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# Gibraltar Foundations

## GIBRALTAR FOUNDATIONS

### 1. Introduction to Gibraltar Foundations

Gibraltar's Private Foundations Act came into force on 11 April 2017. This information sheet contains a brief summary of the main features and characteristics of the legislation ("the Act").

### 2. The Founder

(a) Key to the establishment of a Gibraltar foundation is the founder. The founder of a Gibraltar foundation will be responsible (either directly or through an agent) for endowing the foundation with its initial assets, registering the foundation and determining:

- (i) its purpose;
- (ii) its constitution; and
- (iii) its initial officers (i.e. who the initial councillors and guardian (if any) are).

(b) As soon as the founder endows the assets to the foundation and properly constitutes it, he no longer has an interest in those assets. The assets become the property of the foundation to be applied towards the foundation's purpose. The Act, however, allows the founder to be a member of the class of beneficiaries, in which case he could potentially have certain rights over the assets, which rights depend on the nature of the interest. The nature of the



*"considerable amount of work undertaken by a number of private sector practitioners to get to this successful conclusion"*

**Albert Isola, Minister  
Minister for Commerce**

interest is established by, and determined by reference to, the constitutional documents of the foundation (see below).

- (c) The founder can be a councillor or a guardian (see below), as well as a beneficiary, but not a councillor and a guardian simultaneously.
- (d) A founder can also reserve the following powers to himself (but no others), but only if they are specifically included in the charter (see paragraph 6 below):

- (i) the power to vary or amend the terms of the constitutional documents, in whole or in part;
- (ii) the power to vary or amend the purpose of the foundation, in whole or in part;
- (iii) the power to remove or appoint councillors to the foundation's council; and
- (iv) the power to remove or appoint a guardian to the foundation.

### 3. Establishment and Registration

(a) In order to establish a foundation under the Act the founder must:

- (i) Irrevocably endow the foundation with its initial assets;
- (ii) Subscribe his name to the charter (see further below); and
- (iii) Register the foundation with the Gibraltar Registrar of Foundations (see further below).

(b) Once these requirements have been satisfied the foundation:

- (i) becomes a legal entity separate from its founder, its councillors and its beneficiaries (if any);
- (ii) is able to hold and deal with property in its own name as an absolute legal owner; and
- (iii) is able to sue and be sued in its own name.

#### 4. The Register of Foundations

- (a) The Act creates the office of the Registrar of Foundations ('the Registrar') as well as a Register of Foundations ('the Register'). The Register will contain a record of all foundations registered and will contain the following details in relation to each foundation, information which shall be available to the public:
- (i) the name and registered number of the foundation;
  - (ii) the date of registration;
  - (iii) the name and address of the councillors;
  - (iv) the name and address of the guardians, if any; and
  - (v) the details of the registered office.
- (b) The Register will also contain any further documents required to be filed with the Registrar under the Act, which shall not be available to the public.

#### 5. Purpose

- (a) Under the Act, a Gibraltar foundation may be established for any purpose or purposes which are capable of fulfilment and which are not unlawful, immoral or contrary to public policy in Gibraltar provided that it is not established to carry on any commercial activities. It can, however, carry out commercial activities that are ancillary or incidental to its purpose.
- (b) The purposes of a foundation can, but need not include, the benefit of beneficiaries. A foundation can therefore be established with no beneficiaries.

#### 6. Constitutional documents

- (a) A Gibraltar foundation's constitution is comprised of two documents: a charter ('the Charter') and rules ('the Rules').

#### Charter

- (b) The Charter must include the following information and can only be amended if the Charter itself allows for such amendment, or if amended consequent to a ruling by the Supreme Court of Gibraltar ('the Court') on an application made under the provisions of the Act:
- (i) the name of the foundation;
  - (ii) the name and address of the founder;
  - (iii) the purpose of the foundation;
  - (iv) the assets which constitute the initial assets of the foundation;
  - (v) a statement that the governing law of the foundation shall be the law of Gibraltar;
  - (vi) the power of the founder or any other person to amend the Charter including (if applicable) the power to amend the purposes of the foundation;
  - (vii) the manner in which the beneficiaries of the foundation (if any) are to be designated;
  - (viii) whether the foundation is established for an indefinite period or a definite period and, where it is established for a definite period, that period;

- (ix) the address of the registered office in Gibraltar of the foundation; and
- (x) the address in Gibraltar for service of documents on the founder (if different to the registered office).

