

JERSEY FOUNDATIONS

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The Foundations (Jersey) Law 2009 (the "Law") allows for the incorporation of Jersey foundations.

What is a Jersey foundation and what can it do?

A Jersey foundation is an incorporated body, able to transact, and to sue and be sued, in its own name. It acts through its council, which is the body charged to administer the foundation's assets and carry out its objects.

A Jersey foundation is capable of exercising all the functions of a body corporate, save that it cannot directly acquire, hold or dispose of Jersey immovable property, nor engage in commercial trading activities unless those activities are incidental to the attainment of its objects. No concept of ultra vires applies, so that the constitutional documents do not limit the capacity of a foundation, although they may limit the powers of the council to carry out certain actions.

It should be noted that the Jersey foundation is not an exact equivalent or copy of a foundation established in any other jurisdiction. Just as there are many models for limited liability companies, the legislation allowing the creation of Jersey foundations has been drafted as a stand-alone exercise with no desire or intention to replicate what may be the position in other jurisdictions. Jersey foundations should therefore be considered on their own merits, and it should not be assumed that, for example, they will give rise to the same rights and duties, nor that they will be interpreted in the same way, as foundations established in a different jurisdiction.

Features of Jersey foundations

The council of every Jersey foundation is required to have a "qualified member", which must be a person licensed to act as a council member of foundations under the relevant provisions applying to trust company business pursuant to the Financial Services (Jersey) Law 1998 (the "Financial Services Law"). The business address in Jersey of this qualified member will become the business address of the foundation in the Island.

Additionally, every foundation is required to have a guardian to oversee the carrying out of the functions of the council. This provision is intended to ensure that there will always be a person who can call the council to account, which may be particularly pertinent given the relatively limited rights that are conferred upon the beneficiaries of a foundation, and the fact that many foundations may have no beneficiaries, but be established purely to pursue purposive objects. The guardian need not be a licensed person.

Incorporation of a foundation

The incorporation of a Jersey foundation is an activity regulated under the Financial Services Law, so that only a person who is appropriately licensed under that law can apply for the incorporation of a foundation.

The application for incorporation is accompanied by a copy of the proposed charter of the foundation (but not of the regulations), including an English translation of any part of the charter which is not in English, together with a certificate signed by the applicant, identifying the initial qualified member of the council and giving the business address in Jersey of that person. In many cases, the first qualified member of the council is likely to be the same person as the applicant for incorporation, or an affiliated company of the applicant. The certificate must also confirm that regulations for the foundation are held by the applicant which have been approved both by the founder and by the first qualified member of the council, and that a guardian has been selected for the foundation (although his identity does not need to be disclosed).

Upon incorporation, the name of the foundation and the name and Jersey business address of the qualified member of its council are entered in a register maintained by the registrar of companies (the "Registrar") and the foundation is given a registration number. Registration of these details constitutes conclusive evidence of the incorporation of the foundation and of compliance with the requirements for incorporation.

The charter

The charter is filed with the Registrar and available for public inspection at the Registry. Certain details must be included in the charter, as follows:

- The name of the foundation must be specified. This must not be misleading or undesirable and must end with the word "Foundation", or its equivalent in a foreign language.
- The objects of the foundation must be specified. These must be lawful, and can be charitable or non-charitable or both. The objects can be to benefit a person or class of persons or to carry out a specified purpose, or to do both. The person or class of persons to benefit, or the specified purpose, as the case may be, can be determined in accordance with provisions found in the regulations. By this means, the identity of the beneficiaries, and details of the specified purpose, can be kept private.
- If there is any initial endowment, this must be specified in the charter, which must also state whether further endowments can be made.
- The charter must detail what is to happen to any assets of the foundation remaining after its winding up, although this can be achieved by reference to provisions in the regulations.

- If the foundation will terminate automatically upon a fixed date or upon the occurrence of a particular event, details must be included in the charter.
- If a right is conferred upon any person to wind up and dissolve the foundation, this must be specified in the charter.

