

**Claim No: CA-002-2020**

**THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS**

**IN THE COURT OF APPEAL**

**AND**

**PURSUANT TO ARTICLE 5(B)(1)(b) OF THE JUDICIAL AUTHORITY LAW  
BEING DUBAI LAW 12 OF 2004 (AS AMENDED)**

**BY**

**THE DUBAI INTERNATIONAL FINANCIAL CENTRE AUTHORITY**

Applicant

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**SUBMISSIONS BY THE DUBAI INTERNATIONAL  
FINANCIAL CENTRE AUTHORITY**

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# INDEX

1. Overview
2. The Proceedings to date
3. The Nature of the Jurisdiction
4. The DIFC Trust and Foundations Laws and Awqaf – Background
5. Question 1
6. Question 2
7. Question 3
8. Question 4
9. Question 5
10. Question 6
11. Question 7
12. Question 8
13. Question 9
14. Question 10
15. Question 11
16. Question 12
17. Question 13

## SCHEDULES

Schedules 1A and 1B: 2005 and 2018 versions of the Law compared

Schedule 2: Trust Law provisions sourced from Uniform Trust Code

Schedule 3: Comparative Table of Provisions from  
National Endowments Law  
Dubai Endowments Law  
Sharjah Endowments Law  
DIFC Trust Law  
DIFC Foundations Law

**When incentive to acquire and obtain property is gone, people no longer make efforts to acquire any... Those who infringe upon property rights commit an injustice... If this occurs repeatedly, all incentives to cultural enterprise are destroyed and they cease utterly to make an effort. This leads to destruction and ruin of civilization.**

**Ibn Khaldun (1332-1406): *Muqaddimah***

## 1. Overview

1.1 This is the first recorded occasion on which the Court has been asked to provide an interpretation of DIFC Laws pursuant to Article 5 of *Dubai Law 12 of 2004 (as amended) in respect of the Judicial Authority at Dubai International Financial Centre* (the Judicial Authority Law). It relevantly provides:

**(B) The Court of Appeal:** (1) The Court of Appeal shall have exclusive jurisdiction to hear and determine:

- (a) appeals filed against judgments and decisions made by the Court of First Instance;
- (b) request of interpretation by the Chief Justice of the Courts of any article of the DIFC Laws and DIFC Regulations upon an application submitted to him from any DIFC Body, DIFC Establishment or Licensed DIFC Establishment; such interpretation shall have the same authority as the interpreted legislation.

1.2 Also relevant is Article 27 of the *DIFC Court Law 2004*. It provides:

### References

The Court of Appeal has jurisdiction, pursuant to Article 5(B) of the Judicial Authority Law, to determine the interpretation of any article of the Centre's Laws referred to it by:

- (a) the Court of First Instance concerning any matter before it;
- (b) any of the Centre's Bodies; or
- (c) any of the Centre's Establishments with leave of the Court of Appeal.

1.3 The term "Centre Body" is defined in Article 2 of the Judicial Authority as including the bodies established pursuant to Article (3) of *Dubai Law No. (9) of 2004 in respect of the Dubai International Financial Centre*. DIFCA is established by Article (3) 3.a of that Law.

## **2. The proceedings to date**

2 January 2020	Letter application of the Dubai International Financial Centre (“DIFC”) Authority (“DIFCA”) made to the Chief Justice of the DIFC Courts (Ex JJV1 pages 82 to 94)
27 January 2020	Application registered by the Registrar as case number CFI-008-2020
27 January 2020	Chief Justice issues referral in writing to the Court of Appeal on 27 January 2020 (Ex JJV 96)
27 January 2020	Referral Letter being registered, by the Registrar, as case number CA-002-2020
27 January 2020	Initial Directions for hearing of matter issued
30 January 2020	Amended Claim Form filed
12 February 2020:	Amended Directions for conduct of matter issued
16 February 2020	DIFCA complies with paragraph 2 of Amended Directions (Witness Statement 2 of Jacques John Visser)

### 3. Nature of proceedings

3.1 The Judicial Authority Law is a law of the Emirate of Dubai and consequently the foregoing is a translation: the primary text is in Arabic and arguably the above translation is not entirely satisfactory. A more accurate translation of Article 5(B)(1)(b) would read:

(b) requests of interpretation by the Chief Justice of the Courts in response to an application submitted to him from any DIFC Body, DIFC Establishment or Licensed DIFC Establishment for the interpretation of any article of DIFC Laws and DIFC Regulations ~~upon an application submitted to him from any DIFC Body, DIFC Establishment or Licensed DIFC Establishment;~~ such interpretation shall have the same authority as the interpreted legislation.

3.2 Even if English were the primary text of the Judicial Authority Law it is submitted a Court would almost certainly read it in this way in order to give effect to the command of the legislature.

3.3 Although Article 5 of the Judicial Authority Law was substantially recast in the 2011 amending legislation, this particular provision dates back to the original version of the Law. The DIFCA has been unable to locate any contemporary materials available which shed light on the intent of the drafters of the provision.

