

# THE BAHAMIAN FOUNDATION: A CIVIL APPROACH TO COMMON PROBLEMS

Trusts find their origins in equity; foundations in statute. Trusts date as far back as the Roman times while foundations have a more recent history.



## THE BAHAMAS HAS BECOME THE FIRST LEADING COMMON LAW JURISDICTION TO INTRODUCE FOUNDATIONS LEGISLATION

A trust is fundamentally an agreement, created by deed, between a settlor and trustee for the benefit of one or more beneficiaries. A foundation, on the other hand, is its own legal entity. Both, nonetheless, are fundamental tools in estate planning.

Trusts were initially established primarily for estate planning. Foundations were initially created for the purpose of providing protection for assets as well as preserving confidentiality at the time of the Second World War.

Foundations have been available in several civil law jurisdictions, starting in Liechtenstein in the late 1930s, moving to other European countries in years to come and more recently to non-European jurisdictions, where trusts are not as well known, frequently misunderstood and not always acceptable. The Bahamas now is the first premier Common Law jurisdiction to introduce foundations.

There are no doubt many purposes for which trusts or companies are currently used and for which foundations may also be used. Foundations may be used for estate and tax planning, asset protection, preserving family wealth and confidentiality, segregation of assets and establishing charities. When there are purposes for which a company is better qualified than a foundation, a company could be set up as a subsidiary of the foundation to meet that requirement.

While there are many similarities between foundations and trusts, there are characteristics which are unique to foundations. Many of the distinguishing features result from the fact that a foundation constitutes a hybrid between a trust and a company, having several aspects in common with one or the other.

#### A CIVIL APPROACH CONTINUED...

Similar to a trust, a foundation can be established by will or by charter, executed by a founder who may be a natural or legal person. By way of the charter, a founder may reserve powers to itself such as the ability to revoke the foundation, amend the charter itself or add or remove beneficiaries.

A foundation may have beneficiaries. Beneficiaries may be named at the time of the foundation's establishment, or the charter may provide the procedures for naming them at a later date. Vested beneficiaries are entitled to be notified of their interests and to receive a copy of the charter and accounts.



### A FOUNDATION CONSTITUTES A HYBRID BETWEEN A TRUST AND A COMPANY, HAVING SIMILAR ASPECTS IN COMMON WITH ONE OR THE OTHER

A foundation can also have a protector. The protector can play an active or passive role depending on the foundation's charter. For example, the protector may have the authority to appoint and remove foundation council members or his consent may be required before the foundation's council moves forward with certain changes.

Under the Foundations Act, a foundation may be used to avoid forced heirship in other jurisdictions and is subject to well-established creditor protection provisions. In addition, the foundation's charter may include in terrorem provisions and restrictions against alienation.

Like a company, a foundation, as a distinct legal entity, enjoys limited liability and unlimited duration. It must be registered and have a registered office. A foundation may also redomicile in another jurisdiction and a foundation established in another jurisdiction may redomicile in The Bahamas.

# THE ADVANTAGES OF A BAHAMIAN FOUNDATION

Foundations have several features which make them, in some cases, the preferred option as an estate and inheritance planning tool, including:

- A foundation is a distinct legal entity which is important for “proper law” questions and for providing easily recognizable liabilities and accountabilities;
- The founder may reserve powers as provided by the charter;
- There is broad recognition for foundations by civil law countries;
- Assets placed within the foundation are owned solely by the foundation;
- There are no perpetuity period rules applicable to foundations, which provides for continual, unending succession if that is desired by the founder;
- A change in a foundation’s governing body does not change the legal ownership of the foundation’s assets; and
- It is able to sue and be sued in its own name.

Arising from these advantages, the foundation’s council and its officers are less exposed to possible legal liability. Further, the reservation of powers to the founder is unlikely to lead a court to consider a foundation structure as a sham.

The Bahamian Foundation, with its flexibility and unique advantages, is an important tool for global advisors. Other Bahamian advantages include:

- Usage for private, commercial and charitable purposes;
- Dispositions to the Bahamian Foundation benefit from the jurisdiction’s strong and balanced asset protection law;
- There is no statutory requirement for an external audit unless the foundation’s charter so provides;
- A nominee may serve as the founder;
- All officers, foundation council members and other supervisory personnel benefit from statutory indemnification from all liabilities, losses and expenses incurred by a foundation, provided they acted honestly and in good faith;

#### A BAHAMIAN FOUNDATION CONTINUED...

- Council members do not need to be located in The Bahamas;
- In addition to a foundation council, the Bahamian Foundation may have some other governing body or supervisory person, such as a protector;
- The Founder may assign his reserved powers;
- A foundation established in another country may redomicile in The Bahamas and a Bahamian Foundation may redomicile in another country provided that country permits redomiciliation.