Although not required by the Law, the names and addresses of the first council members can be included in the charter. This option can be attractive to foundations established for charitable objects, which may wish to adopt an open profile towards the public.

The charter can also contain any other matter, including the procedure required for its amendment and any provisions that can or must be addressed in the regulations. There is, therefore, considerable flexibility as to the contents of both the charter and the regulations.

The regulations

Every foundation must have regulations, unless all of its governing provisions are contained in its charter. The regulations are not filed with the Registrar and, accordingly, are not available for public inspection. Only those defined as "persons appointed under the regulations of the foundation" (essentially, the members of the council, the guardian and any other person accorded a particular function under the regulations) are entitled to copies of the regulations, unless the regulations themselves provide rights to other persons, such as beneficiaries.

The regulations must provide for the establishment of the council to administer its assets and carry out its objects. In particular, the regulations must provide for the appointment, retirement, removal and remuneration (if any) of the council members, set out the decision making process of the council, state whether any decisions require the approval of a third party, and state the functions of the council and the extent to which these can be delegated or must be exercised in conjunction with any third party.

Additionally, the regulations are required to provide for the appointment of a new qualified member of the council if the existing qualified member ceases to act for any reason. The regulations will also identify the initial guardian, and provide for the

replacement and remuneration (if any) of the guardian. They may also provide for the reimbursement of expenses of any other person appointed to carry out functions in relation to the foundation. As with the charter, the regulations can contain any other matters beyond those which are prescribed by the Law.

The founder

The founder is defined in the Law as the person who instructs the qualified person to apply for the incorporation of a foundation, together with any person who subsequently becomes a founder under Article 19 of the Law. That article provides that the endowment of a foundation by a person will not make that person a founder or confer founder's rights upon that person unless the regulations provide otherwise.

The founder can be given such rights (if any) as are provided by the charter and regulations and, if permitted by the charter or regulations, those rights can be assigned to other persons. Where the current holder of such rights (including the founder) dies or ceases to exist, the rights will vest in the guardian unless the charter or regulations provide otherwise.

The council

The establishment, powers and duties of the council must be provided for in the regulations, and there must at all times be a nominated qualified member of the council.

The council is charged with administering the assets of the foundation and carrying out its objects. The council may consist of one or more members, who are required to act in accordance with the foundation's charter and regulations and the Law. The council members must act honestly and in good faith with a view to the best interests of the foundation, and exercise the care, diligence and skill of reasonably prudent persons in similar circumstances.

It is not possible for the charter or regulations to relieve the members of the council from liability for fraud, wilful misconduct or gross negligence, and there are limitations on the scope of insurance which a foundation can purchase in respect of such members.

The guardian

All Jersey foundations are required to have a guardian, and the initial guardian is identified in the regulations, which will also provide for matters of succession and remuneration (if any). The guardian cannot be a member of the council unless he is also a founder or the qualified member of the council.

The guardian's duty is to take such steps as are reasonable in all the circumstances to ensure that the council carries out its functions and, to that end, the guardian can require the council to account for the way in which it has acted. It is suggested that this provision must confer upon the guardian such rights as he may reasonably require to have sight of accounting and management documentation relating to the foundation and the activities of the council.

The regulations can confer upon the guardian the right to approve or disapprove any specified actions of the council.

Unless the regulations provide otherwise, the guardian can sanction any action of the council which would not otherwise be permitted by the charter or regulations. In doing this, however, the guardian will have to be satisfied that it is in the best interests of the foundation and that the council is acting in good faith. If the guardian's sanction is forthcoming, this will cause the actions of the council to be deemed to be in accordance with the charter and regulations. This provision may provide a useful means of enabling actions to be taken which would not otherwise be possible, although it will be interesting to see whether, in practice, guardians are comfortable to provide such sanction.

Beneficiaries and provision of information

A foundation need not have beneficiaries, and may be established solely for a particular purpose. Where there are beneficiaries, they have no interest in the assets of the foundation and are not owed any fiduciary or analogous duty by the foundation or by the members of the council, the guardian or any other person appointed under the regulations to perform a function in respect of the foundation.

