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Mauritius Global Business Update 16

The Foundations Act 2012 (“Act”)

We are pleased to inform you that the Mauritius International Financial Centre now offers a new product in addition to the existing limited partnership, private and public company, limited life company and trust.

The new offering is the “Foundation”, a hybrid vehicle which combines the benefits of a company with those of a trust. The Foundations Act 2012 is a very modern legislation and is effective since 1 July 2012.

It is mostly used in wealth management, estate planning and asset holding but is equally ideal as a special purpose vehicle to legally protect one’s assets against personal liability, high taxes or forced heirship rules.

The Foundation is well known and very popularly used in civil law countries. Civil law is of course the most widespread system of law around the world. Examples of civil law countries are all European Union states except UK and Ireland, China (except Hong Kong), and Goa. It is interesting to note that save for Goa, India follows the common law legal system similarly to Australia, UK (except Scotland), Singapore, Hong Kong and USA (except Louisiana) among others. Mauritius has a hybrid system of law combining common law with civil law.

A Foundation does not have legal personality unless it is registered with the Registrar of Foundations and has been issued with a certificate under the Foundations Act.

This new legislation allows for the incorporation and migration of Foundations to and from Mauritius.

Taxation wise, the Foundation may be structured to be exempt from Mauritius tax.

This update is not meant to be and is not an exhaustive list of all the features of the Mauritius Foundation. Only those salient features which, in our opinion, may be of interest to international clients are included here.



1. The basic working principle of a Foundation

- 1.1. A Foundation may be established in Mauritius or elsewhere (migration is allowed) for the purposes provided in its charter. Where a Foundation is established by a will, the latter is deemed to be its charter.
- 1.2. A Foundation is formed when a person defined as a Founder endows property i.e transfers property to the Foundation. The Founder must be of full age.
- 1.3. The purpose of a Foundation may be a) charitable or non-charitable or both, b) for the benefit of a person or class of persons to carry out a specified purpose or both.
- 1.4. The Foundation is managed by a Foundation Council which carries out the objectives and purposes of the Foundation.
- 1.5. The Foundation may have one or more beneficiaries.

2. Registration of the Foundation

- 2.1. To have a legal personality, a Foundation is required to be registered with the Registrar of Foundations and issued with a Certificate of Registration.
- 2.2. Only an extract from the charter of the Foundation needs to be submitted to the Registrar, and should include:
 - 2.2.1. the name - “Foundation” should be included in the full name of the entity
 - 2.2.2. function and objects of the entity
 - 2.2.3. Name and residential address of the founder in Mauritius
 - 2.2.4. Name and residential address of all beneficiaries
 - 2.2.5. Name and residential address of the secretary and all members of the Council, and all other officers.
- 2.3. Other information, such as the detailed business plan and projections can stay confidential to the Foundation.

3. The founder.

- 3.1. The founder is the person who bestows the initial assets to the entity. He can also be a/the beneficiary of the Foundation. A specificity of the Mauritius Foundation is that it can only come in existence after the endowment of the initial assets, as opposed to foundations established in other jurisdictions.
- 3.2. The founder can also be a body corporate.
- 3.3. A person who endows property to a Foundation **after** its registration does not, de facto, acquire the rights and powers of a founder as a result unless allowed by the charter.
- 3.4. If a founder fails to honour his undertaking, as recorded in the charter, to endow property to a Foundation, the latter shall enforce that undertaking against the founder if 12 months have elapsed since registration date or the date of endowment stipulated in the charter.



4. The charter.

4.1. The charter is a constitutional document and must include amongst others:

4.1.1. the name of the Foundation, the particulars of the founder, the purpose and objects of the Foundation, the initial assets of the Foundation, the beneficiary/ies of the Foundation or the manner of appointment and removal of the beneficiary, the period for which the Foundation is established, the name and address of the Secretary, the address of the registered office of the Foundation, and the procedure for the appointment of the council or of a protector or committee of protectors and its powers and duties.

4.1.2. The charter should be in writing and signed by the founder.

5. The property of the Foundation.

5.1. All property legally transferred to a Foundation cease to be the property of the founder and title in such property passes to the Foundation exclusively & legally.

5.2. No beneficiary has any right to the property unless a distribution is made to him in terms of the charter of the Foundation and the Act.

5.3. The property is managed in accordance with the charter and the Act.

6. The council.

6.1. A Foundation is required to have a council, as provided by its charter, to administer its property and carry out its objects.

6.2. The council is akin to a board of directors and its members are appointed either by the founder or a person empowered by him as provided by the charter and the Act and its activities are governed likewise by the charter and the Act.

