. Hang Wu
Lee Kong Chian
School of Law
SMU

AN OVERVIEW OF RECENT TRUST LITIGATION

Trustees and the Sisyphean Task

THE RECENT INCREASE IN GLOBAL IRS EXAMINATIONS
— LESSONS LEARNED AND POINTS OF REVIEW FOR FOREIGN TRUSTEES



John Shoemaker

Attorney, Butler Snow



BUTLER | SNOW

The Recent Increase in Global IRS Examinations

Lessons Learned and Points of
Review for Foreign Trustees

Monday, October 9th, 2023

LAW ELEVATED



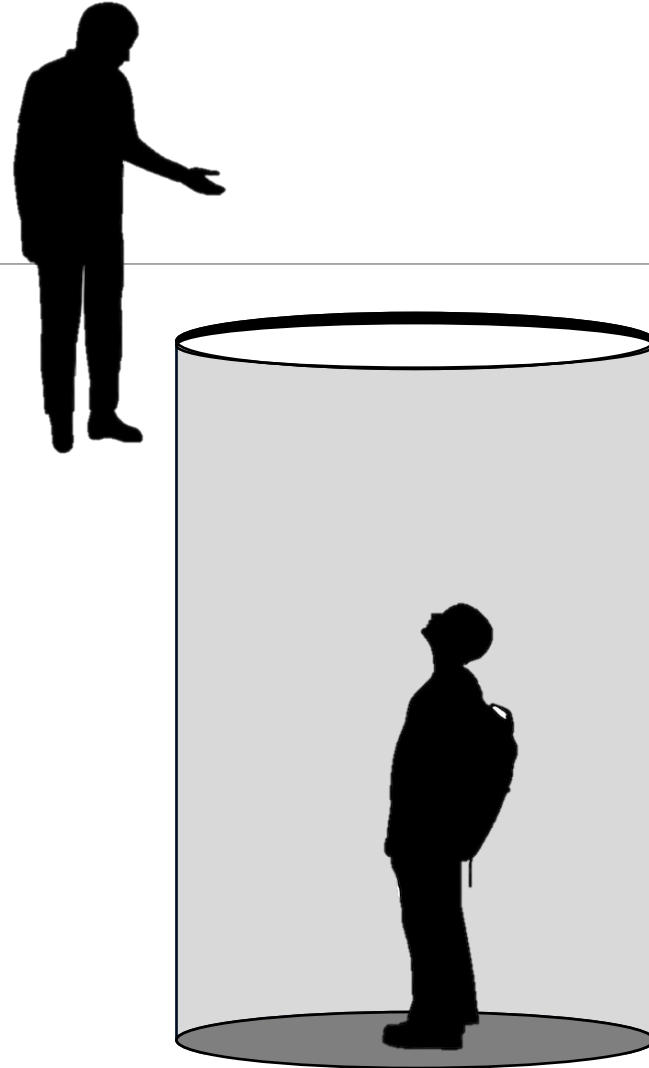
CONTACT DETAILS

BUTLER SNOW SINGAPORE LLP
6 BATTERY ROAD, #26-04
SINGAPORE 049909
TEL: +65 6983 7710

Overview

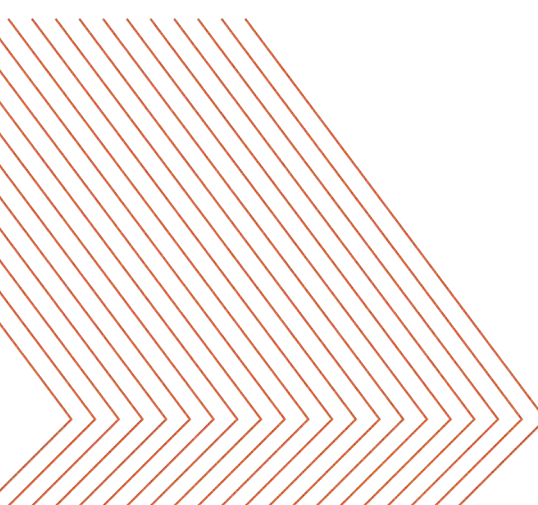
- I. Introduction
- II. The Man in the Hole
- III. IRS Funding and Audits
- IV. Declared Targets
- V. Connections to Non-US Trustees
- VI. Tips
- VII. What's In A Name?
- VIII. Q&A

The Man in the Hole



IRS Funding and Audits

- a. \$80 billion in new funding
- b. Strategic Operating Plan
- c. Expected to increase audit rate



Declared Targets

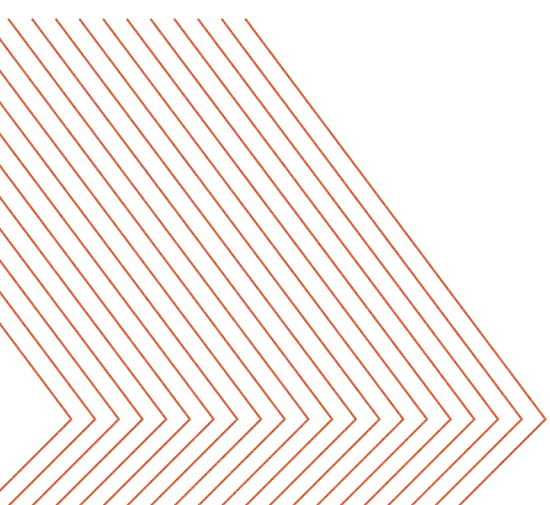
- a. High-income, High Wealth Individuals
- b. International Issues
- c. Foreign Ownership of U.S. Real Estate

Connections to Non-US Trustees

- a. FGT/FNGT
- b. Holding U.S. Real Estate
- c. CTA/CFC/965 Transition Tax

Tips

- a. Get FATCA right
- b. Get QI right
- c. Seek help when needed



Conclusion





QUESTIONS?

John M. Shoemaker

+65 6983 7714

John.Shoemaker@butlersnow.com

Disclaimer

This PowerPoint has been prepared by Butler Snow for informational purposes only and is not legal advice. This information does not constitute an attorney-client relationship. This PowerPoint contains timely information that may eventually be modified or rendered incorrect by future legislative or judicial developments. It is recommended that readers not rely on this general guide in structuring or analyzing individual transactions or matters but that professional advice be sought in connection with any such transaction or matter.

It is possible that under the laws, rules or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation.

Copyright © 2022 Butler Snow Singapore LLP

All Rights Reserved



Trustees and the Sisyphean Task

EXCLUDED PROPERTY TRUSTS (EPTS) FOR USE IN PRE- IMMIGRATION PLANNING TO THE UK



Suzanne Johnston

Partner

Stephenson Harwood (Singapore) Alliance

OCTOBER 2023

STA Conference 2023: Trustees and Sisyphean Task

Excluded Property Trusts ("EPTs")

STEPHENSON
HARWOOD



Relevant property regime (Not an EPT)

How are trusts created by a UK domiciled settlor taxed to IHT?



Assets in a trust such as money, shares, houses or land are known as 'relevant property'. Most property held in trusts counts as relevant property.

Inheritance Tax may be due on the assets held within a trust:

- ✓ on creation of the trust
- ✓ when they are transferred out of a trust (exit charges)
- ✓ on a 10 year anniversary

However an **Excluded Property Trust (EPT)** will not be subject to UK IHT.

EPTs

What are they?