3.4 Complementing this provision is Article 27 of the *DIFC Court Law* 2004. It provide

#### References

The Court of Appeal has jurisdiction, pursuant to Article 5(B) of the Judicial Authority Law, to determine the interpretation of any article of the Centre's Laws referred to it by:

- (a) the Court of First Instance concerning any matter before it;
- (b) any of the Centre's Bodies; or
- (c) any of the Centre's Establishments with leave of the Court of Appeal

3.5 Corresponding provisions are to be found in the laws establishing other financial centres including the following:

*Abu Dhabi Global Market (ADGM)*<sup>1</sup> -

The Court of Appeal shall solely have jurisdiction to consider and decide on appeals made against the judgments and decisions issued by the Court of First Instance, and the interpretation of any articles of the Global Market laws and regulations if the Chief Justice of the Global market Courts deems necessary should be he requested to do so by the Board of Directors or whomsoever the Board of Directors authorise, or any Global Market Establishments or the Global Market Authorities.

*Astana International Financial Centre (AIFC)*<sup>2</sup> -

The Court of Appeal may determine the interpretation of any provision of the AIFC Law referred to it for this purpose by:

- (a) the Court of First Instance concerning any matter before it;
- (b) any of the AIFC Bodies; or
- (c) any of the AIFC Participants with leave of the Court of Appeal.

3.6 There is no record of any application to the Court concerned under any of these provisions.

**Advisory Opinions generally**

3.7 Common law courts have traditionally preferred cases to be resolved by contested proceedings. Thus, in an action for a declaration, a proper contradictor is required<sup>3</sup>, although the need for an “actual controversy” is no longer regarded as requiring an infringement of rights in relation to past events<sup>4</sup>. In some jurisdictions this preference has taken the form of a constitutional requirement for such a controversy before the Courts have jurisdiction<sup>5</sup>. Other jurisdictions expressly provide for the

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<sup>1</sup> Abu Dhabi Law No. (4) of 2013 Concerning Abu Dhabi Global Market Article 13(8)

<sup>2</sup> AIFC Court Regulations Article 26(12)

<sup>3</sup> Martin, Brian: *Declaratory Relief Since the 1970s* (2007) University Club (Perth) Perspectives in Declaratory Relief Conference

<sup>4</sup> See, in the United States context, Schroth: *Actual Controversy in Declaratory Actions* (1934) 20 Cornell Law Review 1

<sup>5</sup> *Muskrat v. United States*, 219 U.S. 346 (1911), *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 (Australia).

provision of advisory opinions by Courts, generally in constitutional matters and on reference by the government or head of state<sup>6</sup>.

- 3.8 The most frequently used example of such a jurisdiction is that of the Supreme Court of Canada, currently conferred by sections 53 and 54 of the *Supreme Court Act* 1985<sup>7</sup>. It provides:

**Special Jurisdiction  
References by Governor in Council**

**Referring certain questions for opinion**

**53 (1)** The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

- (a) the interpretation of the *Constitution Acts*;
- (b) the constitutionality or interpretation of any federal or provincial legislation;
- (c) the appellate jurisdiction respecting educational matters, by the *Constitution Act, 1867*, or by any other Act or law vested in the Governor in Council; or
- (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

**Other questions**

**(2)** The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *ejusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

**Questions deemed important**

**(3)** Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

**Opinion of Court**

**(4)** Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question so

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<sup>6</sup> E.g. India (Constitution, section 143 [any question of law]), Malaysia (Constitution, article 130 [constitutional questions]), Singapore (Constitution, section 100 [constitutional questions]), Ireland (Constitution, Article 26 [constitutional questions]), Nauru (Constitution, Article 55 [constitutional questions]).

<sup>7</sup> Corresponding provisions exist in each of the Canadian provinces and the Canadian Supreme Court exercises appellate jurisdiction in relation to the decisions of provincial Supreme Courts in such cases.



referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons.

#### **Notice to be given to provinces interested**

**(5)** Where the question relates to the constitutional validity of any Act passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney general of the province shall be notified of the hearing in order that the attorney general may be heard if he thinks fit.

#### **Notice to interested persons**

**(6)** The Court has power to direct that any person interested or, where there is a class of persons interested, any one or more persons as representatives of that class shall be notified of the hearing on any reference under this section, and those persons are entitled to be heard thereon.

#### **Appointment of counsel by Court**

**(7)** The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

### **References by Senate or House of Commons**

#### **Report on private bill or petition**

**54** The Court, or any two of the judges, shall examine and report on any private bill or petition for a private bill presented to the Senate or House of Commons and referred to the Court under any rules or orders made by the Senate or House of Commons.

3.9 There is an extensive history of use of these provisions: one study<sup>8</sup> details 21 such cases over 29 years, whilst another states that there have been over 75 federal references to the Supreme Court<sup>9</sup>.

