Jersey -
The Uses of Jersey Foundations

Introduction

The purpose of this briefing note is to set out some of the benefits of Jersey foundations. A Jersey foundation is designed to blend the highly attractive features of both Jersey companies and Jersey trusts. They therefore provide Jersey with an additional vehicle for financial planning, wealth management and charitable purposes.

What is a Jersey foundation?

The Foundations (Jersey) Law 2009 came into force on 17 July 2009. As such, foundations are a relatively recent addition to the range of structures that Jersey can offer. They are a highly flexible vehicle and can be used for a variety of purposes. There are now well over 300 foundations registered in Jersey, and some have even been migrated to Jersey from jurisdictions such as Liechtenstein.

The nature of a foundation is that it has separate legal personality, can contract with third parties, can sue and be sued in its own name and can hold assets in its own name. In that sense it is like a company but differs from a trust, which does not have separate legal personality. At the same time, a Jersey foundation does not have any shareholders; the assets are held for the benefit of beneficiaries or for a specified purpose. Simply put, therefore, a foundation is similar to a company, but with no shareholders.

Constitutional documents

The charter

Every foundation must have a charter, which is a public document that is filed with the Jersey Registrar of Companies and is available for public inspection, for a modest fee. Although a public document, it is usually fairly brief and discloses little. It needs to cover only certain limited matters, such as confirming the name of the foundation, the objects for which it was established and whether there was an initial endowment. Crucially, the charter does not need to set out its objects in any great detail or name beneficiaries individually, and if the nature of the substantive assets of the foundation needs to be kept private, then it is possible to establish a foundation with no initial endowment or only a nominal initial endowment, with the substantive assets being transferred into the foundation shortly after its incorporation.

The regulations

Unless all of its governing provisions are contained in its charter, it is a requirement for every foundation to have regulations. The regulations are not filed with the Registrar and are not public. The regulations will usually set out the bulk of the provisions governing the foundation and will contain the more sensitive details such as going into more detail on the nature of the objects, eg who the beneficiaries are (if the foundation has beneficiaries) and who the relevant people involved with the running of the foundation are. Regulations have the appearance of a cross between a trust instrument and a company's articles of association.

The regulations will establish a council to administer the foundation's assets and to carry out its objects. In particular, the regulations must provide for the appointment, retirement, removal and remuneration (if any) of the council members and set out the decision-making processes of the council (for example, requirements for quorum, the conduct of meetings via telephone, etc). The regulations must also provide for the appointment of a guardian to ensure the accountability of the council and to provide for the reimbursement of the expenses of persons appointed under the regulations. They may also contain other provisions, particularly concerning how the charter or regulations of the foundation may be amended or for the appointment of other persons (such as an auditor) to carry out functions for the foundation.

Letter of wishes

Although not compulsory, where the founder is not going to be directly involved in the running of the foundation (because he is not a council member or the guardian - see below) then it may be useful for the founder to provide the
foundation with a letter of wishes. Although not legally binding (unless the foundation provides otherwise), letters of wishes can be useful to the council members and can be updated by the founder as and when circumstances change. Letters of wishes, like regulations, are private documents.

Offices and roles

The founder

The founder is the person at whose behest the foundation has been established and typically (but not necessarily) he or she will provide the foundation with its initial endowment. In that sense the founder can be regarded as being similar to the settlor of a trust. In the same way, the founder does not automatically have any official role or powers in the running of the foundation once it has been established. This can be drafted into the regulations if required.

The council and the council members

The council is the principal decision-making body and exercises the powers of the foundation in much the same way as do directors of a company. Council members only have duties towards the foundation itself. They have no fiduciary duty to individuals who may benefit from the foundation. The council may consist of one or more members, but must have one Jersey-based member regulated under the Financial Services (Jersey) Law 1998. This person (typically a company rather than an individual) is known as the “Qualified Member” and its role is to ensure the foundation is administered in compliance with Jersey law. The council generally has the role of administering the foundation's assets and carrying out the foundation's objects, and where the founder wishes to be involved in the running of the foundation, he or she would typically achieve that goal by acting as one of the members of the council.

The guardian

A foundation must have a guardian (who can be an individual or a corporate entity) and may have more than one guardian. The principal role of the guardian is to ensure that the council carries out its functions in order to achieve the objects of the foundation. The requirement for a guardian ensures the proper administration of foundations and the protection of the beneficiaries of the foundation. Typically the guardian is a separate person from the council members, although the founder or the Qualified Member may serve both as the guardian and one of the members.

The guardian may be given various executive powers, such as a veto over certain decisions of the council. Where the founder is the guardian he can, therefore, continue to exert considerable influence over the management of the foundation. Alternatively, as mentioned above, the founder could simply be one of the council members. It can be seen, therefore, that there is plenty of flexibility when it comes to deciding who should occupy which role.

Beneficiaries

A foundation does not need to have beneficiaries and may be established solely or partially for a particular purpose. In cases where there are beneficiaries, they do not specifically have any interest in the foundation's assets nor will they be owed a fiduciary or similar duty by the foundation or by a person appointed under the regulations of the foundation. In that sense, they are different from beneficiaries of a trust, to whom the trustees do owe a direct fiduciary duty. Similarly, unless the regulations specify otherwise, the beneficiaries have no rights to information in relation to the foundation. The fact that the regulations can restrict the information provided to people who may benefit from the foundation allows the founder a high level of control and confidentiality.

That said, if a beneficiary under a foundation becomes entitled to a benefit under the foundation in accordance with the charter or the regulations and the benefit is not provided, the beneficiary may seek an order of the Royal Court ordering the foundation to provide the benefit.

Uses of foundations

Some of the uses we have seen so far include:

1. carrying out charitable or philanthropic purposes;
2. providing an asset-holding vehicle where using a trust would give rise to difficulties in civil law jurisdictions that do not recognise the concept of a trust (or at least, struggle to deal with them on a practical level);

3. acting as an alternative to a traditional private trust company, or as an alternative to the purpose trust that would otherwise be used to hold the shares in a private trust company;

4. holding the shares in an off-balance sheet commercial business;

5. retaining and preserving specific assets, including the holding of wasting assets;

6. holding assets for estate planning purposes generally; and

7. acting as a corporate protector where numerous family members wish to come together and have a say in the running of the trusts of which they are beneficiaries.

Conclusion

Jersey foundations provide a flexible vehicle for many different purposes and this continues to evolve over time. It is generally expected that Jersey foundations will be used by those who require transparency, who wish to continue to control certain assets without retaining a legal or equitable interest in those assets, or who simply prefer a structure with which they are familiar.

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