#### Rules

- (c) The Rules generally relate to the management and administration of the foundation and must:
- (i) prescribe the functions of the councillors;
  - (ii) detail the procedures for the appointment, resignation and removal of councillors;
  - (iii) where a guardian must be appointed (see below), detail the procedures for the appointment, resignation and removal of guardians;
  - (iv) make provision for the remuneration of councillors and any guardian;
  - (v) prescribe the manner in which property of the foundation may be distributed, accumulated or applied;
  - (vi) detail whether, and if so how, further property may be endowed upon the foundation; and
  - (vii) prescribe the manner in which property of the foundation shall be distributed on a winding up of the foundation.

- (d) The Rules can, like the Charter, only be amended if the Rules themselves allow an amendment, or if an application is made to the Court under the provisions of the Act.
- (e) Over and above the matters set out above, the Rules may provide further and more detailed information regarding the management of the foundation, and in particular may:
  - (i) provide for the addition and removal of beneficiaries, either revocably or irrevocably;
  - (ii) impose obligations upon beneficiaries as a condition of benefit;
  - (iii) make the interest of a beneficiary—
    - a. liable to termination;
    - b. subject to a restriction on alienation or dealing; and
    - c. subject to diminution or termination in the event of the beneficiary becoming bankrupt or subject to a similar process of law;
  - (iv) provide for the appointment, removal and period of office of an auditor;
  - (v) specify the circumstances in which it may be necessary to appoint a guardian and detail the procedures for the appointment, resignation and removal of any such





- (iv) the benefit of a class of beneficiaries which includes one or more disenfranchised beneficiaries,
  - a person or persons must be appointed to act as guardian of the foundation.
- (e) Once appointed the guardian has a duty to act in good faith with a view to the interests and the purposes of the foundation, and must discharge his duties with due care, diligence and skill.
- (f) Save where a guardian is also a beneficiary of the foundation, he shall owe a fiduciary duty to the beneficiaries, and where there are no beneficiaries he shall owe a fiduciary duty to the founder of the foundation to apply his powers towards the attainment of the purpose of the foundation.

### Beneficiaries

- (g) A beneficiary of a foundation is someone who is entitled to benefit from the foundation and is either identified in the foundation's Constitutional documents by name, or his/her identity is ascertainable as a member of a class of beneficiaries, or by their relationship to another person.
- (h) A founder, councillor or guardian of a foundation may also be a beneficiary.
- (i) The Act adapts the concept of enfranchised and disenfranchised beneficiaries, which has become a feature of foundations law in other jurisdictions, to Gibraltar foundations.
- (j) There are therefore two types of beneficiary: an enfranchised beneficiary and a disenfranchised beneficiary.
- (k) A beneficiary is deemed to be an enfranchised beneficiary under the Act if he is entitled to:
  - (i) copies of the Constitutional Documents;
  - (ii) disclosure of records and accounts of the foundation;
  - (iii) make an application to the Court to request an order to prevent a change to the foundation's purpose or for the dissolution of the foundation.
- (l) A disenfranchised beneficiary is a beneficiary who is not entitled to all of the above rights, notwithstanding that he may be entitled to one or more of them.
- (m) The foundation's constitution may provide for a disenfranchised beneficiary to become enfranchised in certain conditions such as, for example, on reaching a certain age, etc.

### 8. Application of Gibraltar Law to Gibraltar Foundations

The Act includes a provision that applies Gibraltar law to all questions arising in relation to a Gibraltar foundation, and which prohibits a Gibraltar Court from recognizing a judgment or order of a court outside of Gibraltar in respect of a Gibraltar foundation where it is inconsistent with the provisions of the Act.

guardian if these are to be different to the provisions of this Act in respect thereof;

- (vi) subject always to the provisions of the Act, detail the circumstances in which the foundation may be migrated and, if so, include the conditions to be satisfied in respect of such a migration;
- (vii) detail the circumstances and manner in which the Rules may be amended; and
- (viii) contain any other matter that the founder deems fit to include.

