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STRUCTURES FOR ASIAN CLIENTS

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Working with clients around Asia, and structuring with a variety of offshore laws, we are finding an increasing interest in using Guernsey law structures. Ogier's Lara Mardell looks at why this is, looking at key drivers for Asia-based clients and how Guernsey law trusts and foundations can be used to achieve their goals.

Clients in Asia often have successful family businesses and need to structure appropriately to help achieve a smooth transition in the running of the business when the founder passes away. These clients will usually wish to maintain control of the business, rather than cede control to a trustee. Many clients we find are also concerned to limit beneficiary rights to information and to challenge the structure, and a number want perpetual trusts. In addition, many of the very wealthy business owners here are interested in benefitting charities or philanthropic organisations, and may even wish to set up their own organisation but prefer to structure such an organisation outside their homeland.

Business succession planning

There is a proverb in China that 'wealth does not survive the third generation.' Research has backed this up showing that family businesses frequently struggle or fail in the years following the death of the founder, when ownership and control of the business is split between a number of family members.

A traditional trust structure, where family members enjoy the economic benefits of the family business, but a trustee maintains control, will help to mitigate this problem but is unlikely to be what the founder wants – he will probably wish to maintain control of business decisions himself while he is able to, and to name successors to do this Afterwards.

In theory a trust using a traditional law such as English law could be established where the settlor reserved the power to be, or to appoint, a director of a company owned as part of the trust fund. However, there are concerns that without specific legislation addressing the matter this might give rise to trustee liability issues, might cause the settlor to be deemed to be a trustee, or could even jeopardise the validity of the trust.

The Trusts (Guernsey) Law 2007 (the Law) provides expressly that a settlor may retain such powers (and a number of others) without this invalidating the trust or causing the settlor to be a trustee. The Law states further that a trustee acting in accordance with such a power does not act in breach of trust. A Guernsey reserved powers trust can therefore be an ideal vehicle for holding the family company, while allowing the directors of that company to maintain day to day control of it. Such a structure will also enable the directors to make decisions in regard to key matters such as listing the family company.

An alternative to a reserved powers trust is establishing a private trust company (PTC), with the settlor and others of his choosing on the board, to be the trustee, rather than a professional. This way the settlor and his family have direct involvement in the operation of the trust. Guernsey's PTC regime does not require direct regulation of a PTC. Another alternative is the Guernsey foundation (discussed below).

An additional benefit of using a Guernsey law trust is that Guernsey permits perpetual trusts. Many clients in Asia are interested in very long term succession planning, and prefer not to have a limit imposed on the duration of the trust, so this is often a key appeal of Guernsey law.

Limiting beneficiary rights to information and to challenge

Settlors in Asia are often concerned to limit beneficiaries' rights to information regarding trust assets and terms. Guernsey has specific trust legislation which can assist with this. Where a trust deed limits a beneficiary's right to information as to the state and amount of trust property, the Law states that a beneficiary seeking such information must apply to court for it and show that the provision of information is necessary for the proper disposal of any matter before the court, for the protection of the interests of any beneficiary or for the proper administration or enforcement of the trust.

A Guernsey foundation can be structured so that beneficiaries have no right to information at all (see below).

Philanthropy

Guernsey is an attractive option to philanthropists in Asia. Guernsey is a well-regulated jurisdiction, with stable government and the rule of law and an independent judiciary. It also has a strict licensing regime for fiduciaries and an independent financial services regulator, and offers a wide range of high quality service providers and legal advisers.

A number of structures are possible for charitable purposes, including charitable trusts. Guernsey also offers non-charitable purpose trusts, which can be established for purposes which do not need to qualify as charitable, and which will be enforced by an enforcer. These can be particularly useful for general philanthropic purposes. A Guernsey foundation can be established for charitable or non-charitable purposes.

Guernsey charities have to comply with a specific registration regime. Guernsey also has a licensing regime in respect of non-profit organisations generally, which is likely to add gravitas to such an organisation and provide reassurance to those establishing them.

The Guernsey foundation

A foundation is a corporate entity with trust features. Being a corporate entity the foundation itself holds assets (rather than a trustee which holds assets in its capacity as trustee of a particular trust). It is controlled by a council (which is similar to the board of directors of a company). The legislation specifically contemplates and permits retention by the 'founder' (equivalent to a trust's settlor) of material involvement in decision-making - for example the founder can sit on the council, with at least one other person who may be appointed by the founder.

A foundation can be established for beneficiaries or purposes or both. Where a foundation is established for beneficiaries, the beneficiaries can be 'enfranchised', in which case they have a right to information, or 'disenfranchised', where they have no such rights. Where there are no 'enfranchised' beneficiaries, or where the foundation is established for purposes only, the founder needs to appoint a 'guardian' to enforce it. The only requirement for a Guernsey fiduciary to be involved is that where neither a councillor nor the guardian is a Guernsey licenced fiduciary the foundation needs to have a Guernsey resident and licensed fiduciary as registered agent.

With its ability to offer the founder direct involvement in control of the foundation, while potentially limiting beneficiary rights to receive information, the Guernsey foundation is well suited to many Asian clients. It also offers a single-layered alternative to a trust with a PTC as trustee.

The benefits of Guernsey law

Guernsey law trusts and foundations are an ideal way for Asia-based clients to establish structures for succession planning or philanthropy, while maintaining appropriate control of their assets. Guernsey firewalls help to enhance asset protection, and where a trust is used there is no limit imposed on the duration of the trust. Guernsey trust law offers settlors the option of limiting beneficiary rights to information, and the Guernsey foundation enables this to be removed altogether.

Guernsey is also a low tax jurisdiction, where structuring can be achieved in a tax neutral manner, and is well regulated, and well placed to deal with the increasing compliance requirements in the form of FATCA and the Common Reporting Standard. We expect to see increasing interest in the jurisdiction from Asian clients.

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