Abstracts

Trusts and Wealth Management Conference 2019 –
Asian Wealth and the Global Context

Day 1 - Keynote Address by The Honourable Lady Mary Arden

There is an old Chinese saying - 富不过三代 Wealth does not pass three generations. Lady Arden's keynote speech will be a tour d'horizon of some of the problems in trust law, such as those that arise in relation to the right to information, challenges to trustees' exercise of discretion, informality in trusts and the fallout from settlor-dominated trusts.

Day 1 - Plenary 1: Effective Structuring for Family Wealth - Using the Correct Toolbox

With the sharp rise of ultra-rich in Asia, family wealth management has become a key industry topic. This panel will discuss the strategies and tools in family wealth structuring. Drawing from their experience, the stellar line-up of panelists will share on the latest trends in wealth structuring in Asia, opportunities and challenges in practice, as well as key considerations for successful wealth structuring. A wide range of issues will be covered, including options in legal structure, sustainability, governance, philanthropic objectives and tax considerations. This a not to miss session for practitioners, family wealth advisors and academics working in the area of trusts and wealth management.

**Trusts and Wealth Management Conference 2019 –
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Day 1 - Session 2: Managing Asian Wealth: Overseas Investment and Philanthropy

"Asian Wealth in the United States: Some Legal Answers and Policy Questions"

Thomas P Gallanis, Professor, University of Iowa

This paper will examine the legal framework governing, and the policy questions arising from, the management of wealth within the United States when the settlors or beneficial owners of the assets are citizens and domiciliaries of countries in Asia. Among the topics discussed will be the rules governing U.S. financial accounts, investments, and land owned by noncitizens who are domiciled abroad; the use of U.S.-based trusts for such overseas settlors and beneficiaries; and the federal income and transfer taxation rules applicable to wealth planning for such overseas clients, with special reference to the People's Republic of China and its tax treaty with the United States.

"Politics and Policy: Chinese Money and the Impact on Residential Real Estate Regulation in the West"

Dr Edward Ti, Assistant Professor, School of Law, Singapore Management University

The narrative of Chinese real estate investors in some western jurisdictions reads like this: China has in recent decades, enjoyed burgeoning wealth creation across all strata in society. This increased wealth has flooded certain western housing markets resulting in unaffordability and housing shortages. Chinese buyers are attracted to a 'westernised' education for their children, an agreeable and law-abiding civic society all whilst living in a clean and pleasant environment. The strengthening of the Chinese RMB and increase in disposable income mean that such demands are now within reach not just to the wealthy but to upper-middle class Chinese families as well. Western real estate markets are seen as safe havens and bringing about portfolio diversification. But have these phenomena truly led to rich property valuations in cities in the West? Some governments have been quick to politicise the issue of Chinese buyers, blaming them for the lack of housing affordability in their cities despite scarce supporting data. In other cities, there appears to be much stronger evidence that Chinese buyers have indeed precipitated local housing problems. In this paper I comparatively analyse the propriety of the policy and legislative amendments made by governments in Australia, New Zealand and Canada, purportedly in response to the fact that Chinese nationals have been driving up prices in their residential markets. Where appropriate, the paper also makes suggestions how this 'problem' could be better managed.

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"Philanthropy and the Global Elite: A Comparative Study of Philanthropy in Asia"

Ray Madoff, Professor, Director, Forum on Philanthropy and the Public Good
Boston College Law School

This presentation looks at the law and culture of several Asian countries (including Mainland China, Hong Kong, Korea and Singapore) to consider opportunities, impediments and encouragement for ultra -high net worth individuals to engage in philanthropy. We will also look at the availability of different forms of philanthropic giving, including private foundations and donor-advised funds.

Day 1 - Session 3: Property Ownership and Fiduciary Relationships

"Knowing Receipt and Trust Property"

Jamie Glister, University Lecturer in Private Law, University of Cambridge

This paper investigates the concept of 'trust property' in the context of knowing receipt. It examines the kinds of rights that can ground knowing receipt when they are transferred to a third party in breach of trust or fiduciary duty. In particular, the paper highlights the issue of whether information or business opportunities can count as 'trust property' for this purpose. It shows that one of the common objections - that information cannot be traced into other assets - is false. This has consequences for our understanding of knowing receipt more generally.

"'The Beneficial Ownership of Joint Property: Starting Points, Unfulfilled Expectations, and the Impact of Marr v Collie"

John Mee, Professor, University College Cork, Law School

This paper considers equity's treatment of disputes over the beneficial entitlement to property held in joint ownership, focusing on the impact of two recent Privy Council decisions: Marr v Collie [2017] UKPC 17 and Whitlock v Moree [2017] UKPC 44.