6.3. Any officer or his spouse or a person in a direct or collateral line of relationship with the person empowered by the founder, as envisaged in point 6.2 above, cannot be appointed as council member

6.4. A council should have at least one member who is ordinarily resident in Mauritius. Two Mauritius resident members are required should the Foundation wishes to avail of tax treaty benefits.

6.5. Only a natural person who is fit and proper and of good age or a body corporate who is in good standing may be appointed as a council member. Written consent of the appointee is required.



7. Duties and Powers of the council

7.1. A council is required to conduct the affairs of the Foundation in accordance with its charter, has a duty of supervision of its management and conduct and to act honestly, in good faith and to exercise reasonable care, diligence and skills.

8. The Beneficiary.

8.1. A Foundation can have one or more individuals as beneficiary. The beneficiary is the person or institution who will benefit from the Foundation assets, upon distribution of same. However, the beneficiary does not have any beneficial interest in the Foundation.

8.2. A founder of a Foundation can also be its beneficiary.

9. The Secretary.

9.1. Every Foundation must have a secretary which must be a Management Company where the Foundation proposes to apply for a global business licence. GWMS qualifies to act as such secretary.

9.2. Alternatively, the secretary may also be a person resident in Mauritius who is authorized by the Financial Services Commission (“FSC”) to act as such.

9.3. The secretary is required to accept, on behalf of the Foundation, service of all documents pursuant to any legal proceedings instituted against the Foundation;

9.4. Any liability incurred by a secretary while in office continues even after resignation of the secretary and may be enforced by the Foundation.

10. Registered Office.

10.1. Every Foundation needs a registered office in Mauritius which should be stated in the charter.

10.2. Communications, notices and service for legal proceedings should be addressed to this address.

11. The Protector.

11.1. A Mauritius Foundation may opt for a Protector or committee of protectors, and there is no restriction on the appointment of such a Protector who can fulfill this role (unlike other jurisdictions).



12. Pre-registration actions

- 12.1. Actions or contracts carried out in the name of the Foundation prior to registration are deemed to be valid provided these are ratified by the council, post registration, and are allowed by the charter.

13. Liability

- 13.1. Officers of a Foundation and council members remain liable to the Foundation in respect of any fraud, willful misconduct or gross negligence that may be committed by them irrespective of any contract or charter or articles that may provide otherwise.

14. Records

- 14.1. Records of all transactions, cash movements, assets and liabilities and accounting records should be kept.
- 14.2. Financial statements must be prepared. Where a GBL1 licence is held, the accounts must be audited and filed with the FSC within 6 months of financial year end.

15. Global Business Foundations

- 15.1. A Foundation may apply to the FSC strictly through its Management Company (“MC”) to hold a Category 1 Global Licence which enables access to the vast network of taxation treaties of Mauritius.
- 15.2. A GBL1 Foundation must have its MC as its secretary and at least two council members should be resident in Mauritius. GWMS can provide these officers.

16. Taxation of a Foundation

- 16.1. A Foundation is exempt from Mauritius tax in two cases:
 - 16.1.1. where the founder is a non-resident and all its beneficiaries appointed under the terms of a charter or a will are, throughout an income year, non-resident in Mauritius and a declaration of non-residence is filed with the Mauritius Revenue Authority; or
 - 16.1.2. if the Foundation holds a Category 1 Global Business Licence (“GBL1”) under the Financial Services Act 2007 (“FSA 2007”).



- 16.2. In all other cases, a Foundation is subject to Mauritius tax on its chargeable income at the rate of 15%.
- 16.3. Any distribution to a beneficiary of a Foundation is considered to be a dividend to the beneficiary. Such dividend is exempt from Mauritius tax in the hands of the beneficiary and there is no withholding tax in Mauritius on such dividend paid to a foreign beneficiary.
- 16.4. A Foundation is considered to be tax resident in Mauritius if it is registered in Mauritius OR has its central management and control in Mauritius.

17. Redomiciliation

- 17.1. Foreign Foundations can redomicile to Mauritius and vice versa.
- 17.2. Such migration of a foreign Foundation into Mauritius does not create a new legal entity.

18. Winding-Up

- 18.1. A Foundation can be wound up voluntarily or by an order of the Court. A petition can be presented by the Foundation itself, a Beneficiary, a creditor, a liquidator, the Registrar or the FSC for winding up.

19 Confidentiality

- 19.1 The Registrar of Foundations is required to maintain a register of Foundations and record therein certain details and all documents filed in respect of the Foundation such as name, registered office address, name and address of founder, registration date, name and address of secretary, name and address of council members etc.
- 19.2 The register stated above may be inspected only by a person authorised by the secretary of the Foundation or by the FSC against a fee.
- 19.3 Any other records i.e accounting records, minute book, charter etc are open to inspection ONLY by the founder, officer, Registrar or FSC.
- 19.4 The Foundation Act contains a section which imposes a duty of confidentiality on any officer, protector, council member in respect of any information he acquires in respect of the Foundation.
- 19.5 A beneficiary may also inspect the records on request to the secretary.