There are no direct taxes in The Bahamas, thus making Bahamian Foundations ideal for cross border transactions and international estate and inheritance planning. In addition, the country enjoys a long history in providing international financial services supported by many of the world's largest and most prestigious financial institutions.

**IT IS EXPECTED THAT THE MOST POPULAR PURPOSE FOR WHICH FOUNDATIONS WILL BE ESTABLISHED IN THE BAHAMAS WILL BE THE HOLDING AND MANAGEMENT OF ASSETS**

The legislative framework for Bahamian Foundations, the country's common law traditions and tax neutrality and a well established financial services industry provide a compelling environment to establish private, commercial and charitable structures.

# USING FOUNDATIONS

A foundation, as a hybrid between a trust and a company, creates unique structuring opportunities. The additional features of a Bahamian Foundation, including the ability to use it across private, commercial and charitable structures, open the door for creative planning opportunities, some of which are noted below.

## TO INVEST IN FAMILY COMPANIES

For example, a founder has a sentimental attachment to X Limited, which has been in his family for as long as he can remember, and has a beauty products business which employs many family members. He endows a foundation with the shares of X Limited for the purpose of retaining the shares to X Limited for the benefit of his family. By this means, the founder accomplishes his estate planning objectives and avoids the complications which would have ensued had he placed the shares of X Limited into an ordinary trust.

## TO OWN A PRIVATE TRUST COMPANY

A founder creates a foundation to hold the shares of XPTC. The founder, members of his family and his advisors may be elected as directors of XPTC and they assume responsibility for the management of XPTC. The directors of XPTC may assume a more aggressive investment strategy than an institutional trustee would be prepared to undertake and may save some trust administration expenses. The founder does not, however, own XPTC, the foundation does.

## TO PROVIDE FOR PHILANTHROPIC PURPOSES

Many individuals wish to support a philanthropic purpose which may not be exclusively charitable.

For example, a founder may wish to endow a foundation whose purpose is to promote efforts to secure an animal from extinction or to benefit a specific or sporting or entertainment event.

Of course, a foundation may be established for charitable purposes as well.

## TO SEPARATE VOTING AND ECONOMIC BENEFITS

For example, a founder endows the foundation with non-voting shares of X Limited. The foundation will receive the economic benefits from the non-voting shares for the family of a founder while the voting shares continue to be held by the founder in his individual capacity.

## USING FOUNDATIONS CONTINUED...

### TO PROVIDE FOR AN EMPLOYEE SHARE OPTION SCHEME

Foundations can be useful in the context of employee share option schemes.

For example, Employer A endows a discretionary foundation for the general benefit of the employees of Employer A, its affiliates and their dependants. The foundation is funded by contributions from Employer A and in addition, by substantial shareholders in Employer A and its affiliates. The foundation benefits employees and dependants generally but also performs vital functions with regard to share incentive or share option arrangements.

The foundation may use its assets to acquire shares either by purchase or by subscription and either grant options over such shares or agree to sell them to employees, possibly extending valuable credit to the purchasing employee.



## THE ADDITIONAL FEATURES OF A BAHAMAS FOUNDATION PROVIDE THE ABILITY TO USE IT ACROSS PRIVATE, COMMERCIAL AND CHARITABLE STRUCTURES

When the employee wishes to realize his shareholding, the foundation can be a useful vehicle for repurchasing shares and making them available to other employees. This is particularly useful for a private company, where sales of shareholdings may be very difficult to arrange or legally restricted. The foundation can act as a purchaser of the first resort and the foundation can acquire any shares that are for sale, so that it can offer them to other employees. There may also be tax advantages for Employer A and the employees in certain jurisdictions.

### TO PERPETUATE A PARTICULAR CORPORATE GOVERNANCE PHILOSOPHY

As an example, a founder endows a foundation with shares which comprise a controlling interest in X Limited for the benefit of his family. The foundation council's mandate is to evaluate the performance of the CEO, to set the CEO's remuneration and to adopt and evaluate policies of corporate conduct and governance.

#### **TO PROVIDE FOR SUBORDINATED DEBT**

To provide certainty with regard to the ranking of priority amongst creditors involved in a loan transaction or on the issue of debt securities in an insolvency.

