

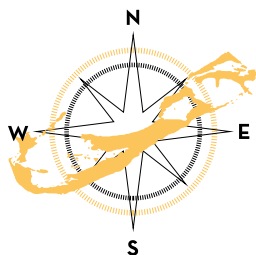
# TRUST BERMUDA

## WHERE EAST MEETS WEST

The relationship between Bermuda and Asia has deep roots. Now a new generation of wealthy Asian families and corporations are discovering the island's advantages







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## TRUST BERMUDA

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his second annual Bermuda supplement to the *STEP Journal* underscores the island's status as a top-tier international financial centre. We at the Bermuda Business Development Agency (BDA) are delighted to partner with STEP Bermuda and the Bermuda Association of Licensed Trustees (BALT) to showcase the island's strengths here, including its links with Asia's 'tiger' economies. More than ever, investors and businesses from China, Hong Kong and Singapore are looking for the many advantages a sophisticated, well-capitalised and highly respected domicile like ours can offer.

Responsive legislative updates keep Bermuda at the forefront of corporate governance. In 2016, Bermuda's courts will celebrate their 400th anniversary – testament to a rich and trail-blazing legal history, grounded in English and Welsh common law. Indeed, Bermuda's final court of appeal is London's Privy Council. Perhaps it should be no surprise, then, that more leading global law firms are setting up offices in our jurisdiction to join the legal powerhouses already here.

Bermuda has capitalised on a mix of unique elements to punch above its weight economically. We are conveniently positioned between North America and Europe. Our regulatory structure is robust and sensible. Our tax-neutral system does not differentiate between foreign and local enterprises, and is conducive to a thriving business sector. Our infrastructure is advanced, including a fully electronic stock exchange and excellent telecommunications. Perhaps most importantly, Bermuda boasts a wealth of intellectual capital: a recent study found that some 15,000 island residents (roughly a quarter of the total) are financial, legal or regulatory experts in transatlantic capital markets.

We continue to look for opportunities, proactively engaging with new international markets, while placing value in our established trading partners. And we trust that these new investors come to discover Bermuda as a top-quality place to do business – just as their counterparts have done for well over a century. ■

**ROSS WEBBER** IS CHIEF EXECUTIVE OFFICER OF THE BDA

# BERMUDA MEANS BUSINESS

**Michael Dunkley**, Premier of Bermuda, explains how the government is helping to keep business booming on the island



This year, Bermuda's government has been extremely busy, building on the foundations that have been set to further facilitate the island's economic turnaround.

There is much to be excited about and thankful for in our island home. While Bermuda does not lead the world in banking services or investment funds, it is a financial centre with about USD500 billion of assets under management – a sum that is growing, thanks to Canada, the UK and continental Europe in particular.

## BUSINESS DESTINATION

This government continues striving to create an environment that is conducive to the attraction of foreign direct investment, and the conduct of international business. We work tirelessly to ensure our leadership and infrastructure strength is visibly demonstrated and available to every business sector, while expending efforts on all fronts to showcase Bermuda as an attractive business destination – it is this environment that we want to consistently provide for STEP and its members' clients.

The Business Development Agency (BDA), an independent organisation funded by both the government and the private sector, continues to convey the message that Bermuda is open to business and open for business. The BDA carries out proactive, targeted



**THE HONOURABLE  
MICHAEL H DUNKLEY, JP, MP**  
PREMIER OF BERMUDA AND MINISTER  
OF NATIONAL SECURITY

marketing and business development strategies to stimulate growth in the Bermuda economy.

Transnational Analytics LLC, of Arlington, Virginia, recently prepared an economic study exclusively for the Bermuda government. The study, published in June 2015, is entitled *Bermuda in the World Economy: Economic Relations with Asia, Canada, Europe and the United States – 2014*. Covering 2007 to 2013, it analyses Bermuda's role in the world economy, focusing particularly on the US and Canada; the UK, Germany and France; and China (including Hong Kong) and Singapore. Bermuda experienced almost USD50 billion in two-way trade with those eight jurisdictions in 2013 and continues to stand out among its peers and other advanced economies for the size and geographical reach of its economy.

## DOMESTIC DEVELOPMENTS

Not only does Bermuda continue to go from strength to strength internationally but, on the local front, this government recently passed two key pieces of legislation – the *St George's Resort Bill* and the *St George's Resort Amendment Bill*. These two pieces of legislation pave the way for the development of a brand new hotel with residential units in St George's, the UNESCO World Heritage Site. This project will provide a substantial economic injection to the east end of the island, creating jobs and career opportunities for Bermudians.

The island is also gearing up for the Bermudian leg of the Louis Vuitton America's Cup World Series yacht races, which together represent the first stage of competition in the 2017 America's Cup. These races feature all of the America's Cup teams and highlight the skills of some of the world's best sailors. The Bermudian section of these preliminary races, which will take place over a three-day period, will include a festival and numerous celebratory activities for Bermuda and all its visitors to enjoy.

As you can see, Bermuda continues to be a thriving and innovative destination, both for locals and our international business partners and visitors. This government views networking and positive industry partnerships as a key component in Bermuda's overall success. It also views STEP as one of its key industry partners, and will support STEP's ongoing endeavours in the trust industry in Bermuda. ■



# 百慕大商业策略

## 百慕大总理迈克尔·邓克力阐述政府如何促进并保持岛上的商业繁荣



迈克尔·邓克力  
百慕大治安官和国会议员  
百慕大总理及国家安全部部长

今年，百慕大政府一直非常忙碌，在已经建立的基础上继续努力，以进一步促进岛上经济的复苏。

对于我们的岛屿家园而言，还有许多令人振奋和感激的事。尽管在银行服务或者投资基金方面，百慕大不是世界的领导者，但它仍是一个拥有5,000亿美元管理资产的金融中心，感谢来自加拿大、英国以及欧洲大陆的投资，这个数字一直在增长。

