Business Succession and Asset Preservation

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Labuan IBFC
International Business and Financial Centre, Malaysia

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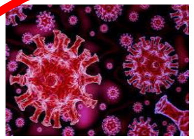
JOINT WEBINAR

WEALTH MANAGEMENT WEBINAR SERIES 2:
Business Succession and Asset Preservation

Thurs, 9 Sept | 4.00pm-5.00pm (GMT +8)

VUCA, wealth destroyers and more…










Advance Planning is Critical

Clawback / Avoidance of Voluntary Settlement

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Section 52 - Insolvency Act

Any settlement or transfer of property shall be **void** against the Director General of Insolvency if:

a) the settler becomes a bankrupt within 2 years after the date of settlement.

b) the settlor becomes bankrupt within 5 years after the date of settlement, the settlement or transfer of property will be void unless the parties can show that the settlor was able to pay all his debts at the time of making the settlement without the aid of the property.

The only **exception** is where

a) the settlement was made before or in consideration of marriage, or

b) if the settlement was made to a purchaser in good faith and for valuable consideration.

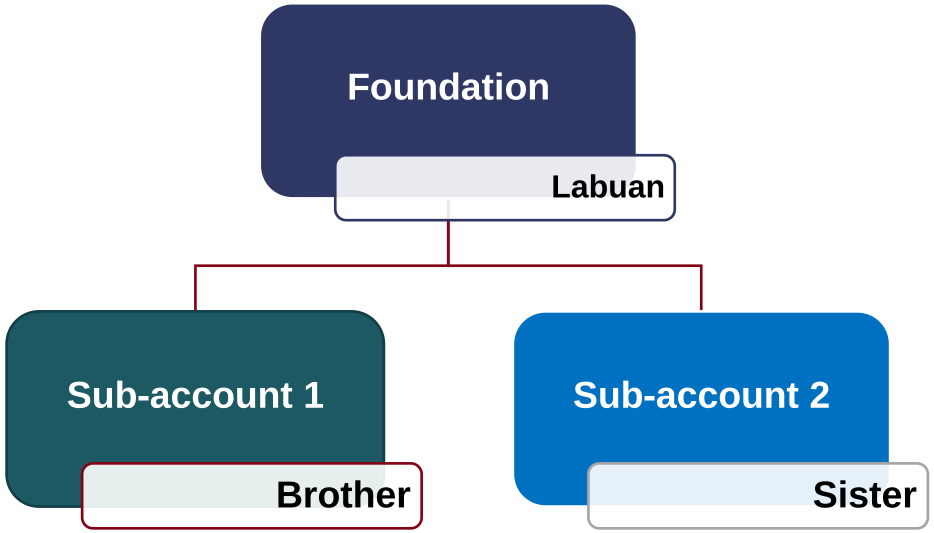
S2 Insolvency Act: "property" includes money, goods, things in action, land and every description of property, whether real or personal and whether situate in Malaysia or elsewhere,… also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined"

