

# Cayman Islands: Foundation Companies

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The Foundations Companies Act, 2017 introduced foundation companies into Cayman Islands law on 18<sup>th</sup> October 2017.

## What is a Cayman Islands foundation company?

It is a type of non-profit company (ie one which cannot distribute profits to members) which is incorporated under the Companies Act (2023 Revision) (the **Companies Act**). The Companies Act applies to foundation companies with two important differences that allow it to function in a similar way to a civil law foundation: it need not have members and its constitution can only be amended if expressly provided in its constitution.

This approach has some important advantages over the introduction of an entirely new legal construct – the latter approach means that the legislator has to provide for a comprehensive set of rules to cover every eventuality from incorporation to dissolution. There are therefore likely to be areas which require clarification by the courts, but there won't be any case law to assist in filling in those gaps and it can be unclear whether case law on companies, trusts or civil law foundations will be relevant.

With a foundation company, these issues are much less acute, as most of the Companies Act expressly applies and secondly, the foundation company will have the benefit of a considerable body of case law on companies.

## Foundation company requirements

In order to become a foundation company, it must meet the 'foundation company requirements', which are as follows:

- (a) it is limited by shares or guarantee (it can dispense with members after its incorporation);
- (b) it has a memorandum that:
  - (i) states it is a foundation company;
  - (ii) generally or specifically describes its objects (which may, but need not, be beneficial to persons);
  - (iii) prohibits dividends or other distributions of profits or assets to its members or proposed members in their capacity as such; but the following are not regarded as dividends or distributions for these purposes:
    - benefits received by any person in their capacity as a beneficiary;
    - reasonable remuneration received by directors, officers or others with a duty under the constitution;
    - reimbursement of expenses or liabilities incurred in relation to the foundation company;
    - benefits from arm's length transactions entered into with the foundation company; and
    - benefits which may be received from surplus assets on a winding up,
  - (iv) provides for the disposal of any surplus assets it may have on a winding-up.
- (c) it has adopted articles; and

- (d) its secretary is a qualified person; i.e. a person who is licensed or permitted by the Companies Management Act to provide company management services in the Cayman Islands.

If the Registrar of Companies (the **Registrar**) is satisfied that those requirements have been met, the certificate of incorporation will contain a declaration that it is a foundation company. Subject to that, a foundation company is incorporated in the same way as any other Cayman Islands company.

Existing companies can convert to foundation companies, if they meet the requirements.

### **Rights, powers and duties**

Foundation companies are very flexible: as well as providing for management by its directors, the constitution can give any rights, powers and duties of any type to any person. Subject to any express provisions to the contrary in the constitution:

- (a) duties are owed only to the foundation company;
- (b) rights are enforceable only against the foundation company;
- (c) directors have an obligation to provide interested persons with the information and documents required by ordinary resolution or on written request by interested persons; ('interested persons' are
  - (i) members and supervisors;
  - (ii) anyone who has a right to be a member or supervisor; and
  - (iii) anyone else specified as such in the constitution);
- (d) an interested person may bring an action on behalf of the foundation company for the enforcement of the directors' duties in the same circumstances and manner as a member of any other company; and
- (e) a beneficiary has no powers or rights.

### **Other key features**

A foundation company may cease to have members provided it has one supervisor, who has the right to attend and vote at general meetings. Supervisors can be given a wider role, but that is not a requirement.

The constitution may only be amended if and to the extent and in the manner authorised by its constitution. Amendments to the memorandum may not cause the foundation company to cease to comply with the foundation company requirements and must be filed with the Registrar within 15 days.

The constitution may provide for resolution of disputes by arbitration or any other lawful method.

### **Operation and management**

The day-to-day management is typically carried out by the board of directors. A foundation company may have by-laws, which are binding but do not form part of its constitution and are not filed with the Registrar, so they are entirely private.

There is no defined role of 'founder' or any need to provide for a founder, as such, but the constitution can provide for rights, powers and duties to be given to a 'founder', if required.

### **Purposes and beneficiaries**

A foundation company may be established for any lawful purposes, which may be commercial, philanthropic or private purposes (or a combination of them) and may (but need not) have specified beneficiaries or otherwise benefit any persons.

### **Company secretary**

There is no need for a foundation company to have a guardian, enforcer or similar third party with fiduciary duties, but there must be a secretary who is a qualified person. The secretary has a regulatory function. In particular, the foundation company:

- (a) must ensure the secretary is provided with any information it reasonably requires to comply with any regulatory laws; and
- (b) cannot accept any asset contributions, unless the secretary has given the foundation company a notice that there appears to be no objection under any regulatory laws,

and there are criminal sanctions for contravention. The secretary also has a duty to maintain full and proper records in relation to this function.

## Uses

The uses of foundation companies include:

- (a) special purpose vehicles for off balance sheet structures – there is no trust needed to hold shares (as they need not have any shares) so the structure can be simpler;
- (b) private trust companies (**PTCs**), enforcers (e.g. of STAR/non-charitable purpose trusts) and protectors – again, there is no need for a trust to hold shares;
- (c) owning shares in PTCs, enforcers or protectors;
- (d) philanthropy – there is no need for it to be charitable, so there is no risk of it failing if the stated purposes do not come within the narrow definition of charity and the founder can specify their own mechanism for enforcing the directors' duties, rather than relying on the Attorney General to do so (as is the case with charitable organisations); and
- (e) succession planning, asset protection and most other uses for which trusts are traditionally used.

## Why use a Cayman foundation company?

There are a number of potential advantages compared to a trust.

- (a) It is a body corporate with limited liability - companies are usually more readily understandable.
- (b) Entering into transactions with third parties is easier.
- (c) It is easier to change management (as directors of a company are not personally liable in respect of contractual and other obligations in the way that trustees are).
- (d) It normally avoids the need for indemnities on changes of service-provider, and the need to transfer property and contractual obligations to new trustees (as it is the foundation company itself which incurs obligations and owns property).
- (e) There is greater flexibility regarding management and supervision - the duties of trustees have been laid down by centuries of case law; the rights and duties in relation to a foundation company are a matter for its constitution and by-laws.
- (f) Duties are owed to the foundation company, not the beneficiaries, unless otherwise provided.
- (g) The founder decides what rights (if any) beneficiaries have.
- (h) There is no risk of invalidity – the certificate of incorporation is conclusive evidence of its existence and that it is a foundation company.
- (i) There is less risk of non-recognition by foreign courts, as the concept of a company is a familiar one to most courts.
- (j) There is less risk of arrangements being overridden by the court - the court has a more limited jurisdiction to do so with companies, as compared to the court's inherent supervisory jurisdiction in relation to trusts.
- (k) The risks (for service providers) of managing companies are generally less than for trusts.

There are also potential advantages compared to foundations in other jurisdictions (depending on the precise rules in the relevant jurisdiction) including:

- (a) greater certainty (due to the fact that it is a type of company, not a new legal construct); and
- (b) greater flexibility as to the duties that are owed and to whom, as well as in relation to the extent of the access to the court and the use of alternative dispute resolution procedures.

## Contacts

A full list of contacts in our International Trusts & Private Client team who specialise in this area can be found [here](#).

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