Common Law Foundations – A Successful Experiment?

With a focus on Jersey, Guernsey and the Isle of Man

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I. Introduction: A Tale of Convergence

It is a well-known fact that trusts are increasingly being recognised in civil law jurisdictions.[1] Until very recently it was less known that there is currently a wave in the opposite direction, notably of common law countries recognising and adopting the foundation concept.

To a certain extent, the latter wave is more tidal than the one initiated by the Hague Trust Convention. Of the countries that have ratified the Hague Trust Convention, only a few have introduced a domestic trust law.[2] By contrast, a number of common law jurisdictions have adopted shiny new foundations laws as part of their domestic law offering.[3]

These countries include, *inter alia*, Anguilla,[4] Antigua and Barbuda,[5] Barbados,[6] the Bahamas,[7] Belize,[8] Jersey,[9] Liberia,[10] Guernsey,[11] the Isle of Man,[12] Mauritius,[13] Saint

1 For an exhaustive list of the countries that have ratified the Hague Trust Convention, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59>. Furthermore, some civil law jurisdictions, such as Belgium, have introduced private international law rules that are based on the Hague Trust Convention.
2 These are Liechtenstein, San Marino, and Malta. Switzerland recognizes the trust under the HTC, see Jakob/Picht, Trusts in Switzerland: core implications for the Swiss estate planning environment, in: Kaplan (ed.), Trusts in Prime Jurisdictions, at 397 et seq.
3 See Noseda, Private Client Business 2009, at 109.
4 Anguilla Foundation Act 2008.
5 Antigua and Barbuda International Foundations Act of 2007.
6 Barbados Foundation Act 2012.
7 Bahamas Foundations Act of 2004.
8 Belize International Foundations Act 2010.
9 Foundations (Jersey) Law 2009.
10 Liberia Associations Law, Part VI, Chapter 60, as approved on 8 January 2002.
11 Foundations (Guernsey) Law 2012.
12 Isle of Man Foundations Act 2011.
13 Mauritius Foundations Act 2012.

Kitts & Nevis,[14] and the Seychelles.[15] In addition, a number of jurisdictions (including Cyprus and Gibraltar), are currently discussing the introduction of foundations laws.[16]

II. Different Foundation Models?

1. Common Ground

Most of these new foundations share some commonalities. Most foundation law models work on the premise that foundations are independent legal entities that are typically established when a person (the «founder») creates a segregated pool of assets which (by virtue of their «dedication»[17]) ceases to be part of the founder's own estate and instead becomes owned by the foundation itself. This is the main difference between a foundation and a trust, where the assets are owned by the trustees, albeit not beneficially. But like trustees, the administrators of a foundation (typically, known as «foundation council») are tasked with administering the assets for the benefit of beneficiaries or for a particular purpose in accordance with the terms of the foundation (which typically include a «foundation charter» as supplemented by by-laws, regulations etc) and the law.[18] Thus, the defining feature of a foundation is that the assets are pooled in an orphan structure without owners, except for the foundation itself.[19]

These assets are «dedicated» to a certain object or purpose, which means that they will only be able to be applied towards the relevant object or purpose, and that it is the duty of the foundation council to pursue the object or purpose stated in the foundation charter.[20]

The idea of a «dedication of assets» to a specific purpose and the fact that the assets are, in effect, self-owned, is very difficult for common lawyers to grasp. In the com-

14 St. Kitts & Nevis Foundations Act of 2003, No. 8 of 2003. The St. Kitts Act was a blueprint to many of the following legislative acts on private foundations.

15 Seychelles Foundations Act 2009.

16 Gibraltar Command Paper on a draft Bill to the Private Foundations Act 2015, 14 October 2015, C13/2015; for further reference see Astengo, Trusts & Trustees 2016, at 651 et seq.

17 The term «dedication» is the one used in most civil law jurisdictions and some common law jurisdictions, such as the Isle of Man Foundations Act 2011. Other common law jurisdictions, such as the Foundations (Jersey) Law 2009 and the Foundations (Guernsey) Law 2012 refer to the term «endowment». The problem with the latter is that it is used differently in some jurisdictions, such as in the US.

