

TRUSTS AND ESTATES

Foundations: popular addition to structuring opportunities in Jersey

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Introduction

The Jersey foundation was introduced in 2009 as a new form of incorporated vehicle.

From the beginning, three broad categories of use for the Jersey foundation — for succession planning, as orphan structures for specified purposes and for philanthropy — have been clearly identified and continue to grow and develop, utilising the flexibility offered by the Foundations (Jersey) Law 2009 (the 'Law'). Before looking at these, it is, perhaps, helpful to highlight some of the key features of the Jersey foundation and to outline the principal components of its structure, recognising that it is not an exact equivalent or copy of a foundation established in any other jurisdiction.

Key features

Some of the key features of the Jersey foundation are as follows:

- **Incorporated vehicle:** A foundation is an incorporated vehicle brought into existence following the completion of a registration process.
- **Legal personality:** A foundation is a separate legal entity that holds assets and enters into contracts in its own name.
- **Public record:** A foundation's existence can be determined as a matter of public record by conducting a search of the register of foundations. The entry of a foundation's name in the register is conclusive evidence that the foundation has been incorporated and that the requirements of the Law in that regard have been complied with.
- **No ultra vires:** The doctrine of ultra vires does not apply, and a foundation can exercise all the functions of a body corporate, save only that it cannot directly (a) acquire, hold, or dispose of immovable property in Jersey or (b) engage in commercial trading that is not incidental to the attainment of its objects. However, both of these restrictions can be overcome by interposing an underlying company so that the relevant activity is not undertaken directly by the foundation.
- **Orphan vehicle:** A foundation does not have shareholders or any other form of owner.
- **Indefinite existence:** Foundations can continue to exist for an indefinite period.

Structure

The principal components of a foundation's structure are outlined as follows:

- **Founder:** The founder is the person upon whose instructions a foundation is incorporated. A founder need not endow assets upon the foundation: it can come into existence without assets.



- **Constitutional documents:** A foundation's constitutional documents are its charter (which is registered and open to public inspection) and its regulations (which are not registered and, therefore, private).
- **Objects:** A foundation's objects can be charitable or non-charitable (or a combination of both) and can be to benefit a person or class of persons, carry out a specified purpose, or to do both.
- **Council:** A foundation has a council, which is similar to a company's board of directors. The council's function is to administer the foundation's assets and to carry out its objects. The council can have one or more members, with one member being a 'qualified person' with an appropriate regulatory licence: this member is known as the qualified member. Council members are required to act honestly and in good faith with a view to the foundation's best interests and to exercise the care, diligence, and skill that reasonably prudent persons would exercise in comparable circumstances.
- **Guardian:** Every foundation has a guardian whose role is to take such steps as are reasonable in all the circumstances to ensure that the council carries out its functions. The founder and the qualified member (but not others) may fulfil a dual role as both council member and guardian.

What are foundations being used for?

In view of the Law's flexibility, foundations are being used for a wide variety of reasons, and three broad categories of use stand out.

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Succession and estate planning

Significant numbers of clients are incorporating foundations for succession and estate planning, and, in addition to inherent preference of a foundation over a trust on the part of some clients, there are several features of the Jersey foundation that can be important in influencing this choice.

- **Disclosure of information:** Save to the extent expressly required by the Law or by its constitutional documents, a foundation is not required to provide beneficiaries (or others) with information about the foundation. In relation to express statutory requirements, the Law provides for copies of the regulations to be supplied to those appointed under the regulations (namely council members, the guardian, and anyone else appointed under the regulations to carry out a function in relation to the foundation). This feature of the Law can be very important, as it allows for a tailored and individual approach to be taken in relation to the topic of disclosure. For some, it may be desirable that there should be no disclosure, whilst, for others, it may be considered that beneficiaries should be given information — but not until a predetermined age or in predefined circumstances. The ability to make such decisions can often be very helpful — particularly, for example, where younger family members are concerned, and efforts are being made to encourage them to develop their own careers and independence.
- **Fiduciary duties:** Another feature that can be important is that, where a foundation's objects are to benefit a person or class of persons (either exclusively or in conjunction with the carrying out of a purpose), the beneficiaries have no interest in the foundation's assets and are not owed a duty (by the foundation, council, guardian, or anyone else appointed under the regulations to carry out a function in relation to the foundation) that is or is analogous to, a fiduciary duty. However, where a beneficiary becomes entitled to a benefit pursuant to the foundation's constitutional documents and that benefit is not provided, the beneficiary can apply to the courts in Jersey for an order that the foundation should provide the benefit.
- **Separate existence:** For some clients, it is important that assets will be held in the name of the newly created foundation and will continue to be held in that name throughout the foundation's existence.
- **Nature of assets:** In some cases, the nature of the assets to be held will influence the choice of structure. A foundation can be established with the express object of holding specified assets, and this (coupled with the absence of fiduciary duties being owed to beneficiaries) can make it an attractive choice where, for example, wasting assets (such as boats or aeroplanes) or 'family silver' assets (such as shares in a family business) are concerned. The use of a foundation to hold such assets can be helpful to manage or avoid some of the tensions that can arise between different groups of family members, with some being keen for a particular asset to be retained whilst others would prefer it to be sold in order to maximise investment returns.
- **Family governance:** A foundation's regulations, whilst required to contain certain information, can also incorporate additional material as required. They can, therefore, be used as a key document in a client's consideration of family governance issues.
- **Reservation of powers:** A founder can be both a council member and a guardian and can also have such rights (if any) in respect of the foundation and its assets as the constitutional documents provide. These features can be important for clients who wish to retain a significant degree of control in relation to the structure being created.

