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Seychelles Foundations

The Republic of the Seychelles is the latest offshore jurisdiction to launch a Foundations law. It is suggested that the main markets that are making use of the Seychelles as an international financial centre – continental Europe and south east Asia – will find the Foundations concept an attractive alternative to the trust concept.

The Foundations Act 2009

A Seychelles Foundation is governed by the Foundations Act 2009.

It is clear from the legislation that a Seychelles Foundation is a separate legal entity which is the beneficial owner of its assets.

The further features of Seychelles Foundations are summarised below.

Founder

A Seychelles Foundation is initiated by a Founder who subscribes his name to the Charter of the Foundation.

The Founder may act on his own account or may be a licensed trust and corporate services provider in The Seychelles, acting for a client who wishes to create the Foundation.

A Founder may reserve, in the Charter or Regulations of the Foundation, for himself or any other person, rights to direct or approve:



- Investment activity;
- Amendments of the Charter or Regulations;
- Appointment or removal of a Councillor;
- Appointment or removal of a supervisory person;
- Rights, entitlement and restrictions of a beneficiary;
- Appointment or exclusion of beneficiaries;
- Dissolution of the Foundation.

The Charter

The Charter is broadly equivalent to the Memorandum of a company. It must include –

- The name of the Foundation;
- The name and address of the Founder;
- The objects of the Foundation;
- Its initial assets (minimum US \$1);
- In the case of “purpose” Foundations, the purpose;
- Details of how the Council is to be established;

- The name and address of the registered agent, and the address of the registered office;
- The duration of the Foundation, unless this is to be of indefinite duration (in which case this must be specified).

The Charter may include other provisions, but in practice these will be reserved for the (private) regulations.

Regulations

The Regulations will in practice deal with the governance of the Foundation. Key provisions will be likely to include –

- Identification of the Councillors who sit on the Foundation Council;
- Rules for the appointment and removal of Councillors;
- Rules to establish how decisions of the Council are made;
- Designation of the beneficiaries, and the rules for the appointment and removal of beneficiaries;
- Rules for the appointment and removal of a Protector or Protectors and their powers and duties;
- Rules for the appointment of persons to carry out particular duties on behalf of the Founder;
- How the Charter or Regulations may be amended;
- Reservation of rights or powers to the Founder;
- appointment of "supervisory persons".

The Council

The Council is the prime organ of management.

The Council must consist of at least one person, who may be a body corporate.

The duties of the Council are to carry out the objects of the Foundation; to manage and administer the assets of the Foundation; and to do such other acts as may be provided by the Charter, Regulations and the Foundations Act 2009.

Either the Founder appoints the Council, or the Council is appointed by the terms of the Charter or Regulations.

A Councillor is bound by the terms of the Charter, Regulations and the Foundations Act.

A Councillor must act honestly and in good faith with a view to the best interests of the Foundation. He, she or it must exercise the care, diligence, and skill of a reasonably prudent person.

The duties of a Councillor are owed only to the Foundation.

Protector

A Protector may be a natural person or a body corporate.

The role of the Protector is to ensure compliance by the Foundation and Councillors with the Charter, Regulations, and the Foundations Act, and to monitor the activities of the Councillors of the Council.

A Founder, a beneficiary or a Councillor may be appointed as a Protector, but a sole Councillor or a sole beneficiary may not be a Protector.

Supervisory Persons

The Act allows for the appointment of "supervisory persons" who can be allocated wide-ranging and feasible supervisory powers over the Foundation, and the Council. A supervisory person includes any Protector and any other person appointed by the Founder or Protector (including a Councillor).

Beneficiaries

By reference to the Charter or Regulations, a beneficiary shall be identifiable by name or ascertainable by reference to a class or relationship to another person.

A Founder may be a beneficiary, but not the sole beneficiary unless on the death of the Founder/sole beneficiary, other beneficiaries are designated.

Beneficiaries are entitled to information about the Foundation; including annual financial statements and minutes and resolutions of the Council.

A beneficiary is not owed fiduciary duties by the Foundation, the Council or any other person appointed under the Charter, Regulations or the Foundations Act (e.g. Protector, or supervisory person).

Administration

A Foundation need not file accounts but must keep proper books of accounts at the registered office or some other place.

The accounts are not filed in any public register. The accounting records must be kept for seven years after the end of the financial year to which they relate.

A Foundation must keep at the registered office in the Seychelles a register of –

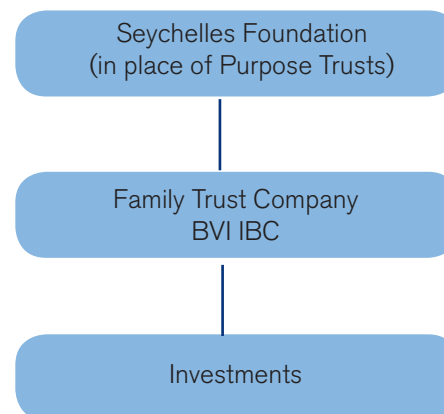
- a) Councillors;
- b) registered agent;
- c) supervisory persons;
- d) donees of power of attorney.

Continuation

A Seychelles Foundation can be continued in another reciprocal territory. A foreign registered Foundation can also continue in Seychelles. The Seychelles Foundations Act also contain detailed provisions for consolidation or merger, and for dissolution.

Case Study

Example of a new potential application of the Seychelles Foundation



Comments

Family Trust Companies (FTC) are often directly owned by the family, who also sit on the board of directors of the FTC with senior executives of the trust and corporate service provider. These arrangements (which have planning weaknesses) address the problem of "loss of control" that trusts pose to settlors.

An improvement on this concept is to have the FTC owned by a "Purpose trust" (broadly a trust for purposes rather than for beneficiaries). This at least addresses the problem of having the Family Trust Company owned by members of the family which can result in tax problems based on management and control, or invite the application of unwelcome foreign succession laws (eg Sharia).

However the concept of a trust owned by another trust is potentially confusing and going forward it will be conceptually simpler to have a body corporate such as a Foundation. The Foundation may also be incorporated for purposes rather than owning the shares of the FTC.

Conclusion

The Seychelles Foundation is a separate legal person consisting of a Founder, a Council, possibly a Protector or other supervisory persons, and beneficiaries. The Foundation is a contractual arrangement, without fiduciary duties to the beneficiaries. The contractual “glue” of the Foundation will be readily understood by Founders in Europe and Asia, and is likely to be preferred to the equitable obligations of the trust. The Seychelles Foundation thus a “deal”, put together offshore, to ensure that the Founder are fulfilled.

The role of the Council is to manage the affairs of the Foundation in order to secure the wishes of the Founder. The Founder can appoint a Protector or some other supervisory person to ensure that the Council comply with the wishes of the Founder. The beneficiaries do not own any assets of the Foundation, or any interests in the Foundation itself. Until they receive a benefit from the assets of the Foundation, the assets remain in the beneficial ownership of the Foundation.

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