18 See Noseda, The Jersey & Guernsey Law Review 2010, at 50.

19 Eg art 25(1)(a) of the Foundations (Jersey) Law 2009 states that a beneficiary under a foundation «has no interest in the foundation's assets». For the Jersey foundation, see Howard, Trusts & Trustees 2016, at 677; Edwards/Neal/Kalsi, Trusts & Trustees 2015, at 668 et seq.

20 See Noseda, The Jersey & Guernsey Law Review 2010, at 50.

mon law world, there is always someone owning assets, be that an individual, a company (which in turn is owned by one or more individuals) or a trustee. The idea that assets own themselves (through a separate and independent legal personality) is alien to the practical and pragmatic way of thinking of common lawyers. On the other hand, the more conceptual mind of civilians struggles with the trust law idea of a person (trustee) being the absolute owner of assets for the benefit of someone else (beneficiary). How can someone own property in their own right (as legal owners) if such property can only be used to benefit someone else? For civilians, the logical answer to this conundrum is that the assets should be self-owned. The different approach of common lawyers and civilian lawyers to the concept of property has been splendidly explained by Paul Matthews in an article published in 2002,[21] but it is a fact that the idea of a self-owned pot of assets underlying the foundation's concept does away with a lot of the practical difficulties associated with trusts, eg when a trustee is replaced by someone else (new owner), which in practice brings into play long and complex chains of indemnities between new and old owners. By contrast, in a foundations' context title to the assets remaines unaffected by a change of personnel/administrators.

2. Dedication of Assets vs Registration

In the civil law world it is often possible to create a foundation without registration. All that is needed is a «dedication» of assets to a specific object or purpose. This is not too dissimilar from what happens in a trust law context, where a trust is established whenever a settlor satisfies the three certainties (certainty of subject-matter, certainty of object and certainty of intention) and complies with the formalities of transferring title to the chosen trustees.

Typically, however, the new foundations laws contain a registration requirement.[22] This is perhaps not surprising, as the new laws have been introduced at a time of increased transparency with mounting calls for the registration of trusts (see eg the registration requirements under the EU 4th Anti-Money Laundering Directive[23]).

What is more surprising (at least in the eyes of a civilian lawyer) is the idea that a foundation may be created without any assets, which is the position eg in Jersey.[24] Thus, the defining feature of the Jersey foundation seems to lie in the registration

21 Matthews, From Obligation to Property, and Back Again?, at 202 et seq.

22 For the registration process, see, eg, art 2 and 27 et seq Foundations (Jersey) Law 2009. Also, see Howard, Trusts & Trustees 2016, at 676 et seq.

23 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

24 Eg see the Foundations (Jersey) Law 2009, art 7(1); the Isle of Man Foundations Act 2011, art 15(1).

requirement *(«it is a foundation because its registration says so»)*, rather than a dedication of assets *(«it is a foundation because someone dedicated assets to a certain object or purpose»)*. Common lawyers do not seem to grasp the significance of the difference, unless of course one suggests that a trust might be created without settling any property.

This did not go amiss to some legislators. Thus, the Foundations (Guernsey) Law 2012 states that a foundation may be created by «*endowing the foundation with its initial capital* […], subscribing his name, as the founder, to the Constitution[25] of the foundation […], and otherwise complying with the requirements of this Law in respect of establishment and registration […]» (emphasis added).[26]

Another common feature of the new common law foundations is the fact that they typically encompass the presence of local agents. For instance, the Foundations (Jersey) Law 2009 requires that a «qualified person» applies for the incorporation of a foundation.[27] On the incorporation of the foundation the qualified person named under art 2(4)(a) Foundations (Jersey) Law 2009 becomes the qualified member of the council of the foundation.[28] Similarly, the Isle of Man Foundations Act 2011 requires foundations to have a «registered agent».[29] Finally, in some instances also the Foundations (Guernsey) Law 2012 provides that foundations have an obligation to install a «guardian» if there is a purpose in respect of which there are no beneficiaries,[30] or if the foundation only has so-called «disenfranchised beneficiaries».[31]

3. Main Differences

As hinted above (issue of registration), there are also notable differences between the new foundations laws.

Broadly speaking, there are two main models.

– The first model consists in adhering as much as possible to the civil law foundation's concept, whilst acknowledging the functional similarities between trusts and foundations (it is a little known fact in the common law world that the original foundations law in Liechtenstein contained a cross-reference to the local trust law to deal with the interrelationship between the various parties, notably the founder, the foundation council, and the beneficiaries).[32] Guernsey is a case in point.

