

Trusts in Guernsey

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This briefing has been prepared for the assistance of clients considering establishing a trust in Guernsey. It is intended to provide a summary of the main legal requirements and general principles applicable to the establishment and administration of trusts. It is not intended to be comprehensive in its scope and it is recommended that a client seek legal advice on any proposed structure prior to taking steps to implement it.

Introduction

Introduction to the trust concept

A trust is a legally binding arrangement whereby a person (known as a settlor) transfers assets to another person (known as a trustee) who is entrusted with legal title to the trust assets, not for their own benefit, but for the benefit of other persons (known as beneficiaries, who may include the settlor) or for a specified purpose or purposes.

The instructions from the settlor to the trustee as to the disposition of trust assets and the terms upon which the trustee is to hold the trust assets will normally be contained in a document often referred to as the trust instrument. This is for the benefit of all parties as it will ensure that the settlor, the trustee and the beneficiaries know what their respective rights and duties are, as complemented by general trust law. The trust instrument will usually provide that the trustee has the power to manage the trust assets in accordance with the terms of the trust instrument and the strict duties imposed on the trustee under Guernsey law as well as the duties under general trust law.

In addition to the trust instrument, it is also common for a settlor to indicate to the trustee their wishes as to the management and disposition of the trust fund in the future in a less formal manner. This expression is often contained in a letter of wishes which, although not legally binding, will generally be considered by the trustee to be of persuasive effect, subject to changes in circumstances, when performing their duties and, for example, determining to make a distribution out of the trust fund.

Following execution of the trust instrument a trust will come into existence upon settlement of the initial property, which may be supplemented at a later date.

The trust system in Guernsey

While trusts have been established in Guernsey for many years, their operation has since March 2008 been governed by a modern, comprehensive statute entitled the Trusts (Guernsey) Law, 2007 (the **Trusts Law**). The Trusts Law provides that a trust exists, and will be enforced by the Guernsey Courts, where a trustee holds or has vested in them assets for the benefit of a beneficiary, whether or not yet ascertained or in existence, or for a charitable purpose or a non-charitable purpose. A Guernsey trust can exist for an indefinite period.

Section 72 of the Trusts Law confirms that the trust assets constitute a separate fund and do not form any part of the personal property of a trustee. The Trusts Law also imposes fiduciary duties on trustees, regulates the administration of trusts and provides rights to beneficiaries. For example, any beneficiary has a legal right to force a trustee to act in accordance with the terms of the trust instrument and the Trusts Law.

The performance of a trustee's duties will be enforced by the Royal Court of Guernsey, if necessary, at the instigation of a settlor or beneficiary (among others). The Guernsey Courts will seek to ensure that a trust established under Guernsey law is administered by the trustee in accordance with the provisions of the trust instrument and the Trusts Law, thus providing a high degree of protection for both settlor and beneficiaries. The Royal Court of Guernsey has an acknowledged proficiency in the law of trusts and the senior British Judges who sit on the Court of Appeal in Guernsey provide further assurance to settlors and beneficiaries that litigation, where it has arisen, will be decided upon justly, fairly and with an expertise which may be lacking in less sophisticated jurisdictions.

There is no requirement under Guernsey law to register trust documents with any governmental office or agency and save for certain beneficial ownership information required to be provided to the Registrar of Beneficial Ownership where a company is owned by a trustee, such information being available only to certain authorities in certain cases, a trust arrangement will be confidential. Indeed, a Guernsey trust may be established by means of a written declaration signed by the trustee alone without the requirement that the settlor appears as a party to the instrument and, save for in certain cases, a trust instrument is not in fact required to establish a valid trust, although it is advisable to have such an instrument for the aforementioned reasons.

The extension to Guernsey in 1993 of the Hague Convention on the Recognition of Trusts gave further impetus to the expansion of trust services on the Island. Under this convention, trusts which have duly been constituted under the laws of Guernsey must be recognised by the signatories to the convention. At present these include the following jurisdictions: the United Kingdom, Jersey, Isle of Man, Bermuda, France, Italy, the Netherlands, Luxembourg, the United States of America, Canada, Australia, Cyprus, Malta, Hong Kong, Switzerland, Panama and San Marino.

Further protection for the settlors and beneficiaries of Guernsey trusts is provided by the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 (as amended) (the **Fiduciaries Law**) which imposes minimum standards on commercial trustees and requires them to be licensed by the Guernsey Financial Services Commission. The Fiduciaries Law, which was replaced with new legislation in November 2021, is complemented by the Fiduciary Rules & Guidance 2021. For more information, read our articles: [Revision of fiduciary regulatory legislation](#) and [Changes to fiduciary regulation in Guernsey](#).