20. Trust and Foundation, their similarities and differences.

| Similarities | Differences | |
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| | Trust | Foundation |
| Trust & Foundation | | |
| Used in succession planning | Has no separate legal persona | Separate legal persona upon registration |
| Assets can be transferred or donated and equally revocable | Assets vest in the trustee, a third party, who acts as provided in the trust deed | Self governing and can hold assets in own name |
| May be created during the Founder's or Settlor's lifetime or on death | Does not have to be registered with any authority. | If registered, Foundation is governed by clear statutory laws and regulations. |
| May be unlimited in duration | Assets vest in the trustee and settlor has no control over assets | Founder can be part of Council and hence control of assets of the Foundation. |
| A Protector or an Enforcer can be appointed | Trustee contracts in own name and may be personally liable. | Council members contract in the name of the Foundation and therefore assume no personal obligations. |
| | Trusts are subject to duration of 99 years but this period may be renewed | Unlimited duration. |
| | Settlor can also be beneficiary of the assets/profits of the trust | Assets and profit belong to the Foundation |
| | Assets are transferred into trust on settlement | Partial transfer of assets on registration is possible |

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21. Mauritius Foundation v/s Foundations from other jurisdictions

| | Jurisdiction | <u>Selected salient features</u> |
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| 1. | Panama | <p><u>Panama Foundation</u></p> <p>1.1 Identity of the beneficiaries can be kept secret and can include the founder.</p> <p>1.2 The charter is deposited with the Registrar and is available to the public.</p> <p>1.3 The by-laws on the other hand are not open to the public.</p> <p>1.4 There is a minimum capital requirement of US\$10,000</p> <p>1.5 It is exempt from tax.</p> <p><u>Mauritius Foundation</u></p> <p>1.6 The identities of all parties including beneficiaries and founders connected with the foundation must be stated in the charter of the foundation which must be filed with the Registrar of Foundations (ROF) if the foundation wishes to have a separate legal personality.</p> <p>1.7 Only an extract of the charter needs to be filed with ROF but the extract must contain the identity details.</p> <p>1.8 If no separate legal personality is required, registration is not required.</p> <p>1.9 If the foundation wishes to benefit under the double tax treaty network of Mauritius, then licencing with the Financial Services Commission (FSC) is required as well as with the ROF. Full disclosure of all parties related to the foundation will need to be filed with the ROF & FSC.</p> <p>⇒ 1.10 At all times, GWMS will require full disclosure of all connected parties.</p> <p>⇒ 1.11 However, no records of the foundation are in the public domain and hence cannot be accessed by the public in any circumstances save if authorised by the secretary of the foundation or by the FSC against a fee.</p> <p>⇒ 1.12 There is NO minimum capital requirement.</p> <p>⇒ 1.13 It is exempt from tax in Mauritius if both the founder & the beneficiaries are non resident in Mauritius and a declaration of non residence is filed with the Mauritius tax authorities.</p> <p>⇒ 1.14 It is also tax exempt if it holds a Category 1 Global Business Licence under the Financial Services Act 2007.</p> |
| 2. | Liechtenstein | <p><u>Liechtenstein Foundation</u></p> <p>2.1 A foundation may be both private and charitable.</p> <p>2.2 A foundation has a representative who deals with government officers.</p> <p>2.3 Private foundations pay SF10,000 a year in tax.</p> |



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| | | <p><u>Mauritius Foundation</u></p> <p>2.4 A foundation may be both private and charitable. 2.5 Every foundation must have a secretary (individual or corporate but always licenced by the FSC) resident in Mauritius. Such secretary is the representative of the foundation. 2.6 Same provisions for taxation as 1.13 & 1.14 above apply.</p> |
| 3. | Switzerland | <p><u>Swiss Foundation</u></p> <p>3.1 Swiss law makes provision for ordinary foundations and special foundations– which include family foundations. 3.2 These do not require registration and are not subject to supervision. 3.3 The beneficiaries must be members of the family and in financial need.</p> <p><u>Mauritius Foundation</u></p> <p>3.4 The foundation can be for charitable or non charitable purpose or set up for a specified purpose. 3.5 Registration is only required if the foundation wishes to have separate legal personality. See 1.6 to 1.9 above for further information. 3.6 The beneficiaries can be anyone and must be identified in the charter of the foundation. The founder can also be the beneficiary.</p> |
| 4. | Luxembourg | <p><u>Luxembourg Foundation</u></p> <p>4.1 Allows only charitable foundations.</p> <p><u>Mauritius Foundation</u></p> <p>4.2 The foundation can be for charitable or non charitable purpose or set up for a specified purpose.</p> |
| 5. | Jersey | <p><u>Jersey Foundation</u></p> <p>5.1 A “qualified member” is required, as is a “guardian” – a kind of protector. 5.2 There is no capital requirement. 5.3 Records must be kept. 5.4 Tax free.</p> <p><u>Mauritius Foundation</u></p> <p>5.5 Every foundation must have a secretary (individual or corporate but always licenced by the FSC) resident in Mauritius. Such secretary is the representative of the foundation. 5.6 Where the foundation wishes to benefit under the network of double tax treaties of Mauritius, it must apply for a Category 1 Global Business Licence issued by the FSC. In such case, the application for the licence must be channelled through an FSC licenced Management Company (MC) (a.k.a a trust company in Europe) and must appoint the MC as its secretary.</p> |