25 The Guernsey foundation's constitution consists of two documents: the charter and the rules, see Kapp, Trusts & Trustees 2016, at 655.
26 Art 1(1) Foundations (Jersey) Law 2009.
27 Art 2(1) and 2(4) Foundations (Jersey) Law 2009.
28 Art 23 Foundations (Jersey) Law 2009.
29 Art 28 Isle of Man Foundations Act 2011.
30 Art 10(1)(a) Foundations (Guernsey) Law 2012.
31 Art 10(1)(b) Foundations (Guernsey) Law 2012; for the distinction between «enfranchised» and «disenfranchised beneficiaries», see Part III.2.
32 Art 552(4) of the Liechtenstein Law on Persons and Companies (PGR) of 1926.

– A separate model focuses more heavily on the corporate features of foundations and creates a novel instrument that is less adherent to the traditional civil law model. Jersey falls in this category.[33]

Which model a foundation falls under is relevant for a number of reasons, eg in terms of recognition in civil law countries such as Germany or Switzerland.[34] This is best explained by reference to the position of founders. Under the civil law model, a foundation is both a separate *and independent* legal person, whereas a company has separate legal personality, *but is not fully independent of its shareholders* (as shareholders retain their voting rights and may terminate the company at will, subject to the company's constitutional documents). Thus, traditional foundations laws take a relatively conservative approach in relation to the issue of «founder's rights», ie the rights and powers that may be retained by a founder without impinging on the independent nature of the foundation. This conservative approach is retained in Guernsey, whereas other common law jurisdictions provide that the founder may provide any rights in respect of «his» foundation.[35]

A comparative analysis shows that the three main differences relate to (a) whether a foundation may be established without assets; (b) the nature and extent of the rights that may be retained by the founder; and (c) the beneficiaries' right to information. The relevant differences may affect the classification and recognition of the foundations in a foreign jurisdiction as well as its governance.[36] The following paragraphs consider the position by reference to the laws in Jersey, Guernsey, and the Isle of Man.[37]

III. Comparative Law Analysis

1. Founder Control

Founder control is a pivotal aspect of any foundation law, as it may determine the recognition of a foundation under the rules of international private law. If a founder retains extensive rights over «his» foundation, some jurisdictions might take the view that the assets should continue to be attributed to the founder (eg for tax or

33 See the comparison of the Jersey foundation with the Cayman STAR trust in Noseda, The Jersey & Guernsey Law Review 2010, at 49 et seq; the analysis in Noseda, Trusts & Trustees 2014, at 517 et seq; and finally Noseda, Private Client Business 2009, at 115 et seq.

34 Eg for the issue of excessive founder control, see III.1. and the references therein.

35 See eg art 18(1) of the Foundations (Jersey) Law 2009: «A founder of a foundation has such rights (if any) in respect of the foundation and its assets as are provided for in its charter and regulations». See also art 29(1) of the Isle of Man Foundations Act 2011.

36 For the concept of «Foundation Governance» from a Swiss perspective, see Jakob, ZSR 2013, at 228 et seq; Jakob, Schutz der Stiftung, at 528 et seq; Sprecher, Jusletter of 26. April 2010.

37 For an assessment of the Manx foundation four years after its enactment, see Rimmer, Trusts & Trustees 2016, at 665 et seq.

other purposes).[38] Thus, any aspiring founder should consider very carefully the extent of reserved powers and weigh the advantages of retaining some control over the foundation against the risk of its non-recognition abroad.

Both under the foundations law of Jersey[39] and the Isle of Man, the founder may reserve *any rights* in respect of the foundation and its assets, as long as it is provided in the foundation charter and regulations.[40] These laws also provide that such rights *may be assigned* to some other person, if the charter or the regulations so provide.[41] This very broad understanding of the founder's rights stems from a misconception of the old Liechtenstein foundation law.[42]

At the other end of the spectrum, the Foundations (Guernsey) Law 2012 provides that a founder may only reserve to himself a power to amend, revoke or vary the Constitution or purpose, or to terminate the foundation.[43] Even then, the law provides that any retention of powers should die with the settlor (if an individual) and otherwise lapse at the latest 50 years after the date of establishment of the foundation – which reflects the position under traditional foundations laws.[44] Furthermore, art 8 of the Foundations (Guernsey) Law 2012 provides limitations to the ability to amend the purpose of the foundation. These provisions have been introduced to ensure that Guernsey foundations tick all the boxes of separate *and independent* legal persons on the basis that a foundation is not merely a company without shares.

