

Jersey foundations

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Date / [December 2024](#)

The Foundations (Jersey) Law 2009 (the “Law”) introduced a new type of entity, the foundation, into Jersey’s legal landscape in 2009. This note is a brief summary of the Law.

A foundation is similar to both a company and a trust in certain respects. It resembles a company in that it is a body corporate (albeit one without shareholders) and is governed by a council in accordance with its charter and regulations in much the same way that a company is managed by its board of directors. It is akin to a trust in that a foundation must have one or more objects which may be a purpose (charitable or non-charitable) and/or be for the benefit of one or more beneficiaries.

Although it shares these characteristics, a foundation is neither a company nor a trust. It is best described as a distinct legal structure which has been introduced to serve different purposes. Some of the key features of a Jersey Foundation are as follows:

- they are ideally suited for private wealth management, succession planning structures and charitable giving;
- they appeal to and are readily understood by those from a civil law background;
- they are very flexible, as the Law permits a substantial degree of bespoke adaptation;
- they have legal personality and may contract or sue, in their own name;
- there is no segregation of legal and beneficial title, as with a trust;
- the founder can restrict the flow of information regarding the foundation and its property to the beneficiaries;
- they are private structures; and

- although they require registration only a very limited amount of information needs to be placed in the public domain.

Incorporation

The person who requests a foundation to be incorporated is known as the “founder” (similar to a settlor of a trust) who may be (but does not have to be) a council member and/or a beneficiary under the foundation.

However, only a Qualified Person (a “Qualified Person”/“Qualified Member” for the purposes of the Law is someone who is registered with the Jersey Financial Services Commission (“JFSC”) to carry on trust company business) can actually apply for the incorporation of a foundation but a founder can instruct a Qualified Person to apply on the founder’s behalf.

The incorporation process is straightforward. The Qualified Person submits the charter, the appropriate fee and a Qualified Person’s certificate, to the JFSC for incorporation. The Qualified Person’s certificate must confirm that:

- the Qualified Person will become the Qualified Member on incorporation;
- the Qualified Person is in possession of the regulations and that they have been approved by the Qualified Person and the founder;
- the address stated in the certificate is the correct business address in Jersey of the Qualified Person; and
- a person has been selected to be the guardian of the foundation on incorporation in accordance with the regulations.

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The JFSC can refuse incorporation if the proposed objects (which may be charitable and/or non-charitable and/or for the benefit of one or more beneficiaries) are unlawful.

Corporate status

Like a company, a foundation exists from that date on which it is incorporated even if, unlike a trust, it has no property at that time. Once incorporated, a foundation has unlimited corporate capacity save that it may not directly:

- acquire, hold or dispose of immovable property situate in Jersey; or
- engage in commercial trading that is not incidental to the attainment of its objects.

Charter

It is a mandatory requirement of the Law that a foundation has a valid charter at all times. Once the foundation has been incorporated, its charter is available for public inspection at the JFSC.

The charter must state:

- the name of the foundation (which must end with the word 'Foundation' or its equivalent in a different language) which must not be misleading or otherwise undesirable;
- the lawful object(s) of the foundation;
- information regarding winding up, dissolution and the term of the foundation; and
- details of the initial endowment (if there is one) and if appropriate a statement that it may be endowed further.

The charter may state:

- the name(s) of the members of the first council;
- any provisions regarding the amendment of the charter; and
- anything which must or may appear in the regulations.

Regulations

A foundation may, if it wishes, have regulations regarding its administration and how its objects are to be carried out. An abridged set of regulations must be filed as part of the application to incorporate the foundation, but it is possible to exclude all sensitive information from that document. In most cases therefore, the key provisions of the regulations should remain private but in certain cases, for example, a sizeable charitable purpose foundation, the founder might wish to place the regulations in the public domain voluntarily or to dispense with the separate charter and regulations and simply merge their provisions together into a single publicly available document.

In any event, the Law provides that regulations of a foundation must:

- establish a council;
- provide for the retirement, appointment, removal and remuneration of council members;
- set out how decisions are to be made by the council;

- set out what decisions (if any) need approval from a separate person and the identity of that person;
- include provisions relating to the appointment of a guardian; and
- include provisions relating to the retirement, appointment and remuneration of the guardian.

Founder

In much the same way that a settlor of a trust is permitted to reserve certain powers to himself or another, the charter and/or regulations of a foundation may provide for certain rights to be exercisable by the founder (or his assignee) in respect of the foundation and its assets. If the founder (or his assignee) dies or ceases to exist, then the founder/assignee's rights will vest in the guardian unless the charter and regulations provide otherwise.

Council

A foundation must have a council to administer the affairs of the foundation and to carry out its objects.

