

# **Applicable Laws on Trust**

## **For Beneficiaries of Private Foundation**

By Austin X.D. Zhang\*

This case study is concentrated on applicable laws on the trust set up in favor of the beneficiaries of a Private Foundation (“The Foundation”). It goes into the Foundation and Trust where conflict of law is brought out with the most significant part to be discussed over applicable laws relating trust creation, trustee and trust administration.

### Scenario

In case of a Cross-boarder investment, the Foundation, formed under the Law No. 25 of 12<sup>th</sup> June, 1995 on (“The Law”) Private Foundations of Republic of Panama is to be the sole member of a company registered in Cayman Island. A Singapore company is appointed as the beneficiary of the Foundation for the purpose of non-disclosure of the Client’s benefits. The client is appointed as one of the two directors (another one is a Singapore resident under Singapore Company Ordinance) of the Singapore Company (“the Company”) and the client sets up a legal relation with a Singaporean (“the Trustee”) who acts as the sole member of the Company by means of declaration of trust (“DoT”). In the Foundation Regulation, the Foundation Council stipulates that the

benefits (dividends or capital gains) are delivered to the beneficiary with a Singapore corporate bank account in Hong Kong, SAR of China. The Company delivers benefits to China domiciled beneficiary (the Client) with a Seychelles corporate account in Hong Kong.

**1. The preliminary condition: the beneficiary of the Foundation receives benefits from the Council and delivers to the Client, who for purpose of controlling the Foundation is appointed as the Protector of the Foundation,.**

(1) The Beneficiary of Private Foundation

Article 5 (7) of the Law has the provision “The manner in which the beneficiaries of the foundation, who may include the founder, are designated”<sup>1</sup>. The Foundation Charter contains the items on beneficiaries that a private document known as the “Regulations” is created by the founder and foundation designate and set down all that related to the Beneficiaries who may be individuals or corporate entities of any national and domicile. The Singapore Company has the capacity of being the beneficiary of the Foundation. The Council distributes to one or several of the Beneficiaries so designated as well as the dates and amounts of such distributions which shall be subject to the provisions of the

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<sup>1</sup> Foundation Charter of the Private Foundation, Mossack Fonseca & Co. 1997, Article 5 (7)

Regulations with a nature of a unilateral promise in written. Unlike the beneficiaries in a trust who enjoys the right in rem or in other words equitable proprietary interests in the trust property owned by the trustee<sup>2</sup>, the beneficiaries in a foundation do not reserve ownership rights on the foundation assets or distribution, and neither do the owners nor the creditors of the Foundation. The distribution of the Foundation's capital or interest is made to the beneficiaries by means of a unilateral transaction mortis causa<sup>3</sup>. The beneficiaries may refuse to receive the benefits from the Foundation at their discretionary and reserve the right of disposal of interests to any parties unless the Regulations have limitations on it. Neither the Law nor the Charter prohibits the beneficiary to transfer the right of receiving benefits from the Foundation to any other third parties, in which case any limits and purpose of transfer is the transferor's affairs<sup>4</sup>. It is expressly stipulated that the Beneficiaries are neither the owners nor creditors of the Foundation, and thus may not validly claim vis-à-vis the Foundation any rights other than those envisaged in the Foundation Charter<sup>5</sup>. The beneficiaries have no remedy at civil law<sup>6</sup> which reflects in the case of foundation, because of which the protector plays a key role in the structure. Under such conditions, the Client is

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<sup>2</sup> David Hayton & Charles Mitchell, *The Law of Trusts and Equitable Remedies*, Sweet & Maxwell, 2005, Edition 12<sup>th</sup> P 1

<sup>3</sup> Maurizio Lupoi, *Trusts A Comparative Study*, translated by Simon Dix, Cambridge University Press, 2000, P 184

<sup>4</sup> Ibid

<sup>5</sup> Foundation Charter of the Private Foundation, Mossack Fonseca & Co. 1997, Clause Seventh (C) : Beneficiaries

<sup>6</sup> David Johnston, *The Roman Law of Trusts*, Oxford University Press 2001, P 287

appointed as the Protector to the Foundation in order to supervise the delivery of benefits to the Company.