Marr v Collie concerned the beneficial ownership of a number of investment properties purchased in joint names by a cohabiting couple in the Bahamas. The decision represents a somewhat unexpected change of direction after Stack v Dowden [2007] UKHL 17 and Jones v Kernott [2011] UKSC 53, with greater emphasis being given to the role of the resulting trust and to the minority approach taken by Lord Neuberger in Stack. Whitlock v Moree [2017] UKPC 44, also an appeal from the Bahamas, concerned a dispute over a joint bank account. The application of resulting trust principles in this context is complicated by the fact that the relationship between a bank and a customer is that of debtor and creditor, rather than the customer having any property right in her "money in the bank".

This paper analyses the impact of these two decisions on equity's approach in this area, including a consideration of the respective roles of the resulting trust and the common intention constructive trust.

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"Identifying Fiduciary Relationships: Their Scope and Remedies"

Duncan Sheehan, Professor of Business Law, University of Leeds

Fiduciary relationships are controversial and huge quantities of ink have been spilled on the topic of what makes them distinctive and who should (or not) be classified as a fiduciary. Different tacks have been taken in order to determine who is a fiduciary, including starting with a core case and trying to analogise outwards. The core case is usually taken to be the trustee-beneficiary relation. It is hard, however, to know why one relationship is analogous to a trust relationship but another not. In short what features of the trustee relationship should we analogise to? Consequently some authors attempt to distil what "loyalty" means and when we must be "loyal" to our principal, while others suggest that loyalty is at best a red herring. Equally controversial have been remedial questions. Charles Mitchell has commented on a tendency to talk about damages for breach of fiduciary duty and suggests that a trend, also identified by Matthew Conaglen, to treat account of profits as based on the fiduciary's being under a disability yet compensatory remedies as somehow duty-based is unsustainable.

This paper tries a different tack to much recent scholarship. It tries to set out the Hohfeldian structure of fiduciary relationships. Conaglen, in his book Fiduciary Loyalty, argued that fiduciary duties are imposed to make the due performance of non-fiduciary duties more likely. In other words they are parasitic on an underlying relationship and indeed loyalty – if that is indeed what fiduciary relationships are concerned with – cannot exist in the abstract. You must be loyal in doing something else. While accepting that fiduciary relationships are parasitic this paper suggests that rather than protecting the due performance of other duties, they are constraints on the exercise of powers. The fiduciary is disabled from exercising powers held on behalf of the principal for his own benefit, so profits improperly made are treated as having been made on the principal's behalf. Yet, unlike Paul Miller, we argue that the discretionary power the fiduciary holds must be Hohfeldian; it must be a power to change the principal's legal relations. The paper examines two further questions: how that is combined with any duty on the fiduciary remedied via equitable compensation and how the status of the fiduciary as, what Penner calls, an epistemic fiduciary – one who provides advice – compares with (what he calls) a practical fiduciary.

What implications can we draw out? Although normative conclusions cannot be drawn from purely analytic work, understanding that fiduciary relationships may involve a collection of separate and distinct Hohfeldian relationships and what they are means we can avoid trends towards confusing duties and disabilities in the context of remedies against fiduciaries. We can also set outer limits to the scope of fiduciary relationship and see why it might add nothing to eg a doctor-patient or bank-customer relationship to say it is fiduciary (except in limited circumstances).

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Day 1 - Plenary 4: Technological Disruption in the Law of Trusts and Wealth Management

"Why do cryptocurrencies have value?"

David Fox, Professor, Edinburgh Law School

Cryptocurrencies have emerged as favoured investment media in recent years. Their traded values have fluctuated hugely throughout the same period, which has called into question their ability to function as efficient payment media or units of account. This paper draws contrasts between them and traditional fiat currencies issued by state authorities. It considers the reasons – both legal and economic – why fiat currencies have traditionally enjoyed greater stability in value compared with these privately issued media.

"Trusts of Crypto-assets"

Kelvin FK Low, Professor, City University of Hong Kong

It has now been 10 years since the world was introduced to bitcoin, an entirely new kind of asset. Intended to serve as a decentralised currency, its birth in the great recession of 2008 appealed to many who were disillusioned with governments and financial institutions. As the code for bitcoin was open-source, it spawned countless copycat "currencies", so-called alt-coins (i.e. alternatives to bitcoin), and together this new class of assets came to be known as cryptocurrencies. It is today widely accepted that they do not serve the economic functions of a currency as either a medium of exchange or a store of value and so are better regarded as crypto-assets instead. Nomenclature apart, initial increases in value of bitcoins and other crypto-assets drew interest from both investors and speculators who did not share in the libertarian ideals of initial adopters, including trustees hoping to secure better returns for their trust funds. This raised potentially two questions. First, and most obviously, could crypto-assets even be the subject-matter of trusts? Secondly, if the answer to the first question was yes, what characteristics of crypto-assets must trustees be cognisant of if they were to choose to include this new asset class among their holdings of trust assets?

