

The Bahamian Private Foundation

A civil law concept in a common law world

Historically, a foundation is a creature of civil law jurisdictions, where it is a distinct and separate legal entity.

Bahamian legislation

In 2004, the Foundations Act (the “Act”) introduced into The Bahamas, a common law jurisdiction, the concept of the “private foundation”. The Act was amended in 2005 and further amended in 2007.

The following is an overview of the Act and the Bahamian foundation.

The foundation defined

The Act defines “foundation” as “*an entity established by a foundation charter and in accordance with this Act; and which is registered*”. A foundation which satisfies the definition of a foundation under the Act is a legal entity, having a separate personality, resident and domiciled in The Bahamas and which can sue and be sued in its own name.

The formation document

A foundation may be established by a will or a foundation charter which will be the formation document of the foundation and is required to contain certain prescribed details, inclusive of, inter alia:

- (i) the name of the foundation with the word “foundation” (or such foreign deviation of this word as permitted at the discretion of the Registrar of Foundations in The Bahamas) as the last word in its name;
- (ii) details of the founder in, that is, the name and address of the founder and the address in The Bahamas for service of documents on the founder;
- (iii) the purpose(s) or object(s) of the foundation;
- (iv) the name and address in The Bahamas of the secretary or foundation

agent of the foundation and the address of the foundation’s registered office;

- (v) the value of the initial assets of the foundation.

In addition to the formation documents discussed above, a foundation may have articles if this is desired.

The charter **is not required to be filed at any public registry or public office in The Bahamas**. The formal establishment of the foundation shall not be completed until the foundation has been properly registered with the Registrar of Foundations in The Bahamas.

Registration of the foundation

Registration of the foundation takes place when a statement signed either by (i) the secretary (ii) foundation agent or (iii) the attorney engaged in the formation of the foundation containing the following particulars is filed (along with the other items discussed below) with the Registrar of Foundations in The Bahamas:

- (a) the name of the foundation;
- (b) the date of the charter and the date of any amendment made prior to the submission of the statement to the Registrar;
- (c) the foundation’s purpose or purposes and objects;
- (d) the date of the foundation’s articles (if any) and the date of any amendment made prior to the submission of the statement to the Registrar;
- (e) the name and address of the secretary and/or foundation agent;
- (f) the address of the foundation’s registered office;
- (g) the period for which the foundation is established;

(h) the value of the foundation’s initial assets and a statement that the foundation may not have assets with a total value of less than \$10,000; and

- (i) such other particulars as the secretary or the attorney shall in his absolute discretion wish to include in the statement.

In addition to the statement referred to above, a list containing the names and addresses of the foundation’s first officers, a statutory declaration by the secretary or foundation agent or attorney at law engaged in the formation of the foundation of compliance with all relevant requirements of the Act, and the prescribed fee are required to accompany the said statement.

A foundation is required to pay a registration fee which amount can vary from between \$125 to \$500 depending on the calendar quarter in which the foundation is registered.

On registration, the foundation will be issued a certificate of registration and from the date in the certificate, the foundation shall be a legal person capable from that date on of exercising all the functions of a foundation.

On an annual basis, the foundation is required to pay annual government fees in the amount of \$500.00. This amount will be increased if it is paid after 30th April.

Assets of the foundation

The foundation is required to have assets endowed to it, in a minimum amount of \$10,000, by its founder, which can consist of cash, shares or other assets.

Subsequent assets can be endowed and persons endowing any subsequent assets will not be regarded as the founder for purposes of the Act.

The Act defines “to endow” as “... to pass, or covenant to pass, the title in property absolutely, with or without consideration, to a foundation so that the property is the asset of that foundation and to pass, for the purposes of this definition includes whatever act may be necessary in relation to that property to transfer title effectively.”

Assets effectively transferred to a foundation, in the absence of fraud, are the property of the foundation, with full legal and beneficial title, and cease to be the property of the founder and shall not become the property of a beneficiary unless distributed in accordance with the provisions of the foundation charter or the articles (if any) or the Act.

Objects or purposes

Under the Act, the foundation’s main purposes or objects shall include the management of its assets. Commercial or business transactions can comprise the purposes or objects of the foundation but must be secondary to its main purposes or objects.

Officers and governing body

A Bahamian foundation is required to have at least one officer, that is, a secretary or foundation agent. If the foundation appoints as its officer a secretary, such foundation is not required to have or appoint another entity as its governing body and in such case, the secretary can and will be the governing body of the foundation. If the foundation appoints as its officer a foundation agent, such foundation will be required to appoint a foundation council which foundation council will be the governing body of the foundation as the foundation agent’s duties will usually be, in such case, primarily administrative.

An officer of the foundation (that is the secretary or foundation agent) must be a licensed trust company or a financial and corporate service provider licensed pursuant to the laws of The Bahamas.

The foundation council can be comprised of (i) two or more natural persons

or (ii) a legal person and one or more natural persons or (iii) one or more legal persons. Such persons can be non-Bahamian individuals or companies and can reside or be located outside of The Bahamas; but, officers and auditors (and their related parties) of the foundation are not eligible to be members of the foundation council.

Meetings and financial matters

The foundation is required to hold at least one officer’s meeting in each year. The founder and members of the foundation council shall be entitled to be notified of the meeting, can table business to be considered at the meeting and attend and be heard at the meeting but are not able to vote.

The foundation is required to keep such financial statements, accounts and records as the officers or the foundation council consider necessary or desirable in order to reflect the financial position of the foundation.

Rights of beneficiaries to receive information

Beneficiaries who have a vested interest in the assets of the foundation have the right to request information or documents pertaining to their interest and to inspect copies of the charter, articles and audits.

Exemptions & stamp duty

A Bahamian foundation is exempt from the payment of business licence fees, income tax, capital gains tax or any other tax on income or distributions accruing to or derived from such foundation or in connection with any transaction to which that foundation is a party. Also, no estate, inheritance, succession or gift tax, rate, duty, levy or other charge is payable by a founder or beneficiary with respect to any interest given to or received from a foundation.

The exchange control rules and regulations do not apply to a foundation or to any transaction by a foundation whose

founder(s) and beneficiaries are non-resident for Bahamian exchange control purposes.

Additionally, all instruments to which a foundation is a party relating to transactions in respect of the assets of a foundation and relating to other transactions concerning the business of a foundation is exempt from the payment of stamp duty, provided however that in the case of assets of the foundation no Bahamian real property or personalty is included in such assets.

Re-domiciliation

The Act permits a foundation registered thereunder to re-domicile and register under the laws of another country having regulation of foundations generally or reasonably compatible with the laws of The Bahamas in the manner provided by those laws.

Additionally, a foundation established under the laws of another country, having regulation of foundations generally or reasonably compatible with the laws of The Bahamas relating to foundations, may, if it will satisfy the requirements prescribed for a foundation under the Act, re-domicile to The Bahamas, provided that the laws of such other country permit it to re-domicile.

Uses

Some possible uses of a Bahamian private foundation include:

1. estate or tax planning;
2. holding shares in an underlying company;
3. charitable or philanthropic purposes; and
4. structuring of commercial deals.

The above is not meant to be construed as legal advice in any way.

Halsbury Chambers