### 商业目标

本届政府不断努力，力图创建一个有利于吸引外国直接投资和国际业务的环境。我们不辞辛劳地工作，以确保我们的领先地位，而且我们基础设施的力量是显而易见的，每个商务部门都可以使用这些设施，同时在这个方面投资的努力使百慕大成为了一个极具吸引力的商业投资目的地——这就是我们想为STEP及其成员的客户提供的便利环境。

商业开发机构（BDA）是一个由政府 and 私人部门合资的独立组织，它一直传达着一个消息：百慕大向商业开放，它因商业而开放。BDA实行积极主动、定向的市场营销和商业开发策略，以刺激百慕大经济的增长。

位于弗吉尼亚州阿林顿的跨国分析公司 LLC，最近专门为百慕大政府准备了一个经济的调查研究。该研究发表于2015年6月，题目为世界经济中的百慕大：与亚洲、加拿大、欧洲和美国的经济关系——2014。分析时段取自2007年到2013年，它分析了百慕大在世界经济中的角色，尤其聚焦于美国和加拿大；英国、德国和法国；以及中国（包括香港）和新加坡。2013年，百慕大与那八个区域的双向交易接近500亿美元，而且相比于与它相似的国家、同规模的其它发达经济体以及它的经济可以涉及到的地理区域，百慕大一直处于突出地位。

### 国内发展

百慕大不仅持续在国际上不断发展壮大，而且在国内，该政府最近通过了两项关键的立法——圣乔治度假村法案和圣乔治度假村修正案。圣乔治是联合国教科文组织世界遗产地，这两项法案为那里有着居住单

元的全新型酒店的发展铺平了道路。这个项目将为该岛的东部注入大量经济动力，为百慕大人带来了工作岗位和就业机会。该岛也在努力让路易威登美洲杯世界快艇竞赛成为百慕大发展的重要动力，这个赛事也展现了2017年美洲杯的第一阶段。这些竞赛突出表现了所有美洲杯队伍的特点，并突出展现了一些世界上最佳航行者的技能。这些预赛将在百慕大地区持续三天时间，这期间将包含一个节日，届时将举行众多的庆祝活动，供百慕大和它的游客一睹风采。

正如你所见，对本地和国际上的业务伙伴以及游客来说，百慕大仍然是一个繁荣、创新的理想场所。该政府将工业联络和积极的行业合作视为百慕大成功的一个关键要素。它也将STEP视为它的一个重要的行业合作伙伴，而且将为STEP在百慕大信托业上的不间断努力提供支持。

# BERMUDA IN BRIEF

## ENVIABLE REPUTATION

**91** treaty partners around the world...

... including partners under **41** tax information exchange agreements (China, Singapore and Japan among them)...

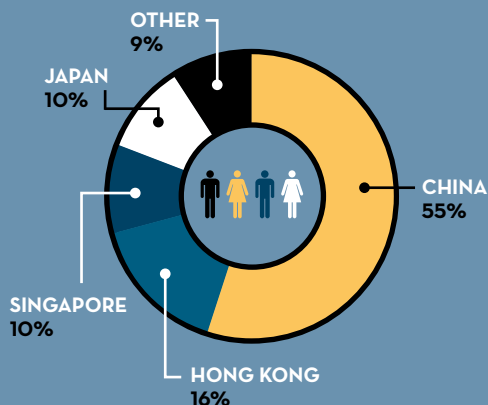
... and **87** co-signatories of the OECD's *Multilateral Convention on Mutual Administrative Assistance in Tax Matters*.

**First** offshore jurisdiction elevated to the OECD's 'whitelist' for jurisdictions that have substantially implemented internationally agreed tax standards, in 2009 - putting Bermuda on a par with G8 and G20 nations such as the UK, US and Germany.

## THE ASIAN LINK

OVER **500** ASIAN COMPANIES HAVE BECOME DOMICILED IN BERMUDA IN THE PAST 13 YEARS

NEARLY **800** COMPANIES BASED IN EAST ASIA ARE CURRENTLY REGISTERED IN BERMUDA, BREAKING DOWN AS FOLLOWS:



BERMUDA SUPPORTS **10,000** JOBS IN ASIA

JUST OVER **2,300** OF THE **64,237** PEOPLE RESIDING IN BERMUDA WERE BORN IN ASIA, ACCORDING TO THE 2010 CENSUS - **DOUBLE THE NUMBER** IN 2000

**USD29.7 TRILLION**

THE WEALTH HELD BY THE WORLD'S **211,275** ULTRA-HIGH-NET-WORTH INDIVIDUALS (UHNWIs) IN 2014

**USD31 BILLION**

THE WEALTH HELD BY THE **102** UHNWIs IN BERMUDA IN 2014

**USD6.98 TRILLION**

THE WEALTH HELD BY THE **46,635** UHNWIs BASED IN ASIA IN 2014

HIGH-NET-WORTH HOTSPOT

## INNOVATIVE LEGISLATION

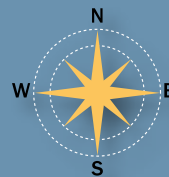
BERMUDA'S TRUST LAWS OFFER SETTLORS AN UNUSUAL DEGREE OF FLEXIBILITY, CONTROL AND CERTAINTY

Uniquely, the **Trustee Act 1975** by s47 provides the court with a broad jurisdiction to confer upon trustees additional powers where 'expedient', providing the flexibility to modernise trusts, while ensuring careful judicial oversight.

The **Trusts (Special Provisions) Amendment Act 2014** lists extensive interests and powers that can be retained by a settlor or granted to a third party (e.g. a beneficiary) without prejudicing the trust's validity, or the third party being deemed a trustee.

The **Trustee Amendment Act 2014** puts a replication of the 'rule in *Re Hastings-Bass*' on a statutory footing in Bermuda, allowing the court to undo the exercise of fiduciary powers based on flawed or incomplete information.