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"Accountability of Algorithms in Trusts and Modern Wealth Management"

Dr Philippa Ryan, Barrister and Senior Lecturer, College of Law, Australian National University

Autonomous algorithms rely on data analysis and artificial intelligence to replace human controls and decision-making. Algorithmic automation has produced profound and unpredictable transformations in the organisation and function of modern economies. Early adopters of algorithms and big data analytics offer their clients highly-automated and customised advice services at a greater scale and lower cost than traditional business models. The benefits of automating service-delivery are obvious. However, wealth managers considering the automation of investment advice and custody services should proceed with caution.

Automated algorithms depend upon accurate analysis of good data to produce either probabilistic or deterministic outcomes. "Deterministic" analysis refers to the tracking of data that is known to be true. "Probabilistic" analysis includes unknowns (or too many knowns). Weather forecasting is an example of probabilistic analysis. When a meteorologist forecasts a 60% chance of rain, it means that, in the past, when the same conditions existed, it rained 60% of the time. Understanding these features is important when deciding whether and which algorithm to use in different service offerings.

Although not an absolute distinction, giving advice lends itself to providing a probabilistic output, whereas decision-making requires a clear determination. It is therefore suggested that where an output is only probabilistic, the systems's percentage of certainty needs to be discoverable; and programmed to indicate whether human intervention is required.

Algorithms and data analytics can also be opaque, making it impossible to audit or defend their processes. This may be problematic for trustees whose use of an algorithm amounts to a delegation of fiduciary or custodial duties. The particular legal issues to be explored here and anti-competitive behaviour, imprudence, and lack of transparency. The overarching aim of policy-makers and regulators must be to ensure that algorithms comply with the same ethical and regulatory frameworks as their human counterparts.

Day 2 - Concurrent Session 5A: Family Wealth Disputes in Hong Kong and Singapore

"Capacity and Undue Influence: A Unified Approach for Wills and Lifetime Dispositions"

Lusina Ho, Professor, University of Hong Kong & Cedric Yeung

As the result of longevity, ageing, and the prevalence of dementia, an increasing number of elderly people are vulnerable to financial abuse from within their families and beyond. The doctrines of capacity, undue influence, and lack of knowledge and approval of the will play a significant role in ascertaining the genuine intention of elderly adults in the making of inter vivos and testamentary gifts. These doctrines apply very differently depending on when the gift is intended to take effect.

The present paper challenges this divide. It argues that situations where allegations of lifetime gifts are made after the passing of the donor do not justify a sharp dichotomy in approach from testamentary gifts, and calls for a more fine-tuned approach that accurately reflects the differences. In particular, it considers: (a) the extension of the presumption of capacity to testamentary gifts; (b) the extension of the current scope of undue influence in relation to wills; and (c) the proper role of the doctrine of lack of knowledge and approval of the will.

It is hoped that a more coherent and rational framework will emerge from the calibration proposed by the paper.

"Testamentary Freedom and Family Wealth Disputes in Hong Kong"

Rebecca Lee, Associate Professor, University of Hong Kong Faculty of Law

In Ilott v The Blue Cross [2017] UKSC 17, [2017] 2 WLR 979, the UK Supreme Court restated the centrality of the principle of testamentary freedom in English succession law, which confers extensive rights on a testator to dispose of his estate in whatever manner he chooses. As a former British colony, this principle is also enshrined in Hong Kong law. Yet even in one of the oldest expressions of this principle, it was not divorced from the importance of familial obligation: Banks v Goodfellow (1870) 5 LR QB 549, 563 per Cockburn CJ. Accordingly, the principle is qualified by legislation that imposes some level of responsibility on the testator to provide for his family.

The preference for testamentary freedom also informs the law of private express trust. The trust is not only a flexible device, but also safeguards testamentary

freedom. For example, trusts are immune from challenges of discrimination in the selection of beneficiaries and trust legislation in many jurisdictions provide for protection against foreign forced heirship rules. In recent decades, as the first generation of local entrepreneurs and property tycoons in Hong Kong ages, we have seen an increase in the use of the trust as an asset protection device. Most recently, as wealth builds up at an astonishing rate in China, Hong Kong has become a trust service hub for mainland Chinese entrepreneurs. These Chinese billionaires, who may be subject to (limited) forced heirship laws and hefty inheritance taxes in mainland China, are motivated to set up trusts to achieve tax mitigation, asset protection from divorce or other creditors, and not least testamentary freedom.