3.10 Prior to 1949, a right of appeal to the Privy Council from decisions of the Supreme Court existed. This had the consequence that the Canadian provisions came to be

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<sup>8</sup> Lawlor: *The Supreme Court's Use of Narratives in Issuing Advisory Opinions* (2018) Western University LLM thesis

<sup>9</sup> <https://en.wikipedia.org/wiki/Referencequestion#Referencejurisdictioninothercountries>

considered by a judicial body whose members' judicial experiences were from jurisdictions where such a judicial power either did not exist or was viewed with disfavour. Their Lordships' approach to the jurisdiction was explained in *A-G (Canada) v. A-G (Ontario)*<sup>10</sup> in the following terms<sup>11</sup>:

We sympathize with the view expressed at length by Newcombe, J., which was concurred in by the Chief Justice, as to the difficulty which the Court must experience in endeavouring to answer questions put to it in this way. It is true that the advisability of propounding for the consideration of the Court abstract questions or questions involving considerations of debatable fact is, to say the least, doubtful; and it is undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it or touching matters of such a nature that its answers must be wholly ineffectual with regard to parties who are not and who cannot be brought before it - for example, foreign governments. Their Lordships agree however with both these learned Judges that the position must be accepted as expounded by Lord Haldane in *the Attorney-General of British Columbia v. the Attorney-General of Canada*<sup>12</sup>, where he says<sup>13</sup>:

The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure, questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them and have found it advisable to limit and guard their replies.

- 3.11 Whilst not bound by this decision, the DIFC Courts may find assistance from the above observation that in a proper case it is the duty of the Courts to render the assistance to the development of the Centre contemplated by Article 5(B)(1)(b) of the Judicial Authority Law by providing the enhanced legal certainty that comes

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<sup>10</sup> [1932] 1 D.L.R. 58, [1931] UKPC 93

<sup>11</sup> at [DLR] pages 61 and 62

<sup>12</sup> [1914] AC 153

<sup>13</sup> at p.162

from an advisory opinion. The fact that comparable financial centres existing as relatively new common law jurisdictions within a wider civil law environment have similar provisions suggests that the views as to the desirability of the underlying principle of providing for advisory opinions is shared within those jurisdictions.

### **The present application**

3.12 The foregoing discussion leads to the question whether this is a proper case for such a matter to be submitted to the Court.

3.13 The considerations on this issue, so far as they have been taken into account by DIFCA, have been outlined above: it is the view not only of DIFCA itself that this course is the most suitable way to address the issues under consideration, but also the view of the relevant professionals and representative organisations operating in this area of the law, who were consulted with prior to these proceedings.

3.14 There are two particular reasons why that view is likely to be held:

- (a) the identified problem is, in part, due to doubts as to the approach the DIFC Courts will take to foreign precedent in the application of the *Trust Law* which is a question only the Court can answer<sup>14</sup>; and
- (b) unlike the position in Canada, where an advisory opinion is in the form of a judicial decision but is not legally binding<sup>15</sup>, a decision of the DIFC Courts under Article 5(B)(1)(b) of the Judicial Authority Law “shall have the same authority as the interpreted legislation”.

3.15 Concerns as to potential inappropriate use of the provision and its counterparts are addressed by the fact that the power of the Chief Justice under the Judicial Authority Law is discretionary and the Court has the capacity to qualify the answers it gives to any question, as observed by the Privy Council in *Attorney-General of British Columbia v. Attorney-General of Canada*<sup>16</sup>. Each of the other provisions in the laws of comparable financial centres contains a like discretion in relation to

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<sup>14</sup> Wealth Management Working Group Report Exhibit JJV1 page 29, Hammadeh, Fadi: *Family Business Continuity on the Middle East & Muslim World* (2018) pages 117-8

<sup>15</sup> although there is no recorded instance of a government ignoring the decision

<sup>16</sup> [1932] 1 D.L.R. 58, [1931] UKPC 93

applications by centre participants and (in the case of the ADGM) centre bodies: the DIFC and AIFC provision gives Centre Bodies the right to approach the Court.

- 3.16 In addition to the benefits which flow to persons and entities operating within the DIFC from the certainty which will be provided by the Court answering the questions posed in the application, the Registrar of Companies will be better placed to perform his functions under Regulation 8 of the DIFC *Operating Regulations* whose terms are discussed below.

