

JERSEY LAW

A MEMORANDUM ON JERSEY LAW FOUNDATIONS

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Introduction

On the 17th July 2009 the Foundations (Jersey) Law 2009 came into effect in Jersey (the "**Foundations Law**").

All references to "**Articles**" in this document are references to articles of the Foundations Law and references to other legislation are to Jersey legislation unless otherwise stated.

The Foundations Law introduced a new type of legal entity into the law of Jersey:- the foundation. This will be a body corporate without shareholders and governed by a foundation council in accordance with the charter and regulations of the foundation. It is envisaged that foundations will be used primarily for charitable and private wealth management purposes although doubtless they will prove effective in other areas as the law of foundations develops.

Although new to Jersey, foundations exist in various other jurisdictions across the world. The Jersey foundation has been modelled on the best features present in the laws of other jurisdictions, while also including unique Jersey features to ensure that Jersey foundations are well run and regulated and allow founders of the foundation the greatest possible freedom of choice.

Background

Foundations have existed in Europe since the Middle Ages, when they were originally used for charitable or religious purposes, however they are increasingly used for wealth management purposes. It is generally considered that the purpose behind Jersey foundations, is to achieve the following –

- (a) The opening up of business opportunities with clients from parts of the world where the concept of a trust is unknown and complicated to understand.
- (b) Improving the transparency of wealth-holding structures. Transparency is now frequently required by tax authorities or courts, as well as increasingly by bodies concerned with high standards of transparency in respect of their senior executives. In some jurisdictions where the concept of trust is not recognised at law, foundations may well be a more transparent and acceptable vehicle.
- (c) To encourage global charities to use the Jersey foundation as a charitable vehicle for giving.

General description of foundations

It is anticipated that foundations will achieve these objectives by creating a legal entity, with easily recognised liabilities and accountabilities, openly recorded on a public registry in the same way as a company. A foundation, like a company and unlike a trust, is a distinct legal entity. However, unlike a company, a foundation has no shareholders. A foundation is an entity that holds assets in its own name for the benefit of purposes (which may be charitable or non-charitable) or for persons or classes of persons as set out in its constitutive documents. For clients and authorities originating in jurisdictions not familiar with the concept of trust, a foundation may well be a more acceptable structure than a trust.

As well as being used for wealth management and estate planning purposes, foundations may also have applications in more specialized areas, such as long-term charitable aims or securitizations, where it is desirable that property be given to a legal entity and applied for specific purposes. As with companies and trusts, the use of foundations will be subject to compliance with the Jersey Financial Service's Commission's policy on sensitive activities.

Specific features of Jersey foundations

A Jersey foundation will be a body corporate (Article 30), registered with the Jersey Registrar of Companies. It will be governed by the Foundations Law, its charter (dealt with in Articles 3–10) and its regulations (if any) (dealt with in Articles 11–17).

All foundations will have a charter. The charter is a public document which must include certain specified details. The detailed provisions applicable to the foundation can be included in the public charter or in the regulations, which will be a private document. It is expected that the majority of foundations will have both a publicly registered charter and a set of private regulations, though there may be cases such as, for example, foundations established for wholly charitable purposes, where it is desirable for the entire constitution of the foundation to be public.

A foundation will be required to have a council (Articles 20–24), which is the body responsible for fulfilling the aims of the foundation in accordance with the Foundations Law, charter and regulations. The council appears to be akin to a board of directors although clear parallels with companies are not appropriate in the context of foundations.

The foundation's council must have at least one "qualified person" (Article 21), who must be licensed to carry out trust company business by the Jersey Financial Services Commission (referred to in this document as the "**Commission**") under the Financial Services (Jersey) Law 1998 and the Codes of Practice published under that Law. In order to promote the particular regulatory framework in which foundations must operate in Jersey, the Commission intends to introduce a new class of 'trust company business' specifically in relation to foundations. This means that any person who wishes to establish or administer foundations in Jersey will need to apply to the Commission for a specific licence to do so – an existing trust company business licence will not be sufficient.