**665 MILES**  
FROM THE US



**2.5 HOURS**  
TO NEW YORK BY PLANE

**PERFECTLY POSITIONED**

**6.5 HOURS**  
TO LONDON ON A PLANE

**9**  
DESTINATIONS SERVED  
BY DAILY DIRECT FLIGHTS  
FROM BERMUDA,  
INCLUDING **NEW YORK**  
AND **LONDON**

**1** HOUR AHEAD  
OF NEW YORK

**4** HOURS BEHIND  
LONDON

**62 MILES**  
OF COASTLINE

**15.6°C**  
LOWEST AVERAGE  
TEMPERATURE  
IN BERMUDA  
(FEBRUARY)

**30.4°C**  
HIGHEST AVERAGE  
TEMPERATURE  
IN BERMUDA  
(AUGUST)

**TAX NEUTRALITY**

**0**  
TAX DEADLINES  
FOR PRIVATE CLIENTS

**0%**  
INCOME, DIVIDENDS,  
PROFITS, CAPITAL GAINS,  
CORPORATION, INHERITANCE  
OR GIFT TAX

**2035**

THE YEAR UNTIL WHICH  
BERMUDA'S FINANCE MINISTER  
HAS GUARANTEED THAT  
**NO INCOME,  
DIVIDENDS  
OR CAPITAL  
GAINS TAXES**  
WILL APPLY TO CORPORATIONS  
OR INDIVIDUALS

**RESPECTED LEGAL SYSTEM**

**1612**

The year in which Bermuda, a common law jurisdiction, adopted English and Welsh law as it then stood. English and Welsh law remains highly persuasive, and the Privy Council in London is Bermuda's final court of appeal.

**1622**

The year in which Bermuda, the UK's oldest overseas territory, became self-governing.

The **International Cooperation (TIEA) Amendment Act 2013** provides that Bermuda's Financial Secretary must apply to court for production orders in relation to requests under tax information exchange agreements, reducing the risk of inappropriate requests.

The **Perpetuities and Accumulations Act 2009** abolished the rule against perpetuities and excessive accumulations, allowing the formation of dynastic and perpetual trusts from 1 August 2009.

The **Trusts (Special Provisions) Act 1989** contains provisions designed to protect trusts governed by Bermuda law from challenges under foreign laws or by foreign courts.









# BIG in Asia

**Elliot Wilson** considers the long-standing links between Bermuda and three Asian powerhouses: China, Hong Kong and Singapore





“When choosing a domicile for Jardine Matheson, we considered a number of sophisticated financial centres and Bermuda topped the list. It still does today”

**B**ermuda is a magnet for investors of all varieties. It offers great weather, a handy location east of the American seaboard, pragmatic and risk-based regulations, a world-class legal system, and a deep pool of highly experienced white-collar financial and business services professionals.

Along with the US, its closest neighbour, and the UK, by dint of the island's status as a British Overseas Territory, Bermuda has developed strong and enduring links with Asia's largest nations and most vibrant city states. At the heart of this relationship are three very different, yet culturally intertwined, jurisdictions: Hong Kong, Singapore and China.

#### TIES TO HONG KONG

Of the three, Hong Kong has the strongest bilateral relationship. Portfolio investment totalling USD109 billion flowed from Hong Kong into Bermuda in 2013, according to data from the International Monetary Fund. That was a record high, and an increase of more than 150% in five years. Only the US provides a consistently larger source of inward portfolio capital to the island.

There are good reasons for this relationship. The former British colony and Bermuda each adhere to English and Welsh common law, ensuring business is conducted by the same legal tenets. It was this lawful guiding force that, 31 years ago, convinced the then Hong Kong-based conglomerate Jardine Matheson, active in sectors from real estate to motor vehicles to retail, to incorporate its new holding company in Bermuda. 'It was the

well administered, British-based legal system that was important to us when choosing to domicile in Bermuda,' says John Lang, President of Jardine Matheson International Services, which is based in the island's capital, Hamilton. 'At the time, we considered a number of sophisticated financial centres and Bermuda topped the list. It still does today.'

As more Hong Kong entrepreneurs opened new factories in China after the handover in 1997, buying up property in major cities, opening bank branches, and building infrastructure, many turned to Bermuda as a domicile for their real estate outfits, funds, trusts and investment vehicles. Trade in services between Hong Kong and Bermuda soared, aided by the island's lack of withholding or capital gains tax. The venerable law firm Conyers Dill & Pearman, whose roots in Bermuda stretch back more than



**USD109  
BILLION**

IN PORTFOLIO INVESTMENT  
FLOWED FROM HONG KONG  
INTO BERMUDA IN 2013



# The Hong Kong connection

**A**s a financial centre, Hong Kong has established links with a number of offshore centres, particularly Bermuda. Given that Bermuda is a British Overseas Territory and Hong Kong is a former British colony, they share a common legal root. It is, therefore, not surprising that the commercial ties between the two territories continues to flourish, 18 years after Hong Kong reverted to Chinese sovereignty.

## SAFE HARBOUR

In the lead up to the handover to China in 1997, and particularly during negotiations on handover arrangements between the British and Chinese governments, many investors were preparing for the worst-case scenario. After all, no other territory in the world had ever experienced such a change of sovereignty, switching from a colony to a territory with a high degree of autonomy under a 'one country, two systems' model. No one knew how the business environment would change, given that the capitalist approach in Hong Kong did not seem to square with the socialist approach in China. That uncertainty bred fear.

The basis for trade and commerce is trust between the partners involved. Reliance on the common-law legal system as a basis for trade was considered vital. Many companies

believed trust would be maintained if their domicile were changed to a jurisdiction with UK ties. Led by a leading 'hong' or trading house, listed companies began to redomicile from 1988, and Bermuda emerged as the offshore destination of choice. This approach may not have found favour with Beijing, but to the investing public, the form, if not also the substance, was important.

Many of the listed companies chose Bermuda because they had operations in more than one country, and needed to amalgamate and accumulate their surpluses in a tax-neutral jurisdiction. There was also a need to undertake this 'continuation' process without any interruption of their corporate existence and business activities – something Bermuda could facilitate.

Bermuda also offered two other features that Hong Kong investors and companies took for granted: first, an absence of withholding or capital gains tax, and, second, the ability to move funds in and out of the jurisdiction at will, and to pay dividends to non-resident shareholders. These factors are vital to the way business is done in Hong Kong.