#### 4. The DIFC Trust and Foundations Laws and Awqaf: Background

##### *Trust Law 2018*

- 4.1 The DIFC *Trust Law* 2018 is in large part a re-enactment of the 2005 Trust Law (DIFC Law No. 11/2005)<sup>17</sup>, which according to Professor W.A. Lee, University of Queensland, co-author (with Professor H A J Ford) of *Principles of the Law of Trusts*, is “an amazing law covering the modern law of trusts. One of its advantages results from the fact that there is no (common law) equity court in Dubai so it was necessary for the DIFC to start from scratch. It has been written in marvellous English and is among the best writing on trusts”.
- 4.2 As with the DIFC *Law of Obligations*, the DIFC *Trust Law* covers the whole topic with which it seeks to deal, rather than, as is conventionally the case with statutes relating to trusts based on the English model, simply addressing only part of the area leaving the rest for existing precedent and judicial elucidation.
- 4.3 As a result specific provision is made for matters that many common law jurisdictions leave to be regulated by the general law of trusts. The reason for this is that Articles 9 and 10, and indeed the majority of the basic provisions of the *Trust Law*, are drawn from the American *Uniform Trust Code* (UTC)<sup>18</sup>, which was created by a National Conference of Commissioners on Uniform State Laws project. The UTC reached its present form in 2005 (although it was subject to minor amendments in 2010), broadly at the same time as the DIFC *Trust Law* was promulgated, and is strongly influenced by the *Restatement of Trusts* (2nd and 3rd) and the 1986 California trust statute (Division 9 of the California *Probate Code*). It has been adopted by approximately one third of the American states but not always in the same terms as the model code which the *Trust Law* follows. This means that there is, and there will continue to be in the future, a body of US state law decisions which may be relevant to the

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<sup>17</sup> Schedule 1 comprises comparative tables of the 2005 and 2018 Laws

<sup>18</sup> Schedule 2 contains a list of the provisions of the *Trust Law* which are modeled on the *Uniform Trust Code*

interpretation and application of the *Trust Law*.

- 4.4 Other significant sources of material in the *Trust Law* are the *Trusts Law (2011) Revision* (Cayman Islands), the *Trusts (Guernsey) Law 2007* and the *Trusts (Jersey) Law 1984*
- 4.5 This means that this particular law is an unusual hybrid – formed as it is in a common law jurisdiction carved out of a Shari’a law Emirate and Federal union, where in matters of personal status such as succession the Shari’a remains paramount, while the trust statute itself is largely based on an American model that will be applied by a judiciary steeped in the common law as developed in England and British Commonwealth jurisdictions<sup>19</sup>.
- 4.6 The terms of Article 9 have the result that the Articles in the *Trust Law* comprise a set of ‘default’ rules, which govern trusts subject to it ‘except as otherwise provided in the terms of the trust’. Articles 9(1) and (2) provide that the *Trust Law* governs the duties and powers of and relations amongst trustees and the ‘rights and interests of a beneficiary’, (the term ‘beneficiary’ is widely defined in Schedule 1 of the *Trust Law*) and probably extends to the objects of discretionary dispositive powers and persons who are potential objectives of such powers) except to the extent that the trust instrument provides otherwise. This approach reflects the position under English law. *Armitage v Nurse*<sup>20</sup> is the leading decision in English trust law on the validity of exemption clauses. In this case, the Court of Appeal held that English law trustee exemption clauses can validly exempt trustees from liability for all breaches of trust except fraud. Counsel in that case submitted that the ‘irreducible core’ duties of a trustee include a duty to inquire into the extent and nature the property and the trusts (see *Hallows v Lloyd*<sup>21</sup>; *Nestle v National Westminster Bank plc*<sup>22</sup> and *Wyman v Paterson*<sup>23</sup>; a duty to obey directions in the settlement unless the deviation is sanctioned by the court (see *Harrison v Randall*<sup>24</sup> and

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<sup>19</sup> see generally De La Rosa: *The DIFC Trust Law* (2008) 14 Trusts & Trustees (Oxford) 480

<sup>20</sup> [1997] EWCA Civ 1279

<sup>21</sup> (1888) 39 Ch D 686, 58 LJ Ch 105

<sup>22</sup> [1994] 1 All ER 118, [1993] 1 WLR 1260

<sup>23</sup> [1900] AC 271, 69 LJPC 32)

<sup>24</sup> (1851) 9 Hare 397

*Royal Brunei Airlines Sdn Bnd v Tan*<sup>25</sup>; a duty to account for his stewardship of the assets under his control; and a duty to carry on the business of the trust with the degree of prudence to be expected of a hypothetically reasonably prudent man of business (see *Speight v Gaun*<sup>26</sup>, and *Whiteley, Re, Whiteley v Learoyd*<sup>27</sup>).

4.7 In the leading judgment, Millett LJ observed:

‘I accept the submission ... that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient. As Mr Hill pertinently pointed out in his able argument, a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term.’

4.8 Article 9(2) therefore establishes the ‘irreducible core’ of trust provisions for a DIFC trust. It is, however, not an exclusive statement of matters which cannot be altered by a trust instrument (see, for example Articles 43(1)(d), 66(3) and 73(10)).

4.9 The *Trust Law* 2005 was the first comprehensive legislation for trusts in the GCC region. It was subsequently followed by the Qatar Financial Centre (“QFC”) whose *Trust Regulations* 2007 in their initial form closely followed the *Trust Law*, the Abu Dhabi Global Market (“ADGM”) which has adopted the law of trusts applicable in England with modifications as to perpetuities<sup>28</sup> and conflicts of law<sup>29</sup> corresponding to those provisions of the *Trust Law* and

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<sup>25</sup> [1995] 3 All ER 97)

<sup>26</sup> (1883) 9 App Cas 1

<sup>27</sup> (1886) 33 ChD 347

<sup>28</sup> *Applications of English Law Regulations* section 4

<sup>29</sup> *Trusts (Special Provisions) Regulations* sections 2 and 3

Bahrain whose comprehensive *Trust Law* 2016 applies throughout the whole of Bahrain.