Trust lawyers may consider that the restrictions under the Guernsey model go further than any modern settlor-reserved power legislation (which typically provide for more or less comprehensive lists of powers that may be retained or granted by a settlor without invalidating a trust). This is correct. Whilst a trust is also independent of its settlor (in the sense that he loses any control over the settled property unless he retains some kind of powers), it does not have to contend with the notion of legal personality. To make a foundation fully dependent of its founder risks blurring the divide between companies and foundations. Of course, the more liberal approach taken by some common law jurisdictions may be very useful to aspiring

38 In detail Jakob, Stifterrechte zwischen Privatautonomie und Trennungsprinzip, at 101 et seq, particularly with respect to the jurisprudence in Austria, Germany, Liechtenstein, and Switzerland.

39 See Edwards/Neal/Kalsi, Trusts & Trustees 2015, at 667 et seq.

40 Art 18(1) Foundations (Jersey) Law 2009; art 29(1) Isle of Man Foundations Act 2011.

41 Art 18(2) Foundations (Jersey) Law 2009; art 29(3) Isle of Man Foundations Act 2011.

42 In fact, in 1998 the Liechtenstein Supreme Court held that even though art 559(4) of the Liechtenstein Law on Persons and Companies (PGR) of 1926 granted the power to revoke the foundation and the power to modify its charter, the founder could not retain the right of intervention with the intention of continuing to use the assets of the foundation for his own benefit and not for the purpose of the foundation. See FL OGH of 8.1.1998, 2 C 133/95-70, and the translation and commentary in Noseda, The Jersey & Guernsey Law Review 2010, at 62. Further, see FL OGH 6.12.2001, LES 1998, at 332 et seq, with a similar tone.

43 Art 11 Foundations (Guernsey) Law 2012.

44 *Id*.

founders, but they ought to appreciate the potential repercussions of retaining extensive powers for the robustness of the structure and its recognition abroad.

2. Beneficiaries' Rights, in particular Right to Information

Another crucial element in any foundations law relates to the position of beneficiaries.

As with trusts, beneficiaries play a crucial role for the validity and correct functioning of a foundation. Unless it is established for a pure purpose (charitable or otherwise), a foundation has to have beneficiaries. This bears many similarities with trusts. However, beneficiaries under trusts and foundations have received a different degree of scrutiny in their respective jurisdictions.

– As trusts do not have any legal personality, the defining feature of the trust mechanism is represented by the tension that exists between trustees and beneficiaries, ie the «fiduciary»[45] nature of the trustees' duties and the beneficiaries' «equitable interest» in the trust property. As the trustee is already a full owner of the assets, the lack of any duty *vis-à-vis* the beneficiaries would make it impossible for anyone to enforce the trust, which is why in a famous English case the judge held that *«there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts»*.[46] The need for a beneficiary to make the trust mechanism work is also known in the common law world as the «beneficiary principle», which explains why the common law world has only recently embraced the concept of «purpose trusts», ie trusts that are established for a purpose (other than a charitable purpose) that does not involve beneficiaries. In some countries, including England & Wales, private purpose trusts are still not allowed (with some exceptions). In addition, the central role played by trust beneficiaries in the world of common lawyers underpins the decade-old debate about the nature and extent of a beneficiary's right to information under a trust. This debate culminated in the 2003 Privy Council decision of *«Schmidt v Rosewood»*[47] where the Privy Council considered that *«the correct approach [to the issue of information] is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts»*. In other words, in the absence of a separate legal personality, where the trust property is personally owned by the trustee (albeit, as a segregated fund)

45 The term «fiduciary» in a trust law context should not be confused with *«fiduciario»*, *«fiduciaire»* or *«treuhänderisch»*, which in many continental European countries describes an agency, ie a duty to act in accordance with the instructions of the principal (with or without a degree of independence). By contrast, in trust law parlance «fiduciary duty» denotes a duty to act in the best interest of the beneficiaries as a whole.

