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The Rise of Business Trusts in Sustainable Neo-Innovative Economies

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THE RISE OF BUSINESS TRUSTS IN SUSTAINABLE NEO-INNOVATIVE ECONOMIES

Lee-ford Tritt & Ryan Scott Teschner***

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INTRODUCTION

Business trusts have been commonly used in the United States as an organizational form for over 100 years.¹ Historically, entrepreneurs used business trusts, which evolved from private donative trusts, to escape regulatory and tax requirements imposed on corporations.² Today, business trusts are narrowly used in specialized niches, such as structured finance transactions and the setting up of mutual funds.³ Yet, as corporations have ascended as the dominant organizational form in the United States for operating a business, the use of business trusts has stagnated. By contrast, business trusts have enjoyed a resurgence in neo-innovative economies such as Singapore. This disparity regarding the prevalence of business trusts as an organizational form in the United States as compared to abroad could prove enlightening for future economic ventures, especially foreign investment. For instance, why are business trusts gaining popularity in Singapore and other Asian markets? And, why have business trusts generally been overlooked in the United States outside of mutual funds and employee pension funds?⁴ This Article seeks to address these questions by discussing and comparing business trusts in the United States with those being used in Singapore.⁵ Beyond providing mere descriptive accounts of business trusts in these two countries, this Article will consider the transportability of key concepts of Singapore business trusts to American business trust law and usage. In

1. See Sheldon A. Jones et al., *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421, 424–28 (1988) (elucidating the origins and history of the Massachusetts business trust).

2. See Lee-ford Tritt & Ryan Scott Teschner, *Re-Imagining the Business Trust as a Sustainable Business Form*, 97 WASH. U. L. REV. 1, 39 (2019).

3. John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 171 (1997). In addition, federal law imposes trust form on employee pension funds. See 29 U.S.C. § 1103(a) (2018) (“Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees.”). The Code equates “employee benefit plan” with “employee pension benefit plan.” *Id.* § 1002(3).

4. In answering these questions, it should be noted that business trusts seem to have been understudied and not widely understood among both business law and trust law scholars and practitioners. Langbein, *supra* note 3, at 188 (“From our understanding that the trust and the corporation are competitors for organizing commercial activity, it follows that we should in principle be able to specify why one or the other prevails in a particular setting. I am not yet able to do this.”); Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. L. 559, 560 (2003) (“There are not . . . clear answers to the fundamental question of whether trusts are a better form of business organization than corporations or partnerships.”); Robert H. Sitkoff, *Trust as “Uncorporation”: A Research Agenda*, U. ILL. REV. 31, 33 (2005) (noting a “stunning lack of familiarity” with business trusts in legal scholarship); see also *id.* at 44 (“Why does [the] trust continue to abide as a form of business organization even after we developed enabling corporation law? Why did enabling corporate codes emerge when we already had highly flexible trust law? Why does corporation trounce trust for the organization of operating enterprises?”).

5. Singapore is an appropriate situs for a comparative analysis because of its viable use of business trusts as well as its status and importance as one of the leading financial centers in the world.

addition, this Article will be mindful that American institutional and cultural business contexts (for example, historical use and the emerging sustainability movement⁶), as well as American trust jurisprudence, may limit the applicability of these key concepts in the United States.

In the modern United States, business trusts have been mostly overlooked—in favor of corporations—by entrepreneurs who wish to start an operating business.⁷ However, business trusts have seen major success overseas. Take Singapore, for example. Singapore provides for organization in both the corporate form⁸ and the business trust form under a common law, code-based system like the United States. Yet, even with the competition of the corporate form, the business trust remains a popular business form in Singapore.⁹ Along with Real Estate Investment Trusts (REITs), business trusts account for a majority of Initial Public Offerings (IPOs) on the Singapore Exchange.¹⁰ Something must prompt Singaporean entrepreneurs to select the business trust form over the corporate form.

6. See generally Lee-ford Tritt & Ryan Scott Teschner, *Amazon Delivers Diversity: Geographical & Social Influences on Corporate Embeddedness*, 16 BERKELEY BUS. L.J. 1 (2019) (discussing the interplay of social consciousness and corporate embeddedness in the context of newer, sustainability-focused companies like Amazon).

7. Sitkoff, *supra* note 4, at 31, 34. Sitkoff notes that business trusts are largely ignored in modern legal scholarship. *Id.* at 33. This Article seeks to contribute to Sitkoff's call for research in this area.

8. The Singapore corporate entity differs from its counterpart used in the United States, but the issue of entity choice in Singapore is roughly approximate to the issue of entity choice in the United States due to the existence of similar code-based, common law systems in both countries.

9. Generally speaking, business trusts are likely used more readily in Singapore because the structure, law, and investment strategies concerning Singapore business trusts reduce uncertainties on many different levels. See *infra* Section II.B.2; see also Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 211–21 (1950).

10. *Singapore's 2017 IPO Market Dominated by Trusts' Strong Performance*, DELOITTE (Nov. 30, 2017), <https://www2.deloitte.com/sg/en/pages/audit/articles/sg-2017-ipo-market-press-release.html> [<https://perma.cc/C5X7-A9CB>] (“Proceeds from the overall Trusts market has improved from S\$0.3 billion raised in 2015 to S\$1.9 billion raised in 2016. To date, 20 Trusts have listed since the beginning of 2013, creating market vibrancy and raising a total of S\$13.9 billion.”); Angela Tan, *REITs, Business Trusts, F&B to Drive IPOs on SGX in 2018*, BUS. TIMES (Jan. 4, 2018, 5:50 AM), <https://www.businesstimes.com.sg/companies-markets/reits-business-trusts-fb-to-drive-ipo-on-sgx-in-2018>; Angela Tan, *Reits, Business Trusts to Continue to Drive IPOs on SGX: PwC Report*, STRAITS TIMES (Jan. 3, 2018, 1:21 PM) [hereinafter Tan, *PwC Report*], <https://www.straitstimes.com/business/companies-markets/reits-business-trusts-to-continue-to-drive-ipo-on-sgx-pwc-report> [<https://perma.cc/7FPM-YCAN>] (“The year 2017 was a brilliant one for IPOs in Singapore. With the market upturn, we see that real estate investment trusts (REITs) and business trusts (BTs) continue to dominate the market making up 88 per cent of total funds raised”); see also Aradhana Aravindan & Anshuman Daga, *Singtel's NetLink Makes Tepid Debut; More Singapore IPOs in the Pipeline*, REUTERS (July 19, 2017, 7:18 AM), <https://www.reuters.com/article/netlink-trust-listing/singtel-netlink-makes-tepid-debut-more-singapore-ipo-in-pipeline-idINKBN1A411D> [<https://perma.cc/FAP3-YQX6>] (“In recent years, SGX has become an attractive destination for companies to list their global assets by way of REITS or business trusts, as yields of as much as 6-7 percent draw in strong participation from retail and institutional investors amid relatively low interest rates.”).

An examination of why entrepreneurs in Singapore are choosing the business trust as an organizational form can inform business practices in America, and perhaps even provide a path for evolution.¹¹ It should be noted, however, that there are some inherent risks—including unintended and unforeseen consequences—when expanding a successful construct developed in a distinct business ecosystem and transplanting it into another.¹² The logic of the transferred legal concept may have a momentum of its own that distorts the principles and practices within the new context. Nevertheless, the legal and economic climates of Singapore and the United States are similar enough to suggest that a comparative review of Singapore and U.S. business trusts may provide valuable insights for American entrepreneurs.

Accordingly, this Article is organized as follows: Part I provides a basic understanding of business trusts in the United States. Next, Part II explores the differences between business trusts in the United States and those in Singapore. Finally, Part III discusses how historical and cultural influences may have shaped the success—or lack thereof—of the business trust form in Singapore and in the United States.

I. A BRIEF INTRODUCTION TO BUSINESS TRUSTS

To properly compare U.S. and Singapore business trusts, our analysis must begin with a basic overview of American private and business trust law.

A. *Traditional Concepts of Private Trusts*

In the United States, a trust is traditionally perceived as a private donative trust. In essence, a private donative trust creates two roles in asset ownership: a legal titleholder and an equitable titleholder.¹³ A settlor is an individual or entity that transfers certain property to a trust, while a trustee holds legal title to the trust property and the beneficiaries are entitled to an equitable interest in the trust property.

A marked characteristic of trust law is the flexibility that comes with a settlor's gift to a trust.¹⁴ This flexibility is a product of the foundational tenet of trust law: effectuating the settlor's intent.¹⁵ Thus, a settlor is

11. See Alchian, *supra* note 9, at 219.

12. Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 655–57 (2002); see also ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974).

13. See RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. d (AM. LAW INST. 2003).

14. Tritt & Teschner, *supra* note 2, at 32.

15. *Id.*; John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1109 (2004); see Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories*

granted wide latitude in altering the numerous default rules that make up trust law.¹⁶ The primary caveats to this flexibility are aimed at preventing public policy offenses, such as trusts designed for illegal or capricious purposes.¹⁷ In general, however, private trust law is primarily focused on facilitating donative freedom.¹⁸

Despite retaining legal ownership, a trustee holds the trust property for the benefit of the beneficiaries.¹⁹ As a result, the trustee owes the beneficiaries a fiduciary duty to administer the trust property in accordance with the trust agreement.²⁰ This fiduciary duty is fundamental to trust law and has been thoroughly developed in trust law scholarship.²¹

A final characteristic of trusts worth mentioning here is that a trust is a separate entity from any party involved in the creation or administration of the trust.²² In other words, the same party may be a settlor, trustee, a beneficiary (or, any combination of those). However, no party is the trust—once formed, the trust exists in complete independence from the other players.²³ This distinct existence affects the legal treatment of trusts, particularly in regard to trust assets. For example, despite the trustee having legal title to the trust property, a trustee's personal creditors cannot reach the assets of a trust. In the same vein, the settlor's creditors are usually precluded from asserting claims over trust property. In short, the separation of the trust from the parties creating it is an important and unique feature of trust law that underlies the attractiveness of private donative trusts.²⁴

Under the New Uniform Probate Code, 61 ALA. L. REV. 273, 288–90 (2010); Lee-ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. 743, 752–53 (2014) [hereinafter Tritt, *Trust Wars*].