## (2) Trust in the Structure of Private Foundation

There exist in this structure two acts of laws, a contractual act of law between the foundation council and the beneficiary and a trust between the member of the Company and the client (beneficiary of the Trust). No formalities are required for creation of implied, resulting or constructive trusts<sup>7</sup>. Both of acts of laws may be governed by different laws that parties may choose the applicable laws in structure. Beneficiaries are not, therefore, of any value in the identification of the structure of a trust<sup>8</sup>. It is essential that the Client dominates the Company on the base of DoT made by the nominee member. Under the DoT made by the Singaporean trustee, the Client (beneficiary of the trust) enjoys the proprietary interests in shares which is the trust asset owned by the trustee, although the shares do not bring any benefits to the member because the benefits received by the Company are delivered to the Client directly. Trace in equitable law is the remedy in trust in favor of beneficiary. There are two ways in which a settler may create an inter vivos trust namely, by way of self-declaration or by transferring property to a third party subject to a DoT<sup>9</sup>.

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<sup>7</sup> David Hayton & Charles Mitchell, *The Law of Trusts and Equitable Remedies*, Sweet & Maxwell, 2005, Edition 12<sup>th</sup> P 64

<sup>8</sup> Maurizio Lupoi, *Trusts A Comparative Study*, translated by Simon Dix, Cambridge University Press, P 183

<sup>9</sup> *Sourcebook on Law of Trusts*, Mohammed Ramjohn, Cavendish Publishing Limited, London, 1995, P 75, P 639

**2. The Applicable Laws. Even in a Declaration of Trust different laws may be chosen to govern the creation and assets of the trust and the trustee.**

The rules of conflict on trusts are, to a large extent, uncertain and incomplete<sup>10</sup>. I would not touch the issue in a general sense but concentrate on this case relating to the settlement and administration of trust. The trustee who drafted and signed the DoT in Hong Kong is to be the sole member of the Company for holding shares in favor of the Client domiciling and residing in China. The trust shall be governed by the law most closely connected at the time of its creation<sup>11</sup>. Theoretically Singapore law should be chosen as the proper law as the legal relation is between the Singapore domiciled individual and the beneficiary. But English law is chosen for governing creation of the Trust due to the fact that most of the beneficiary' business is in England, so as to the Cayman company from which the beneficiary benefits indirectly, and in general, any individual, limited company or other corporation may be a trustee<sup>12</sup>. If the client brings the case in England, English court as far as its jurisdiction is concerned, pays attention to the place where the settler has indicated the trust should be administrated, the place where the trust

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<sup>10</sup> R.H. Graveson, Conflict of Laws (7<sup>th</sup> Edition), London, 1974, P530

<sup>11</sup> David Hayton & Charles Mitchell, The Law of Trusts and Equitable Remedies, Sweet & Maxwell, 2005, Edition 12<sup>th</sup> P 846

