



Legal Briefings

Cayman Islands: an overview of Foundation Companies

Introduction

The Foundation Companies Act 2017 (the “**Act**”) introduced a novel corporate vehicle to the Cayman Islands – the “Foundation Company”. This company structure has a number of applications and continues to grow in popularity. This article provides an overview of the Foundation Company structure in the Cayman Islands.

Relevant legislation, Corporate status

Foundation Companies are governed primarily by the Act together with certain provisions of the Companies Act (as revised) of the Cayman Islands (the “**Companies Act**”) which apply to all types of company. For example, the provisions on voluntary liquidation as set out in the Companies Act apply equally to Foundation Companies as they do to other types of company in the Cayman Islands, albeit with some minor technical differences.

A Foundation Company is a legal person that is entirely distinct from that of its directors, members (where relevant), beneficiaries and founders. In practical terms, this means that a Foundation Company can own assets in its own name and can sue and be sued in its own name.

Constitution

Like other types of Cayman Islands company, a Foundation Company will be incorporated with a memorandum of association and articles of association (the “**Constitutional Documents**”), which will set out the rights and responsibilities of the various parties who are involved in the management of and who benefit from, the Foundation Company as well as setting out various procedural matters such as the co-ordination of meetings of directors and the votes of members, supervisors and founders etc.

In addition, a Foundation Company may also adopt by-laws which expand upon the matters dealt with in the Constitutional Documents and can even be used to confer specific rights on individual or groups of beneficiaries. The reason for not dealing with these matters in the Constitutional Documents is because, unlike the Constitutional Documents, the by-laws of a Foundation Company may be kept entirely private as they are not required to be filed with the Registrar of Companies in the Cayman Islands. This means that in some cases, separate classes of beneficiary may be unaware of the rights and entitlements of other beneficiaries. There is complete freedom as to the contents of any by-laws, provided they do not conflict with the Constitutional Documents (which themselves can be amended) or applicable laws.

Foundation Companies therefore provide the functionality and flexibility of a trust but without any of the complexities associated with trust administration. The fact that, as noted above, Foundation Companies have separate legal personality also effectively guarantees their recognition in civil law jurisdictions where more traditional trusts often are not recognized and encounter difficulties on various matters, including taxation.

Management, Beneficiaries and Members

The following are the key classes of person who will be involved in the management of a Foundation Company:

- Directors: as with most other types of company structures available in the Cayman Islands, a Foundation Company will typically be managed by its Board of Directors who owe fiduciary duties to the Foundation Company.
- Secretary: a Foundation Company is required to retain the services of a secretary at all times. Unlike other types of company, not just anyone can be appointed to this position. In order to be appointed as the secretary of a Foundation Company, the person in question is required to be licensed or permitted to provide company management services in the Cayman Islands. The Foundation Company's registered office is required to be at the secretary's business address.
- Supervisor: if a Foundation Company either chooses not to have any members or at any time ceases to have any members, it is required to appoint a 'supervisor'. The role of the supervisor is, as the name implies, to supervise the management of the Foundation Company but crucially they have no ownership rights or financial entitlement in the Foundation Company. In the absence of any members, this is an important role as it provides the necessary checks and balances to hold the Board of Directors to account in order to ensure that the Foundation Company is being properly managed and conducting its business in accordance with the objects in its Constitutional Documents, the requirements of any by-laws and applicable law.
- Founder: the founder of a Foundation Company is not dissimilar to a settlor in the context of a trust. Founders have no specific rights or powers in respect of the Foundation Company to which they relate, unless such rights and powers are specified in the Constitutional Documents and/or in the by-laws. It is common for the Constitutional Documents to grant the founder the power to appoint or remove directors and beneficiaries (whether subject to conditions or otherwise) of the Foundation Company.