Orphan structures for specified purposes

Significant numbers of foundations have been incorporated as orphan structures for specified purposes, whether to own certain assets or to perform particular roles.

- **PTCs:** A particular example to note is that of a foundation being used to hold the shares in a private trust company (PTC), which acts as trustee of one or more family trusts. This can be an attractive option for some clients, as an alternative to the PTC being owned by a charitable or non-charitable purpose trust. A foundation can also be incorporated to act as the trustee itself in place of (or as) the PTC. This option simplifies the structuring, as it involves just one vehicle (the foundation) rather than two (the PTC and the vehicle that owns the PTC).
- **Other examples:** Other examples to mention are of foundations being incorporated to hold the shares in a company, which acts as a protector of a trust, an enforcer of a non-charitable purpose trust, a council member of a foundation, or a general or limited partner of a limited partnership. Alternatively, a foundation can also be incorporated to discharge any of these roles itself.

Philanthropy

One of the most important uses for Jersey foundations identified to date is in relation to philanthropy.

- **Choice of objects:** A foundation can be incorporated to pursue a client's chosen causes — causes that he or she is passionate about — whether or not they are technically charitable. This flexibility is clearly attractive, and significant numbers of foundations have been incorporated with philanthropic objects, either alone or in conjunction with objects for the benefit of people.
- **Incorporated vehicle:** A foundation exists as a legal entity that holds assets and enters into contracts in its own name. The ability to refer to a foundation as such — and, for example, to use the foundation's name when distributions are made — can be important for clients when considering how their philanthropic giving will work in practice.
- **Ongoing involvement:** One of the attractions of foundations for philanthropy is that they allow opportunities for ongoing involvement. For example, the founder can choose to be a council member (and so might participate in a giving committee, distributing the foundation's assets) or might be the guardian (with a monitoring role, to ensure that the council administers the assets and carries out its objects as required by the constitutional documents).
- **Open profile:** For some clients, it will be important that a foundation's existence is a matter of public record and that its charter can be viewed by conducting a search of the register of foundations. Where a structure is being established for philanthropic purposes, it can often be appropriate to establish and maintain an open profile and relevant information can be included in a foundation's charter to satisfy a client's objectives in this regard.
- **Choice of name:** Another important factor is that there is considerable flexibility as to the choice of name for a foundation, provided that it ends with the word 'foundation' or a foreign-language equivalent. It is, therefore, possible to use a family name or other name of personal significance for a philanthropic foundation if that is desired or, alternatively, to choose a name that preserves the anonymity of the client.

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Conclusion

The number of incorporations and variety of uses seen to date show that the Jersey foundation adds significantly to the structuring opportunities available to clients selecting Jersey as a jurisdiction. Three broad categories of use have become well established, and these continue to grow and develop, utilising the flexibility offered by the Law.

It is clear that the Jersey foundation is of interest to clients familiar with foundations and those wishing to take advantage of the fea-

tures and flexibility offered by the Law, together with other factors (such as political, economic, and geographic stability; a robust and highly regarded regulatory regime; a well-respected judicial system with adherence to the rule of law; a depth and breadth of experience amongst its professional advisers; and proximity to London and its financial markets), which combine to make Jersey an attractive choice of jurisdiction for private wealth-management purposes.