### 7. Foundation Parties

#### Council and Councillors

- (a) A Gibraltar Foundation is managed by a council ('the Council') which must at all times include a Gibraltar resident body corporate duly licensed by the Gibraltar Financial Services Commission to provide professional trustee services (a Licensed Councillor'). Provided the Council includes a Licensed Councillor, it may also comprise additional individuals or corporates, and shall have no maximum number of councillors. Any person (except an incumbent guardian) may be a councillor. A founder or beneficiary may be a councillor. A councillor of one foundation may also be the councillor of another foundation.

- (b) In respect of the management, administration and investment of the property of the foundation, the Council has all the powers of an absolute beneficial owner.
- (c) The councillors have a duty to the foundation to act in good faith with a view to the interests and the purposes of the foundation, and must discharge their duties with due care, diligence and skill. Where the Constitutional Documents identify enfranchised beneficiaries (see further below), the councillors of that foundation have a duty to account to those enfranchised beneficiaries in relation to the foundation's property. Where the foundation has no enfranchised beneficiaries, the duty to account will be owed to the foundation guardian (see below).

#### Guardian

- (d) Under the Act, whenever a foundation is established for-
  - (i) any purpose in respect of which there are no designated beneficiaries;
  - (ii) the benefit of a class of beneficiaries which is not sufficiently certain;
  - (iii) the benefit of a large class of beneficiaries; or

## 9. Powers of the Court in respect of Foundations

- (a) The Act confers a number of significant powers on the Court to intervene in the management and administration of a foundation, in appropriate circumstances, on the application of:
- (i) the Council;
  - (ii) a councillor;
  - (iii) a guardian;
  - (iv) the Registrar;
  - (v) with leave of the Court, any other person.
- (b) The Court has the power to:
- (i) confer on the Council the power to effect a transaction where that power is not vested in the Council by the Constitutional Documents, and the Court considers the transaction expedient;
  - (ii) make an order in respect of—
    - a. the execution, administration or enforcement of a foundation;
    - b. an officer of the foundation, including an order as to the exercise of his functions, the removal of an officer (if, for example, he refuses or is unfit to act, or he is incapable of acting, or is bankrupt, or his property becomes liable to arrest, or is subject to a similar process of law), the appointment, remuneration or conduct of an officer, the keeping and submission of accounts, and the making of payments, whether into court or otherwise;
    - c. a beneficiary, or any person connected with a foundation; and
    - d. any foundation property, including an order as to the vesting, preservation, application, distribution, surrender or recovery thereof.

- (iii) make a declaration as to the validity or enforceability of the terms of the Constitutional Documents;
  - (iv) make an order authorising the rectification of any error or formal defect in the Constitutional Documents; and
  - (v) rescind or vary any order or declaration the Court has made or make a new or further order or declaration.
- (c) If a person does not comply with an order of the Court requiring him to do anything, the Court may order that it be done by another person, nominated for the purpose by the Court, at the expense of the person in default.

## 10. The tax position

### Taxation of foundations

- (a) A Gibraltar Foundation shall be taxed in Gibraltar in a similar way to a Gibraltar trust. Under the Income Tax Act 2010 a foundation is subject to tax if it is resident in Gibraltar. A Gibraltar foundation is always deemed to be resident in Gibraltar unless Gibraltar residents and the issue of Gibraltar residents have been irrevocably excluded from benefit.
- (b) A Gibraltar resident foundation is taxed at a rate of 10% in respect of its taxable income. Taxable income, however, does not generally include passive income.

### Taxation of beneficiaries

- (c) Gibraltar resident beneficiaries of a Gibraltar resident foundation are liable to be taxed on income received from a foundation which can be matched with the taxable income of the foundation.
- (d) Such individuals would be taxed at the personal tax rates applicable to them in Gibraltar.

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