46 Per Millett LJ in *Armitage v Nurse*, [1997] EWCA Civ 1279, at 253 et seq.

47 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26.

common lawyers have concluded that the absence of beneficiaries (or the absence of sufficient duties owed to them) leads to an implosion of the trust mechanism, making the idea of beneficiaries and fiduciary duties centrally relevant to the whole legal analysis.[48]

– By contrast, as foundations have their own legal personality, the focus of civilian lawyers when describing the foundation mechanism has traditionally been on this defining feature, rather than on the position of beneficiaries. The debate about founder's rights is a case in point *(«does a foundation exist if the founder has retained extensive powers? Does this respect the independent nature of its legal personality?»)*. Unlike their trust law counterparts, beneficiaries of a traditional foundation do not have any «equitable» or «proprietary» interest in the trust property, the idea of a «proprietary» interest being the great contribution of generations of English chancery judges developing «equitable» solutions (ie creative solutions *«ex aequo et bono»*) to old issues, including the «problem» of the trustee's owning the trust assets.[49] This relentless focus to the position of beneficiaries is unparalleled in the foundations law world. As a result, beneficiaries under traditional foundations laws have a relatively weak role and relatively few rights. However, over the past few years there has been a convergence between trusts and foundations and it is notable that in a decision of 2004 (the same year of *«Schmidt v Rosewood»*) Liechtenstein's Supreme Court held that *«§ 68 of Liechtenstein's trust law also applies to foundations (…) The main rationale of this information right is to ensure the proper supervision of the foundation's council»*.[50] As far as I can see, there is no indication that the Liechtenstein judges were aware of the *«Schmidt v Rosewood»* case.

48 Charitable trusts are different, as the Attorney General or a Charities Commission has power to enforce the trusts. As to non-charitable purpose trusts, those jurisdictions that introduced them on their statute book (starting with the Cayman Islands in 1997) have come up with the concept of «enforcer», ie someone with locus standi to enforce the purpose of the trust.

49 According to an anonymous writing from 1502, the beneficiaries of a «use» (the precursor of trusts) *«has no more to do with the land than the greatest stranger in the world»* (1502). From around 1400 the Chancellor started a process which led to the idea that the trustee was bound to act for the benefit of the beneficiaries, initially by virtue of a duty based on conscience, which eventually crystallised in the idea of the beneficiary having a proprietary right eg because beneficiaries could ask third parties to return trust property to the trustees in certain circumstances (ie if they were not *bona fide* purchasers without notice of the trust relationship). As Matthews outlined in his article mentioned at note 21 above, it is unfortunate that the pragmatic manner in which common lawyers refer to the concept of property led many civilian lawyers to wrongly assume that a trust relationship creates a double layer of property («legal» vs «equitable»), where in fact the trustee is a full owner of the trust assets, subject to his fiduciary obligations owed to the trustees. However, the point to make for the purposes of this article is that the history of trusts is essentially centred around the beneficiaries, whereas the traditional focus with foundations has been on its separate (and independent) legal personality.

50 FL OGH 23 July 2004, 2CG 2001.52-111 (author's translation).

Unsurprisingly, the new foundations laws introduced by common law countries take different approaches in relation to beneficiaries. Some laws (eg Jersey) go out of their way to state that the foundation does not owe any fiduciary duties (in the common law sense of the term explained above) towards the beneficiaries,[51] presumably to avoid any confusion with trusts. However, even when this happens, the law makes it clear that the beneficiaries may petition the court to ensure that the relevant foundation is properly managed,[52] which is reminiscent of the inherent jurisdiction of the court in trust matters.

However, it is in relation to the beneficiaries' right to information that the various model differ more strikingly. Some laws (eg Guernsey and the Isle of Man) start from the premise that beneficiaries should have a right to information, whereby the laws provide for mechanisms to restrict such right to information provided there are sufficient safeguards to ensure that there is someone who may bring the foundation council to account. Thus, the Manx foundation law gives a right to information to those individuals that have a sufficient interest in the foundation.[53] This right to information might be restricted in cases where the provision of information is prohibited under the rules of the foundation. In these cases, the person interested may apply to the High Court and must show that the information is necessary or expedient to enable the determination as to whether the foundation is carrying out its objects, the assets of the foundation are being properly administered, and the foundation council is carrying out its functions.[54]

