

Guernsey: Trusts

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Guernsey is a leading international finance centre with a well-established trusts industry. Guernsey trusts are governed by the Trusts (Guernsey) Law, 2007 (the **Law**), an advanced and modern piece of legislation which offers both flexibility and a high degree of protection for the parties involved which means that it's a particularly advantageous jurisdiction in which to establish a trust.

What are trusts used for?

Below are some examples of the purposes for which a Guernsey trust may be used:

- estate and succession planning
- philanthropy
- tax planning (for example protected or excluded property settlements for UK inheritance tax purposes and foreign grantor trusts for US tax purposes)
- asset protection
- privacy, and
- commercial uses, such as employee benefit trusts, pension funds and unit trusts.

Key parties and documents

A trust involves the separation of the legal title, or ownership, of property from the right to benefit from that property. A trust is normally established by the transfer of legal title to property (known as the trust fund) by a person (known as the settlor) to another (known as the trustee) to be held for the benefit of one or more persons (known as beneficiaries) or for a particular purpose, which can be charitable or non-charitable.

There is flexibility as to how to create a trust, because the Law provides that a trust may be created by oral declaration (unless it is a unit trust), by an instrument in writing (including a will or codicil) or by conduct. However, usually a trust is created using an instrument in writing (known as a trust instrument). This is generally advisable because it provides more clarity as to the terms of the trust.

There must be certainty as to the intention to create a trust, its property and its objects (i.e. beneficiaries and purposes).

Types of Guernsey trust

Discretionary trusts

Perhaps the most commonly used type of trust, a discretionary trust gives the trustee the discretion as to how, when and how much of the trust fund should be applied for the benefit of the beneficiaries. The beneficiaries have no rights or entitlement as regards the distribution of the trust fund, having merely a hope that the trustee will exercise its discretion for their benefit. The settlor may give guidance, usually in the form of a letter of wishes, as to how the settlor would like the trustee to exercise its discretion, but such guidance is not binding on the trustee.

Life interest trusts

With a life interest trust, one or more specified persons (known as the life tenant(s)) have a right to receive the income from the trust fund or to use trust property during their lifetime. After the death of the life tenant, the trust will usually revert to being a discretionary trust for the benefit of other beneficiaries. This type of trust is commonly used where the settlor wishes to allow someone to remain in a property for their lifetime, but on the life tenant's death, they would like the property to pass to other beneficiaries (either outright or in trust).

Purpose trusts

In Guernsey, trusts can be established for both charitable and non-charitable purposes, or a combination of both. Purpose trusts do not have beneficiaries, and instead have a purpose towards which the assets are applied. Where the purpose trust is non-charitable, an enforcer must be appointed. The enforcer has a fiduciary duty to enforce the purposes of the trust, thereby effectively holding the trustee to account. A charitable purpose trust does not require an enforcer as HM Procureur (Guernsey's attorney general) can enforce the terms of the trust.

Whilst the potential uses of a charitable purpose trust are fairly self-explanatory, non-charitable purpose trusts have a number of potential uses both in a private and commercial context. Such uses include, amongst others:

- in securitisation and finance transactions, to hold the shares in an 'orphan' special purpose vehicle, and
- to hold shares in a private trust company, and
- philanthropy, where the purposes may not fit squarely within the traditional ambit of charity.

Hybrid trusts

Guernsey law permits the establishment of hybrid trusts, which mix charitable and/or non-charitable purposes and/or trusts for beneficiaries. An enforcer must be appointed to enforce the trust in relation to any non-charitable purposes. The trustee will have a duty to administer the trust in the interests of the beneficiaries and in the furtherance of the purposes of the trust.

Protective trusts

A protective trust is a particular form of trust whereby the interest of a beneficiary will automatically terminate if that beneficiary attempts to dispose of his rights under the trust or if they become bankrupt. Protective trusts are especially useful where a beneficiary is socially or financially vulnerable.

Other considerations

Duration

A Guernsey trust can be established for an unlimited duration. This is distinct from many other jurisdictions which impose a maximum trust period at the end of which the trust must terminate. The ability to create trusts of unlimited duration provides settlors with the option of preserving the benefit of their wealth for many generations of descendants.

