

# International BRIEFING<sup>2009</sup>

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## Jersey Foundations

Foundations are important wealth management and wealth preservation vehicles. Currently, the main Foundation jurisdictions are Liechtenstein, and Panama. The launch of a Foundation concept in Jersey is particularly significant for private clients seeking a credible alternative Foundation jurisdiction in Northern Europe.

Liechtenstein's future is now uncertain following recent unauthorised banking disclosures and apparent political concerns about administrative practices within the territory, and Panama's location in South America will not be suitable for many western and central European clients.

The intention of the Jersey legislature is to create a Foundation Law that takes the best features of the laws of other Foundation jurisdictions, whilst adding unique Jersey features to ensure Jersey Foundations are safely and securely regulated whilst allowing Founders the greatest possible freedom of choice.

### Rationale for the Jersey Foundation

Reading the report to the States Authority in Jersey, it appears there are three driving factors for the introduction of the Foundation:

- a) to access private clients resident in jurisdictions where the concept of the Anglo-Saxon trust is unknown;
- b) to offer a more transparent and modern wealth-holding structure to the trust;
- c) to encourage local charities to use Jersey Foundations as a charitable vehicle for giving.



### Key features of the Jersey Foundation:

- The Jersey Foundation is a body corporate.
- It is registered with the Registrar of Companies in Jersey.
- It will be governed by the Foundations Law of Jersey, its Charter, and its Regulations.
- All Foundations must have a Charter. The Charter is a public document.
- However the detailed provisions governing the Foundation and its governance can be contained in the private Regulations, if confidentiality is required.
- The Foundation must have a Council which is the body responsible for fulfilling the aims of the Foundation in accordance with the Law, Charter and Regulations.
- The Council must have at least one 'qualified member'. The qualified member must be a person

registered under the Financial Services (Jersey) law 1998 to carry on trust company business. Jordans can provide the qualified member.

- It is clearly the view of the Jersey Financial Services Commission that the qualified member of the Foundation Council is a safeguard against abuse of the Foundation (e.g. to guard against use of a Jersey foundation for money laundering or terrorist financing purposes).
- A Foundation must also have a Guardian. The Guardian oversees the work of the Council. The Council is accountable to the Guardian.
- The 'Founder' of the Foundation has such rights (if any) in the Foundation and its assets as are provided for in its Charter and Regulations.

## Incorporation of a Jersey Foundation

- Incorporation must be by 'a qualified person' e.g. Jordans (C.I.) Limited.
- The application for incorporation must be accompanied by;
  - a copy of the proposed Charter of the Foundation.
  - a certificate stating that;
    - a) 'a qualified person' named in the certificate will become the qualified member of the Council of the Foundation;
    - b) the certifier is in possession of regulations for the proposed Foundation that have been approved by both the Founder of the Foundation and by the 'qualified person' named in the certificate who will sit on the Council of the Foundation;
    - c) the address in Jersey, specified in the certificate, is the business address in Jersey of the 'qualified person' named in the certificate; and
    - d) a person has been selected who will become the Guardian of the Foundation in accordance with its regulations on the incorporation of the Foundation.

## The Charter

The Charter is obligatory and must contain:

- the name of the Foundation (the name must end with the word 'Foundation' or a word or words that mean 'Foundation' in a foreign language);
- the objects of the Foundation.

The objects may be to benefit a person(s), or a class of person(s), or to carry out a specified purpose, or both. To ensure confidentiality the Charter can state that any person or class of persons who are to benefit may be determined by the private regulations.

The Charter may set out the names and addresses of the first

members of the Council. Any subsequent changes in the membership of the Council will not be deemed to be an amendment of the Charter.

A Foundation need not have an initial endowment, but if it does have such an endowment, this must be specified in the Charter. Further endowments must also be stated in the Charter.

The Charter must specify what is to happen to any assets of the Foundation remaining on a winding up or dissolution. However the Charter can satisfy this requirement by stating that the remaining assets shall be disposed of in accordance with the Regulations.

If the Foundation is to remain in existence for a fixed term or until the happening of a specified contingency, this must be stated in the Charter.

## The Regulations of the Foundation

- A Foundation must have Regulations which comply with the Foundation law.
- However, this requirement is satisfied in respect of a provision that must be or may be included in the Regulations of a Foundation that is included in its Charter.
- The Regulations must;
  - a) establish a Council for the Foundation;
  - b) provide for the appointment, retirement, removal and remuneration (if any) of its members;
  - c) set out how the decisions of the Council are to be made, and if any decision requires the approval of any person, specify the decisions and that person;
  - d) set out the functions of the Council, and, if they must or may be delegated or exercised in conjunction with any other person, the extent to which this must or may be done.
- Given the mandatory appointment to the Council of a qualified member, the regulations must set out a procedure that ensures that a 'qualified person' is appointed to be the qualified member of its Council as soon as reasonably practicable if a qualified member
  - a) dies;
  - b) retires;
  - c) otherwise ceases to act.

