COLLAS CRILL

Review of the Foundations Law of Guernsey and Jersey

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Jersey's foundations law came into force in 2009. It gave birth to a new Jersey legal entity, this creature of statute being the Jersey foundation. Guernsey is now following suit. Its foundations law is expected within the next six months.

What has the experience been in Jersey, and what can be expected for Guernsey? The foundation is an entity with long-standing roots in civil law jurisdictions, so is it a useful construct in these now, essentially, common law jurisdictions or simply castles in the sand?

The Jersey experience

Why did Jersey feel the need to re-invent the foundation for its own use?

The spread of global wealth brought with it the perception that Jersey's finance industry needed to adapt to attract clients from increasingly diverse markets, and that adding the foundation to Jersey's offering of wealth management vehicles could help attract clients from emerging markets, such as those in the Middle East and Far East. Certain of Jersey's competitor jurisdictions were similarly motivated and looking to either introduce or remodel existing foundations laws, which probably catalysed Jersey to push on with adoption of its own.

It is probably fair to say that the take up of Jersey foundations has fallen short of expectations at the time the enabling legislation came into force.

The Jersey foundation emerged on the scene at a time of turmoil for the finance industry worldwide. Reluctance to create new wealth planning structures has been a consequence of enduring economic uncertainty. Its introduction also came when certain civil law offshore jurisdictions were enduring heavy criticism from the OECD. However, the exodus of foundations migrating from those jurisdictions to Jersey that some had predicted never materialised.

Foundations are relatively new to many intermediaries who source business to Jersey, so there remains a learning curve element. There is also some uncertainty as to the taxation treatment of Jersey foundations in the UK and other nations for which tax efficiency is often a critical structuring criterion. These are not aspects that affect more tried and tested Jersey trust and corporate vehicles.

It is unlikely Guernsey will be immune to the above factors, but it may benefit from Jersey's groundwork in promoting a Channel Islands-based foundation.

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Jersey and Guernsey compared

Similarities...

Jersey and Guernsey foundations are conceptually very similar. A founder (who establishes the foundation) and council (responsible for its decision-making) are functionaries of both.

A foundation in either jurisdiction will have the same fundamental elements. It will have separate legal personality and can own assets and operate in its own name. It can be established for any legal objects, including to benefit persons or carry out specified purposes (or both). It is formed by registration with the relevant island's registrar (however, registration does not compromise confidentiality because very little information is disclosed on the public records). It can do anything lawful, and certain limited restrictions on a foundation's ability to carry on commercial activities itself can be addressed through a subsidiary vehicle.

Having regard to those similarities, it seems likely Guernsey foundations will share similar uses to those of its Jersey counterparts. However, there are some important distinctions.

Important differences...

Both Jersey and Guernsey require a registered office be maintained in the island and, therefore, a locally based person with which the foundation has a connection.

However, their requirements for involvement of persons regulated by the financial services authorities are slightly different.

The council of a Jersey foundation must have at least one "qualified member", whereas if a Guernsey licensed fiduciary is not appointed to the council or acting as guardian, one must be appointed as its "resident agent".

The registered agent must be a Guernsey- based licensed fiduciary. It will have power to request copies of the foundation's records and any other documents or information necessary for it to comply with its duties as a licensed fiduciary. This appears to be more of a policing function as compared to the Jersey model which requires the regulated person to have a management function.

Beneficiary status

Another difference between the Guernsey and Jersey regimes is beneficiary status.

Guernsey law draws a distinction between "enfranchised beneficiaries" (those with a right to receive certain information about the foundation), and "disenfranchised beneficiaries" (those that have no such right to information). In contrast, Jersey law provides that, unless stated in the foundation's constitutional documents, a beneficiary does not have a right to receive any information about the foundation.

The Guardian

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A Jersey foundation must have a guardian, whose role is, essentially, to ensure the council carries out its functions. A Guernsey foundation, however, only requires a guardian where there is a purpose in respect of which there are no beneficiaries, or there are "disenfranchised beneficiaries". As such, the guardian in the Guernsey context is more akin to the enforcer of a purpose trust.

A Guardian of a Jersey foundation owes no duties to its beneficiaries. In contrast, a guardian of a Guernsey foundation established with beneficiaries owes certain duties to those beneficiaries.

Reserved powers

Both Jersey and Guernsey foundations recognise the ability of the founder to retain powers in relation to the foundation. These are more limited in the case of Guernsey, so that the founder may only reserve powers for (i) himself and (ii) his lifetime (if the founder is a natural person) or up to fifty years after the establishment of the foundation (if the founder is a legal person). In the case of Jersey, the founder will have such powers in relation to the foundation and its assets as are provided in the charter and regulations, and such rights may be assigned to another person.

Final thoughts

The variations in approach will have to be fully understood when considering whether to utilise a Jersey or Guernsey foundation. The hope is that they will be perceived as complementary, offering clients enhanced structuring flexibility across the islands and that, in time, the clear and innovative legislation developed in both Jersey and Guernsey will make the Channel Islands the foundation jurisdiction of choice.

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