In light of these trends and developments and, this paper has two objectives. The first is to review the recent notable family inheritance cases on the application of the principle of testamentary freedom to examine how the balance between personal autonomy and familial obligation is struck. Notwithstanding the impact of Chinese cultures and traditions in Hong Kong, two features can be discerned. First, the statutory recognition of the need to make reasonable financial provision out of the deceased's estate is much narrower than its English counterpart. Second, the judiciary has also repeatedly affirmed the principle of testamentary freedom. The second objective of this paper is to draw upon the emergence of the use of the (offshore) trust and family trust litigation involving some of the wealthiest families in Hong Kong to highlight the most attractive features of the trust device for managing Asian wealth as well as the corresponding theoretical issues raised by such features. In doing so, the paper seeks to reflect on how Asian trusts are established and administered in a globalised world.

"Contentious Family Wealth Disputes in Singapore: Principles, Policies and Culture"

Tang Hang Wu and Yip Man, Singapore Management University School of Law

[PROVISIONAL: High net worth (and sometimes high profile) families in Singapore continue to face internal disputes. These disputes sometimes lead to litigation about matters relating to trusts, estates, family companies and, increasingly, mental capacity issues. This paper will discuss some recent developments in Singapore in relation to family wealth disputes. They will particularly consider cases relating to mental capacity, jointly owned property and family businesses and companies.]

"Private Law Meets Reality: Trusts & Wealth in the Asian Context"

James Lee, Reader in English Law, The Dickson Poon School of Law, King's College London, & Associate Academic Fellow of the Inner Temple

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This paper examines the modern evolution and operation of trusts principles in Hong Kong and Singapore. My departure point is the recent jurisprudence in the Singapore Court of Appeal in developing the law with regard to the needs of the local context and conditions: see, for example, the approaches to unconscionability in BOM v BOK [2018] SGCA 83 (at [148]) and to illegality in Ochroid Trading Ltd v Chua Siok Lui [2018] SGCA 5. This approach is particularly significant given trends in English trusts and equity cases, which have followed a more pragmatic, commercially orientated approach. For example, the recognition of the possibility of backwards tracing by the Privy Council by looking at the is capable of generating uncertainty: Federal Republic of Brazil v Durant International [2016] AC 297, as considered in the Hong Kong litigation of Heitkamp & Thumann KG v Living Profit Trading Develop Ltd [2018] HKCFI 1006 and [2019] HKCA 119 (see also The Fish Man Limited (in liquidation) v Hadfield [2017] NZCA 589). How are such distinctive detours by the English courts to be factored into the independent judgement of the courts in Singapore and Hong Kong? The aim of this paper is to interrogate the context-specific considerations for the courts in the relevant jurisdictions as they apply to the principles of the law of trusts.

Day 2 - Concurrent Session 5B: Controlling Trustee's Decision-Making

"Whose best interests? The effects of member heterogeneity on strategy optimality in Australian superannuation funds."

M. Scott Donald, Director of the Centre for Law, Markets and Regulation, University of New South Wales

The trustees of Australian pension (superannuation) funds are required to exercise their powers in the best interests of the members of the fund as a whole and to design an investment strategy that has regard to those interests. That obligation is particularly prominent in respect of the 'default' MySuper products they administer. But what if their MySuper members' needs are not homogeneous? The interests of members whose needs are different from those of the typical member will be compromised. Using recently released 2017 data this paper identifies empirically, first, that there is indeed considerable heterogeneity in the membership of most MySuper products. The paper then tests empirically how the trustees of the funds and the members of the funds have responded to this heterogeneity. It finds that there is little evidence that trustees have, in fact, responded to this heterogeneity and posits that such differentiation as exists is currently better explained by other commercial and institutional factors.

"Proper Purposes"

Rachel Leow, Assistant Professor, National University of Singapore

Trustees must exercise their powers for proper purposes. This has been trite law for centuries. Historically, the doctrine was often known as the doctrine of 'fraud on a power'. Despite the long history of the doctrine, surprisingly little is known about why, when, and how the doctrine operates in modern trusts.

This paper addresses five important questions about how, when, and why the proper purpose doctrine operates. First, which purposes are proper, and which are improper? Second, how do courts determine which purposes are proper? Do they look at the intentions of the settlor? How much weight do they give to settlors' letters of wishes? Third, are there differences in approach depending on the type of trust (eg private family trusts vs pension trusts), the type of power (administrative vs dispositive), or whether the dispute is being resolved in Asian jurisdictions? Fourth, what is the effect of finding that the trustee has exercised its power for an improper

purpose? Is the exercise of the power void or only voidable? Fifth, can the proper purposes doctrine be justified? If so, how?