The components of a trust

The settlor/s

Once a trust is created the settlor/s will have divested themselves of legal ownership of the trust assets. The settlor/s may be a beneficiary and, in certain circumstances, they may also act as a co-trustee.

Notwithstanding this, under section 15 of the Trusts Law, a settlor may reserve to themselves certain powers or grant powers to a third party other than the trustee, referred to often as a protector (see below). These include the powers to revoke, vary or amend the terms of a trust or any functions; powers to advance, appoint, pay or apply income or capital of the trust property or to give directions for the making of such advancement, appointment, payment or application; powers to appoint or remove any trustee, enforcer, protector or beneficiary and powers to change the proper law of the trust.

However, it is essential to the validity of a trust that the settlor/s actually dispossess themselves of the trust assets and they may not, for example, simultaneously be a sole trustee and a sole beneficiary.

The trustee/s

Legal title to the trust assets is vested in the trustee/s under the obligations imposed by the trust and they are responsible for the administration of the trust. Trustees are generally either individuals, companies or foundations. Read our articles [The use of Private Trust Companies](#) and [Guernsey foundations and private trust foundations](#) for more information, particularly regarding private trust companies and private trust foundations which are popular in Guernsey.

A trustee must act with due diligence, as would a prudent person, to the best of their ability and skill. A trustee is required by section 22 of the Trusts Law to observe the utmost good faith and act en bon père de famille, which is a phrase particular to Guernsey law meaning that a trustee must in all cases act as a good father would act towards his children or, as per Guernsey case law on this point, as a prudent man of business. A trustee must exercise his powers solely for the benefit of the beneficiaries or in furtherance of the purposes.

Beneficiaries

Beneficiaries are the persons entitled to or who may benefit from the assets held on trust. As stated above, the settlor/s may themselves be one of the beneficiaries. In order for a trust to be valid there must generally be sufficient certainty as to the identity of the beneficiaries. An express power for the addition of further persons to the class of beneficiaries may be included in the trust instrument. The beneficiaries may enjoy equal or unequal benefits, as the trust instrument prescribes or, in the case of a discretionary trust, as the trustee may determine.

It is also possible to include in the trust instrument a power to exclude beneficiaries from future benefit.

Purposes

A Guernsey trust does not have to be established for the benefit of persons but can be established in furtherance of purposes, charitable or non-charitable. For more information, read our article: [Non-charitable purpose trusts in Guernsey](#). Generally, any purpose is permitted provided it is not illegal or contrary to public policy.

It is also possible to have what is often referred to as a hybrid trust, being for the benefit of both beneficiaries and for purposes (either consecutively or in parallel).

The trust fund

The assets constituting the trust fund may be of any type of moveable or immoveable property (including Guernsey real property as clarified in the Trusts Law). At any time after settlement on trust of the initial assets, further assets may be added subject to the terms of the trust. Indeed, a common arrangement is to establish a trust with a nominal initial amount and subsequently to add more substantial assets. These would therefore not need to be specified in the main trust instrument itself.

As noted above, the trust assets constitute a separate fund and do not form any part of a trustee's own estate.

Section 44 of the Trusts Law states that a trustee is entitled to a non-possessory lien over the trust property in respect of all expenses and liabilities (existing, future, contingent or otherwise), securing a trustee's right to be reimbursed or to be paid from the trust fund. This lien continues after the trustee ceases to be a trustee and has duly surrendered all trust property in accordance with section 43 of the Trusts Law when the trustee resigns or is removed. The lien attaches to trust property except where the lien is expressly waived or released. The lien does not attach to real property, unidentifiable property, or property in the hands of a bona fide purchaser for value or a person (other than the trustee) who derived title through such a purchaser.

The protector

It is not essential for the validity of a Guernsey trust that there be any protector. However, in order to

counter-balance the wide discretionary and fiduciary powers conferred on a trustee of some forms of trust, it is often found useful for the settlor/s to appoint a trusted friend or professional advisor, or even themselves (as above), to act as, what is often known as, a protector of the trust. In such cases, the consent of the protector will generally be required before the trustee may exercise certain strategic powers, as above, under the trust instrument (although the protector's powers can range from veto powers to positive powers). On the protector's death, incapacity or resignation, their powers can be passed on to another person.

