

MAURITIUS

Foundations

A briefing by YKJ Legal

Introduction

The Foundations Act 2012 (the "Act") was proclaimed and is effective since 1st July 2012. The legislation obviously caters for the incorporation of foundations in Mauritius and clearly sets out the provisions for the setting up of the vehicle, the role and responsibilities of the members of the council, the role of the secretary and the protector of the foundation, the rights of beneficiaries and provisions for the winding up of the foundation.

Foundations are appealing to clients from civil law countries and who may not be familiar with the concept of trust. A Mauritius foundation is an incorporated body, able to transact, and to sue and be sued in its own name. It acts through its council, which is the body charged with the administration of the foundation's assets and for the attainment of its objects.

A foundation can be formed in Mauritius for such purposes as may be provided in its charter and can be established by means of a will. It may be set up to achieve both charitable and non charitable objects and can be either to benefit a person or class of persons or to carry out a specified purpose. A Mauritius foundation can only acquire legal personality when it is registered with the Registrar of Foundations (the "Registrar") and it has obtained a certificate of registration. It can thus exercise all the functions of an incorporated body: It has the capacity of carrying on or undertaking any business or activity in or outside Mauritius, entering into any transactions and holding assets. It may also upon application with the Financial Services Commission of Mauritius (the "FSC") hold a global business licence.

Key features of the Act

Registration of a foundation

A Mauritius foundation which will hold a global business licence will obviously be an entity which will need to comply with the Financial Services Act 2007. Thus, an application for the incorporation of such a vehicle can only be submitted through a licensed management company.

As part of the incorporation process, an extract of the charter of the foundation must be submitted to the Registrar. It is not necessary under the law to submit the charter. The extract must contain the following information:

- the name, purpose and objects of the Foundation;
- name and address of the founder in Mauritius for the service of documents;
- details of the beneficiary (if any);
- name and address of the secretary and the members of the Council;
- list of names and addresses of the first officers of the foundation.

The Registrar shall maintain a record of every Foundation registered under the Act and all documents filed in relation to the Foundation. It is important to note that the charter itself does not need to be provided to the Registrar and therefore remains a confidential document. Furthermore, the records maintained by the Registrar are not available for public inspection. However, a person authorised by the secretary of the foundation or by the FSC can have access to the file of the foundation at the Registrar's office and will be entitled to inspect the file records.

Also, the records and copy of documents required to be kept by a foundation at its registered office can be inspected by any founder, officer, supervisory person, the Registrar or the FSC.

The Registrar has the power to remove the name of the foundation from the Register of Foundations if the foundation fails to comply with certain statutory requirements.

The Founder

The founder is defined in the Act as a person who endows a foundation with its initial assets. It is important to note that a person who endows assets in a foundation after its registration does not make that person a founder or confer founder's rights upon that person, unless otherwise provided in the charter or articles of the foundation. One aspect of the Mauritius foundation which differentiates itself from other jurisdictions is that the foundation cannot come into existence without endowment of the initial assets. There is no limitation or restriction on the value of such initial assets.

The charter may include provisions in relation to the rights to be given to the founder.

A founder may also be a beneficiary of the foundation and does not need to be resident in Mauritius. Under the Act, where the founder is not a citizen of Mauritius and endows property to a foundation, the transfer of such property shall not be set aside, avoided or otherwise declared invalid or ineffective by virtue of any rule or law of his domicile or nationality relating to inheritance or succession or of any rule or law restricting the right of a person to dispose of his property during his lifetime so as to preserve the property for distribution at his death.

The Foundation Council

A foundation shall have a Council which shall be constituted in accordance with its charter or articles. The duties of the members of the Council are to conduct the affairs of the foundation in accordance with its charter, its articles and with the Act. The Council has the duty to supervise the management and conduct of the foundation's operations and activities and to promote the best interests of the foundation.

The appointment of members of a Foundation Council shall be subject to the charter of the foundation. However, a Council shall have at least one member who shall be ordinarily resident in Mauritius. The members can be any person but such a person should not be a minor, a bankrupt, a person under any physical or mental impairment, a person convicted of an offence involving fraud or dishonesty by a court of Mauritius or elsewhere and in the case of a corporate body, if such a body corporate is subject to proceedings in Mauritius or elsewhere and as a result of which that body corporate can be wound up or dissolved. Furthermore, if the charter or articles provide that the appointment of the members of the Council is to be made by a person who has been empowered by the founder, he shall not appoint any officer or his spouse or a person in a direct or collateral line of relationship with him.