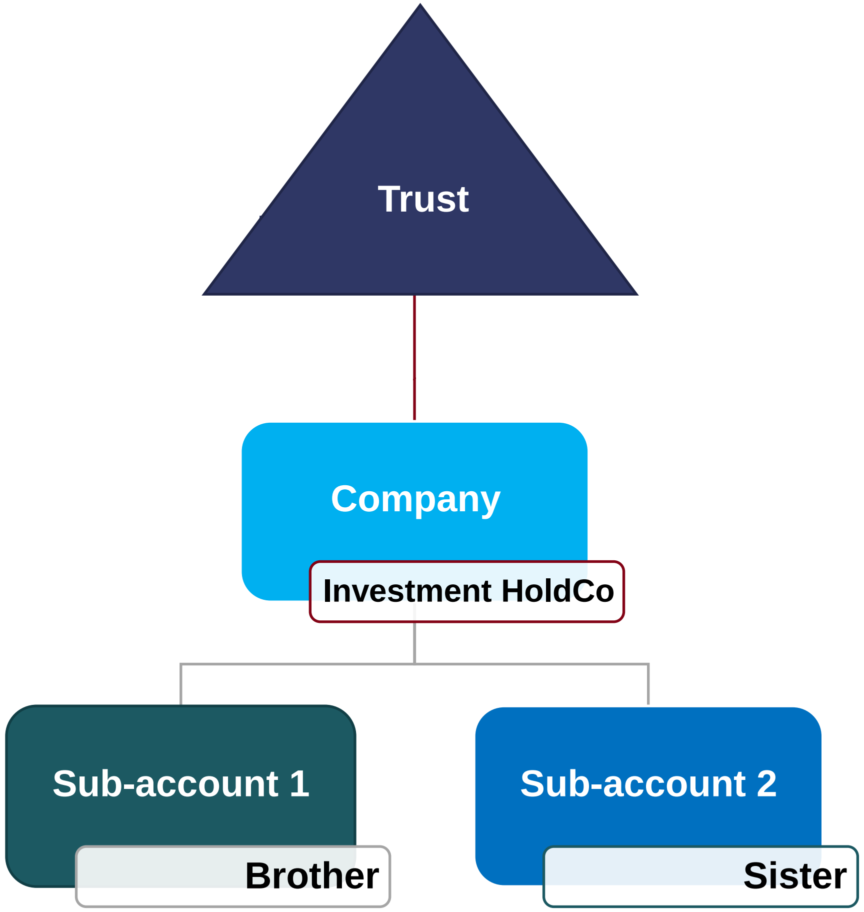
Common Asset Preservation Tools

- Companies - separate legal entities
  - Ownership of shares
- Labuan Trusts
  - Anti-avoidance – S11 Labuan Trusts Act on Fraudulent Labuan Trust or Disposition
- Labuan Foundations
  - Anti-avoidance – S58 Labuan Foundations Act on Fraudulent Dispositions
- Insurance policies
  - Anti-avoidance - S166(5) Malaysia Insurance Act
  - (5) Nothing in this section shall prejudice a creditor of a policy owner from applying to the court for a declaration that this section, wholly or partly, is inapplicable to any particular policy on the ground that the premiums under that policy were paid to defraud the creditor.
  - Statutory Trusts
- Prenups
  - Persuasiveness in Court?

Some families use sub-accounts…

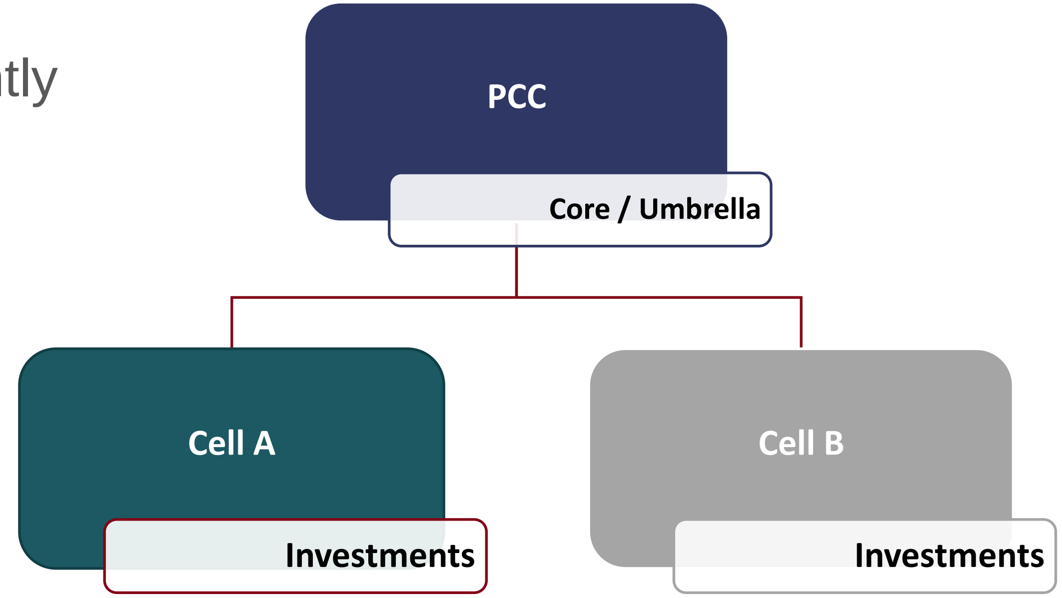
- E.g. Distinctively different risk profiles
- Administratively segregated
  - No legal ringfencing