The qualified person who acts as a council member, under the supervision of the Commission, will ensure that the foundation is not abused for money laundering or terrorist financing purposes.

A foundation must also have a guardian (Articles 13 and 14), who will oversee the work of the council and to whom the council will be accountable. It is thought that the function of the guardian will be somewhat akin to a protector (in the case of private trusts with beneficiaries) or an enforcer (in the case of purpose trusts) but again clear parallels with trusts are not appropriate in the context of foundations.

It is envisaged that foundations will be endowed by assets (Articles 18 and 19). The foundation need not be endowed with assets on its incorporation but if it is (or it is to be endowed later) then this must be made clear in the charter (Article 7).

The Royal Court of Jersey will have various powers in relation to foundations (Articles 43 to 51).

Applications can be made to the Royal Court by a person with standing (as defined in Article 1(1)), including the foundation itself, the founder, the guardian, a beneficiary, a creditor or the Attorney General. The Royal Court's powers include:-

- (a) ordering compliance with a requirement of the Foundations Law, the charter or the regulations of the foundation (Article 44),
- (b) amending the charter or regulations of the foundation (Article 45),
- (c) giving directions as to the foundation's administration (Article 46), and
- (d) dismissing or appointing the qualified member of the council (Article 48).

It is anticipated that the States of Jersey will introduce regulations (which is provided for in Article 56) relating to the following:-

- (a) the dissolution of foundations,
- (b) the merging of foundations.

The States of Jersey will by The Foundations (Continuance) (Jersey) Regulations 2009 permit:

- (a) certain foreign foundations, stiftungs and anstalts to be incorporated (by way of continuance as foundations) in Jersey, and
- (b) allow for Jersey foundations to continue in other jurisdictions.

Establishing a foundation

In order to establish a foundation in Jersey the foundation must first be incorporated. Incorporation (in summary) requires the filing of the following:-

- (a) The charter:- the public document which sets out the following details: -
 - (i) the foundation's name;
 - (ii) the foundation's objects (i.e. the purposes or persons for which or whom the foundation's assets are intended to benefit) and as to whether any purposes or persons may be added or removed as objects of the foundation;
 - (iii) the initial endowment (if any) of the foundation;
 - (iv) what is to happen to the assets of the foundation if it should be wound-up or dissolved;
 - (v) any provisions as to the winding-up of the foundation after a period of time or on the happening of a specified event or on the application of a specified person; and
 - (vi) any provisions as to manner in which the charter or regulations of the foundation may be amended.
- (b) The filing fee as published by the registrar of companies in Jersey.
- (c) A certificate signed by the qualified person (that is a person registered by the Jersey Financial Services Commission under the Financial Services (Jersey) Law 1998 to carry out trust company business relating to foundations) stating that:
 - (i) the qualified person will become a member of the council of the foundation on incorporation;
 - (ii) the qualified person is in possession of the proposed regulations for the foundation which have been approved by the founder of the foundation and by the qualified person; and
 - (iii) a person has been selected to be the guardian of the foundation in accordance with the regulations.

The regulations of the foundation (unless they are already stated in the charter) must provide for:-

- (a) the establishment of a council to administer the foundation's assets and to carry out its objects;
- (b) the appointment, retirement, removal and remuneration (if any) of the council's members;
- (c) how the decisions of the council are to be made, if any decision requires the approval of any other person and, if so, the particular decisions and the identity of the person.
- (d) the functions of the council and the extent to which those functions can be delegated;
- (e) the appointment of a new qualified person to the council if the original qualified person dies, retires or is unable to act;
- (f) the identity of the initial guardian and the appointment of a new guardian if the original guardian dies, retires or is unable to act; and
- (g) the remuneration (if any) of the guardian.

