

MEMORANDUM

RETENTION OF CONTROL BY SETTLORS, FOUNDERS AND OTHERS

1. **The requirement for retention of control:**
 - 1.1 Many intending Settlers or Founders will not wish to relinquish control to Trustees or to the Council of a Foundation in respect of assets, which such a person views as “my assets”.
 - 1.2 This is why there is a need for Trust Law and Foundations Law to provide solutions for retention of control.
2. **Where there is no effective Trust or retention of control makes the person concerned a Trustee:**
 - 2.1 If the Settlor and the Trustees both set out to deceive others that what has been created is a Trust, then the Trust may be a “sham”. Since “sham” requires bilateral deceit, it is very rare.
 - 2.2 The other possibility if there is no bilateral deceit is a nominee arrangement, because the Settlor had control before the creation of “the Trust” and has retained control afterwards.
 - 2.3 If the retention of control is insufficient to create a nominee arrangement, the result may still be that such retention of control is sufficient to make the person concerned a Trustee.
3. **Reserved Powers to a Settlor and to others in a Trust::**
 - 3.1 Some persons may argue that reservation of powers in a Trust is contrary to the very nature of a Trust. Further over-use of wide reserved powers may lead to nominee arrangements or to the user being treated as a Trustee.
 - 3.2 Samoan Trust Law provides:-
 - 3.2.1 that the reservation of wide reserved powers to a Settlor will not invalidate a Trust, unless that Trust is a sham or the reservation may be said to be so excessive that it threatens the very nature of the Trust;
 - 3.2.2 that a Protector may have any proactive power (a power exercisable by the Protector) or reactive power (a power exercisable by the Trustees with the prior written consent of the Protector. To the extent that the Trust does not provide for any such power, there are also automatic default powers given by law to a Protector; and
 - 3.2.3 that a Trust may provide for “prescribed directions” to be given by the Settlor, by the Protector or by any other person or persons to the Trustees.
4. **Reserved Powers to a Founder in a Foundation:**
 - 4.1 The proposed Samoan Foundations Law provides that the Charter or Rules of a Foundation may reserve any powers to the Founder.
 - 4.2 There are also provisions for the Founder to assign any such powers and for any assignee of such powers to do likewise. If there is no assignment, then the powers will vest in the Guardian of the Foundation and thus not be lost.

5. **The use of Private Trust Companies (“PTC”):**

5.1 A possible way of keeping control over a Trust is for the Settlor and/or his family to form their own PTC and thus be their own Trustee.

5.2 The danger of this is that, if the Settlor owns the PTC, there will be no change of control and there will be a nominee arrangement and not a Trust.

5.3 Further, the Settlor and his family may be very good at particular things but not necessarily at being Trustees. Also, they may not understand and should not take on the onerous duties of a Trustee.

5.4 The idea that a PTC will save fees is often a fallacy.

5.5 The way round these problems will be for the PTC to be owned by a Purpose Trust or a company limited by guarantee or a Foundation and for professionals to be directors of the PTC. This will certainly add to costs.

6. **Split share capital:**

6.1 Companies can have more than one class of shares. One such class can have the voting and controlling rights.

6.2 The problem here is that minority shareholders’ interests will still be protected.

7. **The New Zealand solution: Two Trustees with separate roles:**

7.1 New Zealand Trust Law enables there to be a controlling Trustee and an administrative Trustee.

7.2 This is a solution crafted in Trust law and has not found great appeal.

8. **SISTA:**

The Trust Law of Samoa has introduced “SISTA” (The Samoa International Special Trust Arrangement).

The primary purpose of a SISTA is all important and this is stated to be:

“(a) “the shares may be retained indefinitely; and

(b) the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee”

In this way a Trust can be established with a Samoan Trustee Company as Trustee and the Trust holds the issued shares of a Samoan company. The Trustee can retain the shares indefinitely without the need to diversify the investment or convert them, without being at fault. Further, the Trustee can leave the day to day management and control of the company to its directors (who may well not be confined to the Settlor or even to his family) without being liable for the acts or omissions of the directors in this respect.

This is still a solution based in Trust Law and was designed specifically to overcome the risk to Trustees in delegating their powers. It is jurisdictional specific and is framed in Trust Law.

9. **The combination of a Trust with a Limited Partnership:**

This is a solution for the retention of control by a Settlor or others in Limited Partnership Law and not Trust Law.

Samoa is the first jurisdiction to legislate for this in its Trust Law. The proposed Foundations Law will also legislate for the combination of a Foundation with a Limited Partnership.

The basis of the structure and the reason for it is simple. By Limited Partnership Law, which is always statutory, the General Partner must control and manage the investments or business of the Limited Partnership day to day and the Limited Partner must not. Therefore, if the General Partner with a small percentage interest is the Settlor of a trust (or better still a company is the General Partner and is owned and controlled by the Settlor and/or his family), the appropriate person or persons keep control day to day. The interest of the Limited Partner is owned by the Trustees of the Trust, who then have value but no day to day control.

This is the most robust structure for dealing with the problem of retention of control by the Settlor or others without the Trustee being at risk.

NOTE: This Memorandum is provided for your assistance but you should always take professional advice before acting. Circumstances and needs differ considerably from one person to another.

This Memorandum was last updated on 30th July 2015