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Guernsey foundations

After six years of deliberations, the Foundations (Guernsey) Law 2012 was finally enacted on 7th January 2013. What are the key features of a Guernsey foundation, and what does it have to offer?

What are foundations?

Whilst Guernsey has developed an enviable reputation in the provision of trust and corporate services, the foundation is very much an "import". Foundations are well known in civil law countries - i.e. in much of continental Europe and Latin America, and have long been used - by Swiss advisers for example - as a solution to the estate planning and asset protection issues that common-law practitioners have used trusts to address.

Foundations have been described as "incorporated trusts" - they are in many ways a hybrid between the traditional trust concept and the limited company concept and have features from both

Key terms and participants

Founder	this can be an individual or a corporate entity, and includes anyone who has contributed assets to the foundation without consideration.
Council	the executive body that deals with the administration and disposition of foundation assets and performs a role akin to a board of directors, although it also has functions and powers akin to a trustee.
Beneficiaries	these can be enfranchised or disenfranchised (see below) or they could be charitable or non-charitable purposes.
Enfranchised beneficiaries	a type of beneficiary who has a right to information about the foundation. This right is similar to the trust-law equivalent
Disenfranchised beneficiaries	a disenfranchised beneficiary has no rights to information. Whilst they may well benefit from the foundation, they are not in any position to hold the council to account.
Guardian	where there are disenfranchised beneficiaries or where the foundation only has a purpose, a guardian must be appointed (although one can be appointed regardless). The guardian has a fiduciary responsibility to the founder and the disenfranchised beneficiaries to hold the council to account in the conduct of its duties.

Registered office/registered agent	<p>foundations must have a registered office in Guernsey. A licensed Guernsey fiduciary must act as registered agent if the council does not include a Guernsey licensee.</p> <p>The law allows the registered agent powers to require that the council provides certain information about the foundation. The Guernsey Financial Services Commission will require Guernsey licensed registered agents to exercise those powers, as it sees this as a key regulatory safeguard.</p>
Purpose	All foundations must have a purpose. This can be as wide or as narrow as the founder wishes, and as long as the purpose is lawful, there is no real limit on what the purpose can be.
Charter	<p>One of two core constitutive documents. The charter is in two parts – part A is public and includes basic details of the foundation such as its name, number and details of the council and the registered office.</p> <p>Part B of the charter is strictly confidential to the Guernsey Registrar and will include a statement of the purpose of the foundation. This is essentially a regulatory safeguard.</p>
Rules	<p>The rules are not registered with the Guernsey Registrar, and therefore remain completely confidential. They must set out the functions of the council, the procedures for appointment, resignation and removal of councillors and any guardian, and such provisions as the founder wishes in respect of remuneration of the councillors and any guardian.</p> <p>In addition, the rules may set out the manner in which foundation property can be distributed, committed or applied and matters such as appointment and removal of beneficiaries. The rules will have similarities with their trust-deed equivalent, but there should be less historic formality and more flexibility in how they are drawn up – there is a lot of scope to tailor them to the needs of the client.</p>

Trust-like features

- Like trusts, foundations are used in succession planning – the assets of the foundation are segregated from the estate and assets of the founder.
- Foundations have beneficiaries (as noted above). Unlike a trust, a foundation will not fail if there are no beneficiaries. It can continue as long as it has a purpose.
- Foundations can be used for family purposes, charitable purposes or in corporate structures to hold special-purpose vehicles.
- Where a trust has a settlor, a foundation has a founder. In both cases, the definition includes anyone who provides an economic benefit to the trust or foundation without any consideration.
- Founders can provide the council that runs the foundation with a letter of wishes that is not a formal foundation document, but gives the council useful guidance when they consider key decisions.
- Participants in the foundation can ask the Guernsey court for directions in any situation where there is a need to do so.
- There is no requirement to produce formal accounts, but a duty to maintain proper accounting records of the foundation's finances and its assets and liabilities.