### ***Foundations Law 2018***

- 4.10 Although foundations have traditionally been associated with Liechtenstein, where a foundation regime has been available since 1926, they are a form of legal entity which is known in most continental European jurisdictions, though in most cases their use is limited to charitable purposes (with the notable exceptions of Austria, Liechtenstein and the Netherlands). In the so-called offshore world, Panama was the first to introduce a foundation law in 1995. The Bahamas, Mauritius, Anguilla, St Kitts & Nevis have all followed suit, as have Jersey, Guernsey and the Isle of Man. In the European Union, Cyprus has introduced a foundations regime this century and most recently Luxembourg has drafted legislation for the introduction of a patrimonial foundation very similar to the Dutch foundations regime, but it is still subject to parliamentary discussions and approval<sup>30</sup>.
- 4.11 In March 2018, the DIFC joined the QFC and ADGM in enacting legislation for establishment of Foundations<sup>31</sup> although the models diverge somewhat. In 2020, the Ras al Khaimah International Commercial Centre (“RAKICC”) also enacted *Foundations Regulations* largely based on the DIFC *Foundations Law*.
- 4.12 The QFC and ADGM Laws are very largely drawn on the legislation of the Crown Dependencies. The DIFC legislation and its RAKICC counterpart draw on European sources as well.
- 4.13 In common with their ADGM, QFC and RAKICC counterparts, DIFC Foundations are protected from foreign judgments and laws, although to a somewhat greater extent. In terms of governance arrangements, there is little to distinguish between the alternative models. The role of the Court is

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<sup>30</sup> In summer 2013, the former Luxembourg government submitted to the Luxembourg Parliament a draft law on the ‘*Fondation Patrimoniales*’. Following the October 2013 elections, the approval process was delayed.

<sup>31</sup> *DIFC Foundations Law* 2018, *ADGM Foundations Regulations* 2017, *QFC Foundations Regulation* 2016



somewhat more extensively defined, so as to facilitate particular transactions such as mergers and divisions.

4.14 At that point greater differences emerge. Specifically the following features have no counterparts in either the ADGM or QFC:

- the Courts have power to set aside transactions for mistake<sup>32</sup>, along the lines of the jurisprudence which developed in England following the decision in *In re Hastings-Bass*<sup>33</sup> prior to its limitation by the decisions of the Supreme Court in *Pitt v. Holt* and *Futter v. Futter*<sup>34</sup>;
- the capacity to compulsorily settle intra-Foundation disputes by arbitration<sup>35</sup>;
- redomiciliation of Foundations<sup>36</sup>, available also in the ADGM<sup>37</sup> but not in the QFC;
- recognition of Foreign Foundations<sup>38</sup>;
- conversion of DIFC Private Companies to Foundations<sup>39</sup> which is available to any company whose domestic law permits its redomiciliation to the DIFC as a preliminary step as the DIFC *Companies Law* permits that<sup>40</sup>; and
- provision for Depositary Certificates modelled on the Netherlands STAK (being the abbreviation in Dutch of ‘Stichting Administratiekantoor’).

4.15 The STAK-structure separates legal ownership from the economic benefits of ownership. In the performance of this duty the STAK does not act in its own best interest, but rather in the interests of the depositary receipt holders as well as the assets themselves (for instance the continuity of the company in the capital of which the STAK holds shares in administration).

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<sup>32</sup> *DIFC Foundations Law* 2018 Articles 50 to 53

<sup>33</sup> [1974] EWCA Civ 13

<sup>34</sup> [2013] 2 AC 108<sup>[17]</sup><sub>[SEP]</sub>

<sup>35</sup> *DIFC Foundations Law* 2018 Articles 54 to 55

<sup>36</sup> *DIFC Foundations Law* 2018 Articles 57 to 64

<sup>37</sup> *ADGM Foundations Regulations* 2017 Articles 32 to 36

<sup>38</sup> *DIFC Foundations Law* Article 65

<sup>39</sup> *DIFC Foundations Law* Article 66

<sup>40</sup> *DIFC Companies Law* 2018 Articles 144 to 150

4.16 As a general rule, a STAK-structure is set up in order to separate control (over certain assets, typically shares in the capital of a company) from the financial interest (attributable to these assets). This separation is achieved by transferring assets to the STAK, in return for which the STAK issues depositary receipts in respect of these assets to the transferor. Upon transfer the STAK becomes the legal owner of the assets, but - due to a contractual relationship with the STAK - the STAK will hold these assets for the risk and the account of the holders of the depositary receipts of those shares (rather than for its own risk and account). As a result the depositary receipt holders will have the economic benefit of the assets (through the depositary receipts), while - from a legal perspective - the STAK (as legal owner) will have full control over the assets.