## ENHANCED APPEAL

Financial considerations aside, Bermuda offered other advantages (and still does). Its political set-up, with a parliamentary government that dates back to the 1600s, and continuing ties to the UK, offered the political and legal stability that Hong

Kong investors yearned for in the lead-up to the handover. With a legal system resembling that of Hong Kong at the time, and with final appeals to the Privy Council in London, Bermuda was seen as a natural second home for Hong Kong businesses.

Hong Kong professionals have met with a high level of sophistication and commercial sense in their counterparts in Bermuda. Bermuda has been involved with international businesses, many in the insurance and banking sectors, for nearly 100 years, and over 70 per cent of Fortune 100 companies have a presence in Bermuda, so it is vital the island has the legal, accounting and other professional skills to sustain complex commercial deals and promote good corporate governance. In recent years, some of Bermuda's professional firms have established a presence in Hong Kong and, therefore, the ties have become even closer.

By the end of June 2013, more than 470 of the companies listed in Hong Kong were incorporated in Bermuda. Today the Hong Kong Stock Exchange encourages companies incorporated in different jurisdictions to take up listings, and the shares of Chinese, Russian, French, Brazilian and Swiss companies are now traded. Companies incorporated in other offshore jurisdictions may be more prevalent in Hong Kong IPOs today, but Bermuda must always be considered whenever a sophisticated and demanding structure is called for. Quality, and not just quantity, is the key to long-term success. ■



**LESTER HUANG** IS A PARTNER AT PC WOO & CO IN HONG KONG







➡ 110 years, estimates that, by the end of June 2013, more than 470 Bermuda-incorporated corporations and entities were listed in Hong Kong.

Bermudian financial and legal service providers opened offices in Hong Kong to tap into the rising two-way flow of capital. Two of Bermuda's largest law firms, Conyers and Appleby, quickly became mainstays in Hong Kong. Sean Moran, who is now Business Development Manager at the Bermuda Business Development Agency (BDA), remembers working at Bank of Bermuda's Hong Kong division for three years in the late 1990s. 'We had a really high profile in the city,' he says. 'We were constantly busy, setting up corporate trusts and global funds services.' Bank of Bermuda is now HSBC Bank Bermuda, having been sold to the London- and Hong Kong-listed lender in 2004. It still offers world-class fund administration, trust, custody, and asset-management services to institutions and individuals.

### CONDUIT ACROSS CONTINENTS

Nor is it only Hong Kong companies that root themselves in Bermuda, before putting their capital to work in China. Many of the largest US semiconductor makers, including Freescale Semiconductor and Marvell Technology Group, are either headquartered or legally domiciled on the island, in large part because they wanted to anchor their assets

and intellectual property in a pragmatic and business-friendly jurisdiction with excellent levels of transparency and corporate governance. They then ventured forth, opening factories in China and across east and south-east Asia.

Singapore, too, is wedded at the hip with Bermuda. A 2014 report commissioned by the government of Bermuda noted that, along with Hong Kong, the Lion City was a key 'conduit for investment between the world and China'. But Singapore is also a major investor in and through Bermuda in its own right. Two-way trade in goods and services amounted to around USD2.7 billion in 2012, much of it connected to shipping services, and the manufacture of container ships. BW Group, an international maritime services group, is not unusual in opting to register in Bermuda while basing one of its two global main offices in Singapore.

Beijing also needed Bermuda's help as it opened up to the outside world in the 1980s. China's tightly closed capital account (still only partially open) ensured that mainland-based private firms and state-owned enterprises would come to rely heavily on the island, in

order to be able to trade with the outside world. Bermuda acted as a cost-effective, secure and efficient outbound conduit for mainland capital, just as it acted as an inbound channel for Hong Kong and Singaporean capital.

And Bermuda's relationship with China has only grown over the years. The island is thought to support more than 10,000 jobs in China, Hong Kong and Singapore. The BDA's Moran expects to see more mainland companies and citizens set up corporate and family trusts, as China's capital controls ease. 'As a jurisdiction, Bermuda will always be at the top of the list,' he says.

'Our business-friendly government acts as a beacon to Asian investors, thanks to its open-door policy.' Moran points to the rising number of Chinese delegations making a regular pilgrimage to Bermuda. 'They come here to kick the tyres a bit, with a view to setting up trusts,' he says, adding: 'We had a trust lawyer from Shanghai come to visit in February this year, with a view to advising his clients to establish more trusts here.'

Bermuda was also in the news recently, following the May 2015 purchase of Ironshore by Fosun International, for USD1.8 billion. That deal summed up the vibrant relationship between Asia and the island: a Bermuda-based insurer bought by an acquisitive Chinese conglomerate based in Shanghai and incorporated in Hong Kong. Insurance and reinsurance remain key industries on the island. Indeed, the industry is thought to directly employ up to 4,000 people, making it the biggest generator of white-collar jobs in Bermuda after the government.

Bermuda is set to remain a favoured investment destination for Asian corporates and entrepreneurs for decades to come. 'It has everything you need,' says Lang. 'A very good legal system, a deep pool of lawyers and accountants – lots of brainpower within a few city blocks in Hamilton – as well as great financial, telecommunications and IT infrastructure. And that's not forgetting the very high quality of life.' Little wonder Asia's best and brightest love Bermuda so much, and have done for years. ■



10,000

JOB SUPPORTED IN ASIA



**ELLIOT WILSON** IS  
A CHINA EXPERT  
WHO WRITES FOR  
*THE ECONOMIST*







# ROOM FOR MANOEUVRE

**Richard Norridge, Joanna Caen and Keith Robinson** explain some important differences between the variation-of-trust regimes in Bermuda and Hong Kong

**P**ractitioners based in Asia find that one of the most difficult questions for clients who are seeking to establish a trust is which jurisdiction to choose. Within the region, Hong Kong and Singapore are the most popular jurisdictions. They offer stable trust law, often still closely tied to case law developments in England and Wales. Other advantages of these jurisdictions include mixed economies, allowing for diverse investment opportunities, and often close geographical proximity to settlors and their families.