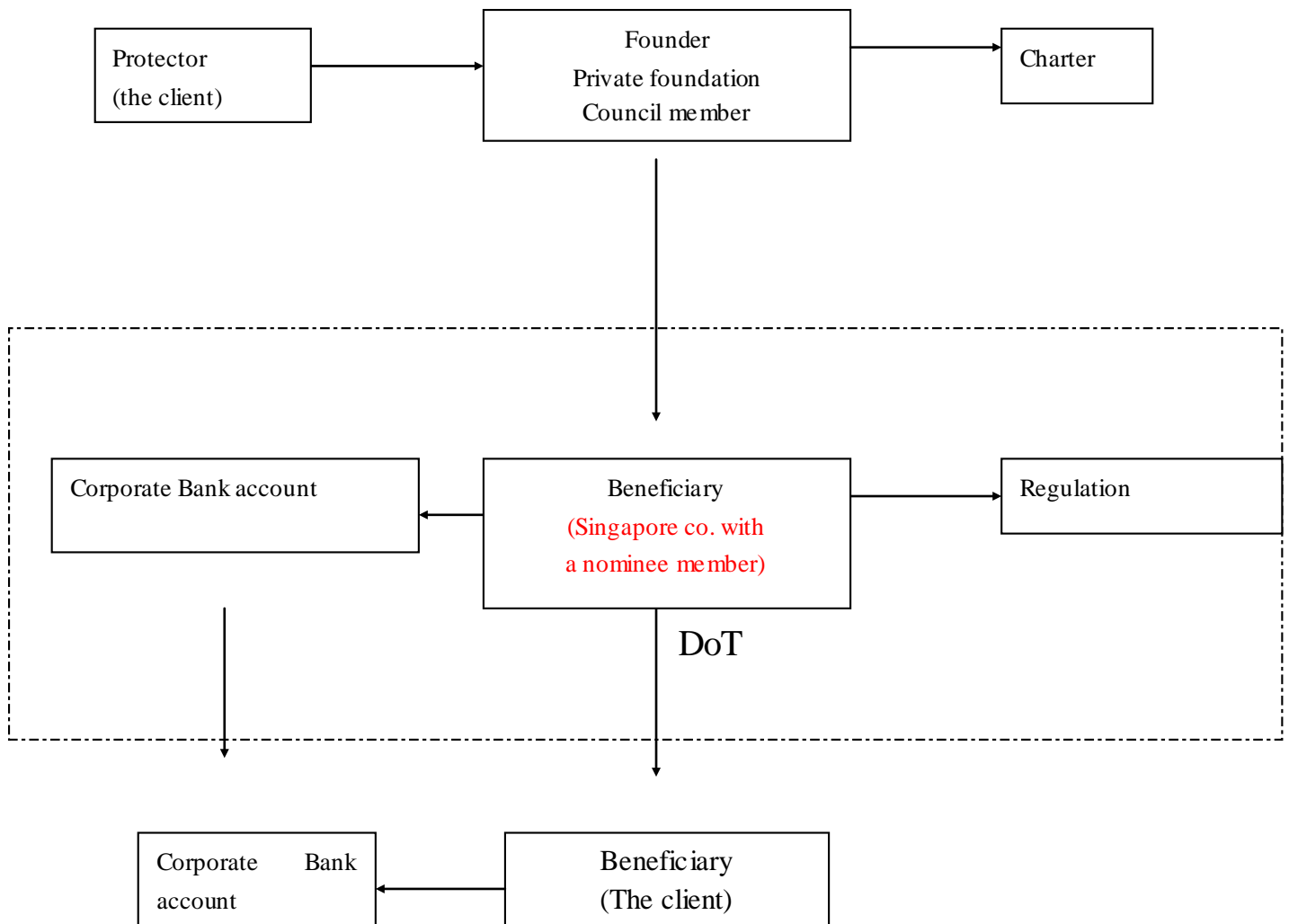
<sup>12</sup> A.J. Oakley, Paker & Mellows, The Modern Law of Trusts, Thomson Sweet & Maxwell (8<sup>th</sup> Edition), London, 2003, P 543, P 95

property is located, the place of residence or the domicile of the trustee, and the purpose of the trust and the place where it is to be carried out. The court may hold that, even if it is English trust, Singapore would be the most appropriate forum for place where the trust property is located, the place of domicile or residence of the trustee or purpose of the trust and the place where it is to be carried out referring to *Chellaram v. Chellaram* which is an example<sup>13</sup>. In light of the above, choice of applicable law on trust administration is obviously important when creating the Trust of which the only function of the trustee is to hold shares of the Company. We can see that the trustee is the only essential person in a trust<sup>14</sup>, and taking this into consideration, Singapore law is therefore the law governing the administration of the trust.

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<sup>13</sup> A.J. Oakley, Paker & Mellows, *The Modern Law of Trusts*, Thomson Sweet & Maxwell (8<sup>th</sup> Edition), London, 2003, P 841, P 858, [1985] Ch.409; (No. 2) [2002] 3 All E.R. 17

<sup>14</sup> Maurizio Lupoi, *Trusts A Comparative Study*, translated by Simon Dix, Cambridge University Press, 2000, P179



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