- ✓ any **trust** (UK or offshore)
- ✓ created by a settlor who was **non-UK domiciled** at the time the trust was created (and has **never been formally UK domiciled**)
- ✓ that contains **non-UK assets** or **non-UK source income**

If the Trust holds any UK situs assets or UK residential property (whether directly or indirectly) within the Trust structure, these assets will be "relevant property" and will be subject to the "relevant property regime".

EPTs

What does it mean for IHT?



Once an EPT is created, no IHT will be charged on non-UK assets and non-UK source income **even if the settlor becomes UK domiciled or deemed domiciled** at a later date



If settlor adds in property **after becoming UK domiciled or deemed domiciled** that property will be subject to the **relevant property regime**

Where settlor is a beneficiary of the trust consider Gift with Reservation of Benefit **'GROB'**

Excluded property only – trust fund **will not form part of estate** for **IHT** purposes

Relevant Property – GROB rules apply and UK assets would still be treated as being **in your estate** for UK **IHT** purposes on your death and would be subject to 40% IHT even if you are non-UK domiciled. In addition, those assets would also be subject to **the relevant property regime** meaning there is a **double tax charge**.

Protected trust status

Income tax and Capital Gains Tax (CGT)



Protected trust status

What is it?



- ✓ any offshore trust
- ✓ that contains non-UK asset or non-UK source income
- ✓ created by a settlor who
 - ✓ was non-UK domiciled at the time the trust was created
 - ✓ has never been formally UK domiciled
 - ✓ is UK resident or non-UK resident

Protected trust status

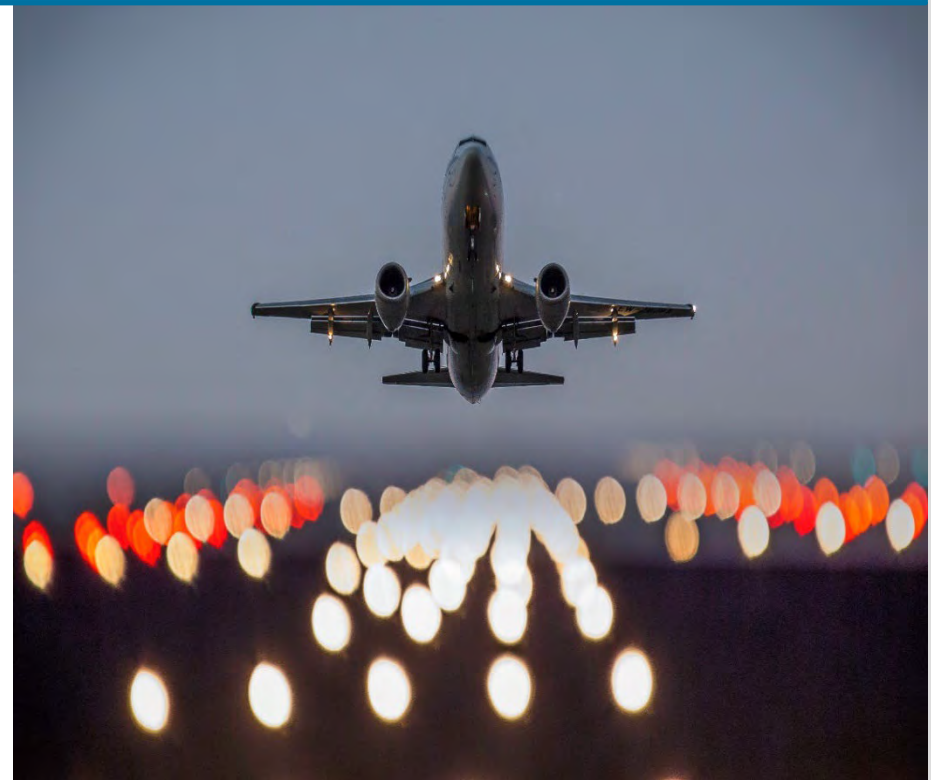
What does this mean for income tax?



This means that any "protected foreign source income" arising to the Trustees will not be taxed personally on settlors

However...

- Settlor will automatically be charged to UK income tax personally on any UK income arising to the trustees
- If a UK resident beneficiary receives an income distribution from the Trust in the UK, that beneficiary will be charged income tax



Protected trust status

What does this mean for income tax and CGT?



- UK resident beneficiary receives a capital distribution from the Trust in the UK, this distribution will be charged to income tax to the extent it is matched to the "relevant income pool" within the Trust. This does not apply if the motive defence applies.
- If the income pool is exhausted, the distribution is then matched to the "gains pool" and charged to CGT. If the gains pool is exhausted, then the beneficiary will receive the distribution tax free.
- If a UK resident, non-UK domiciled beneficiary – who is a remittance basis user - receives an income or capital distribution outside the UK, no UK tax charge will arise. The distribution will still be matched to the relevant income pool and/or gains pool, however as the remittance basis will apply, the beneficiary will not pay UK tax on the distribution, as long as it is received and used outside the UK.

Protected trust status

Reducing the 'relevant income pool'



- Segregate income from capital at trust and underlying company levels and pay your expenses out of the relevant income pool.
- Make income distributions to non-UK residents in the tax year of receipt of income.
- Make income distributions to RBU UK resident beneficiaries abroad and keep the distribution abroad. This is advantageous where a beneficiary needs funds to e.g. purchase a property outside the UK.
- Invest in capital generating assets not income generating assets.
- Ensure majority funding of underlying company is made by way of shareholder loan so that repayments can be made out of capital and distributions are matched to the gains pool thereafter provided the capital distribution exceeds the relevant income pool or if the relevant income pool has already been exhausted.

Protected trust status

Funding EPTs



- Funding is made directly to trustees and not to the company owned or to be owned by the trustees.
- Trustees to then fund the underlying companies by way of shareholder loans.
- This preserves the foreign source income nature of the income and potentially reduces charges to income tax when a capital distribution is made to a beneficiary and reduces the relevant income pool.



Protected trust status

Be careful not to lose it!