Company-like features

- The fundamental difference between a foundation and a trust is that the foundation has a separate legal personality from the council and the founder. It can contract in its own name and it can sue and be sued in its own name.
- The foundation is the legal and beneficial owner of the foundation assets.
- The foundation must be registered with the Guernsey registry and must have a Guernsey registered office. There will also be a requirement for a Guernsey licensee to act as registered agent if the council does not include one.
- There is clear and public certainty as to the foundation's existence – a foundation cannot fail if it has no assets – like a company it can be “re-capitalised” by an additional endowment
- On establishment a foundation will receive a certificate of incorporation and there will be a public record of certain defined information about the foundation and its officials etc.
- A foundation can migrate to and from Guernsey in a very similar way to a company.
- Foundations are wound-up and have detailed provisions on solvency and dissolution, similar to the company law.

Why has Guernsey introduced a foundations law?

Quite simply, Guernsey has recognised that foundations are an important addition to the range of options available to potential clients of its fiduciary sector. Whilst the traditional Anglo-Saxon trust remains very important for Guernsey, it is not always easy for civil law clients to understand. In civil law countries, including most of the emerging markets (such as Brazil, Russia and China to name but three), the foundation is much more familiar and easier to adopt.

If there is a dispute in respect of assets held in the structure, a civil law court will be more likely to recognise and uphold the rights of a foundation than those of a trustee of a trust. An example of this is Russia where a foundation should easily be able to directly own Russian real estate, which would be impossible for a trust. As Guernsey looks to expand its penetration into the emerging economies of the world, it is expected that foundations will play a key part.

Essential features of a foundation

Guernsey was determined that the Guernsey foundation would be regarded as best of breed in comparison with other foundation jurisdictions. Accordingly, the law includes a number of key requirements:

- A key concept in civil law is the “patrimoine” that passes on death to an individual’s heirs by operation of law. This is not applicable to assets that the individual has clearly disposed of, by gift or otherwise, during his lifetime. Assets endowed to a foundation are outside of the patrimoine. To make sure that the foundation is definitively segregated from the individual, under Guernsey law there must be an initial endowment on creation (although subsequent additions are possible).
- To avoid any doubt about the validity of the foundation, Guernsey has restricted the ability of the founder to reserve certain powers under the foundation charter. Where the founder is an individual, the right to reserve powers ends on his death. Where the founder is a company, the right ends after 50 years.
- In order to make it clear that the foundation is an entity with a separate legal personality, the foundation has to be registered and has a registered office, certificate of incorporation etc. There is clear and public certainty as to the foundation’s existence – a foundation cannot fail if it has no assets. Like a company it can be “re-capitalised” by an additional endowment.