However, clients also look for jurisdictions outside Asia, for a multitude of reasons. The clients may feel that trust law in Hong Kong and Singapore is too conservative and not flexible enough. They may also feel that the more traditional offshore jurisdictions, such as Bermuda, are more proactive in adapting their trust laws to better meet the needs of settlors, trustees and beneficiaries than onshore jurisdictions such as Hong Kong and Singapore.

We often find that it is helpful to clients to produce a comparative table of the current regimes in place in each of the jurisdictions being considered. For example, that table

may consider the perpetuity periods on offer in each jurisdiction, the statutory indemnity offered to trustees and other key provisions.

One of the statutory provisions that is becoming of more interest to clients in Asia is the ability of the courts to vary trusts. Clients are conscious that the structure they put in place today may not suit the needs of their family in ten, 20 or even 80 years. For example, changes may need to be made to take advantage of evolving tax regimes, to vary beneficial interests (and even beneficiaries) or possibly to alter the governing law of trusts.

In this article, we consider the differences between the Hong Kong and Bermuda statutory powers of variation.

Both Hong Kong and Bermuda have two distinct statutory regimes that, in effect, allow the High Court of Hong Kong and the Supreme Court of Bermuda to

sanction the variation of trusts. These are, first, a mechanism for the court to consent on behalf of beneficiaries who cannot themselves consent and, second, a mechanism for the court to approve variations without any beneficiary consent at all.

## **CONSENT TO VARIATION ON BEHALF OF BENEFICIARIES WHO CANNOT THEMSELVES CONSENT**

Section 3 of the Hong Kong *Variation of Trusts Ordinance* (Cap 253) and s48 of the Bermudian *Trustee Act 1975* both closely mirror s1 of the English and Welsh *Variation of Trusts Act 1958*. These provisions allow the court in each jurisdiction to provide consent to a variation on behalf of beneficiaries who are unable to consent for themselves.<sup>1</sup> Such consent would be sought when all other beneficiaries consent to the variation.





“Despite sharing the same test of expediency, the Bermudian power is significantly wider than the Hong Kong power”

## POWER TO AUTHORISE DEALING WITH TRUST PROPERTY

Sometimes trustees need to deal with trust property in a manner that deviates from the trust deed. They may not want to have to obtain the consent of all beneficiaries able to consent for themselves because, for example, it may be difficult or expensive to obtain the consent of many individuals, some of whom may have the remotest of interests in the trust. The court has a very limited inherent jurisdiction to authorise such dealings – for example, in cases of emergency or salvage.<sup>2</sup>

Both Hong Kong and Bermuda have statutory provisions that provide a mechanism for trustees to apply for the provision of additional powers that may, in effect, result in a variation of trust. As will be explained below, the Bermudian section is wider, and therefore potentially more appealing to settlors in Asia. Thus, Bermuda may prove to be attractive in this regard.

Section 56 of the Hong Kong *Trustee Ordinance* (Cap 29) authorises the court to confer additional powers on trustees to undertake transactions relating to trust property where the trust instrument does not provide the power for trustees to do so. However, the variation power is limited to the management or administration of trust property.<sup>3</sup>

‘Where in the *management or administration* of any property vested in trustees, any... transaction, is in the opinion of the court *expedient*, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees... the court may by order confer upon the trustees... the necessary power for the purpose...’

In contrast, s47 of the Bermuda *Trustee Act 1975* permits the provision

of additional powers in relation to a transaction affecting or concerning trust property, without the requirement that what is proposed relates to the management or administration of the trust fund.<sup>4</sup>

‘Where any *transaction* affecting or concerning any property vested in trustees, is in the opinion of the court *expedient*, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees... the court may by order confer upon the trustees... the necessary power for the purpose...’

Both Hong Kong and Bermuda use the same English and Welsh test for expediency. This requires that the proposed transaction benefit the trust as a whole, and not simply some of the beneficiaries.<sup>5</sup> However, the conferral of a power has satisfied the test of expediency where this benefits the trust as a whole by facilitating better administration, despite the fact that it is of particular benefit to one group of beneficiaries, who are adversely affected by the absence of the power in a way the others are not.<sup>6</sup> In considering what is expedient, the courts in Hong Kong and Bermuda are agreed that there is nothing improper or contrary to public policy in approving the variation of trusts for the purpose of avoiding or reducing tax liability.<sup>7</sup>

Despite this similarity, the Bermudian power is arguably significantly wider than the Hong Kong power. For example, in England and Wales, it has been held that the limiting words ‘management or administration’ (the same as in the Hong Kong provision) mean the power of variation can only be used to vary beneficial interests in limited circumstances.<sup>8</sup> The Hong Kong Ordinance was significantly updated in 2013. Despite this, the legislature chose to retain the more limited power of variation.

By contrast, the lack of any limitation to ‘management and administration’ allowed the Bermuda court, in *GHIJ v KL*,<sup>9</sup> to approve an application to provide the trustees with the power to vary beneficial interests. Ground

CJ noted that the lack of any limitation in the Bermuda statute to administrative matters must be presumed to have been deliberate.<sup>10</sup>

The Chief Justice also held that the definition of ‘transaction’ was ‘very broad’ and allowed the court to approve a resettlement of the trust in question with certain variations (including to beneficial interests), provided that it was ‘expedient’.

There has now been a second reported Bermuda case on the application of s47. In *Re ABC Trusts*,<sup>11</sup> Kawaley CJ followed with approval *GHIJ v KL* and noted that s47 ‘gives the court a very broad jurisdiction indeed to authorise transactions in relation to trust property which have the effect of varying the terms of a trust deed’.<sup>12</sup>

## SUMMING UP

As can be seen from the brief analysis above, both the Hong Kong and Bermudian statutory powers to permit trustees to deal with trust funds outside the powers permitted by the trust deed are derived from English and Welsh provisions. However, while Hong Kong has recently updated its *Trustee Ordinance*, the legislature chose to retain the more conservative power.