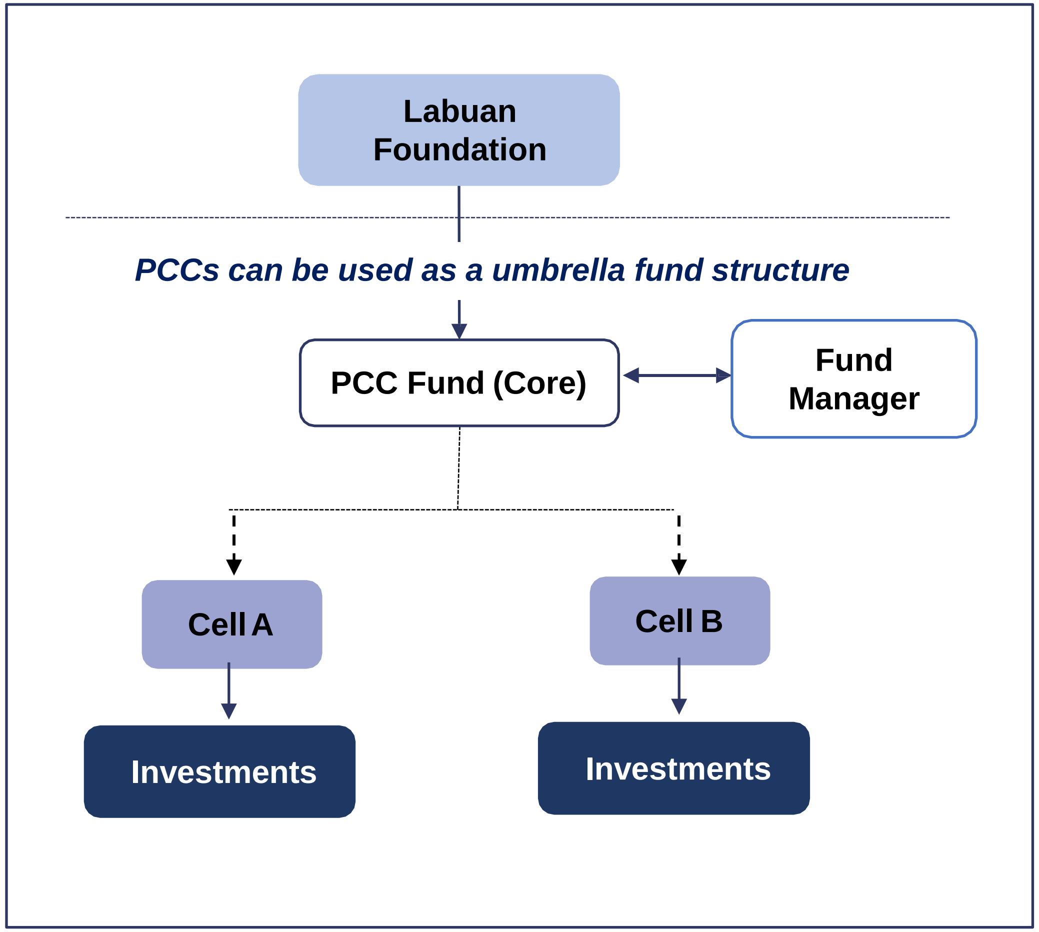


Labuan Protected Cell Company

- Labuan Companies Act 1990 (LCA)
- primarily catering to self-insuring organisations, especially captive insurers
- 2nd largest captive hub in Southest Asia
- popular in the fund management industry
- legal entity that has the ability to form multiple cells, with each cell able to operate independently
- yet entire PCC is treated as a company and a single entity for tax purposes
- each separate cell with segregated assets and liabilities
- Legal ringfencing of each cell's assets and liabilities.- section 130S(3) LCA
- unlimited number of cells possible under "umbrella" of PCC



Possible use of PCC as part of wealth management solution



- Governance embedded in foundation charter and/or articles and PCC constitutional documents

- PCC set up as umbrella fund. Cells may be segregated based on investment types or investment objectives per family branch

- More effective risk management (peace of mind of family branch members) and control

- Significant cost efficiencies:
  a. multiple legal set-ups not required, reducing time, cost and hassle
  b. Cells may be managed by common fund manager
  c. Management of cells is centralised at core with only one board of directors required, regardless of number of cells
  d. Economic Substance Requirements imposed at the core, not the individual cells

- Both structures governed within the same jurisdiction by a single regulator.