The enforcer

In relation to non-charitable purpose trusts, as there is no person to enforce the trusts (as in the case of a trust for beneficiaries or a charitable trust), an enforcer must be appointed whose fiduciary duty is to enforce the trust in relation to its non-charitable purposes. For more information, read our article: [Non-charitable purpose trusts in Guernsey](#).

Forms of trusts

Various types of trust have been developed over time and the most appropriate structure for the settlement will depend on the settlor/s' particular circumstances and objectives. Some of the more common types of trust established under Guernsey law are described below.

Discretionary trusts

The discretionary trust provides maximum flexibility and is often the most efficient structure for both settlor/s and beneficiaries. Under the terms of a discretionary trust, the trustee is given wide discretionary powers as to when, how much and to which beneficiaries they should distribute the income and capital of the trust.

Such a form of trust is useful where at the time of creation of the trust the future needs of beneficiaries cannot accurately be determined. The beneficiaries are not regarded as having any direct legal rights over any particular portion of the trust fund but only a right to be considered to benefit when the trustee exercises their discretion.

Charitable and non-charitable purpose trusts

As above, generally, in order for a trust to be valid there must be identifiable beneficiaries. Without ascertainable beneficiaries who may enforce these duties against the trustee, a trust will not be upheld. A long held exception to this general rule has permitted trusts to be established in favour of charitable purposes. In such instances, it is His Majesty's Procureur who has the role of enforcing the trustee's duties and obligations. For more information, read our article [Guernsey's new charities law: key points for Guernsey trust and corporate service providers](#).

The Trusts Law also permits the creation and enforcement of non-charitable purpose trusts - trusts in

which property is held by trustees on trust to carry out specific purposes which do not qualify as charitable purposes. This type of trust is often simply referred to as a "purpose trust". All the usual rules of Guernsey trusts apply save in three respects:

1. the trust instrument must set out the particular purpose or purposes for which the trust has been established (which can include holding assets)
2. the trust may have only non-charitable purposes or any combination of beneficiaries, charitable and non-charitable purposes
3. the trust instrument must provide for an enforcer, as above.

Non-charitable purpose trusts enable purposes which are not charitable in the strict sense but are, or may be, philanthropic or beneficial in a wider sense, to be fulfilled.

Fixed interest in possession trust

Under a fixed interest trust (also known as a life interest trust or an interest in possession trust) the principal beneficiary will normally be granted a vested interest in the income of the trust fund throughout their lifetime and the discretion of the trustee regarding the disposition of the trust fund will be limited. For example, the trust instrument may specify that the trustee is required to distribute all of the income of the trust fund to a particular individual during that person's lifetime and subsequently to distribute the capital of the trust fund in fixed proportions to named beneficiaries (such as the settlor/s' children).

Revocable trusts

Although for tax and other reasons it is generally more common for a trust to be constituted as an irrevocable settlement, in certain circumstances the settlor/s may require the additional comfort of knowing that they have retained the power to revoke the trust and enforce the return of the trust fund. Any of the types of trusts referred to herein can be drafted on a revocable basis. However, careful consideration should be given to the possible consequences of a revocable trust because, under the jurisdiction of the settlor's domicile, residence or nationality, revocation may negate some of the expected benefits of creating the trust.

Trusts with reservation of powers

As above, although once a settlor establishes a trust they are deemed to have divested themselves of legal ownership of the trust assets, a settlor may wish to reserve for themselves certain powers. Where this is the case, the trust is often referred to as a "reserved powers trust". Most commonly, settlor/s will wish to reserve powers in the area of investment although other powers that can be reserved (or granted to someone else) include those referred to above.

Practical applications of Guernsey trusts

The range of uses to which a trust may be employed is constantly developing but arguably flexibility and confidentiality are the principal advantages which a trust has over other legal forms designed to hold, preserve and transfer wealth. The trust concept has proved to be enormously adaptable and is widely used in financial planning. Such is the flexibility of a Guernsey trust that it would be impracticable to define its full potential. However, some typical applications are the following:

Preservation of wealth

Trusts may be used to preserve the continuity of ownership of particular assets, such as a business, within a family. By vesting legal ownership of the assets in the trustee, the relevant individuals may be able to continue to benefit from the assets, while avoiding fragmentation of ownership among a large number of second and third generation beneficiaries. The use of a trust also avoids, on the death of a beneficiary, the risk of a share of assets becoming owned outside the family, and so enables settled assets to be preserved intact for the benefit of future generations.