It is these differences between statutory provisions that mean settlors and their advisors should be careful to consider all ramifications of choosing one jurisdiction over another. In the case of Bermuda, its more expansive and more flexible power of variation may be one reason why settlors in Asia would consider it over local trust jurisdictions. ■

<sup>1</sup> Thus providing statutory extension to the rule in *Saunders v Vautier* (1841) Cr & Ph 240

<sup>2</sup> See *Lewin on Trusts* (19th edn) at 45-005 - 45-011

<sup>3</sup> Section 56(1); emphasis added

<sup>4</sup> Section 47(1); emphasis added

<sup>5</sup> *Re Craven's Estate (No.2)* [1937] Ch 431

<sup>6</sup> *Southgate v Sutton* [2011] EWCA Civ 637

<sup>7</sup> *Hong Kong Bank Trustee Ltd v Ho Shai Lai* [1985] 2 HKC 704; *GHIJ v KL* [2010] Bda LR 86, at para 9

<sup>8</sup> *Sutton v England* [2012] 1 WLR 326 and *Re English & American Insurance Co Ltd* [2013] EWHC 3360

<sup>9</sup> [2010] Bda LR 86

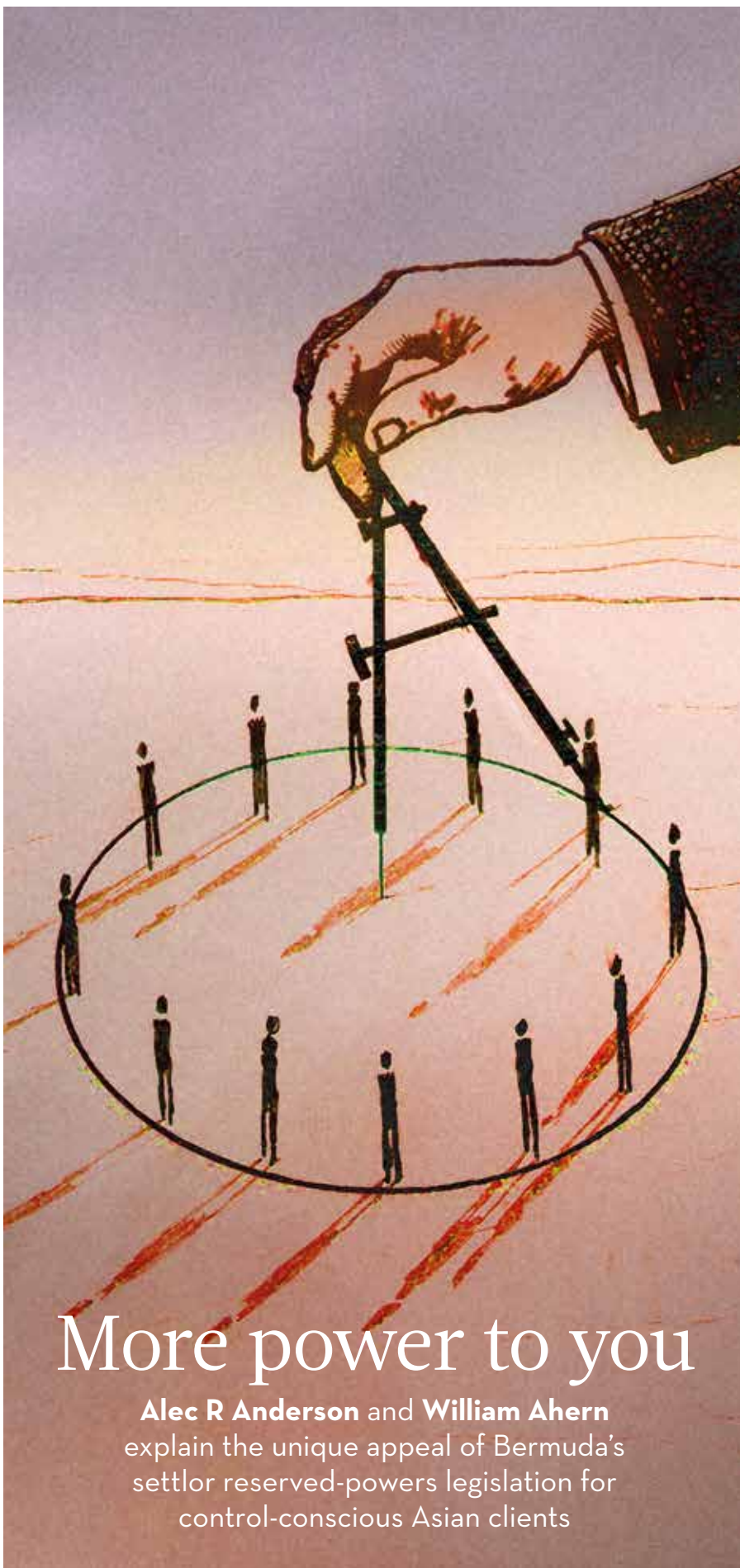
<sup>10</sup> At para 3

<sup>11</sup> [2012] Bda LR 89

<sup>12</sup> At para 5



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# More power to you

**Alec R Anderson** and **William Ahern**  
explain the unique appeal of Bermuda's  
settlor reserved-powers legislation for  
control-conscious Asian clients

**T**he *Trusts (Special Provisions) Amendment Act 2014* (the Amendment Act) provides settlors of trusts with more control, confidentiality and certainty, whether in terms of their tax-planning-motivated asset-holding structures or family-business succession plans.

## GREATER CONTROL

The Amendment Act provides statutory certainty that the reservation of substantial interests and/or powers of control can be retained by a settlor or granted to a third party under the terms of a Bermuda trust without such assets being deemed to be owned by the settlor's estate. While Bermuda's trust legislation has always provided for settlor-reserved powers, the introduction of the Amendment Act clarified the position and also added some unique aspects to the Bermuda trust jurisdiction.