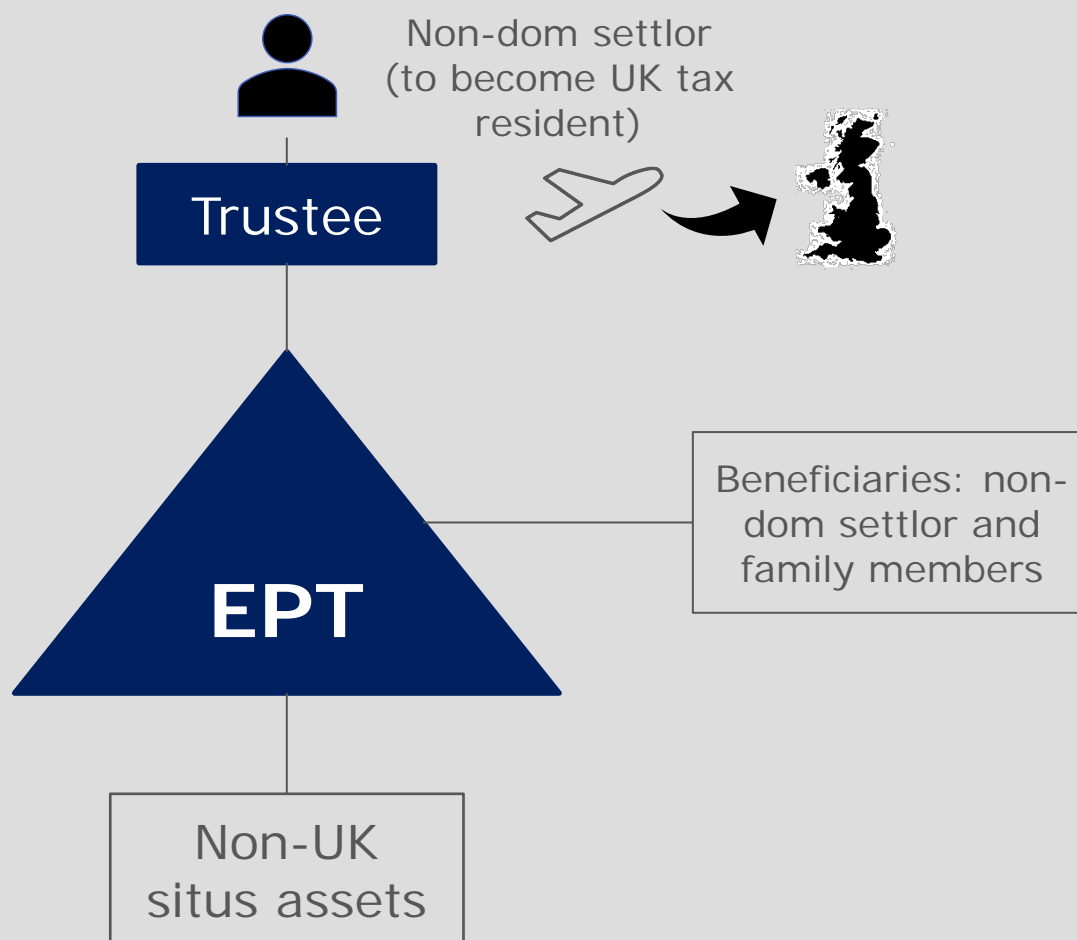
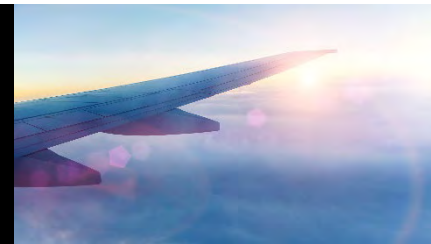
You can lose protected trust status if

- Settlor becomes **domiciled** under **general law** (deemed domiciled is fine!)
- Settlor adds property into the trust once deemed domiciled (**tainting**)



Benefits of EPTs

Case study 1

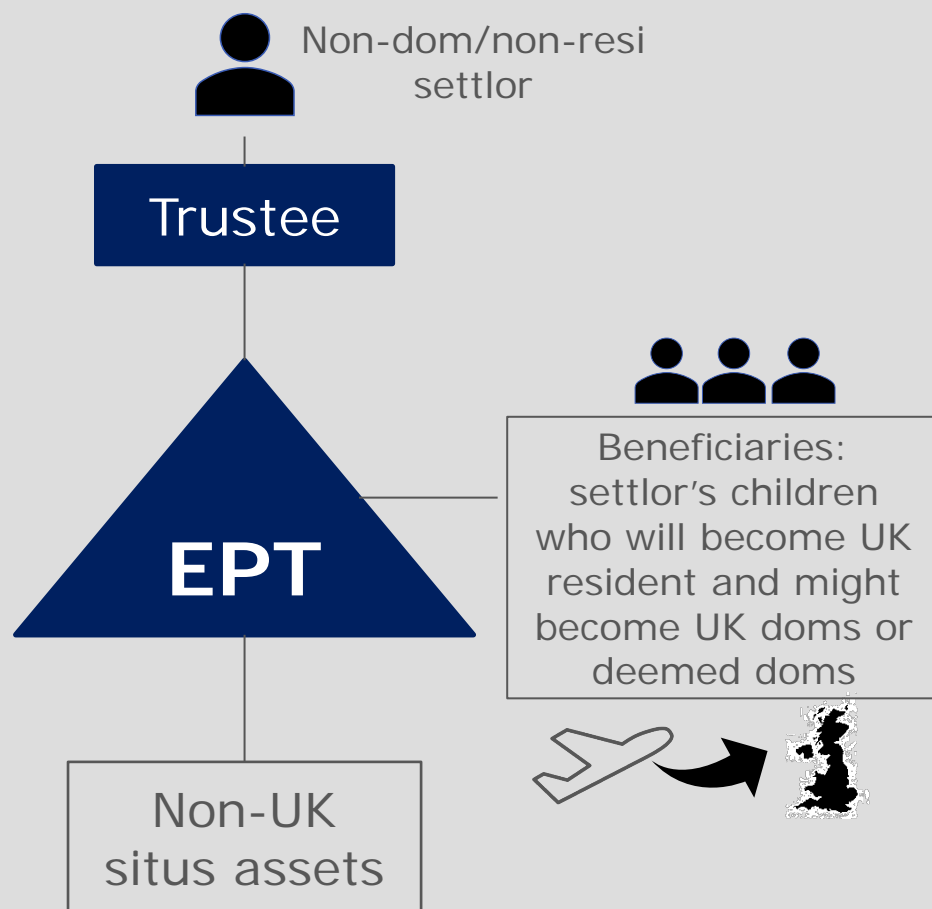


If an EPT is created:

- IHT: trust funds will fall outside his estate for IHT purposes provided not tainted and no UK situs assets form part of the EPT.
- Income Tax: foreign source income arising to the EPT will not be charged to the settlor.

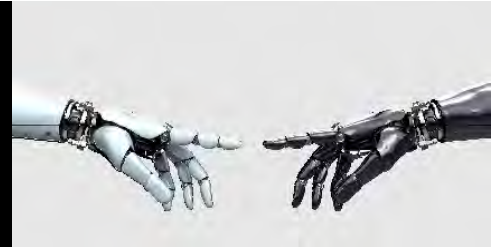
Benefits of EPTs

Case study 2



- EPT is used for succession and tax planning purposes i.e. when HNW parent dies, instead of wealth passing to UK dom or deemed dom children outright (and automatically falling within the IHT net), the bulk of the wealth is in the EPT instead and remains outside the scope of IHT.
- Income tax and CGT are also not charged personally to the children when the underlying EPT fund generates income or realises profits.
- Children are only taxed when distributions are made and to the extent a relevant income pool and a gains pool are available.