In answering these questions, this paper considers a wide range of material ranging from private family trusts to pension trusts. Cases from several different jurisdictions are considered, including England and Wales, Hong Kong, Singapore, and Jersey. Amongst others, it deals with important modern questions about the relevance of a settlor's letter of wishes in proper purposes, the extent to which pension trustees can exercise powers to remodel the balance of powers between the trustees and the employer (e.g. British Airways plc v British Airways Trustees Ltd [2018] EWCA Civ 1533), and the analogy between proper purposes in trusts law and in company law (e.g. Eclairs Group v JKX Oil & Gas plc [2015] UKSC 71).

"Decision making in trusts – applying Wednesbury reasonableness following Braganza".

David Pollard, Wilberforce Chambers

Decisions made by trustees and third parties (eg employers, actuaries, protectors etc) in relation to trusts are important. The decision maker will want to get it right and others may look to the courts to review the decision. Generally such decision making powers are not "absolute", but are subject to review by the courts (whether or not being exercised by a fiduciary).

Although not a trust case, Braganza [2015] UKSC 17 in the UK Supreme Court marks what looks likely to be a definitive shift in favour of public law Wednesbury reasonableness (or rationality) standards applying to many trust related decisions (despite comments to the contrary in some previous cases, including Pitt v Holt [2013] UKSC 26). This is in addition to review tests based on proper purposes, honesty and (for fiduciary powers) unauthorised conflicts of interest.

This talk looks at the implications of Braganza for trustees and other trust decision makers.

Day 2 - Session 6: The Developments and Liberalization of the Law of Trust and Wealth Management – A Comparative Perspective

"The Statutory Liberalization of Trust Law across 152 Jurisdictions: Leaders, Laggards and the Demand for Fiduciary Services"

Adam Hofri-Winogradow, Montesquieu Chair in Comparative Law, Faculty of Law, Hebrew University of Jerusalem

This article reports the findings of the first systematic overview of the statutory liberalization of trust law worldwide. Using a groundbreaking, manually collected, database of the trust legislation of every jurisdiction which has a trust regime respecting 22 trust law variables, I hand coded each jurisdiction's treatments of each variable since 1925 for their relative liberality. Aggregating all jurisdictions' scores regarding all variables, I produced a "trust liberality score" for each jurisdiction/year, expressing the extent to which trust law has been liberalized by each jurisdiction by each year.

Results show the United States to be the global leader in trust law liberality: 19 of the 20 jurisdictions which have the most liberal trust laws are American states. Trust law liberalization in the U.S. is a result of the widespread adoption of the Uniform Trust Code, which includes many highly liberal positions, among the states, as well as of many states having followed an offshore dynamic in adopting highly permissive positions in order to draw users from out of state to resident service providers. The trust laws of many American states are more liberal than those of small offshore island jurisdictions. Even the laws of such relatively conservative American states, on trust matters, as New York and California are quite liberal by global standards. Much of the recent global increase in trust law liberality occurred between 1994-2006. While much of the liberalization of trust law was undertaken in order to create demand for trust, legal and financial service providers resident in the enacting state, multivariate regression analysis of U.S. data fails to show a significant correlation between the liberality of a state's trust law and the amount of establishments in its trust and fiduciary sector, fees earned by resident fiduciaries, resident fiduciaries' spending on legal and financial services or income earned in trusts managed by resident fiduciaries.

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"Japanese wealth management and the transformation of the law of trusts and succession"

Masayuki Tamaruya, Professor, Rikkyo University

A sea change is taking place in the law and practice of trust and wealth management in Japan. As the rapidly aging society is opening up to the globalized market, a number of legislative reforms have taken place in the areas of guardianship (1999), trusts (2006), and succession (2018). The government has introduced a number of measures to encourage intergenerational wealth transfer and diversified investment. And yet, neither law reformers nor government regulators have been able to grasp the whole picture, and the court is forced to sort out and tie complicated loose ends.

Daughter in Hawaii v. Mitsubishi UFJ Trust Bank involved a hastily drawn up trust instrument that purported to exploit tax advantages, but the court refused to find that a trust was created. In Wife v. Step-son, the Japanese court found that a joint account at Bank of Hawaii is a valid will substitute, and rejected the deceased's son's claim against his stepmother to reach the fund in the bank account. The court stated in dicta, however, that the matter may have been more complicated if the will-substitute had violated his forced heirship.