16. Tritt & Teschner, *supra* note 2, at 32.

17. Tritt, *Trust Wars*, *supra* note 15, at 753 n.47.

18. Tritt & Teschner, *supra* note 2, at 32.

19. Austin Wakeman Scott, *The Trustee's Duty of Loyalty*, 49 HARV. L. REV. 521, 521 (1935); see also William F. Walsh, *Nature of Equitable Rights and Equitable Title*, 18 GEO. L.J. 36, 39 (1929) (juxtaposing the equitable ownership that trust beneficiaries possess with the legal title possessed by the trustee).

20. Tritt & Teschner, *supra* note 2, at 32.

21. See generally Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67 (2005) (discussing the effect of social norms on fiduciary duties); John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest*, 114 YALE L.J. 929 (2005) (underscoring the importance of the duty of loyalty in trust law).

22. Tritt & Teschner, *supra* note 2, at 33.

23. See *id.* (discussing the partitioning and protective features of trust law).

24. *Id.*; see also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998) (addressing the importance of asset protection in trust law); Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2588 (2011) (noting the asset protection that results from trusts being legally separate from the creating parties).

*B. Business Trusts in the United States*²⁵

For over a century, business trusts have been a viable form of organization in the United States²⁶ Business trusts were more popular at their inception—when state incorporation laws were prohibitively strict for business owners²⁷—than they are today because of their flexibility, both financially and legally.²⁸ Mutual funds, royalty trusts, and other asset securitization entities make up the majority of business trusts today, which still take advantage of the flexibility that business trusts offer.²⁹

As opposed to the historically cumbersome incorporation process, business trusts can be created through a simple trust agreement.³⁰ Through the trust agreement, property is conveyed to a trustee who holds and manages the property in a way that generates income for the beneficiaries.³¹ This conveyance of property grants the trustee full legal title and management rights in the property.³² The beneficiaries of a business trust, or “unitholders,”³³ are made up of persons who hold certificates issued by the trustee.³⁴ The certificates operate like shares of stock in a corporation: they entitle the unitholder to share in the income and proceeds of the trust as well as to transfer the shares in accordance with the trust agreement.³⁵ Thus, when people choose a business trust to form a profit-generating association, they pay an investment amount to a trustee. The trustee then holds the funds for the purpose specified in the trust agreement while the investors—now beneficiaries—hold transferable interests in the revenue generated by the trustee’s management.³⁶

25. For an in-depth analysis of how business trusts serve as a vehicle for sustainability-focused entrepreneurs in the United States to attain their organizational and social goals, see Tritt & Teschner, *supra* note 2, at 47–54.

26. See Jones et al., *supra* note 1, at 425–28.

27. See *id.* at 426 (“[B]usiness trusts were attractive because they provided an alternative to corporations which could be organized only pursuant to the restrictive state corporate statute.”).

28. See Tritt & Teschner, *supra* note 2, at 39 (discussing the limited liability, entity shielding, capital lock-in, tradeable shares, and legal personhood that business trusts historically offered business owners).

29. See Langbein, *supra* note 3, at 171.

30. Wheeler A. Rosenbalm, Comment, *The Massachusetts Trust*, 31 TENN. L. REV. 471, 471 (1964).

31. *Hecht v. Malley*, 265 U.S. 144, 146 (1924).

32. See *Goldwater v. Oltman*, 292 P. 624, 627 (Cal. 1930).

33. The Business Trusts Act defines a “unit” as a “share in the beneficial ownership in the trust property of the business trust.” BUSINESS TRUSTS ACT ch. 31A, § 1 (Sing. 2005). A “unitholder” is “a person who holds units in a business trust.” *Id.* Thus, unitholders are equivalent to shareholders in a corporation, and are the beneficiaries of the business trust.

34. *Hecht*, 265 U.S. at 146.

35. *Id.* at 146–47.

36. This entire organizational process can happen without the involvement of government actors

As is apparent from their formation and management, business trusts are much like their common law counterpart, the private donative trust. Business trusts offer settlors the same flexibility and freedom in designing their organization as do private trusts.³⁷ Additionally, both types of trusts provide trustees with legal title and beneficiaries with a beneficial interest.³⁸ Further, the roles of the trustee and beneficiaries are set forth in a trust agreement in both private trusts and business trusts.³⁹ Finally—and perhaps most importantly—both private trusts and business trusts have distinct legal status from those involved in their creation.⁴⁰

There are, however, several legally significant differences between private and business trusts. Some scholars and courts have even noted that “the only resemblance [a business trust] bears to an ordinary trust is that the word ‘trust’ happens to have been chosen as the generic term to describe” the association.⁴¹ First, the settlor of a private donative trust conveys property to the trustee without expecting compensation, while a business trust settlor is paid for the conveyance of assets.⁴² Second, a business trust does not collect property with the ultimate intent of distribution, as does a private donative trust. Rather, a business trust obtains property for the purpose of continuing to conduct a profitable business.⁴³ Third, a business trust is created on a fundamental contract theory between the trustee and the settlor(s), while private trusts are founded upon the settlor’s gift rather than a contract.⁴⁴ Fourth, while private and business trust agreements describe the trust assets and duties of the trustee, the business trust agreement must also provide for “the permissible business activities of the trust.”⁴⁵ Finally, and unsurprisingly,

because common law principles help to govern the formation and execution of the business trust agreement. *See* Tritt & Teschner, *supra* note 2, at 40.

37. Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDOZO L. REV. 325, 325 (2001) (“[B]usiness trusts could be viewed as the epitome of promoters’ freedom. Trusts allow promoters to design their organization any way they wish subject only to the pressures and judgments of the markets.”).

38. Tritt & Teschner, *supra* note 2, at 40.

39. *Hecht*, 265 U.S. at 146.

40. *See, e.g.*, Schwarcz, *supra* note 4, at 563–65 (discussing the use of trusts as separate entities, like special purpose vehicles, by companies looking to complete their structured finance goals).

41. *See, e.g.*, *Jim Walter Inv’rs v. Empire-Madison, Inc.*, 401 F. Supp. 425, 428 (N.D. Ga. 1975).

42. Schwarcz, *supra* note 4, at 562.

43. *See id.* at 559–60 (identifying the “widespread” use of business trusts in modern economy, like the financing of mortgages, credit card, and student loan debt); Thomas E. Plank, *The Bankruptcy Trust as a Legal Person*, 35 WAKE FOREST L. REV. 251, 258 (2000) (“The business trustee uses the assets of the business to operate a business.”).

44. Herbert B. Chermiside, Jr., Annotation, *Modern Status of the Massachusetts or Business Trust*, 88 A.L.R.3d 704 § 2 (1978 & Supp. 2001). In fact, private trust agreements need not even be written; they operate as a function of the gift to one person for the benefit of another person. *See* Tritt & Teschner, *supra* note 2, at 40 n.238.

45. Plank, *supra* note 43, at 258.

the settlors of a business trust are usually the beneficiaries.⁴⁶ In contrast, private trust law generally requires parties other than or in addition to the settlor to be beneficiaries of the trust.⁴⁷ Finally, business trusts are taxed as businesses, whereas private trusts are taxed as trusts.⁴⁸

Because common law principles permeated business trust formation and management, business trusts faced many legal uncertainties, including issues of standing and organizational registration.⁴⁹ In response, states began passing statutes that codified the regulation of business trusts.⁵⁰ Now, business trusts are governed by the state laws of the trust's situs. These laws—although varying significantly across states—offer business trust owners more certainty regarding the rights and liabilities of their trusts.⁵¹

1. Delaware Statutory Trust Act

As with most organizational forms, business trusts are most commonly created under Delaware law.⁵² Though the Uniform Statutory Trust Entity Act will be used later in this Article for comparative purposes, it is still informative to briefly discuss the Delaware Statutory Trust Act of 1988 (DSTA) because of the number of business trusts formed in Delaware.⁵³

The DSTA eliminated several common law principles in an effort to “recognize expressly the statutory trust as an alternative form of business association.”⁵⁴ The DSTA requires that a business trust be operated in some manner that generates profit.⁵⁵ However, any legal business, whether or not labeled for-profit, satisfies this “doing business”

46. This best illustrates the pure profitability function of the business trust: The settlors convey assets to the trust with the intent of receiving a personal return on that conveyance.

47. RESTATEMENT (THIRD) OF TRUSTS § 43 cmt. a (AM. LAW INST. 2003). *See also* Morsman v. Comm’r, 90 F.2d 18, 23–24 (8th Cir. 1937) (denying the existence of a trust when the settlor was also trustee and only ascertainable beneficiary).

48. *See infra* Section II.C.1 (discussing the taxation of U.S. business trusts).

49. *See* Chermide, *supra* note 44, at 719–30.

50. *See* William K. Sjoström, Jr., *Tapping the Reservoir: Mutual Fund Litigation under Section 36(a) of the Investment Fund Company Act of 1940*, 54 KAN. L. REV. 251, 293 (2005).

51. *See* Tritt & Teschner, *supra* note 2, at 42.

52. *See* Jared W. Speier, *Clarifying the Business Trust in Bankruptcy: A Proposed Restatement Test*, 43 PEPP. L. REV. 1065, 1075 (2016) (“The foremost statute regarding business trusts is the Delaware Statutory Trust Act of 1988.”).

53. DEL. CODE ANN. tit. 12, §§ 3801–3824 (2019). The Delaware Statutory Trust Act was originally known as the Delaware Business Trusts Act but was renamed to avoid confusion with the meaning of the term “trust” as used in the U.S. Code. Ann E. Conaway, *Lessons to Be Learned: How the Policy of Freedom to Contract in Delaware’s Alternative Entity Law Might Inform Delaware’s General Corporation Law*, 33 DEL. J. CORP. L. 789, 799 n.25 (2008) (citing 73 Del. Laws 238 (2002)).

54. *See* R. FRANKLIN BALOTTI ET AL., BALOTTI AND FINKELSTEIN’S DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 19.2 (3d ed. 2019).