Family Governance Overarching Legal Structures, Family Business, Family Office

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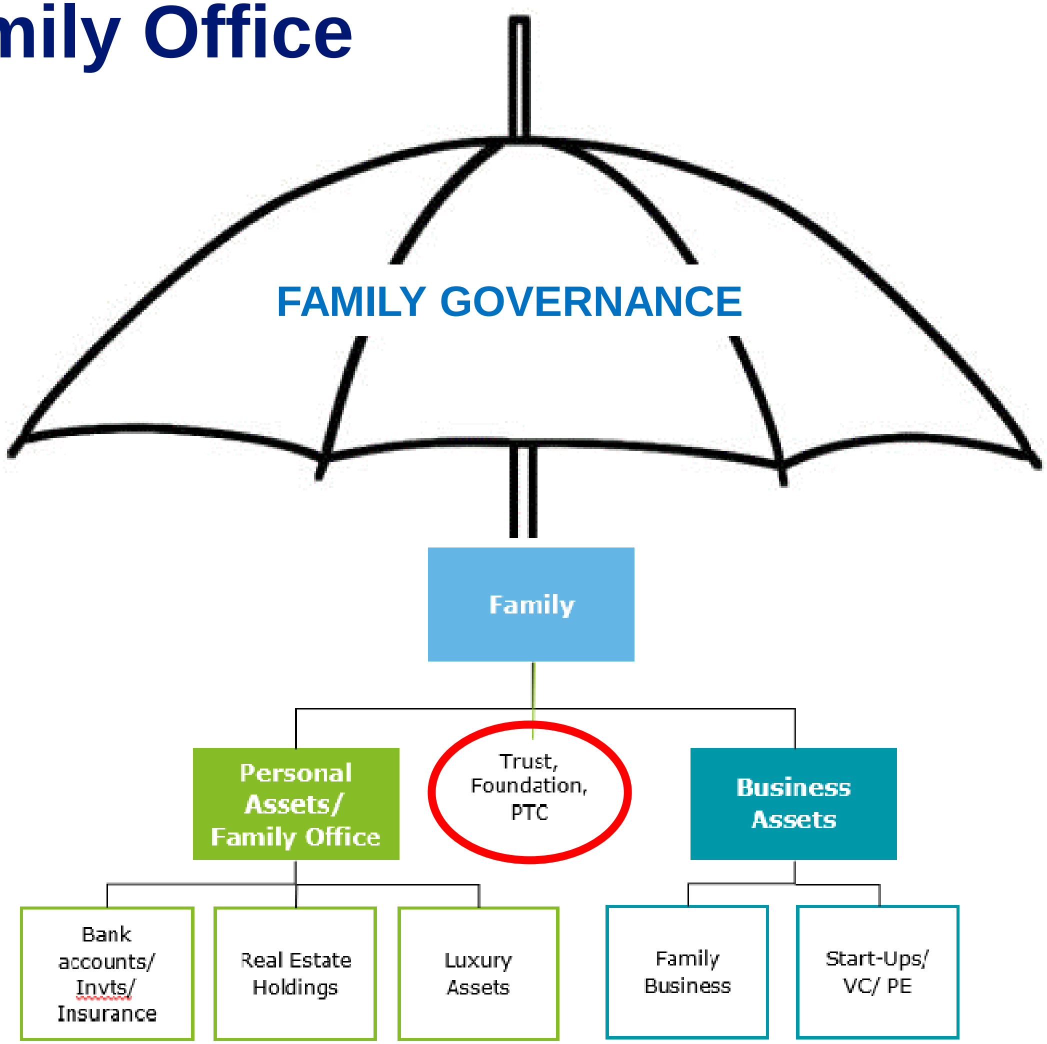
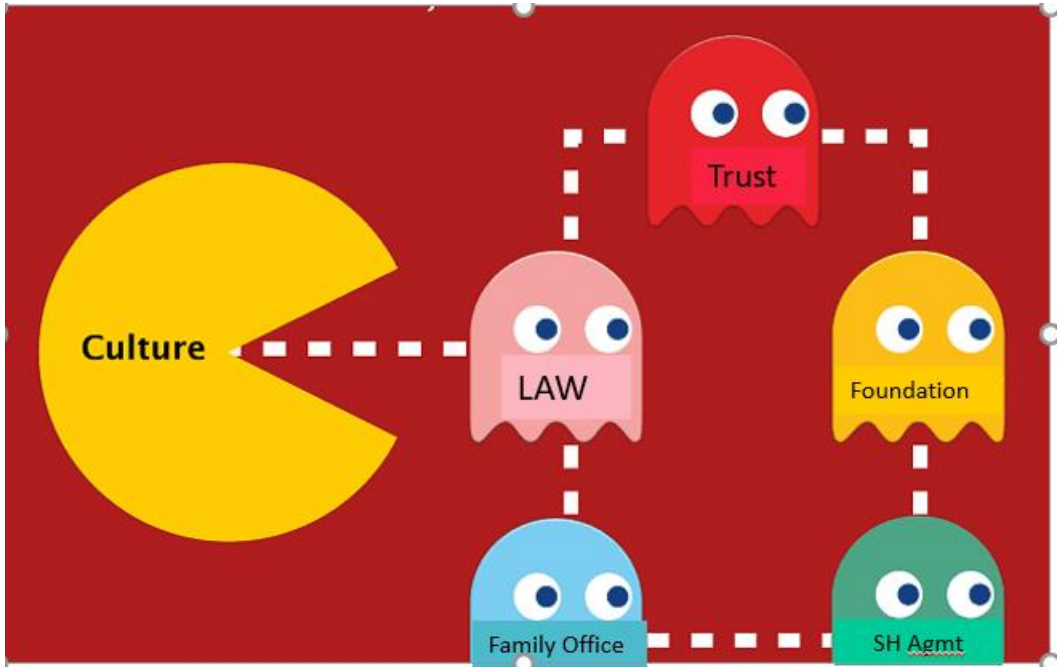