However, if a beneficiary becomes entitled to a benefit from the foundation but does not receive it, he can apply to the Royal Court for the foundation to be ordered to provide the benefit.

Unless required by the charter or regulations, a foundation is not obliged to provide any beneficiary with information relating to the administration, assets or the carrying out of the objects of the foundation.

Administrative matters and record keeping

Foundations are required to include in all written communications, including electronic communications, their name and business address. Documents may be served on a foundation by leaving them at or posting them to the business address.

Unless its charter provides otherwise, the business address of a foundation in Jersey will be the place of administration of its assets and activities. This provision of the Law is designed to address concerns that the concept of a "business address" in Jersey may not be sufficient, if a foundation's affairs were to be scrutinised by courts in certain civil law jurisdictions, to result in such courts finding the foundation to be based in Jersey.

The business address of the foundation will be that of its qualified member, in respect of whom the Codes of Practice for Trust Company Business (published by the Jersey Financial Services Commission) will have application.

The foundation must keep certain records at its business address, namely:

- a copy of the current charter and regulations;
- a register of the names and addresses of the members of its council;
- records sufficient to show and explain its transactions;
- records to disclose with reasonable accuracy its financial position;
- a record of the appointment of the guardian showing his name, address and the effective date of his appointment;
- a register of the names and addresses of all the persons who have endowed the foundation.

Failure to comply with these requirements can lead to a fine.

In addition to this requirement imposed upon the foundation, each council member is required to take reasonable steps to ensure that the foundation's records are prepared and kept properly and accurately and that, in particular, they contain entries of:

- all sums of money received and expended by the foundation;
- the matters in respect of which the receipt and expenditure takes place; and
- a record of the assets and liabilities of the foundation, including shares, interests and units held by the foundation in any other legal person or arrangement.

The records kept by the foundation must be such as to allow the council members to comply with this requirement and, as a general rule, these must be retained for at least 10 years from the date on which they are made.

Criminal liability can attach to a council member where an offence is committed by the foundation with the member's consent or connivance or where the foundation's offence is attributable to the member's neglect.

The Law does not contain any requirement for formal accounts of a foundation to be prepared at any given interval although, as a matter of good practice, it is anticipated that the qualified member will arrange for most foundations to prepare annual accounts.

An annual administration fee is payable to the Registrar before the end of February in respect of every foundation.

The register maintained by the Registrar, including a copy of the foundation's charter, is available for public inspection (upon payment of a fee), and the Registrar will also supply (upon payment of a fee) a certificate of the incorporation and status of a foundation and a certified copy of its charter.

Migration, merger and dissolution

In addition to establishing new foundations in Jersey, it is also possible to migrate existing foreign-law foundations and similar entities to the Island so that they can thereafter continue as Jersey foundations, or to merge such entities with existing foundations so that they can, again, continue as Jersey foundations.

The Foundations (Continuance) (Jersey) Regulations 2009 allow for Jersey companies and "recognized entities" to continue as Jersey foundations, and also for Jersey foundations to continue as "recognized entities" in other jurisdictions. The list of "recognized entities" includes Panama Private Interest Foundations, Bahamas Foundations, Liechtenstein

Stiftungs, Liechtenstein Anstalts, St Kitts Foundations, Nevis Multiform Foundations, Malta Private Foundations, Anguilla Foundations, Isle of Man Foundations and Guernsey Foundations.

The Foundations (Mergers) (Jersey) Regulations 2009 allow for two or more Jersey foundations to merge and continue as one foundation, for Jersey foundations to merge with "recognized entities" and continue as one foundation, and also for Jersey foundations to merge with "recognized entities" and continue as one "recognized entity".

Separate regulations – the Foundations (Winding up) (Jersey) Regulations 2009 – provide for the dissolution of foundations and include provisions regarding the winding up of both solvent and insolvent foundations.

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