Contact me



Suzanne Johnston

Partner at Stephenson Harwood (Singapore) Alliance

T: +65 6622 9649

M: +65 9648 1475

E: suzanne.johnston@shlegal.com

Trustees and the Sisyphean Task

RECENT DEVELOPMENTS AND TRENDS IN INDIA AND SINGAPORE IMPACTING CROSS-BORDER TRUST STRUCTURES



Mahesh Kumar

Managing Partner/Co-Founder

Farro Capital



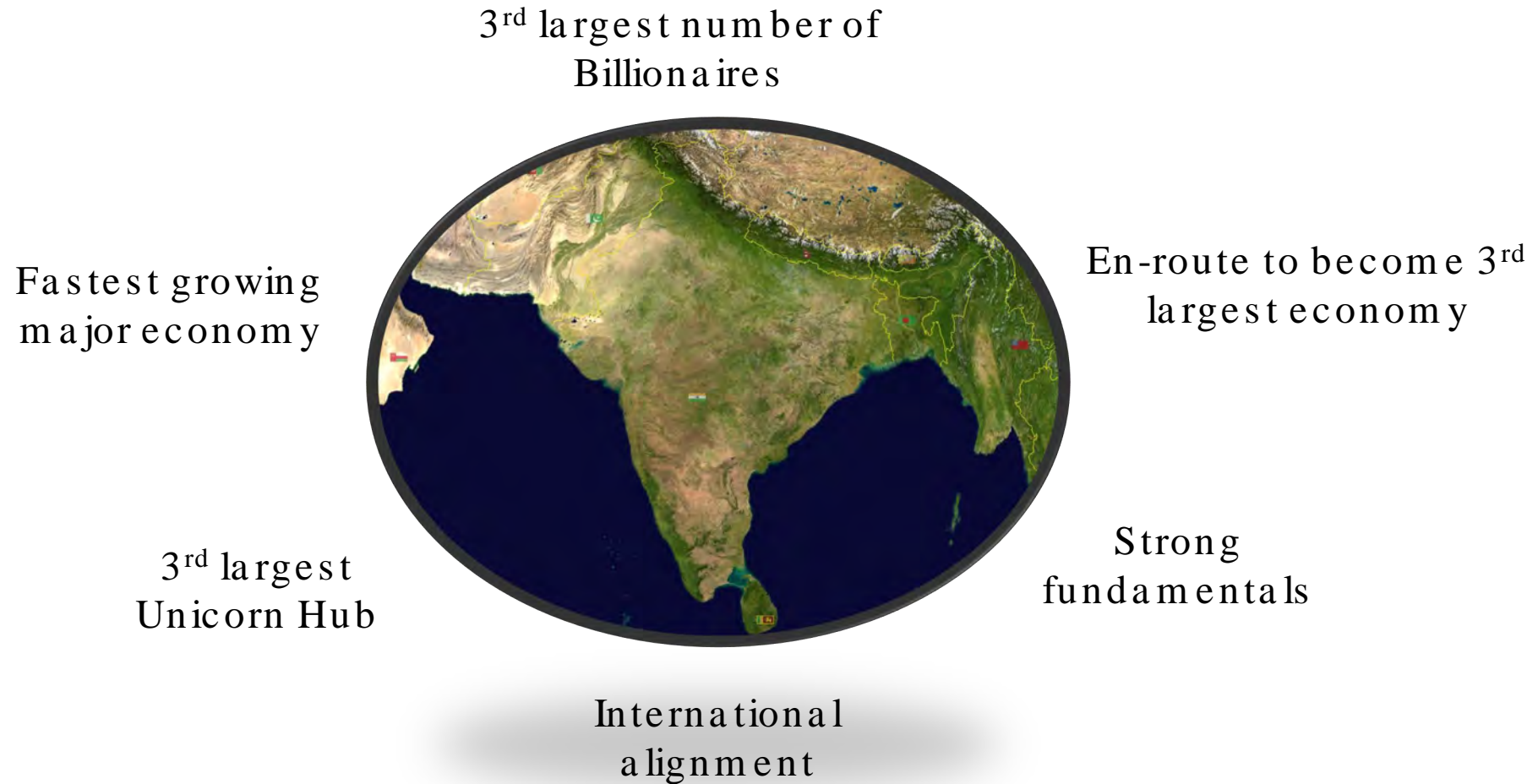
FARRO CAPITAL

Trust Planning Trends and Developments Impacting Wealthy Indian Families

- Mahesh Kumar
Co-Founder & Managing Partner, Farro Capital



Why India ?