- ❑ Rules about how decisions are made within family
- ❑ Expectation Management
- ❑ Code of Conduct

- ❑ Establish or restructure Trust/ Foundation/ Family Office/ Private Trust Company
- ❑ Tax, Legal aspects
- ❑ Align estate planning devices (wills, LPAs)
- ❑ Align Shareholder Agreement
- ❑ Others – M&A, Corporate Governance etc
- ❑ **Incorporate key family governance in structure constitutional docs**

Family Culture Trumps Law, Every Time



**BEST asset preservation strategy for wealth and business owning families:
Early Effective FAMILY GOVERNANCE**

Q&A

Speaker's Profile

Chan Ee Lin

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Qualifications and Professional Affiliations

- ❑ Advocate & Solicitor of the Supreme Court of Singapore
- ❑ Advocate & Solicitor of the Supreme Court of Singapore
- ❑ TEP, fully qualified member of the Society of Trust & Estate Practitioners (STEP)
- ❑ STEP Advanced Certificate in Family Business Advising
- ❑ Mediation: Strategic Conflict Management for Professionals, Singapore Mediation Centre

Relevant Experience

Ee Lin provides highly customised family business governance and succession planning advice to family office and business owning families in Asia Pacific. She has over 2 decades of experience in C-suite and regional positions with leading private banks as an internationally recognised trust & wealth planner and family business governance advisor to high net worth families in Asia Pacific & Middle East. A fully qualified lawyer admitted to the Singapore Bar and a traind mediator at the Singapore Mediation Centre, she holds adjunct professorships at the Nanyang Technological University (NTU) and Singapore Management University (SMU) where she has created internationally and nationally accredited executive and MBA curricula in family business governance. Winner of the SMU Dean's Teaching Honour List Top Adjunct Faculty award in 2019, Ee Lin is also a frequent speaker at international masterclasses and at regional industry events.

Prior to joining Deloitte, Ee Lin held roles such as Co-Founder of a family office services provider with an international law firm, Regional Head of Wealth Planning at one of the oldest UK private banks in the world, CEO of a Swiss trust company, Global Chief of Staff & Asia Pacific Head of International Estate Planning at one of the largest Dutch private banks, and Assistant Director at the Monetary Authority of Singapore.

Ee Lin holds three degrees at Magna Cum Laude level: BA Economics (Stanford University); MBA in International Wealth Management (Carnegie Mellon University) and Doctor of Jurisprudence (SMU). She has been featured in the Citywealth Leader's List 2019 and 2020 and the CityWealth PowerWomen International Financial Centre Top 200 global list since 2014. She has lived and worked in Geneva, Hong Kong, Jersey, Luxembourg, Malaysia and Singapore.

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Labuan Substance Requirements

The New Labuan

Understanding the changes

Malaysia’s commitment as a member of **the Inclusive Framework on BEPS**

Budget 2019 announcement by the MOF on 2/11/2018 brought about **significant changes to the Labuan Tax Regime**.

Addresses Tax evasion & harmful tax practices including elevation of substantial activities requirements in Labuan.