55. DEL. CODE ANN. tit. 12, § 3801(g)(1)–(2).

standard.⁵⁶ Additionally, “[t]he Act eliminates the requirement imposed by other states that the trust be engaged in the conduct of a trade or business or issue certificates or shares.”⁵⁷

The DSTA also eliminated several disadvantageous common law principles. For example, DSTA provides for limited liability of trustees and beneficial owners.⁵⁸ The DSTA also grants the settlor and trustee greater freedom in their relationships with investors.⁵⁹ This freedom is illustrated by the fact that the critical rights of the trustee and beneficial owners—who are also the settlors in the business trusts world⁶⁰—are set in a permissive context, in that the DSTA specifically states: “[e]xcept to the extent otherwise provided in the governing instrument of the business trust.”⁶¹ Such leeway demonstrates the foundational flexibility and freedom of contract that are associated with business trusts as an organizational form.⁶² And that flexibility is likely the greatest advantage that business trusts offer over other forms of association.⁶³

II. A COMPARATIVE REVIEW OF TWO BUSINESS TRUST SYSTEMS

In the United States, business trusts are largely ignored as profitable operating entities, and their use is mostly restricted to specific industries.⁶⁴ In certain foreign markets like Singapore, however, this is not the case.

Singapore has one of the best economies in the world,⁶⁵ and it is known

56. Tritt & Teschner, *supra* note 2, at 43.

57. BALOTTI ET AL., *supra* note 54. Traditionally, to be recognized as a business trust, a trust must engage in business while also issuing transferrable shares. Speier, *supra* note 52, at 1075.

58. DEL. CODE ANN. tit. 12, § 3806(a); *see also id.* § 3817 (providing for trustee indemnification). The liability of the trustee and beneficial owners is allocated through contract. *Id.* § 3803.

59. *See* Tritt & Teschner, *supra* note 2, at 43.

60. *See supra* note 47 and accompanying text.

61. *See, e.g.*, tit. 12, § 3805(e).

62. *See, e.g., id.* § 3806(c) (allowing for the expansion, restriction, and elimination of fiduciary duties save the implied covenant of good faith and fair dealing). There is debate as to whether this provision allows the elimination of the basic duties of care and loyalty. *Compare* Peter B. Oh, *Business Trusts*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 268, 269–70 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) (explaining the “opt-out” regime the DSTA provides regarding duties of care and loyalty), *with* Frankel, *supra* note 37, at 332 (“Eliminating all vestiges of fiduciary duties is an unlikely interpretation of an act establishing a business trust.”).

63. BALOTTI ET AL., *supra* note 54; *see also* Noble Brandon Judah, *Possible Partnership Liability Under the Business Trust*, 56 AM. L. REV. 826, 827 (1922) (finding the flexibility of business trust management to be one of the several advantages that business trusts have over ordinary forms of business).

64. Sitkoff, *supra* note 4. Trusts are, however, used by large public and private charities, so the idea that trusts can be used successfully as operating entities is not a radical concept.

65. Many Americans may not have been aware of this fact until the popular film, *Crazy Rich Asians*, became a box office hit in 2018. This film portrayed just how successful some Singaporeans are. *CRAZY RICH ASIANS* (Warner Bros. 2018).

for being innovative and business-friendly. In fact, in 2018, Bloomberg's Innovation Index ranked Singapore's economy third in the world when measured by stability and overall success.⁶⁶ According to the CIA, "Singapore has a highly developed and successful free market economy. It enjoys an open and corruption-free environment, stable prices, and a per capita GDP higher than that of most developed countries."⁶⁷ Amidst this booming economy, business trusts are becoming more popular on the Singapore Exchange. Recent news articles from Singapore indicate that business trusts, along with REITs, make up the majority of IPOs on the Singapore Exchange.⁶⁸

Unlike in the United States, the business trust is a new concept in Singapore. The Singapore Business Trusts Act (BTA) was enacted in 2004.⁶⁹ The motivation for the BTA was most likely due to the tremendous success of Singapore Real Estate Investment Trusts (S-REITs).⁷⁰ Since S-REITs only dealt with real estate assets, other income generating assets such as ships and infrastructure projects could not be organized as S-REITs. In light of the S-REITs' success, Singapore's authorities started looking to accommodate businesses that manage non-real estate assets by amending its laws to facilitate the listing of other assets.⁷¹ Therefore, the Singapore business trust was the logical extension of the success S-REITs.⁷² In fact, the Singaporean Minister of Finance, Tharman Shanmugaratnam, explained that introducing the business trust structure in Singapore would create a new asset class for investors, and "potentially add depth and sophistication to Singapore's capital markets."⁷³

In the earlier years of these trusts, commentators noted "disappointing IPO debuts."⁷⁴ In recent years, however, business trusts have gained

66. John McKenna, *South Korea and Sweden Are the Most Innovative Countries in the World*, WORLD ECON. FORUM (Feb. 6, 2018), <https://www.weforum.org/agenda/2018/02/south-korea-and-sweden-are-the-most-innovative-countries-in-the-world/> [<https://perma.cc/2DF3-UX3G>].

67. *East Asia/Southeast Asia: Singapore*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/print_sn.html [<https://perma.cc/5UNU-CLVU>].

68. See sources cited *supra* note 12.

69. *Business Trusts Act Timeline*, SING. STATUTES ONLINE, <https://sso.agc.gov.sg/Act/BTA2004?Timeline=On> [<https://perma.cc/B8DU-VTCF>].

70. Tang Wu Hang, *The Resurgence of "Uncorporation": The Business Trust in Singapore*, 8 J. BUS. L. 683, 685 (2012).

71. Tang Wu Hang, *An Introduction to Trust Law in Singapore*, 40 TRUST LAW STUDY 163, 178 (2015), http://shintakuhogakkai.jp/journal/pdf/vol40_en_03.pdf [<https://perma.cc/R7LR-G9QN>].

72. *Id.*

73. Tharman Shanmugaratnam, Minister for Educ. and Deputy Chairman, Monetary Auth. of Sing., *The Securities and Futures (Amendment) Bill 2004 Second Reading Speech* (Sep. 1, 2004), <https://www.mas.gov.sg/news/speeches/2004/the-securities-and-futures-amendment-bill-2004> [<https://perma.cc/HWA7-FLYL>].

74. Norman Pho, *A Tale of Two Cities: Business Trust Listings and Capital Markets in Singapore and Hong Kong*, 11 J. INT'L BUS. & L. 311, 331 (2012); accord Kevin Brown, *Hutchinson Ports*

popularity in Singapore. In fact, they now dominate the IPOs on the Singapore Exchange, along with REITs.⁷⁵

Despite having a similar choice between the corporate form⁷⁶ and the business trust form, Singaporean entrepreneurs are increasingly choosing the business trust.⁷⁷ This preference of business trusts in Singapore necessitates a closer look at Singapore's business trust laws as compared to those in the United States. Though, it should be noted that the success of the business trust in Singapore does not guarantee its success in the United States. When used in a new business environment with distinct laws and practices, a construct that was successful in its original context may adapt to the new environment in unforeseen and unintended ways.⁷⁸ Nevertheless, the legal and economic climates of Singapore and the United States seem similar enough to allow for a successful transplant of the Singapore business trust into the United States.

Accordingly, this section will explore and compare the structure and requirements of business trusts in the United States and Singapore. To make this comparison, this Article will focus on the U.S. Uniform Statutory Trust Entity Act (USTEA) rather than a state-specific statute.⁷⁹

A. Formation

Formation refers to the formal procedures required to create a business trust and to trigger recognition by the sovereignty under which it is organized.

1. Formation of U.S. Business Trusts

To form a business trust, one must file a certificate of trust with the state.⁸⁰ At minimum, the certificate of trust must include the trust's name,

Disappoints on IPO Debut, FIN. TIMES (Mar. 18, 2011), <https://www.ft.com/content/44e6bc0e-5159-11e0-a9c6-00144feab49a> (discussing the disappointing IPO debut of one listed Singapore business trust in 2011).

75. See sources cited *supra* note 12.

76. The Singapore corporate entity differs from that of the United States, but in both countries, the corporate and business trust forms operate within a code-based, common-law system; the issue of entity choice in Singapore is thus roughly approximate to the issue of entity choice in the United States.

77. See *infra* Section II.B.2; see also Alchian, *supra* note 9, at 211–21.

78. See *supra* note 15 and accompanying text.

79. The USTEAs were written by the Uniform Law Commission in 2009 to “modernize[] the existing, but outdated, laws governing [business trusts].” *Statutory Trust Entity Act*, UNIF. L. COMM’N, <https://my.uniformlaws.org/committees/community-home?CommunityKey=8277f058-520e-40f2-8413-bf1c7bc4836d> (last visited Jan. 12, 2019). Although it has only been enacted by Kentucky and the District of Columbia, it nevertheless serves as a good model for comparison purposes. See *supra* note 15 and accompanying text.

80. UNIF. STATUTORY TR. ENTITY ACT § 201(a) (UNIF. LAW COMM’N 2009).

its address, its agent's address, and, "if the trust may have one or more series, a statement to that effect."⁸¹ Beyond those requirements, the certificate of trust may contain any other terms.⁸² The business trust is formed at the moment of filing, unless the certificate specifies a different date.⁸³

2. Formation of Singapore Business Trusts

Singapore business trusts are created through a trust deed.⁸⁴ This deed also "provides for the governance of the affairs of the trust and the conduct of its business."⁸⁵ If the business trust is registered, meaning it is listed on the Singapore Exchange, this deed is required to have certain provisions. These provisions relate to the powers of the trustee, the scope and structure of the business, the duration (or lack thereof) of the trust, "the conditions governing the transfer of units in the registered business trust," the trustee's compensation, the fees payable from the trust property, and any "other matters as may be prescribed by the Authority."⁸⁶

To register a business trust in Singapore, the "proposed trustee-manager" must first apply for registration with the Monetary Authority of Singapore.⁸⁷ This allows the trust to be publicly traded. Registration is not guaranteed, as "[t]he Authority may refuse an application to register a business" for several reasons,⁸⁸ including if "the Authority is not satisfied that the application lodged has complied with section 3." The Authority may also refuse the application if it "is not satisfied that the proposed trustee-manager of the business trust is a company and not an exempt private company." In addition, the Authority may refuse the application if the proposed trustee-manager or any substantial shareholder or officer has been convicted "of an offence involving fraud or dishonesty or . . . has been convicted of an offence under [the Business Trusts] Act."⁸⁹ In certain cases, the proposed trustee-manager is given an opportunity to be heard before the application is refused.⁹⁰ However, in some circumstances, the Authority will deny the application without giving the

81. *Id.* § 201(b).

82. *Id.* § 201(c).

83. *Id.* §§ 201(d), 204(c).