The members of the council are required to act honestly and in good faith with a view to promoting the best interests of the foundation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

An officer of the foundation or a member of the Council shall not be relieved, released or excused from any liability arising from any fraud, wilful misconduct or gross negligence committed by such person.

Beneficiary

A foundation may have one or more persons or classes of persons as beneficiaries and there are no restrictions on the identity of the beneficiaries. The Act provides that the beneficiary of a foundation is entitled to obtain information as regards the fulfilment of the objects of the foundation. A beneficiary is also entitled to inspect and have a copy of the charter and articles of the foundation, audit reports or report on the financial position of the foundation and the annual accounts and the minutes of proceedings of any meeting of the Council.

Upon winding up, any remaining assets of the foundation is transferred to the beneficiaries as provided for in its charter and articles.

The Secretary

Every foundation shall have as secretary a management company duly licensed by the FSC or such other person resident in Mauritius as may be authorised by the FSC.

The Protector

A Mauritius foundation may elect to have a protector or a committee of protectors and unlike most foundations in other jurisdictions, there is no restriction on the appointment of such a protector who can fulfil this role. The Act also provides flexibility in terms of accountability of the council as the role, duty and powers of a protector or a committee of protectors are only as provided in the charter of the foundation.

The Charter

The Act provides for the information which must appear in the charter. The charter of a foundation is the constitutional document of the foundation and specifies amongst others the name of the foundation, its registered office, details in respect of the founder and beneficiaries (if any), the purposes, objects and duration (if any) of the foundation, the endowment of the property which shall be the initial assets of the foundation and the procedure for the appointment of the Council or of a protector or committee of protectors and its or his powers and duties.

The charter of a foundation may also provide for any other matter in respect of the foundation, including provisions in respect of the rights and powers of the founder, the appointment, removal, period of office of officers of the Foundation, auditors, protector or committee of protectors, members of the Council, additional beneficiaries, for the circumstances, if any, in which the foundation may be redomiciled and the conditions to be satisfied in this respect.

The charter of a foundation shall be in writing and shall where the founder is a natural person, be signed by him or where the founder is a body corporate, be signed on behalf of the founder, by the person or persons authorised for that purpose.

Articles of Foundation

Where the charter of a foundation so provides, the Council may have Articles which may include provisions in respect of distribution of assets, identification of any initial or additional beneficiary of the foundation, identification of the remaining beneficiary on a winding-up of the foundation and the distribution of assets to the remaining beneficiary and provisions as to how the affairs of the Council should be regulated.

Termination of a foundation

A foundation can be either terminated by a winding up order of the court or by voluntary winding up.

A petition made to the court to wind up a foundation may be presented by the foundation itself, a beneficiary, a creditor, a liquidator, the Registrar or the FSC, if the foundation is licensed by the FSC where:

- the foundation has, by unanimous resolution of its Council, resolved that it be wound up by the Court;
- the foundation is unable to pay its debts;
- the members of the Council have acted in the affairs of the foundation in their own interests, rather than in the interests of the beneficiaries as a whole, or in any other manner which is unfair or unjust to any beneficiary;
- the court is of opinion that it is just and equitable to do so; or
- the foundation is licenced by the FSC and has carried on business in Mauritius in contravention of the Financial Services Act 2007, the Securities Act 2005 or the Insurance Act 2005 of Mauritius.

Voluntary winding up will occur at the expiry of the period fixed for the duration of the foundation, on the occurrence of any event provided for in the charter of the foundation on a unanimous resolution of the Council to that effect or where the foundation is unable to pay its debts.

Migration

In addition to establishing new foundations in Mauritius, it is also possible to migrate existing foreign law foundations to Mauritius and thereafter continue as Mauritius foundations.



About YKJ Legal

YKJ Legal is a law firm authorised by the Attorney General's office. We are a team of experienced lawyers and have acted as legal counsels to many high net worth individuals, international corporates and banks.

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