- **Restrictions on tax deductions for payments made to Labuan company**
- **No restriction on dealing with Malaysian Ringgit or Malaysian residents**
- **Abolishment of election to pay tax the flat rate of RM20,000 per year**
- **Income from intellectual property no longer taxed under LBATA. It will be taxed under ITA @ 24%**

The New Labuan

Understanding the changes

New economic substance requirements for Labuan entities

New requirement imposed

- Adequate number of full-time employees **in Labuan**
- Adequate amount of annual operating expenses in Labuan

Fails to comply with the substance requirements

Taxed at 24% under LBATA

Substance requirements

Gazette Orders

First introduced via
Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 [P.U.(A) 392]

No	Labuan entity carrying on a Labuan business activity	Minimum number of full-time employees in Labuan	Minimum amount of annual operating expenditure in Labuan (RM)	Regulations
21.	Labuan entity that undertakes <u>investment holding activities</u> other than pure equity holding activities	1	20,000	Updated via: Labuan Business Activity Tax (Requirements for Labuan Business Activity) (Amendment) Regulations 2020 [P.U.(A) 375]
22.	Labuan entity that undertakes <u>pure equity</u> holding activities	Exempt (P.U.(A) 177/2020)	20,000	

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Substance Requirements

LIC Pronouncement 3-2020 issued 11 March 2020

Pure Equity Holding Activity	**Non-pure Equity Holding Activity**
Receive dividends and proceeds from disposal of shares = pure equity holding entity & do not constitute as "commercial activity"	Receive only non-dividend income from the holding of investments such as bonds, sukuk, debt instruments, properties, securities or etc.
• No full-time employee required (P.U.(A) 177/2020) • RM20,000 annual OPEX required	• 1 full-time employee • RM20,000 annual OPEX required

[10 August 2020] - Directive issued on Management and Control requirements for Pure Equity Holding Activity:

(a) To comply with IRB's Public Ruling No. 5/2011 (Residence Status) dated 16 May 2011;
(b) Have its registered office in Labuan;
(c) Appoint Labuan trust company as resident secretary in Labuan; and
(d) Keeps its accounting and business records including minutes of meeting in Labuan.

Holding company can be broadly divided into two categories:

1) Hold a variety of assets and earn different types of income (e.g., interest, rents, and royalties)
2) Hold equity participations and earn only dividends and capital gains

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Substance Requirements

Labuan Foundation

Non-Pure Equity Holding

RM20,000 **and** **One (1) FTE**

Pure Equity Holding

RM20,000 **~~One (1) FTE~~**

Exemption
FTE substance requirement

P.U.(A) 177/2020

Common Reporting Standard (“CRS”) in Malaysia

CRS in Malaysia

- CRS on Automatic Exchange of Information (“AEOI”) has been introduced by Organisation for Economic Co-operation and Development (“OECD”) as a worldwide tax transparency regime coming into force in Malaysia in 2017.

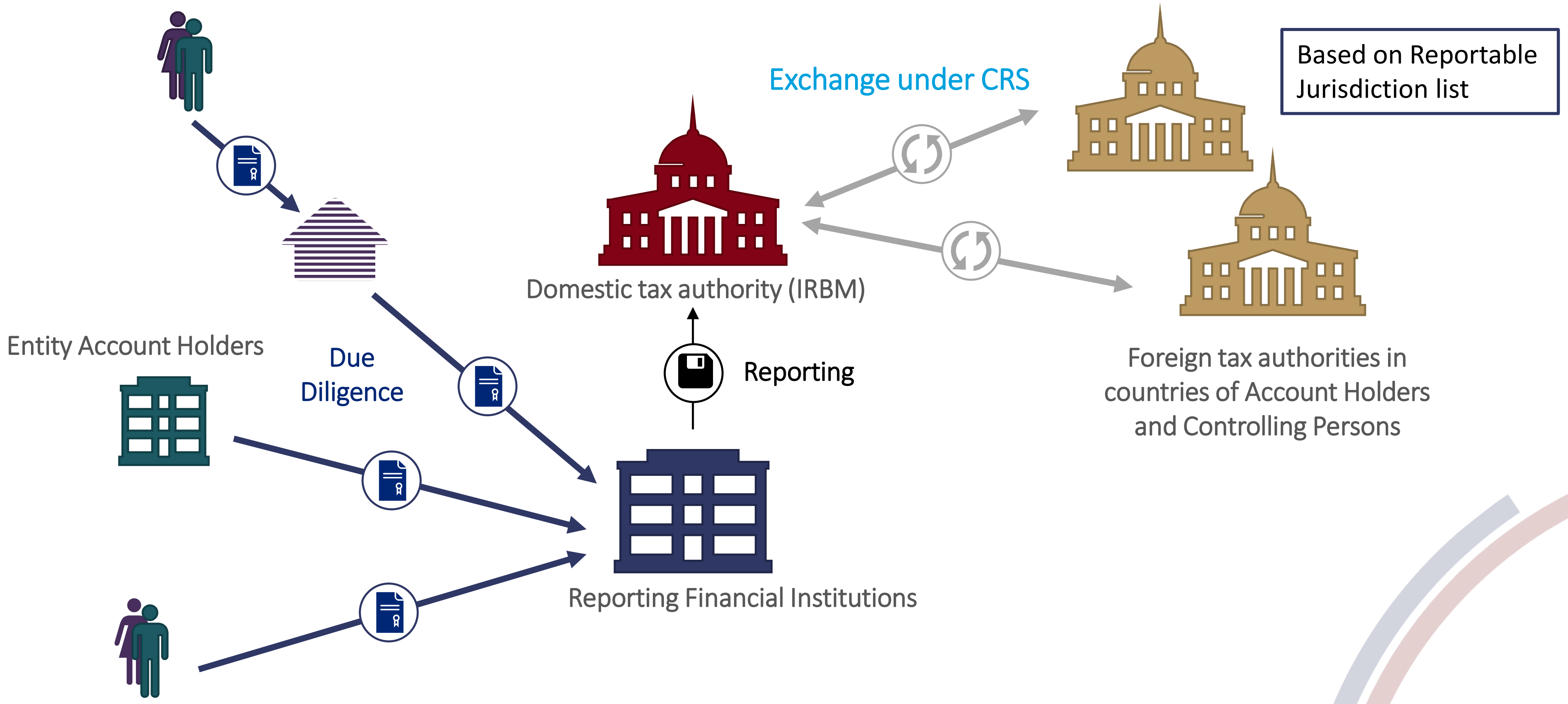
- Under the CRS, governments agree to exchange information automatically with one another on tax residents maintaining financial accounts in other’s jurisdictions.