84. *See* BUS. TRS. ACT ch. 31A, § 1 (Sing. 2005), <https://sso.agc.gov.sg/Act/BTA2004?Timeline=On>.

85. *Id.*

86. *Id.* § 28(1).

87. *Id.* §§ 2, 3(1).

88. *Id.* § 4(2).

89. *Id.* § 4(2)(a), (b), (i).

90. *Id.* § 4(3). For example, if the proposed business manager did not conform with the application requirements, it would be given an opportunity to be heard. *Id.*

proposed trustee-manager such an opportunity.⁹¹ For example, if the proposed trustee-manager has been convicted of an offense involving fraud or dishonesty, the application will be denied without an opportunity to be heard.⁹²

B. Management

Once the business trust is formed, it must be managed in a way that generates profit lest the trust become insolvent. While Singapore and U.S. business trusts are substantially similar, their most marked differences manifest in the context of trust management. Management refers to the formal requirements of who may manage a business trust, the duties a manager owes to unitholders, and liability for a manager's breach of such duties.

1. Management of U.S. Business Trusts

U.S. business trusts may be structured to give ultimate control over the trust to the beneficial owners or to the trustees. "The governing instrument may authorize any person, including a beneficial owner, to direct a trustee or other person in the management of a statutory trust."⁹³ This means that the drafter of a business trust instrument may choose who will manage the trust.⁹⁴

Under the USTEPA, the only restrictions on who may be the trustee of a U.S. business trust are those imposed by the governing instrument or state law.⁹⁵ As the manager of the trust, "a trustee shall act in good faith and in a manner the trustee reasonably believes to be in the best interests of the statutory trust."⁹⁶ Additionally, "[a] trustee shall discharge its duties with the care that a person in a similar position would reasonably believe

91. *Id.* § 4(4).

92. *Id.* § 4(4)(c).

93. UNIF. STATUTORY TR. ENTITY ACT § 201(a) (UNIF. LAW COMM'N 2009).. § 510(a).

94. If the trust is drafted to give the beneficial owners this control, this would give a broad set of powers to the owners of the trust. Additionally, the owners may change authority figures and the overall strategy of the trust, because the governing instrument may be adapted to fit any changes that arise. *See id.* § 103(d) (allowing the governing instrument to be amended with the approval of all beneficial owners).

95. *Id.* § 501, cmt. ("Section 102(19) defines the term "trustee" as a person designated, appointed, or elected as such in accordance with the governing instrument or applicable law. Section 103(e)(6)(C) confirms that the governing instrument may provide for trustee appointment. However, because this act does not provide for trustee appointment, if the governing instrument does not provide for trustee appointment, then under Section 105 the state's law pertaining to trustee appointment in common-law trusts controls.").

96. *Id.* § 505(a)-(b). ("(a) Subject to Section 403, in exercising the powers of trusteeship, a trustee shall act in good faith and in a manner the trustee reasonably believes to be in the best interests of the statutory trust. (b) A trustee shall discharge its duties with the care that a person in a similar position would reasonably believe appropriate under similar circumstances.").

appropriate under the circumstances.”⁹⁷

The U.S. business trust is a separate legal entity by statute.⁹⁸ The beneficial owners and trustees of a business trust enjoy limited liability protection and do not have any financial obligations in the case of insolvency. “A beneficial owner, trustee, agent of the trust, or agent of the trustee is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the trust.”⁹⁹

2. Management of Singapore Business Trusts

Singapore has strict management requirements for business trusts. The trustee must be a company that does not “carry on any other business.”¹⁰⁰ Additionally, the trustee-manager cannot be an “exempt private company,”¹⁰¹ which is defined as:

a private company . . . the shares of which no beneficial interest is held directly or indirectly by any corporation and which has not more than 20 members; or any private company . . . that is wholly owned by the Government, which . . . [is] declare[d] . . . to be an exempt private company.¹⁰²

If any person fails to adhere to these requirements, that person “shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000.”¹⁰³

Prior to the early 2000s, Singapore business trusts and REITs were not treated as separate entities.¹⁰⁴ Unitholders of a business trust do not own the underlying assets of the business trust, but rather “share in the

97. *Id.* § 505(b). The USTEPA models itself after corporate fiduciary duties, not trust fiduciary duties. *Id.* § 505 cmt. This is different from Delaware’s business trust statute, which specifically incorporates trust law into its statutory trust act and allows the governing instrument to expand or eliminate fiduciary duties. DEL. CODE ANN. tit. 12, §§ 3806(c), 3810 (2018).

98. *E.g.*, DEL. CODE ANN. tit. 12, § 3801(g) (West 2018).

99. UNIF. STATUTORY TR. ENTITY ACT § 304(a) (“A debt, obligation, or other liability of a statutory trust or series thereof is solely a debt, obligation, or other liability of the trust or series thereof. A beneficial owner, trustee, agent of the trust, or agent of the trustee is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the trust or series thereof solely by reason of being or acting as a trustee, beneficial owner, agent of the trust, or agent of the trustee.”).

100. *Id.* at Part III, div. 1.

101. *Id.* § 6(1).

102. *Id.* § 2; COMPANIES ACT ch. 50, § 4(1) (Sing. 2006).

103. BUS. TRS. ACT § 6(4).

104. Hans Tjio, *Merrill and Smith’s Intermediate Rights Lying Between Contract and Property: Are Singapore Trusts and Secured Transactions Drifting Away from English Law Towards American Law?*, SING. J. LEGAL STUD. 235, 244–45 (2019).

beneficial ownership in the trust property of the business trust.”¹⁰⁵ Rather, Singapore courts view the beneficial interest under a trust as a right against a trustee rather than a proprietary right.¹⁰⁶ “[U]nit holders are expressly stated not to have any equitable proprietary interest in the trust property but only a right to compel due performance by the trustee.”¹⁰⁷ In *Ernest Ferdinand Perez De La Sala v. Compañía De Navegación Palomar, SA*, the Singapore Court of Appeal recognized that a beneficial interest is “a right against a right,” or “a right to constrain or control the way another person exercises *his* right to deal with a thing, rather than a right against the thing itself.”¹⁰⁸ Such a recognition has allowed Singapore courts to recognize business trusts and REITs as separate legal entities¹⁰⁹—an important development that allows unsecured creditors to look directly to the business trust, rather than through the trustee’s right of indemnity, to enforce their rights.¹¹⁰

In general, the trustee’s powers come from the BTA and the trust deed. The trustee is directed to “manage and operate the registered business trust in accordance with the provisions of [the BTA] and the trust deed of the registered business[] and . . . perform the functions conferred on it by the trust deed and the provisions of [the BTA].”¹¹¹ If authorized by the trust deed, the trustee may delegate its management authority.¹¹²

The BTA also outlines the duties of the trustee-manager. “The trustee-manager . . . shall at all times act honestly and exercise reasonable diligence in the discharge of its duties as a trustee-manager in accordance with [the BTA] and the trust deed . . .”¹¹³ The trustee must “act in the best interests of all the unitholders of the registered business trust as a whole.”¹¹⁴ In the event of a conflict of interest between the trustee and the unitholders, the trustee must always put the unitholders’ interests first.¹¹⁵ Additionally, the trustee must not use information acquired as trustee for its or any other person’s gain to the detriment of the unitholders.¹¹⁶ Finally, the trustee must hold the trust property in “trust for all the unitholders . . . in accordance with the terms of the trust deed.”¹¹⁷ If the

105. BUS. TRS. ACT § 1.

106. Tjio, *supra* note 104, at 239.

107. *Id.* at 245.

108. *Id.* at 239.

109. *Id.* at 244.

110. *Id.* at 242.

111. BUS. TRS. ACT. § 8(1). Breaching this section comes with a fine of up to \$100,000. *Id.* § 8(5).

112. *Id.* § 8(2).

113. *Id.* § 10(1).

114. *Id.* § 10(2)(a).

115. *Id.* § 10(2)(b).

116. *Id.* § 10(3).

117. *Id.* § 10(4).

trustee contravenes any of these duties, it

shall be liable to all the unitholders . . . as a whole for any profit or financial gain directly or indirectly made by it or any of its related corporations or for any damage suffered by all the unitholders . . . as a whole as a result of the contravention.¹¹⁸

Any provision in a trust deed that indemnifies the trustee against “liability for breach of trust where the trustee-manager fails to exercise the degree of care and diligence required of a trustee-manager of a registered business trust” is void.¹¹⁹ Further, unitholders may take legal action against the trustee-manager in his or her individual capacity, which increases the liability of a trustee-manager to include personal liability for contravention of his or her duties.¹²⁰

Unitholders who have invested in a Singapore business trust are not personally liable for any of the trust’s debts, liabilities, or obligations; liability of a unitholder is limited to amounts that were expressly contributed to the registered trust.¹²¹ In this regard, the benefit of using the business trust is that unitholders waive their right to obtain possession of trust property.¹²² This means that business trusts can limit their exposure in certain situations by obtaining more tangible assets.

Despite being subject to strict qualifications and liabilities, trustees in a Singapore business trust enjoy significant protection from removal. Section 20 of the BTA requires at least 75% of unitholders to agree to remove a trustee.¹²³ Because it is difficult for 75% of unitholders to reach agreement, trustees are heavily protected from removal by unitholders.¹²⁴ Accordingly, once a trustee meets the above qualifications,¹²⁵ the trustee need only avoid breaching fiduciary duties to the unitholders to remain in

118. *Id.* § 10(5)(a). Additionally, the trustee will be guilty of a criminal offense with a penalty of up to \$100,000. *Id.* § 10(5)(b).

119. *Id.* § 29(1).

120. *Id.* § 40 (“Any unitholder of a registered business trust who suffers loss or damage because of any conduct of the trustee-manager of the registered business trust which contravenes any provision of this Act may recover the amount of the loss or damage by action against the trustee-manager, whether or not the trustee-manager has been convicted of an offence in respect of such contravention.”).

121. *Id.* § 32 (“For the avoidance of doubt, a unitholder of a registered business trust shall not be liable to contribute to the registered business trust or in respect of any debts, liabilities or obligations incurred by the trustee-manager in its capacity as trustee-manager for the registered business trust, other than such outstanding amounts of money, if any, which the unitholder has expressly agreed to contribute to the registered business trust.”).

122. *Id.* § 34 (“No creditor of a unitholder of a registered business trust shall have any right to obtain possession of, or otherwise exercise any legal or equitable remedy with respect to, the trust property of the registered business trust.”).

