

An overview of Cayman Islands foundation companies

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Introduction

A foundation company is a vehicle unique to the Cayman Islands. It has features akin to a company, retaining separate legal personality and limited liability, whilst functioning in a manner similar to a civil law foundation or a common law trust. This can make foundation companies attractive as both private wealth structures and commercial enterprises.

Corporate status

A foundation company is a body corporate with a legal personality distinct from its members, directors and other connected persons. As foundation companies are governed by the Companies Act (Revised), except where it is inconsistent with the Foundation Company Act (2017) they benefit from an extensive body of case law and are well recognised in other jurisdictions.

Typical uses

Foundation companies may be an attractive alternative to trusts, particularly for clients in civil law jurisdictions where a trust may be unfamiliar or the tax treatment uncertain; like trusts they are ideal succession planning and asset protection vehicles. Clients from common law jurisdictions frequently use foundation companies to hold higher-risk assets such as shares in family businesses and as part of family office and private trust company (PTC) type structures.

It is possible to use foundation companies to act as ownerless or orphan vehicles making them suitable solutions in the context of PTCs, investment funds or in wider commercial transactions.

By way of example, foundation companies may be suitable for use as a:

- holding vehicle for shares in a PTC;
- PTC itself;
- protector or enforcer of a trust;
- special purpose vehicle in financing or commercial transactions;
- vehicle for cryptocurrency related projects, such as for initial coin offerings;
- traditional succession planning and asset protection vehicle; and
- vehicle for philanthropic uses.

Incorporation

Any new or existing company incorporated under the Companies Act (Revised) may apply to the Registrar of Companies (**Registrar**) to be a foundation company provided certain conditions have been met. The conditions are that the foundation company:

- is limited by shares or by guarantee, with or without share capital;
- has a memorandum that:

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- states that it is a foundation company;
- describes its objects (which may include benefitting individual beneficiaries);
- provides, directly or by reference to its articles, for the disposal of surplus assets on winding up; and
- prohibits dividends or other distributions to members;
- has adopted articles; and
- has a secretary who is a person licensed to provide company management services in the Cayman Islands (**Secretary**).

Constitution

A foundation company's constitution may grant any person the right to become a member. It can cease to have members if: (i) its memorandum permits; and (ii) it continues to have a supervisor, being a person other than a member who has a right to attend and vote at general meetings. Once it has no members, the foundation company will not be able to admit new members or issue shares unless its constitution permits it.

A foundation company's management will be carried out by its directors. In addition, its constitution may give rights, powers and other duties to members, directors, supervisors, founders or others relating to:

- admitting, appointing or removing members, supervisors and directors;
- making and amending any bylaws;
- the supervision of the foundation company's management and operations;
- enforcing duties;
- general meetings and voting on resolutions;
- altering the constitution; and
- winding up and disposing of surplus assets.

Bylaws

In addition to a foundation company's constitution, it is possible for a foundation company to adopt its own tailored bylaws in order to modify or expand upon its management and operation. Utilising bylaws offers greater privacy, as this is a private document separate from the constitution which does not need to be filed with the Registrar (unlike the constitution), and can also offer more flexibility through amendment over time.

Rights and duties

Unless varied by the constitution, duties are owed only to the foundation company itself and rights are enforceable only against the foundation company. This can make foundation companies well suited to holding higher risk investments because beneficiaries do not have direct rights of action against trustees as they would in a trusts context.

Rights to information, such as reports and accounts, are limited to interested persons who are defined under the Foundation Act as any members or supervisors, persons with the right to become a member or supervisor or persons declared under the foundation company's constitution to be an interested person. Interested persons can bring actions in the name of or on behalf of the foundation company for the enforcement of directors' duties in the same way as members of traditional companies.

Beneficiaries of a foundation company (if any) have no powers or rights in relation to the foundation company, its management or its assets (unless provided for in the constitution).

Secretary

A foundation company must have a Secretary, licensed to provide company management services in the Cayman Islands. The foundation company's registered office must be at its Secretary's registered office.

Court intervention and resolution of disputes

The firewall provisions of the Trusts Act apply to foundation companies providing protection against claims in foreign courts. Similarly, the ability of a trustee of a Cayman Islands trust to apply to the Grand Court for directions has been extended to foundation companies, offering assistance in contentious and non-contentious situations.

A foundation company's constitution may require the resolution of disputes by arbitration and any resolution manner prescribed by the constitution cannot be set aside unless a party has committed fraud or conducted itself in bad faith.

Tax treatment

A foundation company is not subject to any corporation, income, withholding or capital gains taxes in the Cayman Islands. Members or beneficiaries of a foundation company will not be subject to any income, withholding or capital gains taxes in the Cayman Islands with respect to their interests, nor will they be subject to any estate or inheritance taxes in the Cayman Islands.

In addition, a foundation company which is incorporated as an exempted company may apply for an undertaking that any change in the law to introduce taxes in the Cayman Islands will not apply to the foundation company for a period of up to 30 years from the date of approval of the application.

Fees

Upon incorporation and on the happening of certain other events (i.e. on changing the articles) a fee will be payable to the Registrar.

Every foundation company is required to pay an annual Companies registry fee to the Registrar in January of each year. The Secretary is also likely to charge an annual fee.

In addition, there will be legal fees associated with the incorporation of a foundation company which will vary depending on whether the constitution needs to be tailored and whether bespoke bylaws are required.

Conclusion

Foundation companies can be used in a variety of ways, draw together features of companies and trusts law and are a useful tool in the planning toolbox. To discuss further please contact us.



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