

Foundation Companies: One year on

Morven McMillan and Maxine Bodden
Maples and Calder

The Cayman Islands foundation company is in a class of its own. It is not a carbon copy or an equivalent of a foundation established in any other jurisdiction. This is not the result of an accident but entirely by design - there was no intent to replicate what other jurisdictions have done or to introduce a new tool with limited use and a lack of supporting jurisprudence. Much time and effort has been invested to ensure that Cayman Islands foundation companies are considered on their own merits.

The Cayman Islands foundation company is governed under our Companies Law (2018 Revision) save to the extent that it is modified by the FCL. This means the foundation company is an incorporated structure familiar to private client and commercial practitioners alike, while fundamental modifications to the Companies Law model company mean it will be a highly flexible vehicle for achieving a wide range of private client and commercial objectives.

The long awaited
Foundation
Companies Law
(FCL)
came into effect on
18 October 2017.
The FCL
introduced a
new form of
incorporated
vehicle which,
a year on, has
proved a popular
innovation among
clients.

With the exception of the memorandum and articles of association, which have to be filed with the Registrar of Companies on incorporation, foundation companies are private structures. While the constitution may provide for the making and altering of bylaws for the foundation company, bylaws do not form part of the constitution for any purpose of the Companies Law applicable to foundation companies or the FCL. Accordingly, persons dealing in good faith with a foundation company are not required to consider its bylaws

or look into compliance by the directors or others with its bylaws.

The registered office of a foundation company must be at its secretary's business address. The secretary must be a qualified person, that is, a person who is licensed or permitted by the Companies Management Law (2018 Revision) to provide company management services in the Cayman Islands to the foundation company. The role of the secretary

is particularly important from a compliance perspective which is why it is a licensed role subject to regulation by the Cayman Islands Monetary Authority. It must be certified by the secretary that there is no regulatory obstruction to the acceptance of any contribution of assets to the foundation company. The secretary is under an obligation, which is subject to criminal sanction, to maintain a full and proper record of the secretary's activities and all enquiries which the secretary has made in relation to the acceptance of assets.

The FCL requires the directors, before the foundation company accepts any gift of assets, to identify the provenance of that asset to the company secretary so that the secretary can satisfy itself that the asset clears all the AML thresholds laid down in Cayman's compliance regime. Only when the secretary is satisfied as to the provenance of the asset, and has given its consent to the directors, will the foundation company be permitted to accept the asset in question. That exercise must be undertaken for each and every asset being introduced into the foundation company and must be properly documented. It is for that reason the FCL requires the company secretary to be a "Qualified Person".

Some of the key features of a Cayman Islands foundation company are:

Incorporated vehicle: a foundation company is an incorporated vehicle that is brought into existence following the completion of a registration process;

Legal personality: a foundation is a separate legal entity distinct from that of its members, directors, officers, supervisors and founder. Accordingly, it is able to transact, and to sue and be sued, in its own name. It acts through its board of directors, which is the body charged to administer the foundation's assets and carry out its objects;

Object: a foundation company can be formed for any lawful object, as long as it is lawful and not contrary to public policy and it need not be beneficial to other persons;

Perpetuitous: like a Cayman Islands STAR trust, a foundation company can continue in perpetuity;

Flexibility: a foundation company is very flexible as regards its objects, management and supervision.

Foundation companies appeal to and are readily understood by clients from a civil law background. However, foundation companies also appeal to other clients be-

cause their features suit their specific and individual needs. Such clients are using foundation companies for a wide variety of reasons, including:

Succession and estate planning

Having built businesses and accumulated wealth for many years, many founders are now more than ever concerned with business succession planning, thereby recognising the need to establish a structure to ensure the business is not fragmented on their passing. The flexibility offered by a foundation company allows the founder to establish a structure that is bespoke and specific to his or her circumstances, including the ability to restrict the flow of information regarding the foundation company and its property to the beneficiaries. The fact that a foundation can be established where beneficiaries have no right to enforce and no rights to information may also appeal to some founders.

Hold 'awkward' or 'wasting' assets

Changes in the worldwide economy have brought about a shift in trustees' attitudes as to the assets they will hold. Assets

such as yachts, artwork and aeroplanes are accepted by trustees as trust assets. However, so that a founder may continue to have influence over their management, foundation companies may be the preferred vehicle for such assets. A foundation company may be established specifically to hold such assets and the founder or family members can maintain a level of control as regards, for example, investment, preservation, or running a business.

Hold the shares in private trust companies

Families who wish to retain a level of control often establish a private trust company (PTC) and sit on its board to ensure they have direct involvement in any decision concerning the trust. The shares of the PTC are usually held on the terms of a STAR trust by a Cayman Islands trust corporation. However, the foundation company offers an alternative structure, not only by allowing the founder/settlor and named family members to sit on the board, but the foundation company may itself act as trustee, rather than a PTC. The foundation company may also own the shares of any other corporate in the structure, eg. enforcer or protector.

Charity and philanthropy

A foundation company can be created for charitable purposes,

and also for purposes which are philanthropic but do not meet the strict criteria to qualify as charitable.

Hold shares in off-balance sheet commercial vehicles

Special purpose vehicles are usually established where their ownership needs to be separate from the rest of the structure. A foundation company as a vehicle that prohibits dividends or other distributions of profits or assets to its members can be established for a specific business purpose and is ideally suited to this type of planning.

Cryptocurrency

The foundation company has attracted considerable interest from clients wishing to establish cryptocurrency companies. Many crypto and blockchain companies operate as not for profits so the foundation company is an ideal vehicle.

The Cayman Islands foundation company has quickly become a valuable structuring tool that adds significantly to the structuring opportunities available to clients in the Cayman Islands. 🏹



Morven McMillan

Morven is a Partner in Maples and Calder's Cayman Islands office, where she is head of the Cayman Islands Trusts group. Her expertise includes contentious and non-contentious international trusts and private client work.



Maxine Bodden

Maxine is part of the Maples and Calder Trusts team in the Cayman Islands. Maxine specialises in advising the world's leading banks and trust companies and private individuals on the establishment and ongoing administration of Cayman Islands trusts, including unit trusts, pension and employee benefit trusts and charitable trusts. Maxine is a leader in the use of private trust companies and all matters pertaining to licensing, registration and operation of private trust companies. She also advises clients on wills and the administration of estates.