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ADVOCATES

Guernsey Foundations

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Guernsey Foundations

On 25 July 2012 Guernsey's legislature approved The Foundations (Guernsey) Law, 2012 (the "Law"), which came into force on 7 January 2013, with the Registry accepting registration from 9 January. This is a summary of the principal features of the Law.

1. Whilst intended to reflect accepted civil law characteristics of foundations the Law is not simply a repetition of other jurisdictions' foundation laws, although a number of its provisions will be recognised by those knowledgeable of other jurisdictions. Account has been taken of Guernsey's market needs resulting in legislation that should be well suited to meet the requirements of the Island's clients.

The Law is in three parts: the substantive law and two schedules. This format was a deliberate 'borrowing' of the civil law tradition of a short law with clarification coming in the form of regulations. The first schedule deals with administrative matters, such as establishment and registration. The second schedule deals with migration of foundations, their revocation, dissolution and termination. The migration provisions anticipate that existing foreign foundations would welcome the opportunity to move to Guernsey with its established good reputation and history of administration and management of investment and similar structures.

2. **What is a foundation?**

A foundation has similarities to both incorporated companies and/or trusts but is neither a trust nor a company. Neither is it simply a half way house between the two. Foundations, trusts and incorporated companies are distinct legal structures which have evolved for different purposes and requirements. A foundation is ideally suited for private wealth management, succession planning and charitable giving.

Like an incorporated company it has a separate legal personality so that it may contract and take legal action in its own name and has a management board which for a foundation is known as a council. Unlike a company a foundation has neither shares, share capital nor members. A foundation is more flexible than an incorporated company as the Law allows for a specific and bespoke constitution.

In similar fashion to a trust, assets are held for the benefit of others or for a specific purpose. A trust, however, does not have a separate legal personality. Both foundations and trusts can be used to hold assets which are legally separated from the original owners of such assets. Unlike a trust a foundation will be familiar to those used to dealing with, or in, a civil law jurisdiction as it does not distinguish between and rely upon a separation of legal and beneficial interests.

3. **Some key features of a Guernsey Foundation:**

The Constitution and Rules

The constitution is the core document establishing a foundation and consists of two parts: the charter and the rules.

- Under the Law the charter must include the name and purpose of the foundation, a description of its initial capital or endowment and, if it is a foundation with a limited duration, that duration. It may also contain anything else that the founder wishes.
- The rules are the operative provisions for a foundation. They set out the functions of the councillors, the procedures for their, and any guardian's, appointment, retirement and remuneration and identify the default beneficiary. The rules may also provide for such as how the assets of the foundation should be applied and

how beneficiaries may be added or excluded. They may also impose obligations on a beneficiary such as a condition of benefitting or contain protective measures to terminate a beneficiary's interest for example if he becomes insolvent or otherwise. As described below, the Law allows for "disenfranchised beneficiaries" in a manner which allows concerned founders to limit the flow of information to certain classes of beneficiaries.

The Council

The Law requires that a Guernsey foundation be managed by at least two councillors. If one of the councillors is a Guernsey licensed fiduciary the foundation will be within Guernsey's regulatory regime. If none of the councillors is a Guernsey licensed fiduciary, then the foundation must appoint a Guernsey resident agent whose principal responsibility is to hold the foundation's records within the jurisdiction.

The members of a foundation council owe duties to the foundation itself in the same way as a director of a company owes fiduciary duties to the company to act in the best interests of the company. The foundation council and its members do not owe duties to the beneficiaries.

Section 19 of the Law provides that the councillors have a duty to act in good faith and "en bon pere de famille". The councillors also have a duty not to profit (otherwise than as permitted by the constitution or with the court's approval), to preserve the foundation property, to give information to the guardian and enfranchised beneficiaries, to maintain accounting records, to act together with their fellow council members and to be impartial.

A guardian, however, owes fiduciary duties to the founder and the beneficiaries to enforce the constitution.

The Founder

The founder may determine the foundation's purpose, specify its constitution and endow it with its initial capital. The founder (or his agent) must sign (named as the founder) the constitution. It is the founder who appoints the initial councillors and any guardian and applies for registration. The founder can be either a councillor or a guardian (but not both simultaneously) and may also be a beneficiary.

Guardian

Where there are either disenfranchised beneficiaries or only a purpose with no individual beneficiaries, a Guernsey foundation must have a guardian. The guardian's function is to enforce the purposes of the foundation on behalf of disenfranchised beneficiaries or in substitution for the absence of individual beneficiaries. Foundations that have beneficiaries but no disenfranchised beneficiaries are not required to have a guardian. The guardian may not be both guardian and councillor simultaneously. He must maintain accurate accounts and records of his guardianship.

A guardian owes fiduciary duties to the founder and the beneficiaries to enforce the constitution.

Reservation of powers by the Founder

There are limited powers set out in section 11 of the Law which the founder can reserve to himself such as the power of amendment or revocation of the constitution or of the purposes of the foundation. This approach is consistent with that of continental European laws. Powers may be reserved only for the duration of the founder's life (if a natural person) or for 50 years from the date of establishment in the case of a legal person. After the relevant period the reserved powers will automatically lapse. These provisions do not preclude the Council from delegating certain functions to the founder.

Registration

A foundation comes into being upon registration. The Law requires the Registrar to be provided with:

- the charter;
- a declaration signed by the founder (or his agent);
- the names and addresses of the proposed councillors and their consents to act;
- the name and address of the proposed guardian (if any) and his consent to act;
- the address and telephone number of the registered office of the foundation in Guernsey; and
- (of course) a registration fee.

Provided the name is not unlawful or already taken, and the purpose is not contrary to the law of Guernsey, it will then be registered, given a number and a certificate of registration. It is at this point that the foundation becomes a legal person separate from its founder, the foundation officials (the councillors and any guardian) or beneficiaries. The Registrar has a discretion as to whether or not a foundation will be subject to an annual renewal process (similar to a company's annual validation) and like companies, foundations will be capable of perpetual existence.

The Register

Although foundations are private structures they will require registration but the information that is publicly available is restricted.

Section 4 of the First Schedule of the Law sets out the information which will be publicly available (Part A of the Register). This includes: the name and registered number of the foundation, the name and address of the councillors, the name and address of the guardian (if there is one) and the details of the registered office. The non-public Part B of the Register will include all declarations and other documents required by the Law to be filed with the Registrar.

Legal Personality

A Guernsey foundation will have a legal personality of its own (as noted previously unlike a trust). It is able to contract and sue in its own name. The assets of a foundation belong to the foundation in the same way that the assets of a company belong to the company. They no longer belong to the founder, nor do they belong to the councillors or the beneficiaries.

The separate legal personality is a fundamental difference between a foundation and a trust and has a number of consequences. The beneficiaries of a trust, if all adult and competent and there are no unascertained beneficiaries, are together the owners of the entire beneficial interests in the trust property and as such can terminate a trust (the rule in *Saunders —v— Vautier* [1868]). In contrast to this the beneficiaries under a foundation have no such rights because they have no legal or beneficial interests in the foundation's assets. They only have those rights which have been given to them under the constitution.

Types of Beneficiary

Beneficiaries are those entitled to benefit from a foundation and must be identified by name or be ascertainable as a member of a class or by their relationship to another person. The Law provides for both enfranchised and disenfranchised beneficiaries. An enfranchised beneficiary is entitled to a copy of the constitution, records and accounts of the foundation and to apply to Court to change the purposes or wind-up a foundation.