Other details

Term

A foundation may exist for an indefinite term or it may be wound-up and dissolved upon the happening of a specific or event or upon the expiration of a fixed period of time as specified in the charter (Article 9).

Disclosure of Documents and Information

Unless otherwise provided in the regulations, the regulations of the foundation need not be supplied to any person other than a person appointed under the regulations of the foundation (Article 17). This provision is complimented by Article 26 which states except as otherwise required by the law of Jersey, the charter, the regulations or an order of the Court, a foundation is not required to provide any information about the foundation to any person, including a beneficiary. The combined effect of Articles 17 and 26 is not entirely clear but it would appear to mean, in effect, that unless otherwise stated in the charter and the regulations or ordered by the Court:-

- (i) disclosure of the regulations can be restricted to the members of the council and the guardian; and
- (ii) disclosure of any information or documents relating to the assets, administration and functioning of the foundation (with the exception of the regulations and the charter) can be restricted to the members of the council.

The charter, as mentioned previously, is a public document and will be open to inspection by members of the public as such. However, as the vast majority of the information relating to the foundation can be set out in the regulations rather than the charter, this should not present a problem from the founder's point of view.

Interestingly the Foundations Law provides that, if the objects of the foundation are 'persons or a class of persons' then the details concerning it or them can be set out in the regulations, thus protecting their identity if required (Article 5). The same would not appear to apply, however, if

the objects of the foundation are either charitable or non-charitable purposes. Whilst one can perhaps understand why details of the charitable purposes of a foundation should be public information is difficult to understand why the same should be true of non-charitable purposes.

Acts of Members of the Council and Beneficiaries' Interests

The members of the council must act honestly and in good faith with a view to the best interests of the foundation and exercise the care, diligence and skill that reasonably prudent persons would exercise in comparable circumstances (Article 22). All of which appears to be very much akin to the duties of a director of a company under article 74 of the Companies Law 1991.

The acts of a member of the council are valid notwithstanding a defect in the appointment of the member; or the member's qualifications (Article 22). Likewise the capacity of the foundation is not limited by anything in its charter or regulations and the doctrine of the *ultra vires* does not apply in respect of a foundation (Article 31). These provisions appear to be much akin to the provisions of articles 80 and 18 respectively of the Companies Law 1991 (as amended).

A person appointed under the regulations of the foundation when acting in the course of that appointment (regardless of any exclusion clauses in any document) shall not be relieved or released from any liability in respect of their fraud, wilful misconduct or gross negligence (Article 24). This seems much akin to the provisions of article 30 of the Trusts (Jersey) Law 1984 (as amended) in relation to the limitation on the exclusion of liability of trustees. Although not entirely clear, this limitation on the exclusion of liability of would appear to extend not only to the liability of the members of the council but also to the guardian.

The Foundations Law expressly provides in Article 25 that:-

- (i) a beneficiary of a foundation has no interest in the assets of the foundation; and
- (ii) (notwithstanding the express duties owed by the members of the council as indicated above) a beneficiary is not owed by the foundation or any persons appointed under the regulations of the foundation (which would seem to mean the members of the council and the guardian) a duty that 'is or is analogous to a fiduciary duty'.

It also provides that where a beneficiary becomes entitled to a benefit under the charter and regulations and the benefit is not provided, the beneficiary may apply to the Royal Court for an order that the foundation provide the benefit.

It is perhaps worthy of comment that, given the express statutory duties placed upon a member of the council under Article 22, the fiduciary duties which are owed by directors of companies to the companies' shareholders and the fiduciary duties owed by trustees of trusts to the beneficiaries of those trusts; it is difficult to imagine how the members of the council of a foundation can owe no fiduciary duty to the beneficiaries of that foundation.

Given that a beneficiary of a foundation apparently has no right to be provided with any information or documentation relating to that foundation, other than the charter it is difficult to envisage how a beneficiary would be in a position to be aware of any failure by the council of the foundation to provide the beneficiary with a benefit to which he or she was entitled. Presumably the law in this area will evolve in to order to provide a beneficiary with some disclosure rights in this regard even if they are in no sense proprietary by nature.