Then in Disinherited Eldest Son v. Favoured Second Son, the court, for the first time in the history of Japanese trust law, ruled on the interaction between trust and forced heirship. The court ruled that disposition by trust is subject to a forced heirship claim and such a claim must be satisfied out of the beneficial interests. This ruling is significant in that it rejected an approach that allows an heir to attack the validity of trust itself. Nonetheless the decision raised more questions than it answered, and the presentation will address some of those issues.

The trust instruments examined in those cases were all drawn up in haste without careful planning in advance. The Japanese lawyers are still in a steep learning curve, despite the trust's almost a century long history since the introduction of Trust Act 1922. The fact is that need for the use of trusts for wealth management and succession purposes were felt only in the 2010s, and until then the trust had almost exclusively used in commercial settings. Nonetheless there are signs that trusts are beginning to capture a sizable wealth accumulated by a wide range of Japanese middle class, as well as those belonging to the super-rich. The presentation will assess the potential impact of such transitions both within and across Japan's jurisdictional border.

"The Multiple-faced Asset-management Business in China - From the Perspective of Daziguan Reform"

Jianbo Lou, Professor of Law, Peking University Law School

The turmoil in Mainland China's asset-management-business was followed by tightened regulation, forcing the industry to reshape. The concept "Great Asset Management (da zi guan)", as introduced by the regulators, has inspired various predictions on the future of asset-management-business in China.

Given the existing asset-management services provided by various financial institutions in China, the author is to argue that the so-called daziguan shall not be taken as that banks, insurance companies, securities companies, trust companies, futures companies and other financial institutions shall provide uniform asset-management-products to the public. Rather, they shall tailor their services to investors with different needs in different ways. Moreover, unlike what proposed by commentators that the relationships between the investors and the management institution shall all be trustor-trustee-relationships, the paper is to propose that asset-management may be built upon a corporate, a trust, as well as just mandate or other kinds of contractual relationships.

What the concept daziguan denotes is that various asset management businesses in China shall be under the uniform regulations, instead of respectively by the CSRC, CBIRC in accordance with different rules. The achievement of genuine uniform regulations relies upon not only the uniform of regulatory bodies but also the abolishment of segregation of business for different kinds of financial institutions.

"Islamic Wealth Management in Singapore"

Arif A. Jamal, Associate Professor Faculty of Law, National University of Singapore

This paper seeks to do two primary things. First, it aims to sketch the various forms of 'Islamic' (quotation marks deliberate) wealth management devices and structures that are mainly used in Singapore. Second, it will attempt to evaluate these devices and structures as to their compatibility, or not, with the underlying ethos of Islamic finance and certain of the salient principles of Islamic finance, such as the prohibition of riba, the concern with uncertainly (gharrar), etc. Finally, and slightly tangentially, the paper will also touch upon what type of wealth management products are being sought out as an indicator of market demand.

Day 2 - Concurrent Session 7A: Trusts and Family Offices: Transparency, Governance and Succession

"Trusts and UWOs: Unpacking the 'holding' requirement puzzle"

Simone Wong, Reader in Law, Kent Law School

Unexplained Wealth Orders (UWOs) came into use in the UK in January 2018 when the Criminal Finance Act 2017 came into force. UWOs are investigative tools aimed at giving new powers to law enforcement authorities to fight money laundering. A UWO requires a person who is reasonably suspected of being involved in, or of being connected to a person involved in, serious crime to explain the nature and extent of their interest in particular assets, and to explain how the assets were obtained, where there are reasonable grounds to suspect that that person's known lawfully obtained income would be insufficient to allow him or her to acquire the assets. UWOs apply to any asset which exceeds £50,000 in value. They are not limited to individuals, such as politically exposed persons, and will apply to other structures, e.g., trusts and companies, that can hold assets. Furthermore, UWOs can apply to assets located within and outside of the UK. This papers examines the addition of UWOs to the arsenal of anti-money laundering measures in the UK. Compliance with a UWO will no doubt make further inroads on the privacy of trusts since (more) information about a trust will have to be disclosed in order to explain the origin of the funds used to obtain specific trust assets. In addition, persons taken to 'hold' trust property for the purposes of UWOs will include the trustee, a 'beneficiary, whether actual of potential' as well as any person who may exercise effective control over the trust assets in question. 'Beneficiary, whether actual or potential' is clearly intended to be sufficiently wide so as to include beneficiaries of both fixed and discretionary trusts. While a fixed beneficiary may be taken to have equitable proprietary rights in the trust assets, it is questionable whether a discretionary beneficiary similarly has proprietary rights while still an object of the trust and where the trustee has not yet exercised his discretion in the beneficiary's favour. Given the absence of any guidance provided by the Criminal Finances Act 2017, the paper seeks to interrogate the meaning of 'hold' and determine when a discretionary beneficiary ought to be treated as 'holding' trust assets for the purposes of UWOs in order for UWOs to be made in a more principled manner.