In summary, the Amendment Act specifically provides that the settlor may reserve or grant to a third party any and all of a range of interests or powers, including the power to:

- revoke the trust in whole or in part;
- vary or amend the terms of a trust instrument or any of the trusts, purposes or powers arising thereunder in whole or in part;
- decide on or give directions to advance, appoint, pay, apply, distribute or transfer the trust property;
- act as, or give directions as to the appointment or removal of, directors or officers of companies owned by the trust, or direct the trustees how to exercise voting rights with respect to the shares of such companies;
- give directions in connection with investments or the exercise of any powers or rights arising from such trust property;
- appoint, add, remove or replace any trustee, protector, enforcer or other office holder or advisor;
- add, remove or exclude any beneficiary, class of beneficiaries or purpose;
- change the governing law and the forum for administration of the trust; and
- restrict the exercise of any powers, discretions or functions of a trustee by requiring that they shall only be exercisable with the consent, or at the direction, of a person or the persons specified in the trust instrument.



These reserved powers are likely to appeal to clients from traditional families who find the surrender of total control over family assets, in the interests of succession planning, unfamiliar and unappealing.

### LIMITED FIDUCIARY DUTIES

The Amendment Act clarifies that the terms of a trust deed governed by Bermuda law may expressly provide that the person who holds the powers listed in the Amendment Act shall not be subject to a fiduciary duty. This is helpful where a family friend or trusted advisor is given powers as protector but is not intended to be held to fiduciary standards of duty and liability.

The Amendment Act, uniquely, provides for the creation of statutory presumptions as to the fiduciary nature of the reserved powers. The new presumptions apply to Bermuda trusts created after the new legislation came into force and are subject to any overriding contrary intention in the trust instrument. For such new trusts only, it is presumed that, if the powers are granted to a beneficiary or reserved by a settlor, those powers will be personal and non-fiduciary (as long as the power holder is not the sole trustee), and, in any other case, those powers will be fiduciary. The setting out of these presumptions creates certainty, but also flexibility, as the presumptions can be overridden by express terms in the trust.

The Amendment Act also provides that no person (unless formally appointed as trustee and holding a vested interest in trust property) shall be deemed to be a trustee by reason only of the grant or reservation of any of the powers specified in the Amendment Act. This, therefore, avoids the unintended consequences of settlors or protectors being deemed to be trustees by virtue of their control powers over the trust property, which could otherwise have an adverse impact on the tax residence or situs of a trust.

### INCREASED CONFIDENTIALITY

Another very important clarification is the express provision that assets in a trust in relation to which a settlor has reserved powers are not included in the estate of the settlor. This is particularly useful in the context where a settlor has certain control powers, yet wants to avoid probate, which can be generally open to inspection by the public. On the

**“Most wealthy people want what they cannot have: immortality. A dynasty is the next best thing and a dynastic trust structure is an effective way to achieve that, especially through reserved powers”**

death of the settlor, the trust’s existence and administration will carry on in a more confidential environment. In the event of a dispute, this may be a highly desirable feature of the structure.

The Amendment Act allows the express limitation of trustee duties so that they are owed solely to one beneficiary during the life of the settlor or reserved-power holder (similar to certain versions of US foreign grantor trusts). This means access to information by any contingent beneficiaries can be limited for that period – something that appeals to privacy-conscious families that wish to keep trust information disclosure to a minimum.

### THE APPEAL FOR HONG KONG OR OTHER ASIAN CLIENTS

There is no doubt that Hong Kong Chinese families have a strong desire for privacy, both in terms of their financial situation and their arrangements for the succession of their assets and businesses to their families. This desire is borne out of the bitter experience of many Hong Kong patriarchs before and after the rise to power of the Chinese Communist Party in 1949, with many suffering confiscations. This experience gave new resonance to the expression ‘loose lips sink ships’. Family heads were, and still are, often concerned that their private succession arrangements may be

disclosed to family members at a time they regard as premature.

The fact that there has been no shortage of family succession litigation in the Hong Kong courts in recent years shows, perhaps, that either too much private information has leaked about ownership of family assets and the family head’s plans for later generations, or that these families have failed to adopt proper governance procedures to head off such disputes. Nevertheless, given the concerns of wealthy family heads about who has information concerning their succession plans, and when, these new Bermuda trust law provisions will prove attractive.

The settlor control provisions will also no doubt be attractive to first-generation wealth builders, (of whom there still are plenty in Hong Kong and even more so in mainland China), who are controllers by nature. Most wealthy people want what they cannot have: immortality. A dynasty is the next best thing and a dynastic trust structure is an effective way to achieve that, especially through the use of reserved powers and by controlling the succession to those powers. Certainly such powers will make the idea of a trust more appealing to many, as they will not have to rely on a non-binding letter of wishes.

The Bermuda powers go well beyond Hong Kong’s recent trust law changes in this regard. They impose a clear distinction between control and ownership of trust assets, but also blend the two concepts. That said, practitioners need to tread carefully. It will be tempting to give settlors everything on the menu, which may have unintended consequences. These powers need to be crafted with great care after taking into consideration the laws of the jurisdiction where the assets or settlor reside. The statutory provisions legislating that reservation of these powers will not result in the settlor being regarded as owner of the trust assets may not necessarily be recognised in a foreign court when the dispute concerns revenue law, divorce or a creditor dispute, and assets or the settlor are situated in that foreign jurisdiction. ■



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# 请讲 相同的语言

## SPEAKING THE SAME language

**Steven Wang and Fozeia Rana-Fahy**  
explain why Bermuda is well placed  
to meet the needs of China's growing  
high-net-worth population

**A**sia Pacific is home to more high-net-worth individuals (HNWIs) than anywhere else, and their wealth is expected to surpass that of HNWIs in all other regions by the end of 2015. Furthermore, between now and 2017, HNWI wealth in Asia Pacific is expected to grow by over 10% annually, the fastest rate in the world.<sup>1</sup> China has played, and will play, a huge role in this growth. So what strategies are its HNWIs adopting to manage their wealth?