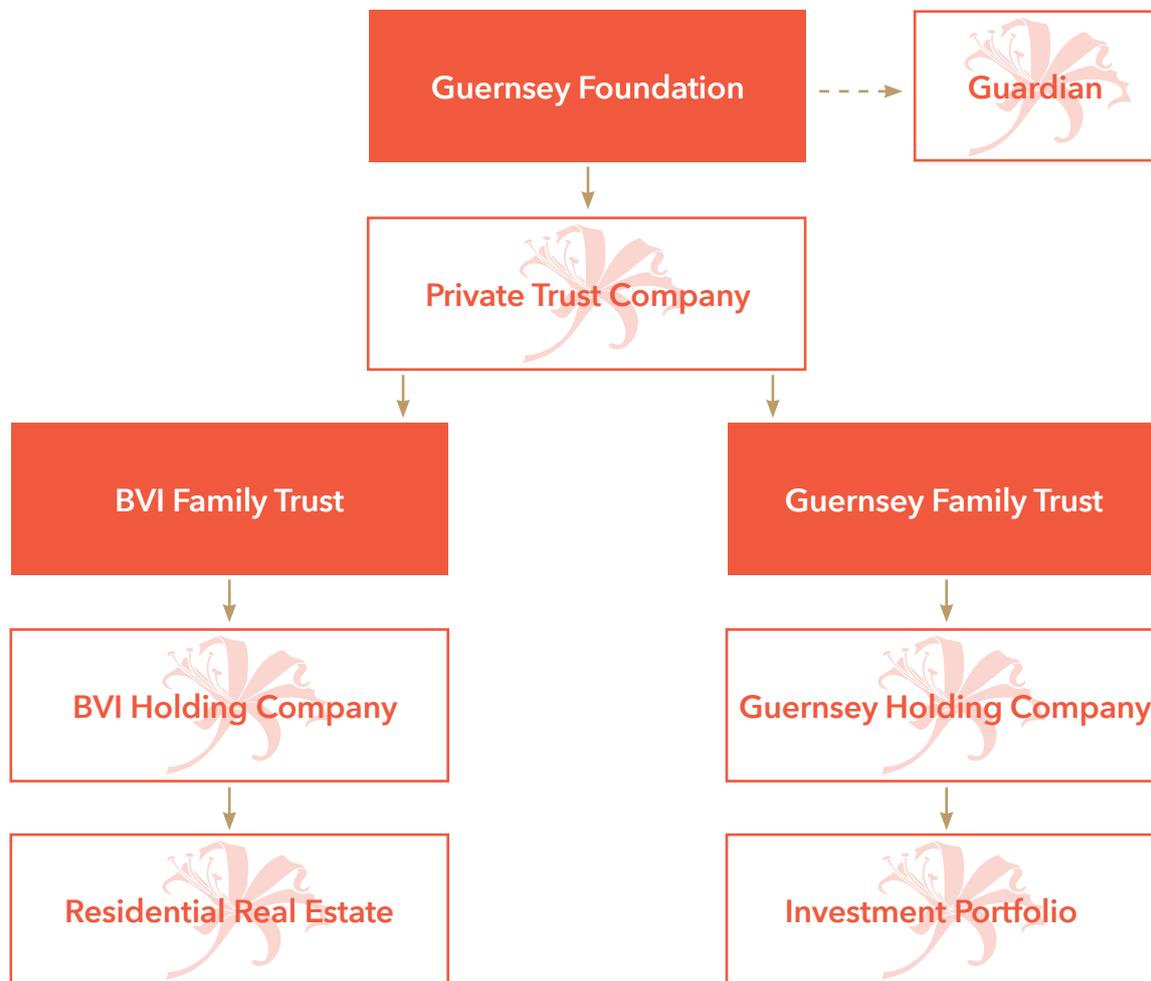
What can foundations be used for?

As noted at the outset, foundations can be considered as a succession and estate planning vehicle in their own right. For some clients, a foundation will therefore be a straight replacement for a trust.

Foundations naturally lend themselves to philanthropic or charitable purposes and can perform that function just as easily as a trust. One of the obvious advantages of using a foundation over a trust in this regard is that when a philanthropic or charitable donation is made, it is done so in the name of the foundation rather than in the name of the trustees.

Foundations can be used for non-charitable purposes, which allows a great deal of flexibility in terms of what the foundation is required to do. In addition to family/dynastic purposes, the foundation purposes could be, for example, to establish a corporate structure to hold a securitised investment. This is already the experience in Jersey where a third of all foundations registered to date have been formed for corporate transactions of this type.

Finally, foundations can be used to perform any of a number of functions that you might find in a traditional trust structure as set out in the diagram below:



Where you have a private trust company (“PTC”) acting as trustee, a foundation is ideally suited to own the PTC without any succession issues. The foundation therefore fulfils the same role as a purpose trust would and for civil law clients that might be an added attraction.

Alternatively, the foundation can take the place of the PTC entirely and act as the trustee of a family trust.

A foundation can also perform the role of a protector to a trust or, for particularly complex family situations, can replace the protector committee - the foundation acts as the protector and the protector committee become the council members - the rules can be tailored accordingly.

As a final idea, a foundation can be established to act as the family-controlled investment adviser to the trustee. Again, the family can have a great deal of input with regard to decisions of the foundation council, and thus the recommendations made to the trustee. Again the rules can be drafted to govern the process according to the family’s needs.

Conclusion

Foundations are flexible, multi-purpose vehicles and a very important addition to Guernsey’s offering in the fiduciary arena, particularly in the emerging markets where civil law tradition applies.

It is not a question of whether a foundation is better or worse than a trust - it is simply an additional choice that clients and their advisers will have available to them. In some situations or for some clients, the foundation may simply be a more attractive option than the traditional trust which, until now, was all that Guernsey legislation could provide.

It is certainly hoped that the new foundations law will help Guernsey increase its attractiveness to clients from all over the world, and in particular, the emerging markets that are increasingly important centres of new wealth creation.