The council must at all times include a member who is a Qualified Member. This requirement is important as it is the principal means by which the JFSC regulates and oversees the operation of foundations. The Qualified Person who applied for the incorporation of the foundation automatically becomes the Qualified Member of the council on incorporation but a subsequent one can be appointed at a later date. Any removal or retirement of the Qualified Member will not be effective unless and until the appointment of a replacement Qualified Member has taken place.

Every Qualified Member must inform the JFSC of its appointment and, on an ongoing basis, its business address in Jersey.

Duties and liabilities

The Law provides that the council members shall:

- act honestly and in good faith with a view to the best interests of the foundation; and
- exercise the care, diligence and skill that reasonable prudent persons would exercise in comparable circumstances.

One of the unique features of a foundation is that it and any persons (e.g. members of the council or a guardian) appointed under the regulations do not owe any form of fiduciary duty to the foundation's beneficiaries. The Jersey Court has held that just as a company owes its shareholders no duty of care in relation to its own assets, so too a foundation is unlikely to do so to any beneficiaries (see *In re. A Limited* [2013] JRC 075).

It follows from this that the founder and Qualified Person may draft the constitution of the foundation on such terms as they wish save with one important qualification, the Law expressly provides that nothing in the charter, regulations or any contract may relieve, release or excuse a person appointed under the foundation from any liability for that person's fraud,

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wilful misconduct or gross negligence (an exculpation “threshold” which is virtually identical to the one applying to the trustees of Jersey law trusts).

Beneficiaries

The definition of a beneficiary under a foundation is broadly in line with the trusts law. A foundation has beneficiaries to the extent that the foundation’s objects provide a benefit to a person and/or class of persons, but the rights of a beneficiary of a trust and a beneficiary under a foundation are fundamentally different.

The Law expressly provides that a beneficiary under a foundation has no interest (whether legal or beneficial) in the foundation’s assets or in the foundation itself. This provision effectively means that foundations are “ownerless” structures.

However, the Law does permit a beneficiary under a foundation to seek an order from the Royal Court of Jersey ordering the foundation to provide a benefit if that beneficiary has become entitled to receive a benefit under the foundation in accordance with the charter or regulations.

Except as specifically required by the Law, a court order, or by its charter or regulations, a foundation is under no obligation to disclose any information relating to the administration of the foundation, the assets of the foundation or the way in which the foundation is carrying out its objects, to any person (whether or not a beneficiary). In this respect, foundations differ markedly from trusts because ordinarily a trustee, on request, is under a statutory duty to produce to a beneficiary certain documents which comprise the trusts accounts.

Guardian

A foundation is required to have a guardian at all times. Apart from the founder and the Qualified Member, a person may not be both a member of a foundation’s council and that foundation’s guardian simultaneously.

The guardian’s role is similar to the role of an enforcer of a non charitable purpose trust in that it must take “such steps as are reasonable in all the circumstances to ensure that the council of the foundation carries out its functions”. Accordingly, the council accounts to the guardian for the way in which the council has administered the foundation’s assets and acted further to the foundation’s objects.

In addition, the regulations of a foundation may give the guardian the power to approve or disapprove any specified actions of the council. In this respect, a guardian can operate like a protector of a trust.

Administration, judicial supervision and regulation

A foundation is obliged to include its name and business address on all written communications and to keep certain records (the charter, regulations, register of council members, financial records and the names and addresses of those who have endowed the foundation) at the Qualified Member’s business address. Like a company, a foundation is obliged to pay an annual fee to the JFSC in order to maintain its name on the JFSC’s register.

The Royal Court of Jersey has been given extensive powers by the Law to ensure that a foundation complies with all and any requirements and obligations found in the Law, its charter or its regulations.

Those powers include:

- the power to order amendment of a charter or regulations;
- the power to give directions;
- the power to protect the interest of minors and unborn beneficiaries under a foundation; and
- the power to dismiss and appoint a Qualified Member.

The Royal Court has confirmed that it will construe these statutory powers widely and in a manner which is equivalent to the Court’s general supervisory jurisdiction in relation to trusts (see *In re. A Limited* [2013] JRC 075).

Conversion of company to foundation

Under the Foundations (Continuance) (Jersey) Regulations 2009, a Jersey company may apply to the JFSC to be incorporated as a foundation. The process is relatively straightforward comprising completion of an application form, notice to certain creditors and the registrar of companies in Jersey and payment of a fee. Further information about the conversion process is available upon request.

Migration of foundations to Jersey

Under the Foundations (Continuance) (Jersey) Regulations 2009, it is possible for certain ‘recognised entities’ (e.g. Bahamas foundations, Guernsey foundations and Liechtenstein stiftungs and anstalts) to be continued as foundations in Jersey. The migration process is managed by the JFSC through an application process. Further information about the process is available upon request.

Conclusion

The use of foundations has evolved since they were introduced and they are now used in a variety of ways, including in a private wealth context.



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