Despite any provision of the Regulations of a Foundation to the contrary, if the qualified member of its Council retires or is removed, the retirement or removal does not take effect until immediately before the new appointment of a new 'qualified person' to the Council has taken effect.

## Role of Guardian

- A Foundation must have a Guardian. The regulations must provide for the appointment of its Guardian.
- Accordingly, the Regulations of a Foundation must;
  - a) identify the initial Guardian of the Foundation;
  - b) provide how a Guardian of the Foundation may retire;
  - c) provide how a new Guardian is to be appointed; and
  - d) provide for the Guardian's remuneration, if any.
- Although a Founder, or a qualified member of the Council, may be a Guardian, no other member of the Council may also be a Guardian.

The Guardian must take all reasonable steps to ensure that the Council carries out its management functions.

The Regulations of a Foundation may give its Guardian the power to approve or disapprove any specified actions of its Council.

To illustrate the potential powers of the Guardian, except to the extent that the Regulations of a Foundation provide otherwise, the Guardian of a Foundation may sanction or authorise any action taken or to be taken by the Council of the Foundation that would not otherwise be permitted by the Charter or Regulations of the Foundation. However in such circumstances the Guardian must be satisfied that such sanction or authorisation is in the best interest of the Foundation, and that the Council, in taking any such sanctioned or authorised action, is or will be acting in good faith.

- Generally, the Regulations of a Foundation may in addition to containing any provisions required by the law, provide for any other matters to do with the management and administration of the Foundation, such as the appointment, retirement, removal and remuneration of persons acting on behalf of the Foundation.

## The Founder

- A Founder of a Foundation has such rights in respect of the Foundation and its assets as are provided for in its Charter or regulations.
- Any right a Founder of a Foundation may have in respect of the Foundation and its assets may be assigned to some other person if this is authorised by the Charter or Regulations.
- Where a Founder (or the Founder's assignee) dies holding rights in the Foundation or its assets, these vest in the Guardian, unless the Charter or Regulations provide otherwise.

## The Council of a Foundation

- A Foundation must have a Council to administer the assets of the Foundation and to carry out its objects.
- The Council of a Foundation may have one or more members.
- The Council must include a qualified person.
- Any member of the Council must be at least 18 years old.
- The members of the Council of a Foundation must conduct the Foundation's affairs in accordance with its Charter and Regulations, and the Foundations Law. The members of the Council must act honestly and in good faith, with a view to the best interests of the Foundation. The members of the Council must act with the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- Members of the Foundation Council cannot be relieved in the Charter or Regulations for fraud, wilful misconduct or gross negligence.

## Beneficiaries

- It is to be noted that a beneficiary under a Foundation has no interest in the Foundation's assets.
- A beneficiary is also not owed any type of fiduciary duty by the Foundation or its Council members.
- However if a beneficiary under a Foundation becomes entitled to a benefit under the Foundation in accordance with the Charter or the Regulations of the Foundation, and the benefit is not provided, the beneficiary may seek an order of the Royal Court ordering the Foundation to provide the benefit.
- The beneficiary must seek the order within the period of three years from the time when the beneficiary became aware of his or her entitlement to the benefit. If the beneficiary has not attained the age of 18 when he or she became aware of his or her entitlement, the period of three years runs from the day on which the beneficiary reaches 18.

## Foundations not obliged to provide information

Unless otherwise stipulated by the Foundations Law, or the Charter or Regulations, the Foundation is not required to provide any person (whether or not a beneficiary) with any information about the Foundation.

## Corporate issues

A Foundation is an incorporated body, which is issued with a certification of incorporation bearing a unique registration number. It can exercise all the functions of a body corporate. However a Foundation may not;

- a) own immoveable property in Jersey;
- b) engage in commercial trading that is not incidental to the attainment of its objects.

The doctrine of ultra vires does not apply to Jersey Foundations, so that the capacity of Foundations is not limited by;

- a) its Charter, or Regulations; or
- b) any act by a person appointed under the Regulations of the Foundation.

Jersey Law shall prevail in all respects relating to the Jersey Foundation, and its status.

A Foundation must keep at its business address;

- a) a copy of its Charter and Regulations;
- b) a register showing the names and addresses of the Members of its Council;
- c) records sufficient to show and explain its transactions;
- d) a record of the appointment of the Guardian showing the date of his or her appointment and his or her name and address;
- e) records which disclose with reasonable accuracy its financial position;
- f) a register of the names and addresses of those who have endowed the Foundation.

For further information, please contact:

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