Reservation of powers

The settlor of a Guernsey trust has the freedom to reserve a number of powers to themselves or to others, often referred to as a protector, without prejudicing the validity of the trust. Examples of powers that may be reserved by a settlor include:

- the power to revoke or amend the terms of the trust in whole or in part
- the power to advance, appoint, pay or apply the income or capital of the trust
- the power to act as a director of a company wholly or partly owned by the trust
- the power to give binding directions to the trustee to purchase, retain, sell, manage, lend or charge any assets of the trust
- the power to appoint or remove any trustee, enforcer, protector, beneficiary, investment manager, investment adviser or other professional
- the power to change the proper law of the trust, and

- the power to restrict any trustee power by making the consent of the settlor or a third party (such as a protector) a prerequisite to the use of such power.

Asset protection and firewalls

The Law contains provisions (known as 'firewall' provisions) that prevent a Guernsey trust from being rendered void by reason that it avoids or defeats a claim under foreign matrimonial, civil partnership or forced heirship laws. These firewall provisions also defend Guernsey trusts against attack by courts in foreign jurisdictions by ensuring that (subject to the terms of the trust) all questions arising in relation to a Guernsey trust or any disposition of property to or upon such a trust are to be determined in accordance with the law of Guernsey, without reference to the law of any other jurisdiction including, for example, questions as to:

- the capacity of the settlor
- the validity, interpretation or effect of the trust or disposition or any variation thereof
- the administration of the trust, including the functions, appointment and removal of trustees and enforcers, and
- the existence and extent of any functions in respect of the trust, including powers of variation, revocation and appointment, and the validity of the exercise of any such function.

A foreign judgement which is inconsistent with the Law will not be recognised or enforced by the Guernsey courts.

It is however recommended that the trust assets are, so far as possible, located in Guernsey, to guard against a foreign court order attaching directly against property in the foreign jurisdiction.

Trustee's duties

A trustee must act prudently and in the interests of the beneficiaries and perform its duties honestly and in good faith.

Rights of beneficiaries to information

Often, knowledge of entitlement under a trust can be detrimental to beneficiaries. For example, where a beneficiary is in education, knowledge of entitlement to wealth may not serve the best interests of that beneficiary, or in the case of a pension scheme, the entitlement of one member should not be information available to other members. A trustee should therefore consider carefully whether information can and should be disclosed to beneficiaries.

Under the Law, a trustee is specifically not obliged to disclose the following:

- any document which reveals the trustee's deliberations as to how it should exercise its trustee functions
- the reasons for any decision made in the exercise of those functions
- any material upon which such a decision was or might have been based, and
- any letter of wishes.

A beneficiary can apply to the Royal Court of Guernsey for an order requiring the provision of the above information, and a trustee should exercise caution when refusing any such request for information. A beneficiary will also have certain rights to information as a matter of Guernsey customary law.

In addition, if the trust instrument is silent then the Law specifically requires a trustee to provide information as to the state and amount of the trust property (e.g. trust accounts) at the request of any beneficiary (amongst others).

Limitation periods

The limitation period for bringing actions for breach of trust is three years from the date the claimant first became aware of the breach, provided the claim is not based on fraud or conversion to the trustee's own use. As regards minor and unborn beneficiaries, together with beneficiaries under a legal disability, knowledge of the guardian is imputed to the beneficiary. As such, the action will be barred three years after whichever is the earlier of the beneficiary's guardian having knowledge of the breach or the beneficiary's ceasing to be a minor or under a disability. Furthermore, in any event, an action for breach of trust (unless based on fraud or conversion to his own use) is barred after 18 years from the date of the breach.

A judgment in an action against a trustee founded on breach of trust is binding on all the beneficiaries of the trust so long as such beneficiaries were represented in the action (whether individually or as members of a class) or had notice of the action and a reasonable opportunity of being heard.

Alternative dispute resolution (ADR)

The use of alternative dispute resolution is contemplated by the Law. If permitted or directed by the trust instrument or authorised by the court, any claim against a trustee founded on breach of trust may be referred to arbitration or mediation and, if resolved by such means, will bind all beneficiaries so long as they were either represented or had notice and a reasonable opportunity of being heard and, in the case of minors or unascertained beneficiaries, the mediator or arbitrator certifies such beneficiaries were independently represented.

Tax and legal advice

Tax and legal advice should be sought on a case by case basis, to ensure that the creation or administration of a new trust does not give rise to adverse tax or legal issues.

Contacts

A full list of contacts in our International Trusts & Private Client team who specialise in this area can be found [here](#).