4.17 The separation of control and financial interest can be used for various purposes, such as:

- private wealth planning / protection of the continuity of the company / anti-hostile take over measures;
- employee participation; and
- privacy protection.

4.18 Against this background the following assessment<sup>41</sup> by Professor Paolo Panico<sup>42</sup> is perhaps not surprising:

“... it is worth noting that the ‘torch’ of jurisprudential creativity and vision that in the mid-1920s had permeated the Liechtenstein *Personen und Gessellschaftrecht* in the original conception of its authors, Wilhelm and Emil Beck, has been passed on in our times to the drafters of the DIFC Foundations Law 2017.”

### **DIFC Operating Regulations**

4.19 Applicable for both trusts and Foundations established under DIFC Laws are the provisions of the DIFC *Operating Regulations*, which apply to all entities established under DIFC Law.

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<sup>41</sup> Panico, Paolo: *Trusts & Trustees*, Volume 23, Issue 10, 1 December 2017, Pages 1051–1065,  
<sup>42</sup> author, *International Trust Laws* (Oxford University Press)

- 4.20 Regulation 8 of these Regulations empowers the DIFC Registrar of Companies, upon application, to place a trust on a special register established for that purpose, and to make statements about its status and the character, nature and effect of DIFC Laws for the purposes of the laws of other jurisdictions.
- 4.21 This provision is unique to the DIFC and answers a significant need for DIFC entities and trusts which seek to acquire property or engage in transactions outside the DIFC in jurisdictions which require certainty as to such matters – particularly, in the context of Articles 40(10) and (11) of the *Trust law* and Articles 19(10) and (11) of the *Foundations Law*, as to compliance with local ownership restrictions.

### **The Islamic Analogue: Awqaf**

#### *The nature of Awqaf*

- 4.22 In parallel to the development of the trust in common law countries, a remarkably similar structure developed in the Islamic world known as the *waqf* (the plural of which is *awqaf*) thrived, and then declined<sup>43</sup>. However, more recently, as great wealth has been created in many Islamic countries, and as a result of the Islamic tradition of philanthropy, there has been a revival in interest in the *waqf* structure, and increased resources are now being held on terms which seek to comply with the requirements of Islamic law.
- 4.23 The Islamic equivalent of the trust, the *waqf*, existed for over five hundred years before the first identified English trust and, in the view of some commentators (e.g. Gaudiosi<sup>44</sup> and Hammadeh<sup>45</sup>) may have provided a model for it.
- 4.24 The understanding of the nature of *awqaf* in the modern context has developed to the point that Accounting Standards now exist promulgated by The

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<sup>43</sup> see Stibbard, Paul et al: *Understanding the Waqf in the World of the Trust*, (2012) *Trusts & Trustees*, Volume 18, Issue 8, Pages 785-810

<sup>44</sup> Gaudiosi, Monica: 'The influence of the Islamic law of *waqf* on the development of the trust in England: the case of Merton College' *University of Pennsylvania Law Review*, volume 136, p1231-1261.

<sup>45</sup> Hammadeh, Fadi: *Family Business Continuity on the Middle East & Muslim World* (2018) pages 107-108

Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)<sup>46</sup> established in Bahrain in 1991. Its Standards<sup>47</sup> provide a useful summary of the key features of a *waqf*. The discussion below relates to traditional Islamic jurisprudence: as will be seen this has been supported by statute within the United Arab Emirates.

- 4.25 In establishing jurisprudence (*fiqh*) for the basis of awqaf, Muslim scholars place much weight on the early Islamic period in the seventh century. The first religious waqf was believed to be the Mosque of Quba in Medina created during the lifetime of the Prophet (Peace be upon Him) for religious purposes. Soon after this, a philanthropic waqf was created of seven orchards in Medina for the benefit of the Prophet. The Prophet (PbuH) settled these orchards on a charitable waqf for the benefit of the poor and needy. This practice was followed by the second Caliph Umar who, on the advice of the Prophet (PbuH), settled a palm orchard, with the usufruct of its fruits held on separate terms to its long-term ownership. Some of Caliph Umar's companions took this principle further some years later by putting a condition that the fruits and revenue of their waqf should first be given to their own children and descendants. Only the surplus would be given to the poor.
- 4.26 A *hadith* narrated by Abu Huraira<sup>48</sup> reported the Prophet (PbuH) as saying:-  
When a man dies, all his acts come to an end, but three; recurring charity (*sadaqa jariya*) or knowledge (by which people benefit), or a pious offspring who prays for him.
- 4.27 The classic Islamic sources typically took into account each of these good deeds separately. Nevertheless, Muslim scholars increasingly perceived the importance of seeking, by appropriate means, to perform all three of these good deeds.

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<sup>46</sup> <http://aaoifi.com/?lang=en#>

<sup>47</sup> AAOIFI Shari'ah Standards (2017), AAOIFI Exposure Draft G3/2018 *Waqf Governance*

<sup>48</sup> Muslim 1992, *bab 3, hadith 14*

4.28 The Prophet (PbuH) is also recorded<sup>49</sup> as saying -

A pious offering to one's family, to provide against their getting into want, is more pious than giving alms to beggars. The most excellent of sadaqa (charity) was that which a man bestowed upon his family.