In addition to the above, the following classes of person can also be associated with Foundation Companies:

- Members: Unlike many other types of Company in the Cayman Islands, Foundation Companies may, but are not required to have members (subject, as referred to above, the requirement to appoint a supervisor where there are no members). However, even where Foundation Companies do have members, membership of a Foundation Company is very different to being a member of a typical company incorporated with limited liability. Members of Foundation Companies are **not** automatically entitled to participate financially in the success of the Foundation Company unless the Constitutional Documents or by-laws provide otherwise.
- Beneficiaries: Unlike other types of Cayman Islands company, Foundation Companies can have a separate class of interested persons known as 'beneficiaries'. It is the beneficiaries who, subject to the Constitutional Documents and any by-laws, are able to participate financially in the success of the Foundation Company. The founder(s) of the Foundation Company may impose such conditions on the terms of participation of beneficiaries as they see fit. Further, whereas members in more conventional companies have some ability to control the affairs of a company (e.g. by appointing or removing Directors or by passing (or refusing to pass) shareholder resolutions) and they have

the right to access certain company records, the beneficiaries of a Foundation Company have no such rights automatically. Beneficiaries' rights, if any (including in relation to their right to distributions and/or financial information) must be expressly provided for in the Foundation Company's constitution. Alternatively, a Foundation Company can be set up such that beneficiaries are entirely passive and have no rights beyond their financial interest.

Characteristics and Common Uses

If one word could describe the Foundation Company structure, it would be "flexible". As will be apparent from the above, the roles and entitlements of members and beneficiaries are, generally speaking, neither prescribed nor proscribed. It is therefore entirely within the discretion of the founders of the Foundation Company without any need to artificially circumvent any statutory rights of a particular class of person.

It is perhaps for this reason that two of the most common applications for Foundation Companies are to use them in the context of family offices / family trusts (whether as part of succession planning or otherwise) and also in the establishment of decentralised autonomous organisations ("DAO"):

- **Family office:** the benefits of using a Foundation Company to operate a family office / family trust may be apparent already from the foregoing. The flexibility available to founders to determine the basis and extent of any entitlement of beneficiaries has proven to be extremely attractive as they are able to set the specific terms of any entitlement and the extent of any direct involvement / rights to information in the underlying business. The fact that the Foundation Company has separate legal personality also overcomes many issues of recognition and taxation in jurisdictions that don't otherwise recognise common law trusts. In the context of family offices with interests and assets across the globe, this advantage should not be underestimated both in terms of sheer convenience and the potential for time and cost savings in what would otherwise be 'difficult' jurisdictions.
- **DAOs:** as the name perhaps implies, DAOs often do not themselves have legal personality and it is therefore necessary for projects that involve DAOs to incorporate an entity which will act as the counterparty to any contractual relationships outside of the DAO (e.g. service providers). The ability for Foundation Companies to not have members is particularly attractive as this feature is entirely consistent with the de-centralised and 'ownerless' nature of a DAO. Also, the ability to provide for entirely bespoke arrangements and rights within the by-laws only adds to the attractiveness of Foundation Companies in this context.

Further Assistance

If you think that a Foundation Company might be useful in connection with one of your projects or to find out more, please contact a member of the Loeb Smith Team for more information.

E: gary.smith@loebsmith.com

E: robert.farrell@loebsmith.com

E: elizabeth.kenny@loebsmith.com

E: cesare.bandini@loebsmith.com

E: wendy.au@loebsmith.com

E: vivian.huang@loebsmith.com

E: faye.huang@loebsmith.com

E: yun.sheng@loebsmith.com





About Loeb Smith Attorneys

Loeb Smith is an offshore corporate law firm, with offices in the British Virgin Islands, the Cayman Islands, and Hong Kong, whose Attorneys have an outstanding record of advising on the Cayman Islands' law aspects and BVI law aspects of international corporate, investment, and finance transactions. Our team delivers high quality Partner-led professional legal services at competitive rates and has an excellent track record of advising investment fund managers, in-house counsels, financial institutions, onshore counsels, banks, companies, and private clients to find successful outcomes and solutions to their day-to-day issues and complex, strategic matters.