2 Key challenges

High Taxes



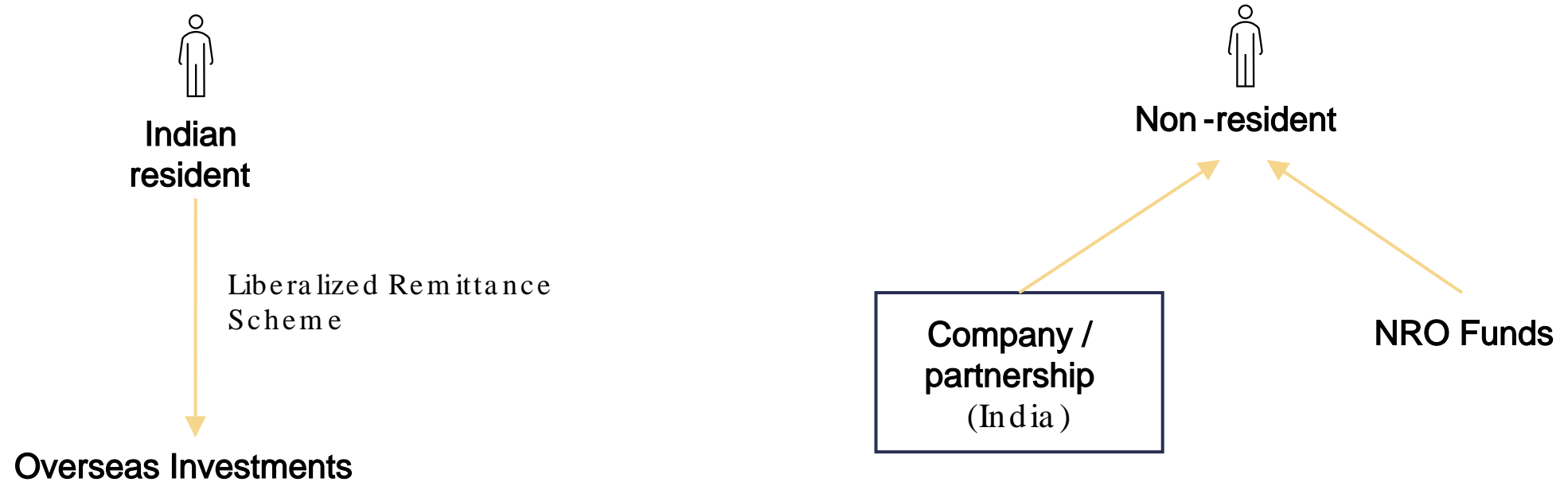
Foreign
exchange
controls

Key trends

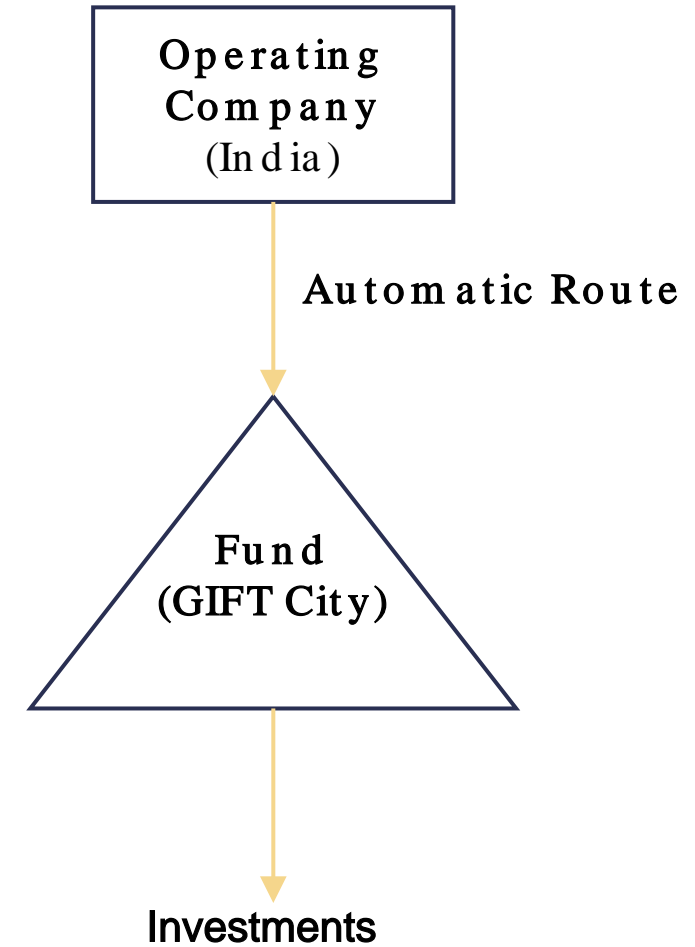
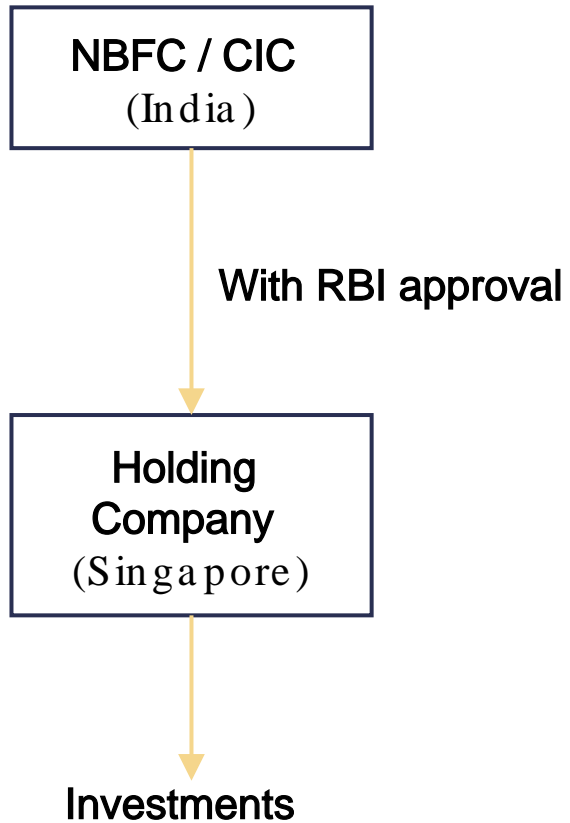
- Generation shift
- Global mindset and ambitions
- Outflow of wealth from India
- More certainty around taxation of foreign trusts
- Disclosure of foreign trusts
- Trust planning becoming more sophisticated
- Pre immigration trust planning
- Institutionalized approach
- Singapore as preferred investment base



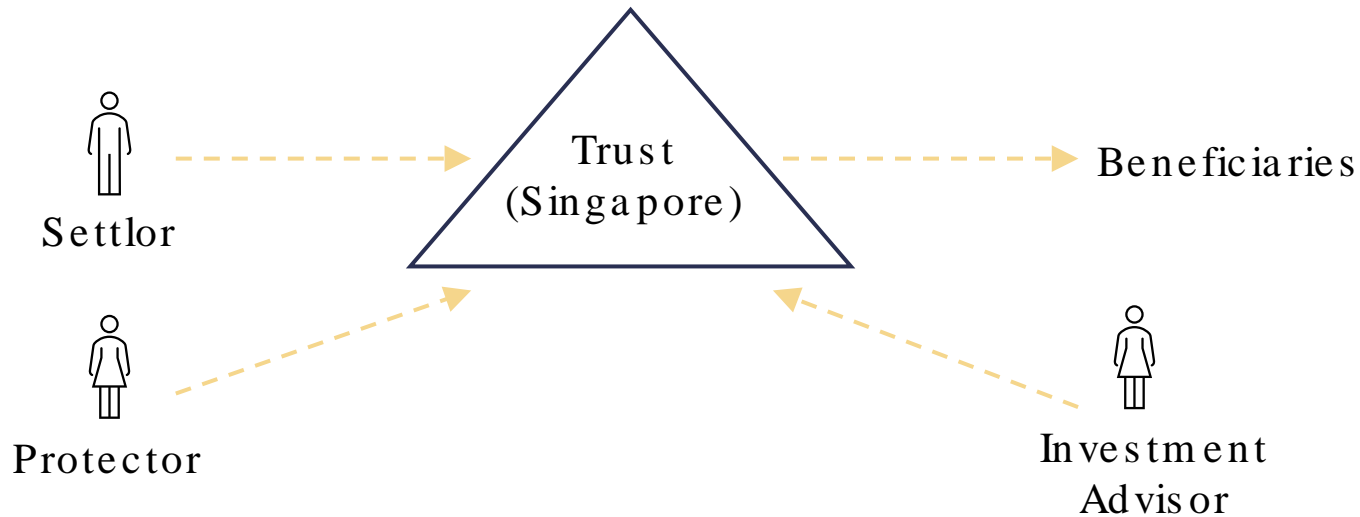
Many routes to take wealth out of India



Many routes to take wealth out of India (Contd.)



Trust planning for Indian Families : Key Considerations



- Settlor in India / outside India
- Revocable / irrevocable
- Discretionary / specified income
- Decision making powers (Settlor/ Trustee/ Protector/ Investment Advisor)
- Residence of Beneficiaries and distributions