- Malaysia has committed to exchange the CRS information from 2018 and would also be receiving financial account information on Malaysian residents from other countries’ tax authorities.

- Malaysian-based Financial Institutions (“MYFIs”) will need to identify and document individual and entity Account Holders, including certain Controlling Persons behind entity Account Holders. Based on this documentation, Reporting MYFIs will need to report such persons to the Inland Revenue Board of Malaysia (“IRBM”) which will then exchange the information with the relevant foreign tax authorities.

CRS / AEOI

How does it work?



CRS / AEOI

Who reports?

Depository Institutions

Example:
Place deposit e.g. savings, fixed deposit accounts
- ➢ Commercial banks

Custodial Institutions

Example:
Hold securities through nominees or custodian
- ➢ Investment banks

Investment Entity

Example:
Invest in portfolio or unit trust funds
- ➢ Managed funds (PCC?)

Specified Insurance Companies

Example:
Invest in cash value insurance
- ➢ Life insurance companies

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CRS

Treatment of Trusts

Reporting Financial Institutions	Passive Non-Financial Entity (NFE)
• Trust that is professionally managed (i.e. at least one of the trustee is a FI, or trustee have appointed Fund Manager (who is a FI), who has discretionary management over the trust assets)	• Trustee of a trust that is not a professional corporate trustee
• Trust / Trustee will have obligation to report on financial assets (i.e. shares, securities, commodities, swaps, insurance and annuity contracts and interest in partnerships) held in the trust	• Reporting obligation by the FI
• Trust falls within definitions of "Investment Entity" (gross income primarily attributable to investing, reinvesting and trading in Financial Assets and managed by another entity that is a FI).	• FI will have to identify the "Controlling Person(s)" of the passive NFE (i.e. settlors, trustees, protectors, beneficiaries, any natural person exercising ultimate effective control over the trust)