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"Trust Registers and Transparency: A Step Too Far?"

Elizabeth Virgo, PhD Candidate, University of Cambridge (Gonville and Caius College)

Trust registers (i.e. registers of information about the individuals who are the beneficial owners of trust assets) are becoming more common around the globe as jurisdictions become increasingly focused on combatting money laundering, terrorist financing and tax evasion. We are used to registers of assets, and registers of legal owners and those with security interests. But the identities and interests of trust beneficiaries have typically remained secret. A move to require individuals to be registered, to risk forfeiting their interests if they are not, and in any event to have their interests governed by registration rules, has the potential to trigger significant changes to the practical mechanics of the trust as a property-holding device and may elicit broader conceptual changes in our understanding of the trust. Whether such changes to our basic understanding of trusts will be warranted by the benefits of increased transparency that governments desire is not clear. This paper will explore these various difficulties and will examine the future of the trust in this new era of disclosure and transparency.

Family Offices, Private Trust Companies and Trust Integrity Issues: Problems and Solutions

Chan Ee Lin (NTU) and Vincent Ooi (SMU)

Family offices and private trust companies are commonly used for succession planning by ultra high-net worth individuals. In this paper, we consider the common structures used, focusing on the composition of their management. Several family governance issues commonly arise in practice, such as control and management, duties owed by the managers, succession planning, and how to resolve possible conflicts between beneficiaries. These must be evaluated when considering the structures to adopt. In addition, where settlors attempt to retain considerable control over the trusts (for example, through "double hatting"), trust integrity issues may arise, raising risks of trusts being treated as sham or illusory trusts. We propose several solutions to resolve the family governance and trust integrity issues highlighted in this paper, including focusing on the importance of proper administration, succession planning and employing professionals with good trust experience to assist in management.

Day 2 - Concurrent Session 7B: Wealth Management and Trust Law Developments: Practice Insights and International Perspectives

"The Times are Changing: A Trust and Wealth Law Update from the U.S."

Jeff Carson, Senior Vice President, Diversified Trust Co

According to the UBS Billionaire Insights 2018 Report, 58% of new billionaires are from the Asia Pacific region. There is little doubt, Asia is and will continue to be a key factor in the growth of worldwide wealth for many years to come.

The entrepreneurs and business owners of Asia have proved adept at creating vast wealth. The increase in ultra-high net worth individuals in the region has spurred a related need for sophisticated service providers to assist in the preservation and eventual transfer of assets to future generations. There is the potential for trillions of dollars of wealth to transfer between generations over the next several decades. The need for planning to both preserve and transfer this wealth must be addressed.

As the country with the largest percentage of worldwide billionaires, the U.S. has a well-established network of service providers who cater to the unique needs of this population. From the creation of multi-generational trusts as a vehicle for wealth preservation to utilization of asset protection strategies for risk management to the creation and administration of family offices to manage generations of wealth, there are vast opportunities for sharing U.S. best practices with emerging wealth regions around the world.

Recent major court opinions, substantial modifications to federal tax law in 2017 as well as the efforts of various state's to attract cross-border trust business combine to create an exciting time in the trust and wealth management business in the U.S. Whether the discussion is concerning the "fiduciary standard", addressing "dead hand control" in drafting or a beneficiary's "right to notice", the issues are universal in application to those of wealth and the service providers who advice the wealthy.

The article will provide an overview of the major developments in U.S. trust and wealth management law over the last several years that have the potential to impact those doing business in the U.S. or considering doing so in the near future from a licensed estates attorney and shareholder in a trust and wealth management firm.

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"Comparative Study of Bassi of Trust Law between Uk and China and Their Relevant Implications in Implementation and Proposal for Future Legislation in China"

Zhang Ting , Visiting Fellow of University of Cambridge on Comparative Study of Trust Law, Senior Partner of Beijing Docvit Law Firm, Director of International Business Department

English trust law has emerged as the most sophisticated in the world. The first codification can be traced to 1872. The whole framework of trust law affected deeply the whole world. China has just recently developed its trust law more than 100 years later than the UK and it is under-developed in certain aspects, which causes a lot of problems in the development of wealth management and charity. This article analyses the basis of trust law of both UK and China from both the theoretical and practical perspective in detail and provides the legislative suggestions to the Chinese trust law.