123. *Id.* § 20(a).

124. Tang, *supra* note 70, at 692.

125. See *supra* notes 111–124 and accompanying text.

control of the business trust.¹²⁶

This near-immunity granted to trustees is an attractive feature of the BTA for trust sponsors.¹²⁷ Most trust sponsors own the trustee-manager company, or at least own a majority stake in it.¹²⁸ Thus, the sponsor often has an interest in keeping the original trustee in place.¹²⁹ The sponsor can protect that interest well because the sponsor needs only 25% of the units “plus one” to retain the original trustee.¹³⁰ Further, because the sponsor is usually a unitholder,¹³¹ the sponsor also votes on whether to remove the trustee. Essentially, because the sponsor is playing defense in trying to keep the trustee, the sponsor has a much lower burden in ensuring the continuity of the trustee of its choice.¹³²

The advantage that sponsors have in retaining their trustees has been a major factor in certain companies deciding to list as a Singapore business trust.¹³³ In fact, the difficulty in removing the trustee without the sponsor’s cooperation was part of the driving force in the BTA. Tharman Shanmugaratnam¹³⁴ stated that the 75% removal requirement was the correct threshold for preventing frivolous removal of trustees, while still

126. See Tang, *supra* note 70, at 696 (identifying and analyzing the fiduciary duties required of Singapore business trustees).

127. *Id.* at 692.

128. *Id.*

129. This interest is two-fold: first, the sponsor, by owning the trustee-manager company, has significant control over how the trust is operated. Second, and equally as important, the sponsor has a financial interest, in that the trustee-manager company is paid for its performance as trustee. Thus, as shareholder in the trustee-management company, the sponsor derives financial gain from the company continuing to receive performance fees. See Tang, *supra* note 70, at 697–98 (addressing performance fee calculation and certain concerns with performance fees generally).

130. *Id.* at 692.

131. CLIFFORD CHANCE, WHY SINGAPORE BUSINESS TRUSTS ARE PROVING POPULAR WITH INDIAN SPONSORS 2 (2012), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/09/why-singapore-business-trusts-are-proving-popular-with-indian-sponsors.pdf> [<https://perma.cc/3K7E-FG2U>].

132. The ability of sponsors to retain the original trustee-manager company is not looked upon fondly by all commentators. For example, David Webb, a well-known Hong Kong corporate governance activist, argues that sponsors have too much control at the expense of unitholders. Tang, *supra* note 70, at 696. In discussing Hutchison Whampoa Ltd.’s decision to list in Singapore as a business trust, Webb remarked:

All in all, we can see no good reason for [Hong Kong] to emulate Singapore Business Trusts. There's no tax reason for doing so, and there are governance reasons why we shouldn't. We should not race to the bottom just to win business from tycoons who are not willing to work with existing corporate governance standards, nor should we offer tax incentives for trustee-managers (or any other business sector).

David M. Webb, *HPH Trust is No Loss to HK*, WEBB-SITE REPORTS (Jan. 21, 2011), <https://webb-site.com/articles/hutchport.asp> [<https://perma.cc/M8KY-5KGH>].

133. See, e.g., Tang, *supra* note 70, at 697 (discussing the 75% requirement to be an effective prevention against hostile takeover of the trustee-manager company).

134. Tharman Shanmugaratnam was Singapore’s Minister of Finance from 2007-2015. *Finance Minister Bios*, MINISTRY OF FIN. SING., <https://www.mof.gov.sg/About-Us/finance-minister-bios> (last visited May 16, 2019).

providing sufficient rights to unitholders to remove inefficient trustees.¹³⁵ This frivolous removal threatens the continuity of the business trust as an effective organization.¹³⁶ Accordingly, the 75% requirement is focused on the efficiency of the trust, not as an entrenchment device.¹³⁷

C. Taxation

One of the most important factors to consider when selecting an organizational form concerns the tax consequences associated with the potential business structures.

1. Taxation of U.S. Business Trusts¹³⁸

The taxation of a U.S. business trust depends on its purpose. If a trust “is created to protect or conserve trust property on behalf of trust beneficiaries”—like an ordinary donative trust—it will be taxed as a trust under Subchapter J.¹³⁹ If a trust is “a device to carry on a profit-making business,” as a true business trust would be, it is subject to the check-the-box tax regulations.¹⁴⁰ The check-the-box regulations allow a business trust to elect to be taxed as a partnership under Subchapter K or as a corporation under Subchapter C.¹⁴¹ If a business trust elects partnership treatment, it will be treated as a pass-through entity and generally only taxed at the beneficiary level.¹⁴² If a trust elects to be treated as a corporation, however, it may be taxed at both the trust level and the beneficiary level.¹⁴³ If a business trust is publicly traded, it generally must be taxed as a corporation.¹⁴⁴

135. Tharman Shanmugaratnam, Minister for Educ. And Deputy Chairman, Monetary Auth. of Sing., The Securities and Futures (Amendment) Bill 2004 Second Reading Speech (Sep. 1, 2004), <https://www.mas.gov.sg/news/speeches/2004/second-reading-the-business-trusts-bill> [<https://perma.cc/HWA7-FLYL>].

136. Tang, *supra* note 70, at 697.

137. *See id.* Professor Tang recognizes this focus as a possibility, but also recommends that Singapore’s policy makers reconsider the 75% requirement. *Id.*

138. For a thorough discussion of taxation of U.S. business trusts, see Tritt & Teschner, *supra* note 2, at 44–47.

139. Carter G. Bishop, *Forgotten Trust: A Check-the-Box Achilles’ Heel*, 43 SUFFOLK U. L. REV. 529, 554 (2010).

140. *Id.* at 554–55.

141. Karen C. Burke, *Passthrough Entities: The Missing Element*, 40 PEPP. L. REV. 1329, 1331 (2013).

142. GEORGE K. YIN & KAREN C. BURKE, PARTNERSHIP TAXATION 29 (3d ed. 2016).

143. *Id.* at 17.

144. *Id.* at 15.

2. Taxation of Singapore Business Trusts

A Singapore business trust is generally taxed like a Singapore corporation,¹⁴⁵ meaning that it is subject to the same tax rates, tax relief, and foreign tax credits as Singapore corporations.¹⁴⁶ Singapore business trusts are only taxed at the trustee level,¹⁴⁷ and unitholders are not taxed on distributions made by the trust.¹⁴⁸

D. Transferability

Transferability refers to the ability of unitholders to dispose of their interest, or units, in a business trust. Like U.S. corporations, both U.S. and Singapore business trusts—as a general rule—allow free transferability of ownership in the company. The primary restriction on that transferability is what the trust’s governing instrument provides.

1. Transferability of U.S Business Trusts

Another benefit of the business trust is transferability. “A beneficial interest in a statutory trust is freely transferable,” and “[a] beneficial interest in a statutory trust is personal property regardless of the nature of the property of the trust.”¹⁴⁹ This freely transferable interest allows for more flexible terms when fundraising for business trusts. While public trading is a great option, more creative ways to partner, trade, invest, or sell are available to business trusts, including contribution by owner.¹⁵⁰

Similarly, merger is available and not as heavily regulated for business trusts as it is within the public markets.¹⁵¹ Ultimately, merger or winding up—while not an end goal for many businesses—tends to be easier for business trusts. Only those who have an interest in the business trust may

145. INLAND REVENUE AUTH. OF SING., IRAS E-TAX GUIDE: INCOME TAX TREATMENT OF A TRUST REGISTERED UNDER THE BUSINESS TRUSTS ACT § 4.1 (2d ed. 2019).

146. *Id.* § 4.2.

147. *Id.* § 4.5.

148. *Id.*

149. UNIF. STATUTORY TR. ENTITY ACT § 601.

150. *Id.* § 603. Contribution by the owner is not necessarily an option for a publicly traded company due to the structuring of certain publicly-traded ownership agreements. For example, the Code of Federal Regulations requires that purchasers of securities be an accredited investor. 17 C.F.R. § 230.501(a) (2018).

151. UNIF. STATUTORY TR. ENTITY ACT § 706(a) (“A statutory trust may merge with one or more other constituent organizations pursuant to this section and Sections 707 through 709 and a plan of merger if: (1) the merger is not prohibited by the governing law of any constituent organization; and (2) each of the other organizations complies with its governing law in effecting the merger.”). By contrast, because public companies fall under the Code of Federal Regulations, numerous activities must be undergone before merger or acquisition, including market value validation, identification of shares outstanding, disclosure of prior IPO’s, securities disclosure, and more. 17 C.F.R. §229.1000.

receive discharge of debt, a distribution of surplus property, and other beneficial interests.¹⁵²

2. Transferability of Singapore Business Trusts

The trust deed governs the conditions for transferring units in a registered business trust.¹⁵³ The trust deed may permit the free transfer of trust units, or it may place more restrictions on transfer. This allows for flexibility in how a Singapore business trust wishes to operate.

When a Singapore business trust chooses to cease operations, there are three ways in which a registered business trust may be wound up. First, it may be wound up under a provision of the trust deed.¹⁵⁴ Second, it may be wound up at the direction of the unitholders.¹⁵⁵ Finally, it may be wound up by court order.¹⁵⁶ Winding up is subject to certain notice requirements, and a court ordered wind up may impose more requirements.¹⁵⁷

The recent affirmation of the Singapore business trust as a separate legal entity has made it so that the business trust may be liquidated as an entity.¹⁵⁸ This has positive implications for the developing insolvency and restructuring laws in Singapore.¹⁵⁹

E. Other Requirements

Other requirements with which U.S. business trusts and Singapore business trusts must comply include voting requirements and requirements for distributions to unitholders, among others. These remaining requirements in the USTEA and BTA demonstrate the final nuanced differences between U.S. and Singapore business trusts.

152. UNIF. STATUTORY TR. ENTITY ACT § 803(a)–(b) (“(a) A dissolved statutory trust shall wind up its activities, and the trust and each series thereof continues after dissolution only for the purpose of its winding up. (b) In winding up its activities, a statutory trust shall: (1) discharge the trust’s debts, obligations, and other liabilities, settle and close the trust’s activities, and marshal and distribute the property of the trust; and (2) distribute any surplus property after complying with paragraph (1) to the beneficial owners in proportion to their beneficial interests.”).