FARRO CAPITAL

Thank You

- Mahesh Kumar
Co-Founder & Managing Partner, Farro Capital



Trustees and the Sisyphean Task

DEVELOPMENTS IN CHINA AND HONG KONG



Clifford Ng

Partner/Head Private Client Practice

Zhong Lun Law Firm

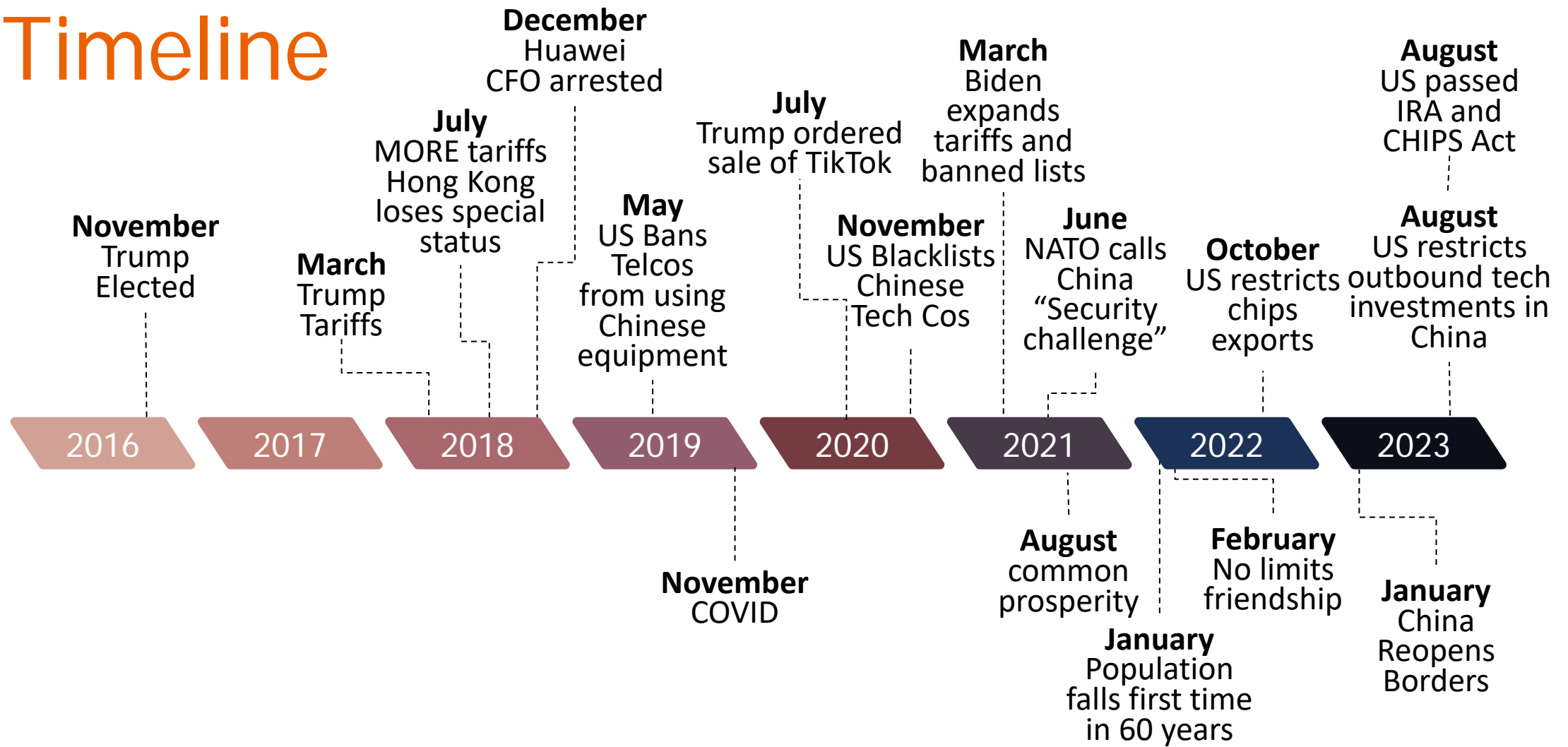
CHINA AND HONG KONG UPDATE

CLIFFORD NG

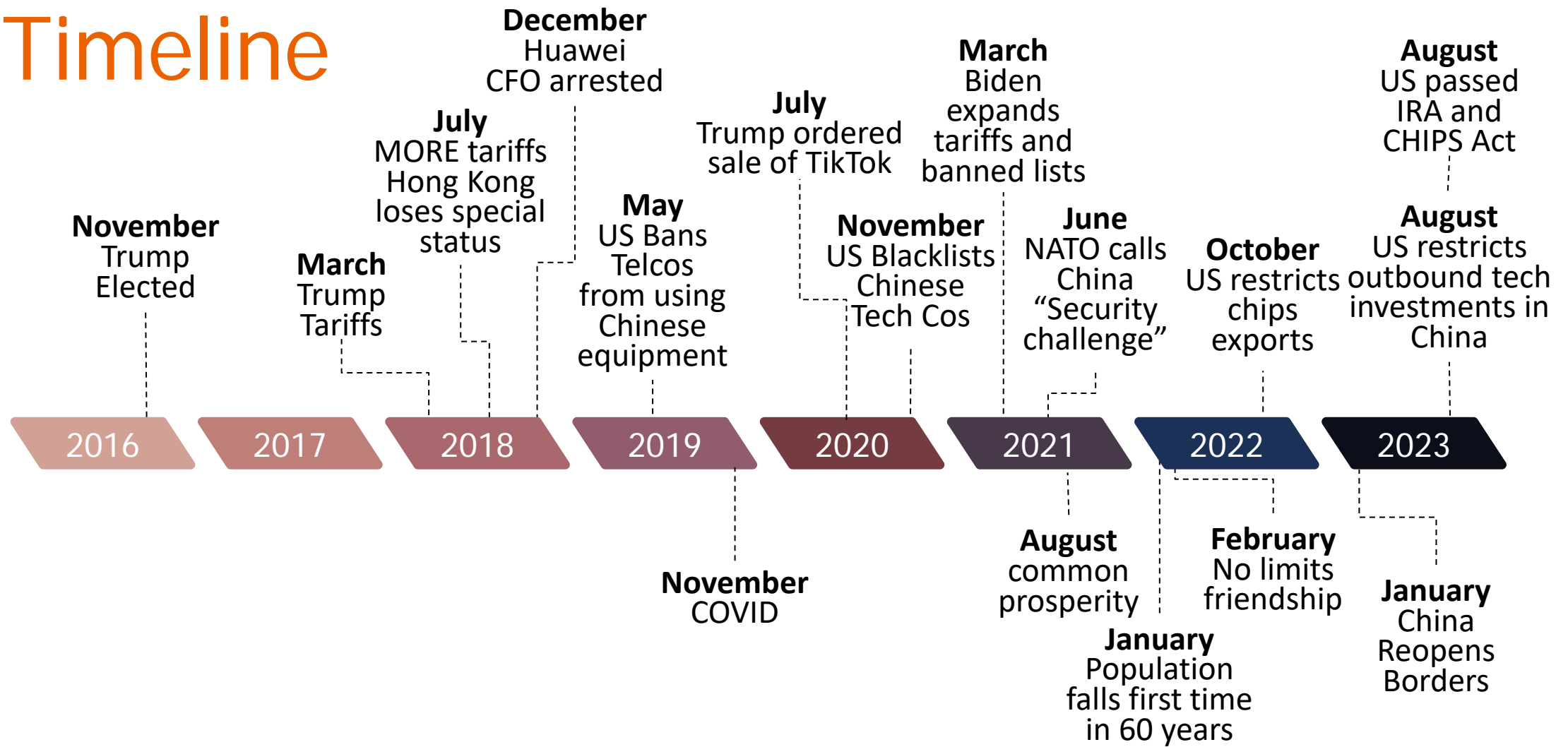
9 October 2023



Timeline



Timeline



FOREIGN EXCHANGE CONTROLS

01

- Outflow of 49 billion USD in August 2023
 - Largest figure since December 2015
- “Ants Moving”
 - SAFE outlawed “split settlements” in 2019
- Underground banks
- Stock Connect Loophole
 - CSRC’s Ministerial order (10 Jun 2022)
- Criminal?