In China, the nature of the trust should be regarded as a financial management system or a property management system, and the core of which is "managing assets on behalf of others". The entrustment is established and based on the mutual trust. Different from the donation, the purpose of entrustment is to manage assets according to the will of settlor for the benefit of beneficiaries. Therefore, literally, the entrustment is based on trust. That is to say, "the trustee gaining the trust, being entrusted, managing property on behalf of others and performing whose entrustments". In fact, the trust is defined as a system in which the entrusting party (the "settlor") entrusts his or her property to a trusted third person (the "trustee"), and the trustee manages or disposes of the property for beneficiary's benefit according to a certain purpose.

We shall explore codification possibilities in the aspects of accurately defining trust and entrustment, introducing some concepts of equity, relaxation of formality, detailing fiduciary duties and modification of relevant laws in China in order to remove the obstacles to develop private wealth management and charitable trust.

"Capacity Constraints and CEO Succession in the Indian Family Business Groups"

Vijaya Bhaskar Marisetty, University of Hyderabad

Family affiliated firms are lauded for their long-term value creation and diversification benefits. However, they come at the cost of private benefits of control and risk aversion. In a rapidly changing and highly competitive business environment, family firms could become extinct if they fail to restructure their business model by reducing

their capacity constraints. In this context, we examine the role of CEO succession, by an outsider, as a major event that has the potential to change overall risk exposure of family portfolio. An outside CEO can reduce the burden of capacity constraints associated with family business groups, however, they come at the cost of diluting family values and control. Using Indian family business groups data for over two decades, our study sheds new light on the challenges associated with succession plans of family business groups.

Day 2 – Plenary 8: Looking Past the Express Trust – Principles and Techniques

"Abuse of Trust"

Professor Graham Virgo QC (Hon), University of Cambridge

The valid creation of a trust will have significant benefits but in doing so the settlor's rights may be compromised and new obligations created. But there may be times where the settlor's apparent intention to create a trust is not genuine since the settlor has an ulterior motive to create a different set of rights and obligations. Such a trust might be described as a sham and would be invalid. Determining whether the trust is being abused in this way is of significant practical importance. The doctrine of 'sham' has a variety of different components, but their relevance is rarely considered, and whether there is even a distinct doctrine of sham is a matter of controversy. Both these issues will be examined in this paper.

The paper will also consider other circumstances where the use of the trust may be considered an abuse, particularly where it is being used to achieve an illegal purpose and when this should operate to invalidate the trust, another matter of real practical importance but about which there is significant uncertainty.

In doing so the paper will consider various jurisdictions and will identify key themes to assist in determining when the use of a trust is actually an abuse.

"'Constructive Trusts on Express Trusts': The New Zealand Experience"

Jessica Palmer, Professor University of Otago

New Zealanders' high rate of discretionary trust usage is well known and is not restricted to high net worth individuals. Trusts are commonly settled by middle income earners over the family home and any other significant assets they may own. The beneficiaries are generally the settlors and their children as well as a nominated charity. The children or grandchildren are usually the final beneficiaries. Settlors retain significant involvement with the trust property, appointing themselves as trustees and usually also holding powers to appoint and remove both other trustees and beneficiaries. The family lawyer or accountant is usually appointed as an independent trustee.

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New Zealand's high number of trusts is mirrored by a significant focus on finding ways through the ring-fence created by trusts in order to provide some recourse for creditors and spouses or de-facto partners of the settlor. Statutory look-through provisions are limited, so challenges have been mounted on the basis that the particular trust is a sham, an alter ego of the settlor, or illusory; or that the powers held by the settlor are capable of being treated as items of property with a value commensurate to the value of the trust property. While most of these approaches have met with little success, a recent line of cases has shown the courts' willingness to instead recognise the trust property as being subject to a distinct constructive trust in favour of the settlor's past spouse or partner.

The constructive trust arises in response to the reasonable expectations of the third-party claimant that they would receive an interest in the property in return for various contributions made. Constructive trusts have been recognised despite the independent trustee having no knowledge of the expectations and/or the contributions. In so doing, courts have seen themselves as departing from trust orthodoxy saying that "traditional rules…must bend to the practical realities" (Vervoort v Forrest [2016] NZCA 375 at [62]).

This paper will examine these constructive trust cases and analyse whether they are in fact a departure from trust principles and whether such departure is justified. These cases raise questions in relation to the nature of the trustees' interest in the property and whether it can be susceptible to a constructive trust, and the requirement of trustee unanimity. The subsequent enquiry is then whether such claims could arise in other jurisdictions where a greater emphasis is placed on the need for a common intention between the claimant and property owner, rather than simply the reasonable expectations of the claimant, and whether such common intention can be established without involvement of the independent trustee.