For example, X Limited wishes to borrow from both Z Bank and A Bank. X Limited establishes a foundation of which both Z Bank and A Bank are beneficiaries. The charter of the foundation could clearly provide that the rights of Z Bank will be subordinated to those of A Bank.

#### **TO HOLD THE BENEFIT OF WARRANTIES/COLLATERAL**

In order to avoid novation issues, the foundation would hold the benefit of warranties for a wider and/or changing class of investors.

For example, X Limited wishes to borrow funds from a consortium of lenders. It is anticipated that the members of the consortium will change from time to time. X Limited endows a foundation in which all lenders are beneficiaries in proportion to the size of their loan. The foundation incorporates A Limited which becomes the borrower. A Limited enters into certain warranties and lodges collateral with the foundation for the benefit of the lenders; as lenders change, they are excluded or added as beneficiaries of the foundation.

#### **TO HOLD ASSETS OFF BALANCE SHEET IN CONNECTION WITH THE SECURITISATION OF MORTGAGES, ETC.**

A foundation provides a convenient means of packaging financial instruments into marketable securities.

For example, X Limited wishes to sell its mortgage portfolio to a number of investors. X Limited forms a foundation which incorporates A Limited. X Limited endows its mortgage portfolio to A Limited and the shares of A Limited are sold to the investors.

# A SUMMARY OF THE FOUNDATIONS ACT 2004

A complete copy of the Act is available at [www.bfsb-bahamas.com](http://www.bfsb-bahamas.com) but its provisions and key features include the following:

- A Bahamian Foundation is by statute a legal entity resident and domiciled in The Bahamas. It is precluded from carrying on any activity prohibited in The Bahamas or any activity which it is not licensed to perform.
- As the foundation is a legal entity, assets transferred to the foundation shall be the assets of the foundation and shall cease to be the assets of the founder.
- As is common with foundations, certain powers may be reserved to the founder. Alternatively, the law provides for the foundation to have a protector to whom powers can be vested in the event that a nominee founder is used; or to a foundation council or other supervisory or governing body/person.
- The Foundation must have a Secretary.
- The foundation must be registered with the Registrar General of The Bahamas.
- The secretary of the foundation must certify to the Registrar General:
  - That the foundation charter contains a statement that the value of the assets of the foundation may not be less than B\$10,000.00 or US\$10,000.00 or the equivalent thereof in any other currency.
  - That all of the requirements of the Foundations Act in respect of the registration of the foundation have been complied with.
- The foundation charter or articles may but need not be filed with the Registrar General. However, as set out in the Act, the charter must include:
  1. The name of the foundation with the word “Foundation” or a foreign language equivalent acceptable to the Registrar as the last word of the name;
  2. (a) The name and address of the founder;  
(b) If the founder is a legal person, the number and place of registration of that legal person;  
(c) The address in The Bahamas for service of documents on the founder;
  3. The purpose or purposes and objects of the foundation;
  4. The endowment of the initial assets of the foundation;

5. The designation of the beneficiary, or the identification of a body by which the beneficiary is to be ascertained, or a statement that a foundation has been formed, to benefit the public at large;
  6. A statement of whether the foundation is established for an indefinite period or a definite period; if the foundation is established for a definite period the charter must state that period;
  7. The name and address in The Bahamas of the secretary to the foundation and the registered office in The Bahamas of the foundation, and;
  8. A statement that the foundation may not have assets with value of less than B\$10,000 or US\$10,000 or the equivalent in any other currency.
- An extract of these minimum requirements must be held at the office of the Registrar General.
  - Re-domiciliation features allow a foundation from another jurisdiction to be re-domiciled to The Bahamas and for a Bahamian foundation to be re-domiciled to another jurisdiction.
  - Vested beneficiaries of a Bahamian foundation must be notified of their interest and will be entitled to request information from the officers of the foundation.
  - Proper records and accounts must be kept by the officers of the foundation which can be inspected by any officer, foundation council member, founder, auditor or any other supervisory person (e.g. protector) if any, at any time.
  - There are no perpetuity period rules applicable to foundations under this legislation.
  - Confidentiality provisions restrict any person acquiring information in his/her capacity as an officer, protector, council member, attorney or auditor of the foundation from disclosing such information relating to the foundation without the expressed consent from the founder and beneficiaries, or as required by law or a Bahamian court.