The Foundations (Guernsey) Law 2012 differentiates between two distinct types of beneficiaries.[55] Where the Charter states that beneficiaries are *not* entitled to information (so-called «disenfranchised beneficiaries»),[56] the law requires that there be a guardian (art 10(1)(b)). Incidentally, Liechtenstein adopted a similar solution in its new 2009 law.[57]

By contrast, Jersey takes the opposite approach, ie under the Foundations (Jersey) Law 2009 beneficiaries do *not* have any right to information,[58] except as specifically provided by the law or the charter.[59] Thus, prospective clients in Jersey are offered a regime *à la carte*, where they can choose to opt-into a more transparent setting. The

51 See eg art 25 of the Foundations (Jersey) Law 2009: «A beneficiary under a foundation –
(a) has no interest in the foundation's assets; and
(b) is not owed by the foundation or by a person appointed under the regulations of the foundation a duty that is or is analogous to a fiduciary duty».
52 See Part 5 of the Foundations (Jersey) Law 2009.
53 Art 31 Isle of Man Foundations Act 2011.
54 See art 31(5), (6) and (7) Isle of Man Foundations Act 2011.
55 This is a unique feature of the Guernsey foundation law, see Kapp, Trusts & Trustees 2016, at 656.
56 Art 31(5) Foundations (Guernsey) Law 2012.
57 Art 552 § 11 of the revised Persons and Companies Law (PGR).
58 As set out in art 26(2) Foundations (Jersey) Law 2009.
59 Art 26(1) Foundations (Jersey) Law 2009.

default absence of information rights is compensated by the obligation to appoint a guardian stated in art 13(1) Foundations (Jersey) Law 2009.[60]

Thus, the beneficiaries' right to information – as a crucial element of the control over the activities of the foundation council – is differently structured in the various jurisdictions examined. It is, however, only one among several constituents of a broader governance system.

3. Foundation Governance: The Role of Guardians and Enforcers

Foundation governance is the bedrock of any foundation law. In Guernsey, the proper functioning of a foundation is ensured by an enhanced governance mechanism that combines a fiduciary duty of the councillors[61] with the choice between beneficiaries' rights to information and the appointment of a guardian. The latter is not required under Guernsey law unless there are no beneficiaries at all or there are no beneficiaries that are entitled to information on the foundation (ie there are only disenfranchised beneficiaries).[62] Once appointed, a guardian has the duty to act in good faith and *en bon père de famille* to enforce the constitution and the purpose of a foundation.[63] This concept of foundation draws inspiration from the Foundation Law of Liechtenstein, where the beneficiaries are an important feature of the Foundation Governance concept, as opposed to many other civilian jurisdictions that rely more on state supervision.[64]

Similarly, the Manx foundations law confers extensive information rights on those interested in the foundation and requires the appointment of an enforcer where the foundation has no objects (ie beneficiaries) and is established to further a non-charitable purpose.[65]

Jersey on the other hand requires the appointment of a guardian in all circumstances.[66] Such guardian has to ensure that the council of the foundation carries out its functions in accordance with the charter and the law.[67] In order to do so, the guardian may require the council to account to him for the way it has administered the foundation's assets and acted to further the foundation's objects.[68] Additionally, the regulations of a Jersey foundation may give its guardian the power to approve or

60 See the analysis in the following section (III.3.).
61 Albeit this is not expressly stated in the Foundations (Guernsey) Law 2012, see eg Guthrie/Moore, Trusts & Trustees 2015, at 646.
62 Art 10(1) Foundations (Guernsey) Law 2012.
63 Art 19(2) Foundations (Guernsey) Law 2012. He or she has, in other words, a duty of care towards to the founder and the beneficiaries of the foundation.
64 For further reference see Jakob, Die Liechtensteinische Stiftung, at 209 et seq; Jakob, Schutz der Stiftung, at 184 et seq.
65 See art 14 Isle of Man Foundations Act 2011. For further reference, see supra III.2.
66 Art 13 Foundations (Jersey) Law 2009.
67 Art 14(4) Foundations (Jersey) Law 2009.
68 Art 14(5) Foundations (Jersey) Law 2009.

disapprove any specified actions of its council.[69] If these actions are not otherwise permitted by the charter or regulations of the foundation, the guardian may, if he or she considers it appropriate, sanction or authorize them.[70] These broad rights of a guardian of a Jersey foundation correspond to the virtually inexistent beneficiaries' rights under the Foundations (Jersey) Law 2009, in stark contrast to the path chosen by Liechtenstein and Guernsey.