4.29 Abu Hanifa's school of law defined a Waqf<sup>50</sup> as "*The detention of the corpus from the ownership of any person, and the gift of its property or usufruct either presently or in the future to some charitable purpose*". In legal terms, the ownership of the property owned by the waqf was no longer held by the founder, nor was it acquired beneficially by any other person. Rather, it was held for the purposes of the waqf.

4.30 Settling a waqf is voluntary charitable giving unlike *zakat* which is obligatory and one of the five pillars of Islam. *Zakat* can only be given to Muslims whereas waqf and other charity can be given to both Muslims and non-Muslims.<sup>51</sup> Waqf is a narrower concept than "charity" which encompasses alms, grant, inheritance, loan, waqf.

4.31 During the first 300 years of Islam, Muslim scholars developed jurisprudence with respect to the creation, management and administration of awqaf progressively.

4.32 The brief summary of the principles applicable to a waqf structure below highlights some of the similarities with trusts and foundations.

### *Parties To The Waqf*

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<sup>49</sup> Lord Hobhouse cited this "precept of the Prophet Mohamet himself" in the Privy Council decision in *Abu Fata Mahomed Ishak v. Russomoy Dur Chowdhry* (1894) Law Rep 22 Ind App 76 (PC) although holding that a family waqf without a significant charitable component would fail under Islamic law. See the discussion in Stibbard et al. (op.cit.) at pp. 787-788

<sup>50</sup> Charitable foundations were known in the Muslim world as Aqwaf. The word waqf and its plural form aqwaf derive for the Arabic root waqafa. Literally this means making a thing stop and stand still. Its second meaning became pious/charitable foundations.

<sup>51</sup> Fatwa No. 18148 31-May-2011 *General Authority of Islamic Affairs and Endowment*: The concept of charity in Islam encompasses *zakat* (obligatory alms) *al-fitr zakat* and all kinds of charitable work. There is scholarly consensus that *Zakat* must only be given to Muslims. Other charity may be given to both Muslims and non-Muslims.  
<http://www.awqaf.ae/Fatwa.aspx?Lang=EN&SectionID=18&RefID=18148>

4.33 The founder of a waqf (waqif) will typically appoint himself or another person to be the first administrator (mutawalli). Except in the case of certain religious charities, a mutawalli can be female or even a non-Muslim. It is also permissible to have a committee giving powers in relation to the administration of a waqf. In a similar way to the position of trustees, no minor or incapacitated person can be appointed as a mutawalli. There is also no right of inheritance to the office of mutawalli. In the event that there is no stipulation in the waqf documentation for the appointment of a successor to the office of mutawalli, and no other person has the power to do so, the power may fall to the qadi (effectively, a judge).

#### *Powers of the Waqif*

4.34 The waqif may have a wide degree of discretion when determining the succession of beneficiaries. Nevertheless, under some systems of law a waqif is not permitted to exclude their own son or daughter from having a benefit in his or her estate.

4.35 In addition, a waqif may during his or her lifetime, appoint, remove and control a mutawalli, define the amount of a mutawalli's remuneration and appoint a new mutawalli.

#### *Wider Class Of Family Beneficiaries*

4.36 In the absence of specific direction by a waqif, fixed inheritance rules on death apply but directions may be given which are inconsistent with these.

#### *The Mutawalli*

4.37 A mutawalli is a manager of a waqf and deals with the administration of the waqf property. He or she is appointed by the waqif. Normally, the waqif would receive a salary for services rendered. It is acceptable for a waqif to appoint himself or herself as the first mutawalli. The waqif also has the power to remove any mutawalli he has appointed on any grounds. Even in the absence of a mutawalli who has been appointed by the waqif to act after the death of the waqif, the qadi may appoint a mutawalli, who might typically be a descendant or relative of the waqif who has full capacity. If two mutawallis

have been appointed by a waqif to administer the waqf after their death, they should act jointly together.

- 4.38 In terms of the management of the property of the waqf, the first duty of the mutawalli is to preserve the waqf property. This is followed by a duty to maximise the revenue for the benefit of the beneficiaries. The waqf document should also set out how the mutawalli is to be compensated for his time. If the document does not mention remuneration for the mutawalli, he may, if appropriate, apply for an award from the qadi.