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| | <p style="text-align: center;">⇒</p> | <p>5.7 GWMS is a licenced MC. 5.8 There is no capital requirement. 5.9 Records must be kept. 5.10 Tax free only under certain conditions as stated under 1.13 & 1.14 above.</p> |
| <p>6.</p> | <p>Isle of Man</p> <p style="text-align: center;">⇒</p> | <p><u>Isle of Man Foundation</u></p> <p>6.1 Unlimited duration. 6.2 Requires a licence. 6.3 There is no requirement for a qualified person. 6.4 The High Court has extensive supervisory powers. 6.5 Tax free.</p> <p><u>Mauritius Foundation</u></p> <p>6.6 Unlimited duration. 6.7 Does not require a licence save as described under 1.9 above. 6.8 Regarding qualified person, please see 5.5 to 5.6 above. 6.9 Courts generally do not supervise foundations but has a role in certain matters when application is made to it in matters like winding up or litigation. Only the Supreme Court has jurisdiction on foundations. 6.10 Tax free only under certain conditions as stated under 1.13 & 1.14 above.</p> |
| <p>7.</p> | <p>Seychelles</p> | <p><u>Seychelles Foundation</u></p> <p>7.1 Foundation must be registered with Registrar of Foundations. 7.2 No requirement to state the name of any beneficiaries in the foundation charter 7.3 Needs to appoint a registered agent licenced by Seychelles authorities. The registered agent is the official representative of the foundation in relation to service of documents on the foundation. The Seychelles Foundation Act does not provide for the appointment of a secretary. 7.4 Registered office of the registered agent is the registered office of the foundation. 7.5 No requirement for a councillor to be resident in Seychelles. 7.6 Tax free. 7.7 Nominee founders are permitted. 7.8 Shelf foundations are permitted for immediate use.</p> <p><u>Mauritius Foundation</u></p> <p>7.9 Registration is only required if foundation requires to have a separate legal personality. 7.10 Identity of beneficiaries must be stated in the charter document. See 1.1 to 1.6 above for more information. 7.11 Mauritius law provides for the appointment of a secretary as opposed to a registered agent. Service of documents is also effected to this registered office address.</p> |



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| | | 7.12 Registered office of the secretary is the registered office of the foundation. |
| | | 7.13 Requirement for a council member to be resident in Mauritius. |
| | | 7.14 Tax free only under certain conditions as stated under 1.13 & 1.14 above. |
| | ⇒ | 7.15 Nominee founders are not allowed. |
| | ⇒ | 7.16 The concept of shelf entities has long been abandoned in Mauritius. |
| | ⇒ | 7.17 The relative flexibility of the Seychelles foundation may at first sight look appealing because of the secrecy inherent in the law i.e identities of beneficiaries not stated in charter, nominee founders, shelf foundations etc. However these are features of an era long gone and now looked down by international watchdog financial organisations like `OECD, FATF and countries like EU countries, USA, RSA etc. These very characteristics are sure attention grabbers to tax authorities worldwide. |
| | ⇒ | 7.18 The 2012 Doing Business Survey by World Bank ranked Mauritius 23rd as the easiest place to do business while Seychelles is ranked 103 rd . |
| | ⇒ | 7.19 The 2012 MO Ibrahim Index on governance has placed Mauritius first again among African countries for the 4 th year in a row. |

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International network

GWMS is the sole member firm for Mauritius of AITC (www.aitc-pro.com), an elite international network of selected independent professional firms comprising of independent tax consultants and law experts represented globally. AITC's member firms spans Europe, United States, Canada, South America, Australia, Asia, Africa and is continuing to broaden its coverage worldwide, expecting to reach 60 member firms this year. As a truly multi-disciplinary group, AITC is well able to advise clients on a wide range of international tax and legal issues, across most major business environments.



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