ESTATE ADMINISTRATION

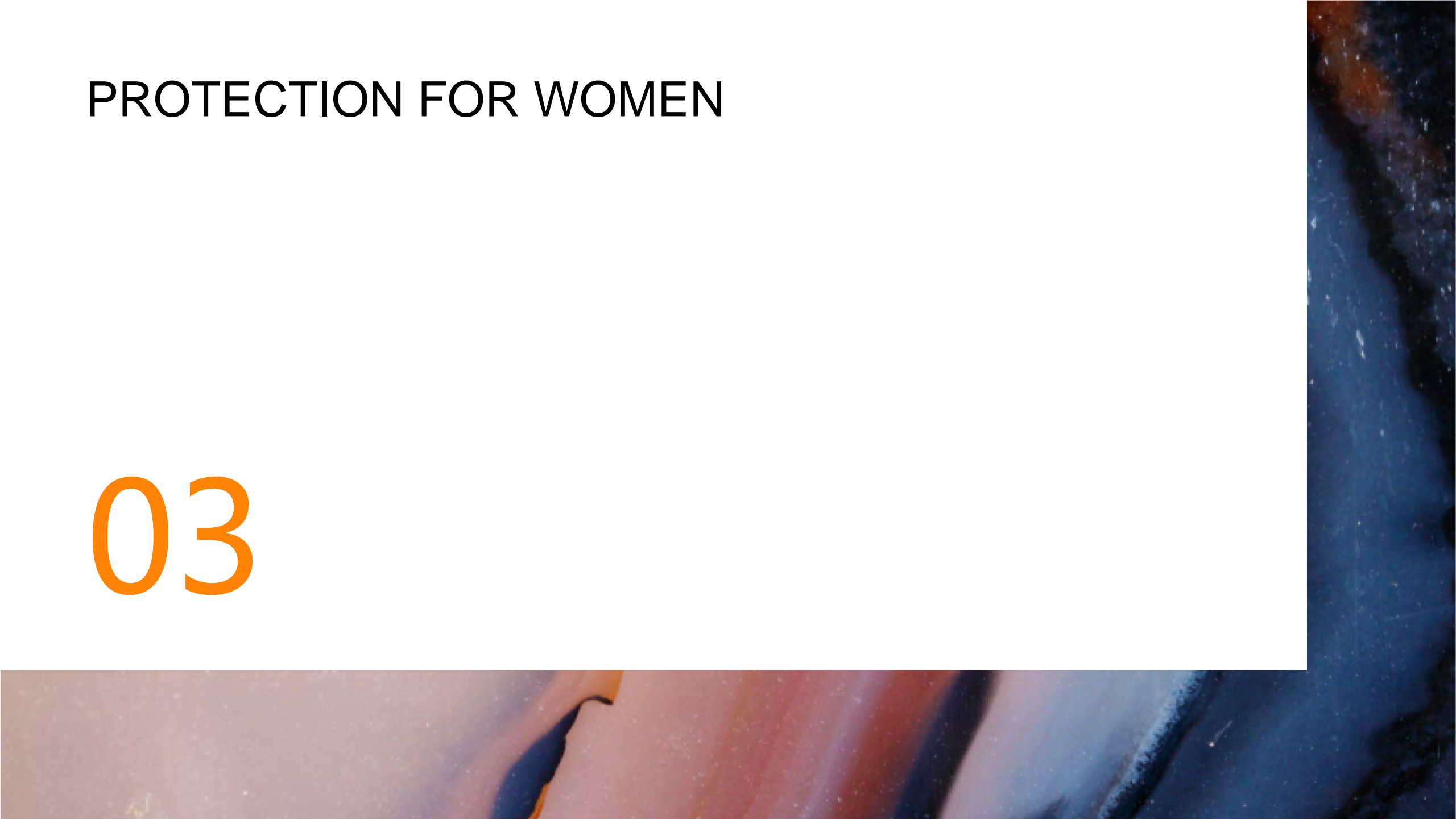
02

Civil Code effective 1 Jan 2021

- Formalities: Printed wills and recorded wills
 - Requirements: 2 witnesses
 - Doctrine: Most recent will prevails (previously notarised will prevails)
 - Scope: Widened scope of legal heirs to nieces and nephews
-
- Estates and Community Property
-
- Cross-border Issues

PROTECTION FOR WOMEN

03



Law on the Protection of Women's Rights and Interests

- Amended and effective on 1 Jan 2023
 - 'Discovery' requirements?
- Foreign Assets
 - Expressly mentioned by PRC Ministry of Justice
- Concealed Assets
 - Assets "Concealed" by foreign trust?

Record of marital status of property buyers

REDUCTION IN CHINESE LUXURY TAX
INCREASE DUTY FREE ACCESS

04

COVID Consumption

- Current PRC luxury tax:
 - VAT (~17%) +
 - Sales Tax (25%-45%; depends on goods) +
 - Tariff (average 12.47%; 0%-100%; depends on goods)
- 14th Five-Year Plan (covers 2021 – 2025): Increase number of duty-free shops
 - Hainan duty-free model
 - PRC expects to see in-town duty-free sales achieving RMB 3.5 billion in 2023, RMB 36.8 billion in 2025, RMB 86 billion in 2030*
 - Potentially more duty-free regime in Shenzhen, Shanghai, Beijing
- Impact on Hong Kong

*Statistics retrieved from https://pdf.dfcfw.com/pdf/H301_AP202303141584240542_1.pdf

SECTORAL OVERSIGHT

05

Gaming: 2019-2021

Ant / Alibaba / Big Tech: December 2020

Private Education: July 2021

- Over 160,000 tutoring agencies closed
 - Stock price dropped (15 Feb 2021 – 15 Feb 2022):
 - GSX Techedu: -98%
 - TAL Education : -96%
 - New Oriental: -91%

Law: October 2022

Investment risks?

NEW LISTING REQUIREMENTS

06

VIE Reviewed?

New Listing Requirements

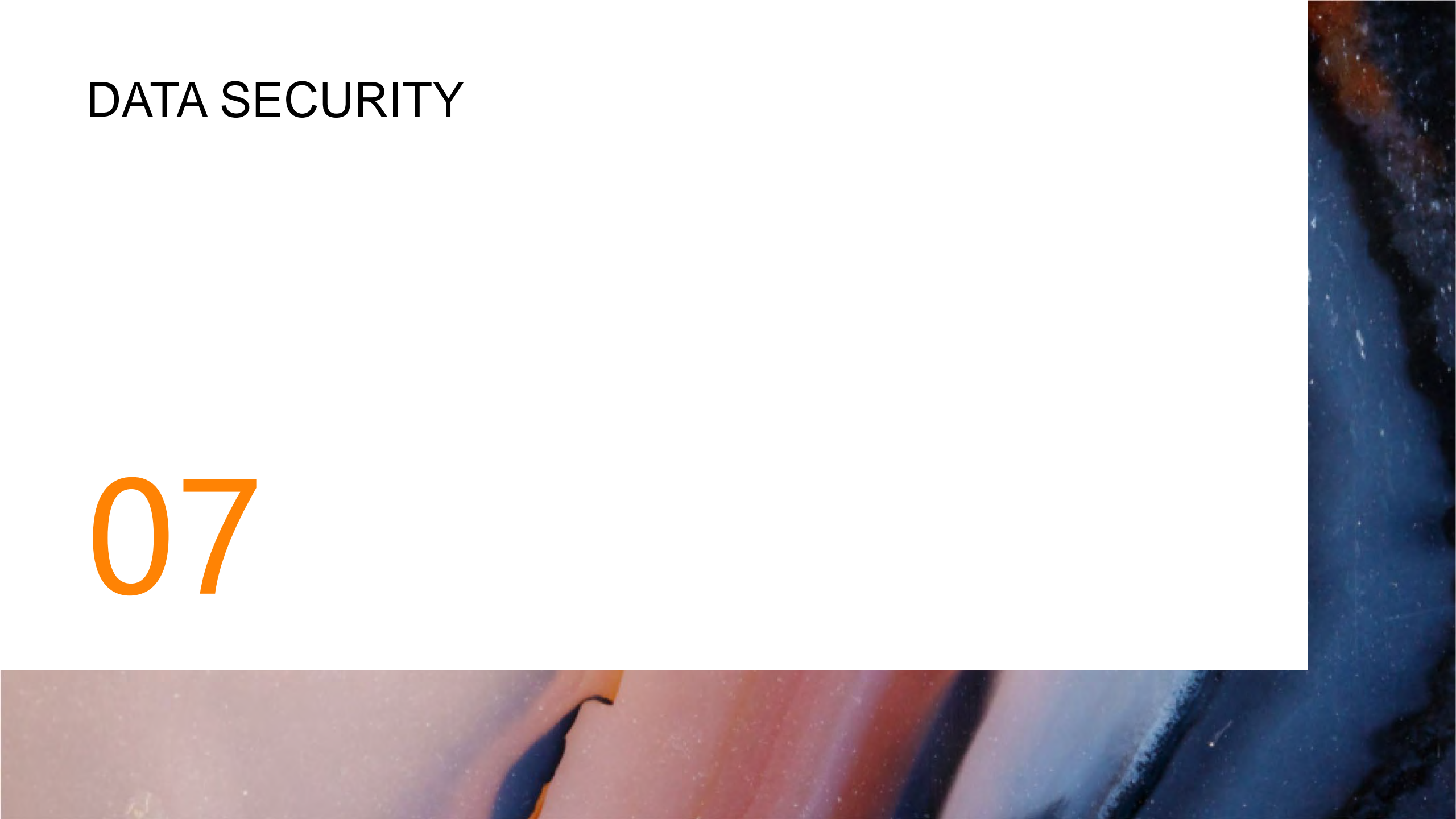
- Promulgated by CSRC on 17 Feb 2023
- Effective on 31 March 2023
- First time imposing regulations over VIEs officially and specifically
- Filing to CSRC before listing and post-listing

Ninebot (689009.SH)

- First VIE-structured business listed in PRC (29 Oct 2020; SSE STAR Board)
 - VIE structured adopted for potential overseas listing
- VIE was neither officially reviewed nor banned before
- Implied review and approval?