IV. Conclusions

Whilst it can be argued whether all common law jurisdictions captured the essence of the foundation's concept (some jurisdictions seem to place excessive weight on the registration requirement or the corporate nature of foundations) there is now a vibrant international foundations scene. Also, the existence of different foundation models is reminiscent of what has been happening in the trust law world since the introduction of non-charitable purpose trusts and special trust regimes which have been introduced to deal with specific issues in mind, eg the right of beneficiaries to information or the trustees' liability (eg STAR Trusts in the Cayman Islands[71] and VISTA Trusts in the BVI[72] respectively).

It is also refreshing that these laws have been introduced as a result of a conscious choice, rather than as an organic consequence of colonialism. The existence of different models enables real choice.

On the other hand, certain features of some common law foundations (eg the ability to restrict the beneficiaries' rights to information) should not be overplayed. We live in an increasingly transparent world where regulation requires an enormous amount of disclosure which is at odd with the most private features of foundations (Common Reporting Standard, beneficial ownership registers, etc).

Also, practitioners should take into account the legal system of the country or countries where the various participants are resident or where foundations assets are situated. In the absence of an international convention on the recognition of foundations, the classification of a foundation may give rise to thorny issues. For example, a foundation may be treated as akin to a trust for UK inheritance tax purposes,[73] but (unlike a trust) should qualify as a «non-natural person» for the pur-

69 Art 14(6) Foundations (Jersey) Law 2009.

70 Art 14(7) Foundations (Jersey) Law 2009.

71 STAR Trusts take their name from the Special Trusts (Alternative Regime) Law 1997, now incorporated into Part VIII of the Trusts Law (Revised).

72 VISTA is an acronym of the Virgin Islands Special Trusts Act, 2003.

73 Section 43 of the Inheritance Tax Act 1984 provides that *«Settlement means any disposition or dispositions of property (…), whereby the property is for the time being held in trust for persons in succession or for any person subject to a contingency, or (…) or would be so held (…) if the disposition or dispositions were regulated by the law of any part of the United*

poses of the annual tax introduced in 2013 to dissuade the holding of UK real estate through offshore companies to avoid inheritance tax.

Particular care should be taken at the design stage. If a practitioner does not pay sufficient attention to the underlying issues or, simply, gives in to an overbearing (and perhaps, hard-nosed) client, the relevant foundation may lead to adverse tax consequences or worse, the foundation's assets might be included in the founder's estate for matrimonial, succession, and/or insolvency purposes – if not in the country of incorporation of the foundation, at least in other jurisdictions.

And although the attempts of common law legislators to introduce foundations have been criticised both at home (for introducing a foreign object under domestic law) and abroad (for not fully understanding the foundation's concept), these jurisdictions should be praised for taking the initiative. Unfortunately, the same cannot be said for many civil law jurisdictions that have either ratified the Hague Trust Convention (only San Marino introduced a domestic foundations law post-ratification) or whose courts have recognised trusts as part of their case law (following a string of cases recognising trusts, including the famous Poillot case of 2004,[74] in 2011 France moved to enact a tax law that was designed to frustrate the use of trusts by French families.[75] Belgium (who introduced private international law rules dealing with trusts in 2004)[76] followed suit in 2015[77]).

Be that as it may, the vast spreading of foundations law over the past decade and the increasing recognition of trusts outside their traditional catchment area are a sign of the shrinking global village. As families and their advisers become more international, this is definitely good news.

Kingdom; or whereby, under the law of any other country, the administration of the property is for the time being governed by provisions equivalent in effect to those which would apply if the property were so held (…)».

74 Mrs Evelyne Poillot v the Director of Tax Services of the Hauts de Seine Nord, TGI Nanterre, 4 May 2005 0303-950.

75 Art 14 de la loi n° 2011-900 du 29 juillet 2011 de finances rectificative pour 2011, which modified the Code général des impôts (CGI).

76 Art 122 et seq of the Private International Law of 16 July 2004.

77 Art 38 de la loi-programme du 10 août 2015, which modified art 2 § 1(13) Code des impôts sur les revenus 1992.