153. BUS. TRS. ACT § 28(1)(d).

154. *Id.* § 44(3)(a).

155. *Id.* § 45(1).

156. *Id.* § 46(1)–(3).

157. *Id.* §§ 47(2)–(3), 48(2), 48(5).

158. Tjio, *supra* note 104, at 245.

159. *Id.* at 262.

1. Other Requirements of U.S. Business Trusts

As a testament to the flexibility of business trust, the USTEA imposes few additional requirements beyond what has already been discussed. For example, the USTEA provides that trustees may act only through a majority of the trustees.¹⁶⁰ If, however, the majority of trustees indicate they would vote in consent to an action, the trustees may act without a meeting, without previous notice, and without actually taking a vote.¹⁶¹ The rules governing unitholder voting are the same.¹⁶²

The limitations on distribution from a business trust are similar to those in corporate law. A trust may not make distributions if doing so would result in insolvency.¹⁶³ The determination of whether a distribution is appropriate is left to the trustee.¹⁶⁴ A trustee may base the appropriateness of a distribution on “a fair valuation [of the trust] or other method that is reasonable under the circumstances.”¹⁶⁵ This standard by which the trustee makes this determination illustrates the flexibility of the distribution process

The USTEA also models corporate law in trust litigation. Because a U.S. business trust is a separate legal entity, the trust may sue and be sued under its own name.¹⁶⁶ In the context of unitholders suing the trust, the suit may come in either direct or derivative form.¹⁶⁷ Like corporate law, if a business trust is named as a party in a derivative suit, the trust may appoint a special litigation committee to determine whether pursuing the action is in the best interests of the trust.¹⁶⁸ Moreover, the special committee may be composed of trustees, provided they are independent and disinterested in the derivative suit.¹⁶⁹ These trustees hire outside counsel and investigate the merits of the suit and its impact on the trust as a whole.¹⁷⁰

160. BUS. TRS. ACT § 503(1).

161. *Id.* § 503(2). If the trustees act in this way, they must provide notice to the trustees that were absent or that would not have consented had the action been voted on. *Id.*

162. *Id.* § 603(1)–(2).

163. *See id.* § 615(a)(1)–(2).

164. *Id.* § 615(b).

165. *Id.* § 615(b)(2). Despite this fluid standard in determining distributions, an improper distribution can result in the trustee being personally liable for the amount of distribution deemed improper. *Id.* § 616(a). However, as section 616(a) mentions, a distribution is improper only if the trustee acts outside the prescriptions of section 505. *Id.* Because section 505 gives latitude to trustees—requiring they act in what they reasonably believe to be the best interests of the trust—a plaintiff would be hard-pressed to show an improper distribution absent some egregious trustee conduct. *See id.* § 505(a)–(b).

166. *Id.* § 308.

167. *Id.* §§ 609, 610.

168. *Id.* § 613(a).

169. *Id.* § 613(b).

170. Marc I. Steinberg, *The Use of Special Litigation Committees to Terminate Shareholder Derivative Suits*, 35 U. MIAMI L. REV. 1, 2 (1980). Understandably, many scholars critique the use of

2. Other Requirements of Singapore Business Trusts

The BTA imposes requirements on registered business trusts that are similar to some of the securities regulations in the United States. Interestingly, some of the requirements imposed on business trusts are actually higher than those for other entities listed on the Singapore Exchange.¹⁷¹ Yet, for the many business trusts on the Singapore Exchange, this seems to be a palpable tradeoff for the benefits that come with the business trust form.

For example, under the Business Trust Regulations, registered business trusts must have an audit committee that meets the requirements imposed by the Singapore Monetary Authority.¹⁷² The Business Trusts Regulations provide that the audit committee must be comprised of three or more members who are all “independent of management and business relationships with the trustee-manager.”¹⁷³ Additionally, a majority of audit committee members must be “independent from every substantial shareholder of the trustee-manager” as well as independent of business relationships with the trustee-manager.¹⁷⁴ The audit committee is responsible for reviewing the audit plan of the trust, the appointed auditor’s evaluation of the trustee’s accounting controls, and the auditor’s report, among other things.¹⁷⁵

There are also disclosure requirements on registered business trusts, such as disclosures of all interests the directors of the trustee-manager company have in the trust and trust transactions.¹⁷⁶

In addition, the BTA specifically provides that when a conflict of interests arises, the directors of the trustee-manager company are to “prefer the interest of the unit holders as a whole.”¹⁷⁷

Many other formalities, such as proxy voting,¹⁷⁸ disclosure of

special litigation committees, finding that the committee will always determine that litigation is contrary to the company’s best interests. *See, e.g., id.* (“After calling witnesses, examining documentary evidence, and issuing a detailed report, the committee, with the concurrence of the special counsel, concludes that the suit is contrary to the corporation’s best interests because of the litigation’s improbability of success, its high costs, the disruption to the company’s business, and the adverse impact on employee morale.”). *But see* Minor Myers, *The Decisions of the Corporate Special Litigation Committees: An Empirical Investigation*, 84 *IND. L.J.* 1309, 1309 (2009) (using SEC filings to find that special litigation committees pursue litigation more frequently than previously recognized).

171. Pho, *supra* note 74, at 317.

172. BUS. TRS. ACT § 15(1).

173. BUS. TRS. REGULATIONS, Chap. 31A, Reg. 2, § 13(1)(b)(i) (Sing. 2006).

174. *Id.* § 13(1)(b)(ii).

175. *Id.* § 13(6).

176. BUS. TRS. ACT §§ 13–14.

177. Tang, *supra* note 70, at 691.

178. BUS. TRS. ACT § 60 (“(1) A unitholder of a registered business trust entitled to attend and vote at a meeting of the unitholders of the registered business trust, or at a meeting of any class of unitholders of the registered business trust, shall be entitled to appoint another person or persons, whether a unitholder

interests,¹⁷⁹ appointment of powers,¹⁸⁰ and distributions to unitholders¹⁸¹ are outlined in the registration process. Additionally, Singapore business trusts are required to hold an Annual General Meeting.¹⁸² During this meeting, most business decisions are made through a voting system.¹⁸³ Examples of these decisions include passing resolutions,¹⁸⁴ annual

or not, as his proxy to attend and vote instead of the unitholder at the meeting. (2) A proxy appointed under subsection (1) to attend and vote at a meeting of the unitholders of a registered business trust instead of a unitholder of the registered business trust shall also have the same right as the unitholder to speak at the meeting, but unless the trust deed otherwise provides — (a) a proxy shall not be entitled to vote except on a poll; (b) a unitholder shall not be entitled to appoint more than 2 proxies to attend and vote at the same meeting; and (c) where a unitholder appoints 2 proxies, the appointments shall be invalid unless he specifies the proportions of his holdings to be represented by each proxy.”).

179. *Id.* § 12(1) (“Subject to subsections (2) and (3), every director of the trustee-manager of a registered business trust who is in any way, whether directly or indirectly, interested in a transaction or proposed transaction entered or to be entered into by the trustee-manager for or on behalf of the registered business trust shall, as soon as practicable 2005 Ed. Business Trusts CAP. 31A 20 Informal Consolidation – version in force from 1/7/2015 after the relevant facts have come to his knowledge, declare the nature of his interest at a meeting of the directors of the trustee-manager.”).

180. *Id.* § 97 (“(1) The Authority may appoint any person to exercise any of its powers or perform any of its functions or duties under this Act, either generally or in any particular case, except the power to make subsidiary legislation. (2) Any person appointed by the Authority under subsection (1) shall be deemed to be a public servant for the purposes of the Penal Code (Cap. 224).”).

181. *Id.* § 33(1) (“The trustee-manager of a registered business trust shall have the right to declare a distribution of profits, income or other payments or returns to the unitholders of the registered business trust out of the trust property of the registered business trust; but such distribution shall only be made if the board of directors of the trustee-manager makes a written statement, in accordance with a resolution of the board of directors of the trustee-manager and signed by not less than 2 of the directors, that the board of directors is satisfied on reasonable grounds that, immediately after making the distribution, the trustee-manager will be able to fulfil, from the trust property of the registered business trust, the liabilities of the registered business trust as these liabilities fall due.”).

182. *Id.* § 53(1) (“The trustee-manager of a registered business trust shall call a general meeting of the unitholders of the registered business trust known as the “annual general meeting” once in every calendar year and not more than 15 months after the holding of the last preceding annual general meeting, but so long as the unitholders of the registered business trust hold their first annual general meeting within 18 months of the registration of the registered business trust, the trustee-manager need not call an annual general meeting in the year of the registration of the registered business trust or in the following year.”).

183. *Id.* § 57(1) (“So far as the trust deed of a registered business trust does not make any other provision in that behalf and subject to section 58 — (a) 2 unitholders of the registered business trust personally present shall form a quorum; (b) any unitholder of the registered business trust elected by the unitholders present at a meeting may be chairman thereof; (c) on a show of hands, each unitholder of the registered business trust who is personally present and entitled to vote shall have one vote; and (d) on a poll, each unitholder of the registered business trust shall have one vote in respect of each unit in the registered business trust held by him.”).

184. *Id.* § 66 (“Where a resolution is passed at an adjourned meeting of the unitholders of a registered business trust or of unitholders of any class of units in the registered business trust, the resolution shall for all purposes be treated as having been passed on the date on which it was in fact passed and not on any earlier date.”).

returns,¹⁸⁵ and financial statements.¹⁸⁶ The enforcement branch is made up of compliance,¹⁸⁷ inspectors,¹⁸⁸ injunctions,¹⁸⁹ and penalties.¹⁹⁰

F. *Primary Benefits and Differences*

In reviewing both the USTEA and the BTA, four major differences are evident between the two systems: control, structure and enforcement, sustainability, and taxation.

1. Control

The sponsoring entity of a Singapore business trust can easily retain control of the business trust. Section 20 of the BTA prescribes an onerous 75% threshold before a trustee-manager may be changed.¹⁹¹ This provision makes it difficult for unitholders to remove the trustee-manager, as a three-fourths majority at a meeting is extremely difficult to achieve. Since the sponsoring entity is likely to control the trustee-manager company by way of majority shareholding, a sponsoring entity may prevent even the possibility of removal of the trustee-manager by retaining more than 25%

185. *Id.* § 74(1) (“The trustee-manager of a registered business trust shall lodge with the Authority, within one month after the annual general meeting of the unitholders of the registered business trust, a return containing such statements and particulars as may be prescribed by the Authority.”).