DATA SECURITY

07



Provisions on Strengthening Confidentiality and Archives Administration of Overseas Securities Offering and Listing by Domestic Companies

- Effective 31 March 2023
 - Regulation 44
- National secrecy and data security
 - Interplay with other data protection laws?
 - Implications to private wealth
- Impact on consulting, research, securities, law?

REDUCED STAMP DUTY

08

Stamp duty halved for stock trading from 0.1% to 0.05%

- Effective 28 Aug 2023
- Will Hong Kong follow?
 - Current stamp duty rate of Hong Kong:
 - 0.13% each by Transferor and Transferee

HONG KONG POLICY INITIATIVES

09

Profits Tax Concessions
for Eligible FIHVs
and Special Purpose
Entities*

Developing Hong Kong
into a philanthropic
centre

Providing market
facilitation measures

Further expanding the
role of InvestHK

Launching a new
Network of Family Office
Service Providers

Establishing the Hong
Kong Academy for
Wealth Legacy

Promoting art storage
facilities at the Hong
Kong International
Airport

Introducing a new
Capital Investment
Entrant Scheme

FOREIGN-SOURCED INCOME EXEMPTION REGIME

10

EU put Hong Kong on watchlist of harmful tax regime in 2021

Scope

- Applies only to Multi-National Entities (MNE)
 - Does NOT affect individuals and standalone local companies
 - Does NOT affect regulated Financial Entities regulated by SFC
- 4 types of FSI:
 - Interest
 - Dividend
 - Disposal gain
 - Intellectual property income

(with certain exceptions)

CATL

11

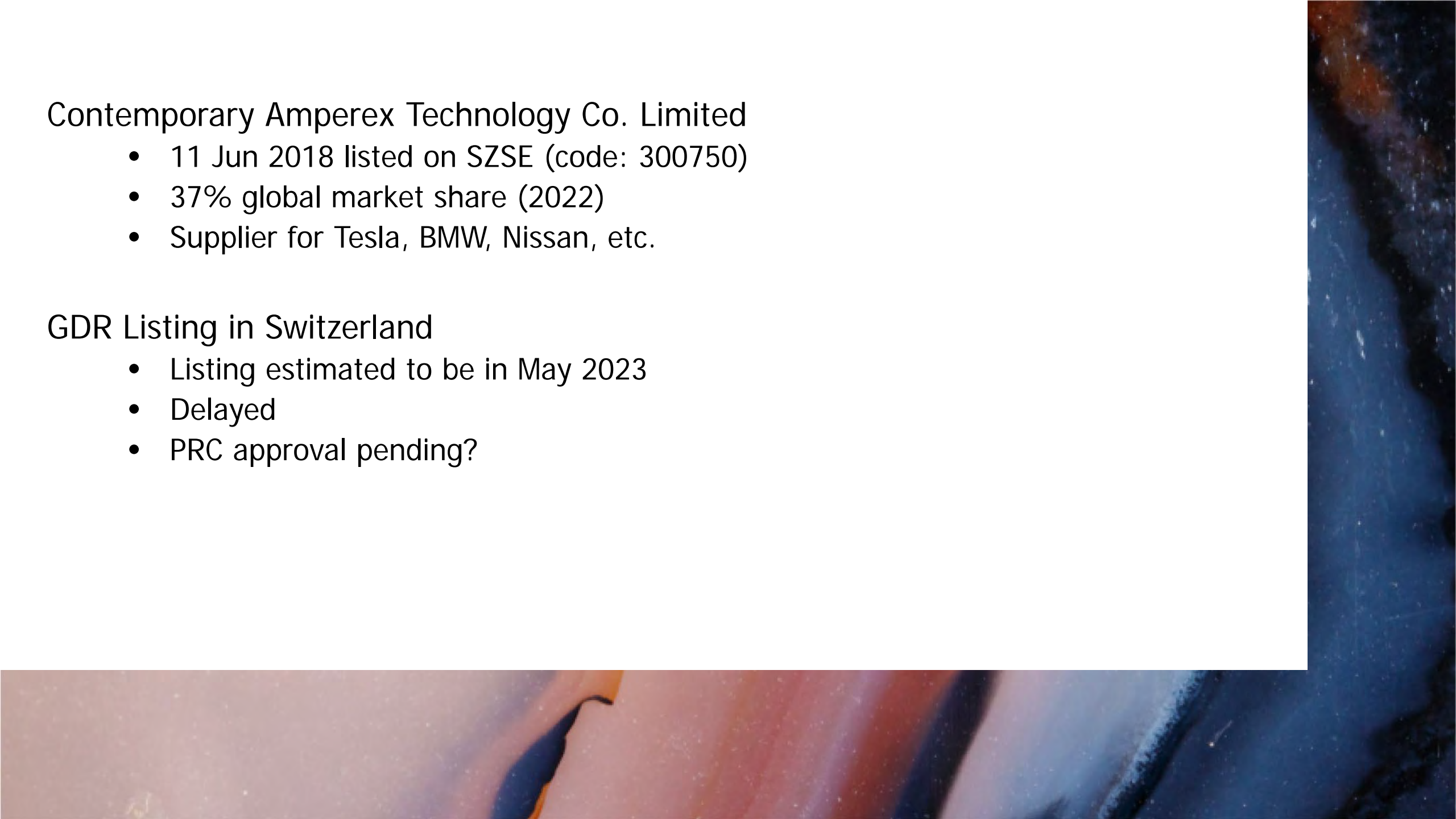


Contemporary Amperex Technology Co. Limited

- 11 Jun 2018 listed on SZSE (code: 300750)
- 37% global market share (2022)
- Supplier for Tesla, BMW, Nissan, etc.

GDR Listing in Switzerland

- Listing estimated to be in May 2023
- Delayed
- PRC approval pending?





ZHANG LAN

12

The image features a white rectangular area in the center, which serves as a background for the text. To the left of this rectangle is a vertical strip of reddish-brown color. Below the white rectangle, there are abstract, colorful brushstrokes in shades of blue, purple, and red, suggesting a painting or artistic background.

Anything new???



Details matter

Contemporaneous documentation matters

Offshore trusts can work

LOOKING AHEAD





Trustees and the Sisyphean Task



Edmund Leow,
SC ChT
Senior Partner
Dentons Rodyk.
(Moderator)



David Chong,
ChT
Founder &
President
Portcullis Group



Henry Chong
CEO
Fusang



Ian Lee
Head (AML
Supervision Division)
MAS



Nancy Chien
Partner
Bedell Cristin
Jersey Partnership



Sean Coughlan
Managing Director
Trident Trust

THE FUTURE OF TRUSTS

Trustees and the Sisyphean Task

CLOSING ADDRESS



Edmund Leow, S.C. ChT

President, Singapore Trustees Association

Senior Partner, Dentons Rodyk