#### DUE DILIGENCE

While a Bahamian Foundation can be established for any lawful purpose and provides persons with a variety of options, it is subject to The Bahamas KYC regime. In this regard, one officer of the Bahamian Foundation must be a secretary that is licensed as a Bank or Trust Company or a Financial Corporate Service Provider who must conduct the necessary due diligence and provide the registered office.

## THE FOUNDATIONS ACT 2004 CONTINUED...

### INDEMNIFICATION

All officers, foundation council members and other supervisory persons benefit from statutory indemnification for liabilities, losses and expenses incurred by the foundation provided they acted honestly and in good faith.

Furthermore no officer, foundation council member or other supervisory person shall be liable for acts, omissions, errors of another person, except through their own gross negligence, willful deceit or misconduct, fraud or dishonesty.

### EXEMPTIONS

A Bahamian foundation is exempt from business license fees, income tax, capital gains tax and gift, estate and distributions tax on income or distribution accruing to or derived from the foundation or in connection with any transaction to which the foundation is a party.

It is also exempt from stamp duty, except when Bahamian real estate is included in the assets of the foundation.

Exchange Control Regulations also do not apply to a foundation, provided the foundation does not have any founders or beneficiaries who are treated as residents for Exchange Control purposes.

### REGISTRATION FORMALITIES

The registration process for Bahamas Foundations is comparable to that of a company registration in The Bahamas and, similarly, Bahamas Foundations will be registered by the Registrar General.

Like a company, the name of the Bahamas Foundation must first be reserved at the Registrar General's Office prior to the submission of the necessary documentation. The Registrar will confirm that the name of the foundation is valid for use and that the name chosen has been reserved for a period of 90 days.

Once the foundation name has been reserved, the required documentation may be submitted to the Registrar before the expiration of the 90-day period. This documentation will include the application for registration and statement signed by the secretary of the foundation or any attorney engaged to form the foundation.

The relevant fees must also accompany the documentation submitted for acceptance by the Registrar. The fee for the registration of a Bahamas Foundation is \$500. However, the

legislation allows for this fee to be prorated by each calendar quarter. For example, a foundation being registered between April and June will incur a registration fee of \$375 while a foundation being registered between October and December will pay \$125 for that year. The annual fee payable for each subsequent year will also be \$500.

# THE CHARTER

## DRAFTING PROVISIONS

The charter of a foundation establishes the basis for the structure as a legal entity and areas of accountability. As a result, careful consideration must be given to the objectives of the founder and the desired governance of the foundation.

Importantly, the foundation's intent to manage its own assets must be set out in the charter. The charter must designate the beneficiary or identify the means by which the beneficiary is to be ascertained, or state that a foundation has been formed to benefit the public at large.

Many options are available to the founder. The mechanisms for the appointment, removal, period of office and representative authority of officers of the foundation, including the number and description of such persons and the appointment, removal and period of office of the auditor, if any, to the foundation are at the discretion of the founder. Unless the foundation is public in nature, the charter is likely to reserve the right to appoint or remove an auditor to the founder or to make such appointment optional.

Providing for the endowment of supplementary assets of the foundation in addition to the initial assets is a very important step in drafting the charter of a foundation. The absence of this provision may inhibit the ability to make further contributions to the foundation.

The addition or removal of beneficiaries, the appointment of a foundation council or other supervisory persons such as a protector or committee of protectors and specifying the duties, functions, powers and rights to remuneration of a protector or committee of protectors and specifying circumstances in which the charter may be amended, if any, are useful planning tools.

## THE CHARTER CONTINUED...

A fundamental consideration is the reservation of rights or powers to the founder. The founder may retain the power of appointment and removal of the foundation council; power to appoint and remove officers; to nominate, add and remove beneficiaries; to establish the dispositive provisions of the foundation; to retain powers, to give advice or directions with regard to investments; to appoint and remove a protector, protector committee or some similar body; and power to amend and revoke the charter. The founder may assign his powers to any person.



## THE FOUNDATION'S INTENT TO MANAGE ITS OWN ASSETS MUST BE SET OUT IN THE CHARTER

The charter, importantly, may require or permit the making of articles. Where the charter provides that articles shall or may be made, such articles may without limitation include regulations:

- Concerning the distribution of assets made, or to be made, by the governing bodies of the foundation;
- Providing for the identification of any initial beneficiaries, or any beneficiaries to be designated at a later date, of the foundation;
- Providing for the identification of the remaining beneficiary upon a winding down of the foundation; and
- Providing for the regulation of any governing bodies of the foundation.

In the absence of articles, the Act will apply.