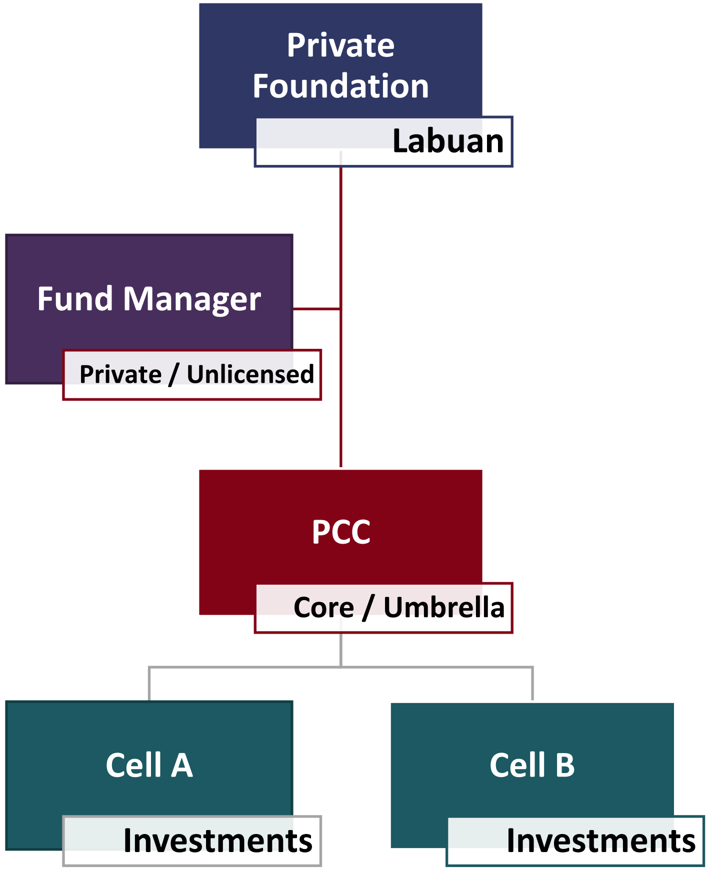
CRS

Treatment of Trusts

Reporting Financial Institutions	Passive Non-Financial Entity (NFE)
• 5 steps in applying CRS to a trust: (i) Determine if the trust is reporting FI (ii) Identify financial assets of a trust (i.e. debt and equity interest in the trust) (iii) Identify reportable accounts (iv) Apply due diligence (v) Reporting information and financial activity in each reportable account	• 5 steps will still apply by the FI
• Reportable Account Holder: ○ Settlor (Total value of all Trust property) ○ Beneficiary (Total value of all Trust property) ○ Any other person exercising ultimate control (Total value of all Trust property) ○ Debt interest holder (Principal amount of Debt) [Account Balance or Value or Gross Payment paid or credited during the year]	• Reportable information by the FI are: ○ Name/address/place of birth, Tax Identification Number (TIN) of each Controlling Person ○ Total amount balance or value (i.e. value of, and movement on the account it maintains for the trust.

CRS

Reporting for a PCC



Issues on CRS reporting

What is the impact of CRS on a PCC Fund?

- A PCC as an investment fund can be either
  - a Reporting FI (an Investment Entity); or
  - a Passive Non-Financial Entities (NFE).
- If the PCC Fund appoints an external professional fund manager (e.g., asset management company/other FI) to assist the PCC Fund to manage its investments – CRS Reporting FI.
- If the PCC Fund is a public fund and accepts funds from public – CRS Reporting FI.
- If the PCC Fund's investments are **not** managed by a professional fund manager and the PCC is **not** a public fund – Passive NFE.

What is the impact of CRS on a PCC Fund and PCC Holders?

- ***If PCC is a Reporting FI*** – Due diligence on PCC holders and reports to the IRBM on financial account information of PCC holders which are non-MY tax residents.
- ***If PCC is a passive NFE*** – No CRS compliance obligation. If the PCC opens/has financial accounts with FIs (e.g. bank accounts, investment accounts etc.), the FIs will report the financial account information of the PCC if the PCC has controlling person which are non-MY tax residents.

Q&A

Speaker's Profile

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Executive Director, Tax, Malaysia

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Qualifications and Professional Affiliations

- Bachelor of Management (majoring in Finance and Accounting) from Universiti Sains Malaysia.
- Member of the Chartered Tax Institute of Malaysia (CTIM)
- Registered tax agent under Section 153(3) of the Income Tax Act 1967

Relevant Experience

Pei Pei is currently the Deloitte Private Leader of Malaysia. She is also an Executive Tax Director of the Deloitte Tax Services Malaysia. She leads Malaysia's tax practice in serving business owners, family groups and high net worth individuals in areas including succession planning, international tax, estate planning and wealth preservation.

Pei Pei has over 30 years of experience in the public accounting practice in both corporate and individual taxation with considerable experience in managing corporate tax engagements. Pei Pei's corporate tax advisory experience includes group tax planning, tax due diligence review for mergers & acquisitions as well as corporate tax restructuring for inbound and outbound investments.

Pei Pei was also involved in CRS implementation services to a number of Malaysian banking groups, investment banking group and asset managers. She is a frequent speaker at various events and seminars on topics relating to the CRS implications on investors and tax implications on wealth planning conducted for private bankers and high net worth individuals.
Pei Pei also advised family owners on the tax considerations in the corporate restructuring as well as the transfer of assets relating to succession planning, including the setting up of Labuan Foundation for purposes of succession planning.

She is also a licensed tax agent under Section 153 of the Income Tax Act, 1976.

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