Assets

A foundation acting through its council may exercise all the functions of a body corporate and thus may acquire, hold or dispose of any form of assets providing this is not inconsistent with the provisions of the Foundations Law, the objects of the foundation or the charter or the regulations. However, a foundation may not directly acquire, hold or dispose of immoveable property situated in Jersey (Article 30).

Applicable laws and protection from attack by foreign laws

Subject to some stated exceptions and qualifications, any question that arises in respect of a Jersey foundation or the endowment of a Jersey foundation must be determined by the law of Jersey and without reference to any law outside of the jurisdiction of Jersey (Sub-Article 32(1)). The exceptions and qualifications include matters such as:-

- (i) the recognition of the law of a jurisdiction other than Jersey in determining whether a founder of a foundation or some other person endowing the foundation is or was the owner of such property or the holder of such a power;
- (ii) where there is an express provision that Jersey law shall not apply in the charter;
- (iii) where a testamentary disposition is invalid under the law of the testator's last domicile it will not be validated purely by reason of the provisions of Sub-Article 32(1) as indicated above.

Furthermore Article 32 consists of some further complex provisions preventing Jersey foundations from attack by the law of foreign jurisdictions. For instance, the incorporation of a foundation or the endowment of a foundation will not be void, voidable or in any way invalidated by reason:-

- (i) that the law of jurisdiction other than Jersey prohibits or does not recognise foundations or prohibits the endowment of foundations;
- (ii) that the incorporation or endowment of a foundation avoids or defeats a right claim or interest imposed by the law of a jurisdiction outside of Jersey on a person:-
 - (a) by reason of a personal relationship with the founder, another person endowing the foundation or beneficiary of the foundation, or
 - (b) by way of foreign heirship rights.

It is also provided in Sub-Article 32(9) that despite any enactment, customary law or rule, a judgement of a court of a jurisdiction outside of Jersey that concerns the provisions of Sub-Article 32(1) (as indicated above) shall not be enforced, given effect to or give rise to any right, obligation or liability if the court in giving judgement failed to consider the provisions of Article 32.

Concerning a foundation or an endowment to a foundation the law of Jersey relating to *legitime* and the rights of a surviving spouse shall not apply save where the founder or any person endowing the foundation is domiciled in Jersey.

The rule of *donner et retenir ne vaut* will not apply to any issue concerning the validity or administration of a foundation or a transfer of property by or to a foundation or an entity owned wholly or partly by a foundation.

Documentation and fees

A foundation must keep at its business address the following documents otherwise it may be subject to a fine:-

- (i) a copy of its charter and regulations as they are for the time being in force;
- (ii) a register showing the names and addresses of the members of its council;
- (iii) records sufficient to show and explain its transactions;
- (iv) a record of the appointment of a guardian of the foundation showing the date of his or her appointment and his or her name and address;
- (v) records which disclose with reasonable accuracy the financial position of the foundation; and
- (vi) a register of the names and addresses of those who have endowed the foundation.

In addition to paying a filing fee when a foundation is established, a foundation must also pay an annual administration fee, details of which will be published by the registrar of companies in Jersey.

Amendments to the charter

Any amendments to the charter must be notified to the registrar of companies in Jersey.

Winding-up and désastre law

The Bankruptcy (Désastre) (Jersey) Law 1990 will apply to Jersey foundations in the same way as it applies to Jersey incorporated companies (Article 54).

A foundation is obliged to state in its charter or in its regulations the details as to what is to happen to the assets of the foundation if it is wound up and dissolved (Article 8). Surprisingly the Foundations Law gives no further guidance as to how the assets of a foundation are to be distributed on dissolution but it is anticipated that the States of Jersey will introduce regulations under Article 56 dealing with this issue.