### WHAT CHINA'S WEALTHY WANT

Most Chinese HNWIs have accumulated their wealth in their own lifetime, with the majority being between 40 and 50 years old. There were in effect no family businesses until the 'Reform and Opening Up' policy, implemented 36 years ago, saw China embrace foreign investment and allow entrepreneurs to start enterprises. The second stage of the reform led to the privatisation and contracting out of much state-owned industry. This led to immense changes in Chinese society and proved instrumental in the growth of China's HNWI population.

With first-generation wealth gradually passing to the second generation, and with warring family factions turning to the courts to resolve their disputes (with all the attendant publicity), Chinese HNWIs are increasingly seeking sophisticated asset-protection solutions and diversification of investments to meet current and future needs. Such protection must also be compliant with increased regulatory and reporting requirements.

**"Chinese advisors are increasingly visiting Bermuda with the aim of using its products"**

To meet this need, a growing number of Chinese financial institutions are promoting domestic family trusts. Offshore trusts are also increasingly being considered and used by Chinese HNWIs and their advisors, who see them as an effective tool for succession planning and asset protection. Additionally, many self-made millionaires in China are setting up family offices to effectively manage their wealth, often via offshore trust structures.

### THE BERMUDIAN SOLUTION

Bermuda is seen as a prime jurisdiction for many global HNWIs. Indeed, Chinese advisors are increasingly visiting the island with the aim of using its products and engaging Bermuda legal and other advisors. The reasons for setting up trusts in Bermuda are diverse, and include estate and succession planning, asset protection, beneficial tax structuring, and avoidance of laws restricting testamentary freedom. Supporting such trusts are a reliable

regulatory structure, strong laws and jurisprudence based on the English and Welsh model, reputable trust companies, and a wealth of other regulated fiduciary and professional service providers.

Discretionary trusts, which often provide the most flexible and efficient structure for a settlor and family beneficiaries, are typical in Bermuda; fixed-interest trusts are far less common. Non-charitable purpose trusts also continue to be popular, particularly in the context of commercial interests. (Bermuda

was the first offshore jurisdiction to adopt legislation providing for valid non-charitable purpose trusts, under the *Trusts (Special Provisions) Act 1989*.)

Additionally, charitable trusts may be established in Bermuda, to create a charitable fund or to make provision for existing charitable institutions or purposes. Philanthropy is on the rise in China, as more HNWIs realise that charitable giving can not only help those who are less fortunate, but also indirectly benefit their finances, careers and families. According to a study by the CEIBS Kaifeng Centre for Family Heritage at the China Europe International Business School, entrepreneurs who rank more highly in terms of philanthropy are less likely to suffer from government investigations, stock-price declines and reduced government subsidies.<sup>2</sup>

### ON THE BALL

Members of the trust industry in Bermuda work closely together to ensure the island's legislation is regularly updated to suit the developing needs of the market it serves. Among many examples are the changes to the *Trusts (Special Provisions) Act 1989*, which provide clarity on the interests and powers that a settlor can retain or grant to a third party without prejudicing the validity of the trust (for more on this, see page 18).

Overall, such changes have made Bermuda trusts more accessible to global HNWIs who are unfamiliar with the trust concept. As the Chinese HNWI population grows and develops, so will Bermuda's popularity as a jurisdiction of choice. ■

<sup>1</sup> *World Wealth Report 2015*, Capgemini and RBC Wealth Management  
<sup>2</sup> [bit.ly/ChinesePhilanthropy](http://bit.ly/ChinesePhilanthropy)



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# 5 ways Bermuda is appealing to overseas property buyers

To further stimulate demand for both residential and commercial property, the Bermuda government has introduced additional legislative and policy changes that make purchasing property much more attractive for overseas buyers seeking to relocate to the island.

## ① REDUCED RENTAL VALUE THRESHOLDS

From a residential perspective, the minimum ARV threshold (annual rental value, assessed by the government) for large standalone executive homes has recently been reduced from USD177,000 to USD153,000 as it relates to overseas buyers. Although the minimum threshold equates to a purchase price of around USD3 million, overseas buyers have more inventory from which to choose. In addition, overseas buyers can now purchase two residential properties (previously only one was permitted).

## ② INCREASED CHOICE OF CONDOMINIUMS

Qualified overseas buyers are now able to purchase any privately developed condominium with an ARV of USD32,400. Previously, supply in this market segment was restricted through policy, but recent changes have opened the market up considerably, giving overseas buyers more choice in terms of design, location and price. Overseas buyers can now purchase two condominiums.

## ③ LOWER LICENCE FEES

During the height of the market, overseas buyers paid alien licence fees of 25 per cent of the purchase price for homes, and 18 per cent for condominiums. To ensure the island competes favourably from a global perspective, the Bermuda government has significantly reduced the fees, to 8 per cent for standalone homes,

and 6 per cent for condominiums. The government has extended these competitive licence fee rates to 30 September 2016, at which time they will increase to 12.5 per cent and 8 per cent respectively.

## ④ ABUNDANT COMMERCIAL OPPORTUNITIES

From an investment perspective, the government has the authority to permit international companies domiciled in Bermuda, with a physical presence, to purchase both residential and commercial property for their own purposes. If you wish to own, rather than rent, there are great opportunities to purchase commercial properties. Prices are affordable, thanks in part to the post-2008 commercial property market correction, and there is a variety of commercial inventory from which to choose.

## ⑤ NEW LUXURY RESIDENTIAL INVENTORY

A number of recent announcements have been made around new luxury residential

inventory, including the passage of government legislation and planning approvals relating to several proposed hospitality and residential developments. The proposed new residential inventory will be available to overseas buyers and will satisfy a segment of the market seeking new-build, high-specification residential units with luxury, branded hotel facilities and amenities.

Morgan's Point Ltd, for example, recently announced that it has received planning approval to develop 149 branded luxury condominiums and a five-star boutique hotel. A planned mega-yacht marina will also add significant value for buyers who wish to own waterfront property in Bermuda. These new developments will provide our market with much-needed luxury inventory and more choice for our overseas buyers. ■



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