186. *Id.* § 79(1) (“Notwithstanding section 78 and anything in the trust deed of a registered business trust the units of which are listed on the approved [securities] exchange, the trustee-manager of the registered business trust may, in such cases as may be prescribed by the Authority and provided all the conditions imposed thereunder by the Authority are complied with, send a summary financial statement of the registered business trust complying with the requirements of subsections (4) and (5) instead of copies of the documents referred to in section 78(1) to the unitholders of the listed registered business trust.”).

187. *Id.* § 102(1) (“If any person in contravention of this Act refuses or fails to permit the inspection of any register, minute book or document or to supply a copy of any register, minute book or document, the court may by order compel an immediate inspection of the register, minute book or document or order the copy to be supplied.”).

188. *Id.* § 103(1)(a) (“Notwithstanding anything in this Act, the Minister may appoint any person as an inspector to investigate any matter if he is satisfied that — (a) a prima facie case has been established that, for the protection of the public, the unitholders or the creditors of a registered business trust, it is desirable that the affairs of the registered business trust should be investigated . . .”).

189. *Id.* § 104(1) (“Where a person has engaged, is engaging or is likely to engage in any conduct that constitutes or would constitute a contravention of this Act or the trust deed of a registered business trust, the court may, on the application of” — 127 CAP. 31A Business Trusts 2005 Ed. Informal Consolidation – version in force from 1/7/2015 “(a) the Authority; or (b) any person whose interests have been, are or would be affected by the conduct, grant an injunction restraining the first-mentioned person from engaging in the conduct and, if the court is of the opinion that it is desirable to do so, requiring that person to do any act or thing.”).

190. *Id.* § 110. “Any person guilty of an offence under this Act for which no penalty is expressly provided shall be liable on conviction to a fine not exceeding \$50,000.”).

191. *See* BUS. TRS. ACT § 20 (requiring a 75% supermajority of unitholders to agree before a trustee can be removed).

of the units. This requirement gives unit holders very little say in management.¹⁹² In contrast, the unitholders in a U.S. business trust may have broad power in the control and management of the trust.¹⁹³

2. Structure and Enforcement

There are also differences in how Singapore and U.S. business trusts are structured and enforced. This may shed light on why business trusts are more readily used in Singapore as compared to the United States.

The management of U.S. business trusts is more flexible than the management of Singapore business trusts. In Singapore, only a company that does not carry on any other business and is not an “exempt private company” can act as the trustee manager of a Singapore business trust.¹⁹⁴ This requirement is much more restrictive than the requirements in the United States. Under the USTEA, there are no restrictions on who may be the trustee of a U.S. business trust except those imposed by the governing instrument or state law.¹⁹⁵ In addition, many of the strict operational aspects imposed on Singapore trusts are not imposed on U.S. business trusts. For example, U.S. business trusts are not required to hold annual meetings, have a certain number of independent trustees, or have an audit committee.

While some of Singapore’s BTA is very similar to the USTEA, many of its requirements are more stringent. Some of Singapore’s business trust requirements are closer to U.S. corporate law requirements than to U.S. business trust requirements. This makes sense because Singapore’s business trust law seems to structure these trusts so that they may be listed on the Singapore Exchange. However, even with some of the BTA’s strict requirements, Singapore business trusts retain the flexibility that makes them so popular. Meanwhile, in the United States, business trusts do not come prepackaged to be listed on the stock exchange in this way. This does not preclude U.S. business trusts from being publicly traded, but rather provides the flexibility to structure the business trust in a way that will allow it to be listed on the stock exchange if so desired¹⁹⁶ To do so,

192. Tang, *supra* note 70, at 696.

193. See *supra* notes 95–96 and accompanying text.

194. BUS. TRS. ACT § 6(1) (“No person other than a company (not being an exempt private company) shall act as the trustee-manager of a registered business trust.”).

195. See UNIF. STATUTORY TR. ENTITY ACT § 501, cmt. (UNIF. LAW COMM’N 2009) (“Section 102(24) defines the term ‘trustee’ as a person designated, appointed, or elected as such in accordance with the governing instrument or applicable law. Section 103(e)(6)(C) confirms that the governing instrument may provide for trustee appointment. However, because this act does not provide for trustee appointment, if the governing instrument does not provide for trustee appointment, then under Section 105 the state’s law pertaining to trustee appointment in common-law trusts controls.”).

196. For a contrasting view, see Frankel, *supra* note 37, at 342–43.

the verbiage of a trust's governing instrument may need to be updated to conform more closely to the Corporation Act and the Securities Acts. At the same time, the trust instrument must be drafted to specifically outline the trust's differences to corporations. For example:

The position in the [BTA] is much clearer in this regard. The [BTA] contains the equivalent of ss 339(3) and 340 of the Companies Act. Therefore, an officer of the trustee-manager is both criminally liable and personally liable for any debt that he contracted without any reasonable or probable ground for expecting, at the time of contracting, that the debt would be paid.¹⁹⁷

Mirroring this well-defined law in the United States, which is the paragon of public trade structure, is essential for business trusts that wish to trade publicly. This mirroring of terms in the USTEA to terms found in the Uniform Corporations Act is similar to the BTA's equivalency to the Singapore Companies Act—which applies to companies incorporated in Singapore and outlines everything from incorporation to winding up. But even more important is the ability of business trusts to differentiate themselves from corporations while having enough structure to comply with securities law. Doing this would allow a business trust to be publicly traded without being as constrained as corporations.

In addition to these more restrictive requirements, Singapore trust enforcement is much more punitive than U.S. business trust law. The BTA imposes strict requirements on business trusts, and trustees may face criminal liability and fines for nonadherence, in addition to personal liability for a breach of duty to the unitholders. In contrast, the USTEA imposes civil liability on trustees who breach their fiduciary duties, but it does not provide for criminal penalties.

3. Sustainability

In Singapore, business trusts may not have gained popularity because they can be used as a sustainable vehicle. This is likely because Singapore's Code of Corporate Governance requires *all* listed companies to practice sustainability.¹⁹⁸ However, the general value put on sustainability in Singapore is different from the emphasis placed on

197. Lee Suet Fern & Linda Esther Foo, *Real Estate Investment Trusts in Singapore: Recent Legal and Regulatory Developments and the Case for Corporatisation*, 22 SING. ACAD. L.J. 36, 61 (2010).

198. MONETARY AUTH. OF SING., CODE OF CORPORATE GOVERNANCE 2 (Sing. 2018) (“Corporate governance refers to having the appropriate people, processes and structures to direct and manage the business and affairs of the company to enhance long-term shareholder value, *whilst taking into account the interests of other stakeholders*. Companies that embrace the tenets of good governance, including accountability, transparency and *sustainability*, are more likely to engender investor confidence and achieve long-term sustainable business performance.”) (emphasis added).

sustainability in the United States.

While the USTEA may not preclude sustainability, it does not encourage it as Singapore law does. Singapore business trusts are encouraged to practice sustainability even though the trustee of a Singapore business trust “shall . . . act in the best interests of all the unitholders of the registered business trust as a whole,”¹⁹⁹ While this language could suggest that the trustee of a Singapore business trust must only maximize profits for the unitholders, the Singapore BTA must be read in conjunction with Singapore’s Code of Corporate Governance, which “is applicable to listed companies in Singapore.”²⁰⁰ The first introductory note to this Code states:

Corporate governance refers to having the appropriate people, processes and structures to direct and manage the business and affairs of the company to enhance long-term shareholder value, *whilst taking into account the interests of other stakeholders*. Companies that embrace the tenets of good governance, including accountability, transparency and *sustainability*, are more likely to engender investor confidence and achieve long-term sustainable business performance.²⁰¹

This language makes clear that sustainability is encouraged in Singapore for all listed companies, including business trusts. Sustainability may be encouraged in this way because it comports with Singaporean investment strategy, which is derived from Confucianism:

Here, thrift involves the use of limited resources—material, capital and human resources, and these result in improving productivity and overall profitability. In Asia including in Singapore, savings and accumulation of wealth through hard work and thrift have often been cited as key strategies of early Chinese settlers to establish their own small businesses.²⁰²

This mindset is much more focused on incremental wealth, and Singaporean investors are much more risk averse than their western counterparts. These protections for all stakeholders allow investors to focus on personal gain as well as sustainability concerns, another Confucian value.²⁰³

199. BUS. TRS. ACT § 10(2)(a).

200. CODE OF CORP. GOVERNANCE 2 (Sing. 2018). Although “Corporate” is in the Code’s name, the Code applies to all listed companies, thus including all listed business trusts.

201. *Id.* (emphasis added); see also Thomas Thomas, *Singapore*, in THE WORLD GUIDE TO CSR: A COUNTRY-BY-COUNTRY ANALYSIS OF CORPORATE SUSTAINABILITY AND RESPONSIBILITY, Chap. 45 (Wayne Visser & Nick Tolhurst eds., 2010) (ebook) (“The Code of Corporate Governance encourages Singapore-listed companies to enhance shareholder value through good corporate governance.”).

202. KIM CHENG PATRICK LOW, *Values Make a Leader, the Confucian Perspective*, in INSIGHTS TO A CHANGING WORLD 13, 19 (2d ed. 2010).

203. Kim Cheng Patrick Low & Ang Sik Liong, *Confucian Leadership and Corporate Social Responsibility (CSR), the Way Forward*, 2 ASIAN J. BUS. RES. 92, 102 (2012) (“Caring for others is an important aspect of opening up oneself by engaging in relationships with other persons in the community

While thoughts on risk may differ, the trend toward good-before-greed—which is more in line with Singapore’s investment philosophy—continues to grow in the United States. Like Singapore, business trust law in the United States should codify sustainability. If the United States wants to compete with innovative markets like Singapore, its business laws and practices must keep up with the changing times.²⁰⁴ One step in this direction would be for states to add a section on sustainability in their business trust statutes. Of course, even without this codification, business trusts are still ideal for sustainability.

4. Taxation

There are fundamental differences in how Singapore and U.S. companies are taxed, regardless of form. In Singapore, all companies, including business trusts, are taxed at the company level and not at the shareholder level. By contrast, in the United States, companies are either taxed at the shareholder level or at both the company and the shareholder level. These tax differences may make Singapore more appealing for businesses, but it does not seem to affect choice of organizational form in Singapore since business trusts are taxed like any other company. U.S. business trusts do have more flexibility when it comes to taxation, however. Though business trusts are taxed like other companies, non-publicly traded business trusts are eligible entities under the check-the-box regulations and may thus choose either a partnership or corporate taxation system.