Forced heirship

Where a settlor properly disposes of assets during their lifetime by settling them on trust, the trust assets will not form any part of the settlor's estate upon their death. This may enable a settlor to avoid forced heirship rules which may be mandatory under the laws of his domicile, residence or nationality and which would otherwise dictate the persons to whom and proportions in which a settlor's estate will devolve. Section 14 of the Trusts Law was specifically enacted to provide that no Guernsey trust will be invalidated nor will any person be subjected to any obligation or liability simply by virtue alone of the fact that the trust avoids or defeats (or might do so) their rights or claims which might arise under foreign heirship rights or by virtue of their marriage, common law relationship, civil partnership or by their relationship to another person.

Succession planning

The effect of a trust is to divest the settlor of ownership of the settled assets. Accordingly, upon the death of a settlor there will be no need to obtain a grant of probate or similar formalities in order to deal with the trust fund. A trust, therefore, provides an efficient vehicle for the transfer of beneficial ownership interests on the death of a settlor.

Further, because the interests of a beneficiary under a discretionary trust will not constitute a separate asset under Guernsey law, a trust structure may mean that stamp duty or inheritance taxes which would otherwise be payable on the death of a settlor or beneficiary are not payable. In addition, a trust can be used to hold shares in a company owning immovable property, rather than directly in the real property itself, with the effect of transforming the characterisation of an interest from immoveable to moveable, which can present attractive opportunities for tax and financial planning.

A trust may also be used to protect financially unsophisticated beneficiaries and to make financial provisions for the improvident.

Asset protection

Historically, trusts have been established for the principal purpose of protecting assets from risk. In a modern context, trusts may be employed to hold assets in a secure and stable political environment.

Trusts play a major role in financial planning for individuals, families and companies and are apt to serve to protect assets against the potential future liabilities of a settlor, such as punitive taxation. The use of the trust and underlying company combination may enable trust assets to be held in a jurisdiction which does not recognise the trust concept. Such an arrangement may also be attractive to a lender for the purpose of obtaining security against assets.

Trusts can also safeguard assets against strategic risks, such as confiscation or expropriation by the State in the country of the settlor/s' domicile, residence or nationality. As a further protection, a modern trust instrument can provide for the proper law and administration of a trust to be changed to another jurisdiction in the event of political or strategic emergency in the country of the trust's governing law or the trustee's residence.

Commercial trusts

The variety of means to which a trust may be put in the commercial context continues to develop. Guernsey trusts have been, or could be, used for the following commercial purposes:

- as a unit trust for the collective investment of capital
- in Eurobond issues, the interests of investors may be regulated pursuant to the terms of a debenture trust deed
- in off-balance sheet transactions, the share capital of an "orphan" special purpose vehicle will typically be held by a trustee under the terms of a non-charitable purpose trust
- in an inter-creditor agreement, the rights of one creditor group may be subordinated to the rights of other creditors and regulated under the terms of a subordination trust forming part of the overall security package
- asset securitisation schemes have been structured to provide for mortgages and receivables to be held pursuant to the terms of a trust
- employee share option and executive incentive schemes as well as regular pension schemes often benefit from being established in a trust structure in a politically stable, fiscally neutral jurisdiction

Taxation

Where all of the beneficiaries are resident outside Guernsey, a Guernsey trust will be exempt from assessment both in respect of Guernsey income tax on income arising outside the Island and income

on bank deposit interest arising inside Guernsey. For practical purposes, therefore, the trustee may make distributions out of a trust fund established in Guernsey without any withholding or deduction for Guernsey income tax. There are no inheritance, wealth, gift or capital gains taxes levied in Guernsey nor is there any stamp duty, value added tax or equivalent forms of indirect taxation charged on the creation or transfer of assets to a trust.

Ogier's experience

In connection with the formation and administration of trusts in Guernsey, we are able to provide the full range of legal services including the following:

- providing initial advice and liaison with professional advisers in other jurisdictions in order to recommend the most practical and efficient structure to achieve the settlor/s' objectives
- preparing trust instruments, letters of wishes and documentation for underlying companies to hold trust assets
- preparing supplement instruments relating to an existing trust
- trust and estate planning and restructuring
- preparing and reviewing documentation relating to commercial transactions involving trusts or underlying companies
- legal opinions and advisory work
- assisting the settlor in the choice of a trustee for a Guernsey trust or use of a private trust company or foundation and the preparation and review of all documentation to provide for the proper administration and operation of the trust and underlying companies

We also provide other legal services which are complementary to our private wealth practice to ensure that our clients' requirements are fully met, including property law, corporate and funds law and dispute resolution.

About Ogier

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