KEEPING CONTROL

Private trust companies offer the wealth protections that come with a trust, but with better control of the assets.

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It has been said that there are only two things in life that are certain: death and taxes (some say death and nurses). Recent years have seen a dramatic rise in the popularity and use of trusts in this region. Hong Kong has great expertise in trust matters thanks to the adoption of the English legal system, which understands and can enforce trusts. Hong Kong abolished estate duty some time ago, but those who have assets abroad will probably be subject to estate duties abroad. In most cases, estate duties are one of the easiest taxes to avoid or reduce, but only if plans are made early.

No responsible head of a family will leave his loved ones to sort out his/her estate with all the costs, delays and heartaches that this involves. Even a simple estate will take at least a year to administer A multi-jurisdictional estate will take considerably longer, and can easily cost up to six per cent of the asset value. During this delay, the assets are normally frozen.

Trusts provide an alternative solution with many potential advantages. A trust will avoid all the expenses and delays inherent in a will and can give asset protection, considerable tax advantage during your lifetime and avoidance of estate duty on death.

So trusts are fantastic, right? Yes, but the disadvantage is clear in the title. The setting up of a trust involves the transfer of assets to trustees and of course, you have to trust them. Many potential Settlors love the potential advantages of a trust but are quite naturally wary of losing control of their assets.

The alternative to a trust is a will, which involves the appointment of Executors who take possession of your assets after your death and then distribute them to your heirs. So the Executors are like the Trustees and the Beneficiaries of the trust are like the Heirs under the will. One way or another, you have to trust somebody. It's a lot easier to get assets transferred while you are around. You know where they are and can sign them over to the trustees rather than leaving executors to try and find them.

Leaving everything to devolve under your will does give you the comfort of having all assets in your name during your lifetime but does leave your family with the problems after you're gone. The assets are blocked until probate can be granted and the family are left to correspond with the Executors at a time when they are most vulnerable and emotional.

The alternative is to set up your own Private Trust Company (PTC). It should be incorporated as a company limited by guarantee with a cascading chain of ownership through memberships rather than shareholdings. This allows for continuity of ownership and therefore administration.

A guarantee company has the advantage that the membership expires on the death of the owner leaving the remaining members to carry on the good work. Most clubs in Hong Kong are based on companies limited by guarantee. Members do not have a transferable interest. The membership expires on death and can't otherwise be transferred. The same holds true with a membership in a PTC.

Different members of the PTC can be given different voting rights so ownership can be arranged in such a way as to give the Settlor the majority vote and therefore control during his lifetime but on his death control passes to the spouse or younger generations as required. Any desired result can be achieved with careful structuring and thought.

It is important to ensure that the PTC has sufficient substance so that it and the trust it administers cannot be attacked as a sham. One of the fundamental principles of correctly setting up a trust is that there must be a movement of assets away from the Settlor to a third party. A company is a third party, but it is not advisable for the Settlor to be the sole member and director.

The board of directors can consist of the Settlor, spouse or a trusted friend but they should serve alongside a professional director with trust experience, which gives the PTC substance and expertise.

In short, while you lose ownership of the assets, you retain the control of the company that owns them, and you can be involved in the day-to-day administration of the trust assets. It would be wrong to oversimplify the various legal and practical considerations involved in setting up your own PTC, but it does present an interesting possibility for those that have previously been wary of trusts.