III. EXTRAPOLATIONS

Despite the availability of the business trust form in both Singapore and the United States, the U.S. business trust remains pigeon-holed while

at large. It would help an individual to improve one’s relationship when one demonstrates interest, concern and attention; and it also helps one to become less self-absorbed and more empathic. Volunteering and helping with charity work is something many of us feel that we would like to do but cannot afford the time. Looking at ways to give something back to society and feel more invested in it is very satisfying and rewarding. There are many areas where charity and voluntary work are involved. Children, animals, environmental, search and rescue are some of the areas that rely on unpaid help to survive. Finding an area that is of particular interest can add an important dimension to one’s life, introduce one to new skills and people and enhance one’s quality of life. By finding positive ways to care for others one adds value to one’s life, feel more engaged with others and generate a more constructive, healthy, sharing way of living with others. One can improve the quality of life for everyone.”).

204. See Joseph L. Bower & Lynn S. Paine, *The Error at the Heart of Corporate Leadership*, 95 HARV. BUS. REV. 50, 58 (2017) (“[Businesses] must create value for multiple constituencies. In a free market system, companies succeed only if customers want their products, employees want to work for them, suppliers want them as partners, shareholders want to buy their stock, and communities want their presence [T]hat managers should always maximize value for shareholders [] oversimplifies this challenge and leads eventually to systematic underinvestment in other important relationships.”).

the Singapore business trust has been more widely used. Differences between the two versions of the business trust in control, structure and enforcement, sustainability, and taxation alone seem insufficient to explain this phenomenon.

Why are the use of business trusts gaining popularity in Singapore and other Asian markets? Though observational and not empirically based, the popularity of business trusts in Singapore as compared to the United States could be based on several reasons.²⁰⁵

One reason to select a Singapore business trust is that the sponsoring entity²⁰⁶ of the business trust can maintain considerable control over the trust through the trustee-manager,²⁰⁷ which is often a wholly-owned subsidiary of the sponsoring entity.²⁰⁸ Even when the underlying asset of the business trust has been sold, a Singapore business trust may still provide the sponsoring entity with a stable stream of income because the sponsoring entity retains shares in the trustee-manager company, which is paid administration fees. Current American economic culture, however, generally focuses on protecting shareholders from managerial entrenchment.²⁰⁹ Thus, the difficulty that business trust unitholders face in removing trustee-managers may seem contrary to current American shareholder control over management.

Additionally, Singapore business trusts are uniquely structured to allow a sponsoring entity with high a value asset to provide itself with liquidity. Unlike other entities, Singapore business trusts can make

205. As IPOs are slowing down in Singapore, so has the use of business trusts. Also, observationally, some Singapore business trusts have performed poorly *from an investor perspective*—but not because of the underlying organizational form. The poorly performing business trusts seem to be the trusts established with highly depreciable assets (like ships). Those business trusts established without highly depreciable assets—like hotels and hospitals—seem to be faring better.

206. The sponsoring entity is the group that provides the business trust with assets in exchange for cash or units in the trust. Herbert Smith Freehills LLP, *Singapore Business Trusts – Client Briefing*, LEXOLOGY (Apr. 10, 2013), <https://www.lexology.com/library/detail.aspx?g=3c1fc6a5-a0ea-48d6-a169-afe318456baf> [<https://perma.cc/YB7P-6PVY>].

207. Note, however, that though this control may be popular with entrepreneurs in the United States, it may be unpopular with American investors.

208. CHANCE, *supra* note 131, at 2; *see also* Pho, *supra* note 74, at 322 (reviewing eleven Singapore business trusts and finding that each had a sponsor which directly or indirectly controlled the trustee).

209. *See, e.g.*, Jay B. Kesten, *Managerial Entrenchment and Shareholder Wealth Revisited: Theory and Evidence from a Recessionary Financial Market*, 2010 BYU L. REV. 1609, 1613 (2010) (“Unsurprisingly, many commentators reason that entrenchment, by insulating managers from the disciplinary force of the market for corporate control and hindering actual changes of control in underperforming firms, reduces shareholder welfare.”); K.J. Martijn Cremers et al., *Commitment and Entrenchment in Corporate Governance*, 110 NW. U. L. REV. 727, 745 (2016) (“The idea that good corporate governance is equivalent to stronger shareholder rights, while managerial entrenchment epitomizes bad governance, has won not just the academic debate. It has also gained predominance in the policy debate, both in the United States and internationally.”).

distributions to the unitholders²¹⁰ from “profits, income or other payments or returns.”²¹¹ Therefore, Singapore business trusts are particularly well-suited to manage income generating assets with high levels of depreciation. For example, NetLink—a business trust on the SGX—used the business trust structure to build its network, which was capital intensive. Under a corporate structure, NetLink “would be weighed down by the depreciation charge and would have difficulty paying out high dividends. As such, a business trust structure allows the stable cash-flows to be ‘extracted’ and be paid to investors in the form of distributions.”²¹² In essence, Singapore business trusts allow the sponsors to turn illiquid assets into liquid assets.²¹³

Further, Singapore business trusts offer unique opportunities to potential investors,²¹⁴ while providing “a very well-defined and understandable picture to potential investors on the investment portfolio of the business enterprise.”²¹⁵ Given the extreme flexibility of business trusts in the United States, though, investors may be more reluctant to invest in an entity that they perceive to be too lightly regulated (unlike the Singapore business trust structure).

In addition, differences between economic ecosystems of Singapore and the United States may explain some of the variance in the use of business trusts in the two nations. First, unlike the evolution of business trusts in the United States, Singapore business trusts evolved from the phenomenal economic success of S-REITs. The Singapore business trust was the natural extension of S-REITs since lawyers and businesspeople were already familiar with the successful use of trusts as an investment

210. The Business Trusts Act defines a “unit” as a “share in the beneficial ownership in the trust property of the business trust.” BUS. TRS. ACT CHAP. 31A, § 1 (Sing. 2005). A “unitholder” is “a person who holds units in a business trust.” *Id.* Thus, unitholders are equivalent to shareholders in a corporation, and are the beneficiaries of the business trust.

211. *Id.* § 33(1). One scholar has noted that this gives business trusts “more flexibility than corporations, since corporations are limited to distributing dividends out of accounting profits only.” Pho, *supra* note 74, at 317.

212. Mr. IPO, *Netlink NBN Trust*, SING. IPOs BLOG (July 8, 2017), <https://singapore-ipos.blogspot.com/search?q=asian+pay+television> [<https://perma.cc/QG98-6LBQ>]; see Mr. IPO, *Asian Pay Television Trust*, SINGAPORE IPOs BLOG (May 19, 2003), <https://singapore-ipos.blogspot.com/search?q=asian+pay+television> [<https://perma.cc/7MUB-U2N2>].

213. CHANCE, *supra* note 131, at 2 (“Often times Sponsors in need of capital have cash-flow generating assets ‘trapped’ within their organizational structure. Sponsors may realize value by concurrently transferring these ‘trapped’ assets into a Business Trust and offering the units in the Business Trust to investors. As such, Business Trusts create liquidity from otherwise illiquid assets and are most suited for Sponsors in infrastructure, real estate and shipping businesses, which tend to have cash-generating assets.”).

214. For example, the Singapore business trust provides investors with the opportunity to invest in high value assets—such as ships—as well as in infrastructure projects in which they might not normally be able to afford to invest.

215. Tang, *supra* note 71, at 181.

vehicle and business entity. In fact, the teams of lawyers and practitioners who marketed the Singapore business trusts were the S-REIT teams, not the corporate lawyers or trust lawyers. These teams were already familiar with successfully using trusts in business enterprises. Second, Singapore's industry was hungry for a new trust product to capitalize on the success of S-REITs.²¹⁶ Singapore government aggressively marketed business trusts upon its enactment of the BTA. In addition, law firms such as Clifford Chance aggressively marketed business trusts as a new product to existing and potential clients—both in Singapore and internationally.²¹⁷

Other factors also may influence why business trusts are generally overlooked in the United States, such as the effects of the American market, investor acumen, or complacency within corporate legal and business culture. In addition, business trusts are not the focus of mainstream courses in law schools and business schools in the United States. Nor are business trusts studied or understood well among academics or practitioners in the United States. And, limited liability company structures offer similar benefits to the business trust but in a more familiar organizational form to American entrepreneurs and business lawyers.

CONCLUSION

To compete with emerging markets, the United States will have to keep pace with the use of innovative business structures. Although business trusts have taken a back seat to other organizational forms in the United States, the success of business trusts in neo-innovative economies such as Singapore should elicit serious discourse concerning its potential use in the United States.

This Article demonstrates the relative ease and flexibility with which a business trust is formed and managed, particularly in the United States. Such advantageous characteristics have the potential to send the use of business trusts upward, especially in a time of non-traditional business ideas such as sustainability and Corporate Social Responsibility. Further, this Article's comparison of American and Singaporean business trusts tends to show that more stringent requirements, which would provide more certainty for business trusts in the United States would not

216. Currently, the industry in Singapore has turned to "initial coin offerings" as the new hot product—basically cryptocurrency's equivalent to an IPO without having to follow securities regulations. See Wulf A. Kaal, *Initial Coin Offerings: The Top 25 Jurisdictions and Their Comparative Regulatory Responses (as of May 2018)*, 1 STAN. J. BLOCKCHAIN L. & POL'Y 41, 41–43, 51–52 (2018) (discussing the fundamental elements of initial coin offerings (ICOs), as well as the regulation of ICOs in Singapore).

217. See CHANCE, *supra* note 131, at 2 (listing the "numerous advantages" that business trusts provide their sponsors and investors).

necessarily impede their inherent flexibility—the main attraction of the business trust.

This Article discusses what might account for the varying successes of the two versions of the business trust. Of course, even if the United States were to copy the exact structure of the Singapore business trust, an overhauled American business trust law may not be able to generate the same success as seen in Singapore. However, the lessons that we can garner from Singapore business trusts may very well lead American entrepreneurs to think twice before passing over business trusts as the optimal form for their profit-seeking enterprise.