*Statutory provisions for awqaf*

- 4.39 Laws in each of the Emirates of Sharjah<sup>52</sup> and Dubai<sup>53</sup> and at UAE national level<sup>54</sup> now provide a legal framework for Awqaf (the translation used in the English versions of these Laws is “Endowment”). Schedule 3 comprises a Table setting out the corresponding provisions of these Laws and the DIFC *Trust Law* and *Foundations Law*, and demonstrates a high level of similarity between these laws

*Awqaf and the Common Law*

- 4.40 As noted by Koessler<sup>55</sup>, a trust is a very flexible instrument. To the extent that the terms of a trust provide a means of distribution of assets, or indeed for their administration, there is no reason why Shari’a obligations cannot be complied with even though this is not a prerequisite for a valid trust.
- 4.41 Courts of common law jurisdictions have dealt with a number of cases involving awqaf. The Privy Council Reports note at least 28 decisions. However, these decisions have tended not to concern themselves with administration, but rather with whether a waqf was validly established, and have then applied Shari’a after an Indian statute<sup>56</sup> provided for the validity of

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<sup>52</sup> Endowments Law 2011

<sup>53</sup> Endowments Law 2017 (which incidentally in Article 52 recognises the DIFC’s “endowment provisions”)

<sup>54</sup> Endowment Law 2019

<sup>55</sup> Koessler, James: *Is There Room for the Trust in a Civil Law System? The French and Italian Perspectives* (March 1, 2012). Available at SSRN: <https://ssrn.com/abstract=2132074> or <http://dx.doi.org/10.2139/ssrn.2132074>

<sup>56</sup> *Mussulman Wakf Act 1923* which amongst other things abolished the rule against perpetuities

awqaf if valid according to Shari'a. For example, in *Chaudhri Mahbub Singh and others v. Haji Abdul Aziz Khan*<sup>57</sup> the Privy Council was prepared to make a finding as to whether the deceased had converted to Islam, which was necessary for the validity of a waqf. In *Dajani and others v. Mustafa El Khaldi since deceased and another*<sup>58</sup> the question on the validity of the waqf itself was either left to the Sharia Court or agreed between the parties. And in *Fatuma Binti Mohamed Bin Salim Bakhshuwen v. Mohamed Bin Salim Bakhshuwen*<sup>59</sup> the Privy Council upheld a decision from the Court of Appeal in East Africa which invalidated a Kenyan waqf on the basis that the charitable element was illusory.

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which would otherwise have applied to family awqaf.

<sup>57</sup> [1938] UKPC 66

<sup>58</sup> [1946] UKPC 21

<sup>59</sup> [\[1952\] AC 1](#)



## 5. Question 1

Whether the property referred to in Article 34(1)(d) of the *Trust Law* can include property located in a jurisdiction which does not recognise trusts?

*Proposed answer: Yes*

### *Discussion*

- 5.1 Article 3 of the DIFC *Trust Law* is a standard provision within DIFC legislation. However, it does not have the effect that DIFC trusts can exist only in relation to property located in the DIFC or other common law jurisdictions.
- 5.2 In equity, beneficial ownership rests in the obligations which the owner of a property (the legal owner) has in relation to the property and the income which flows from it where that is not absolutely enjoyed by the legal owner but instead by others (the beneficiaries). Equity enforces these rights by compelling the legal owner to act in accordance with the obligations which the owner has to those beneficiaries. The conventional expression of this is to be found in the equitable maxim ‘Equity acts *in personam*’<sup>60</sup>.
- 5.3 The trustees of a DIFC trust are subject to the jurisdiction of the DIFC Courts and can be compelled by the Courts to deal with the trust property and any income which flows from it for the benefit of the named beneficiaries and, if the trustees were to refuse to do this, to replace them as trustees and make orders (so-called ‘vesting orders’) in favour of new trustees if the removed trustees failed to co-operate with the transfer of the trust property. The Court could, and in appropriate circumstances would, order a court officer (usually the Registrar) to execute the necessary transfers on behalf of the trustees if this

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<sup>60</sup>

for an early application, see *Penn v. Lord Baltimore* (1750) 1 Ves Sen 447

is necessary. The exercise of these powers by the Court is not dependent on the *situs* of the trust property.

- 5.4 Failure by the trustees to comply with a Court Order would be a contempt of Court, punishable as such.
- 5.5 As the rights *in personam* that exist relate to individuals within the jurisdiction (or subject to it) there is nothing particularly odd about the fact that DIFC trusts can take effect even though the trust property is locally situated outside the DIFC.
- 5.6 It was only very recently that this question had to be decided by the United Kingdom Supreme Court although there were earlier decisions such as *Attorney-General v Jewish Colonisation Association*<sup>61</sup> and *Duke of Marlborough v Attorney-General*<sup>62</sup> involved that assumption. In *Akers and Others v Samba Financial Group*<sup>63</sup>, the reasons of Lord Sumption provide a succinct summary of the position:

84. The question whether some species of proprietary interest is capable of existing is necessarily a question for the general law. Unless the general law recognises the possibility of such an interest, it is self-evident that the parties cannot create or transfer it. That necessarily provokes the question: the general law of which jurisdiction? Normally, it will be the *lex situs*. This would be obvious in the case of land, but is equally true of shares. Shares in a company are legal rights against that company, dependent on the law of its incorporation. The principle is the same as that which applies where a person assumes a contractual obligation to transfer an interest which is incapable of existing under the *lex situs*. It is stated in Anton's Private International Law, 3rd ed (2011) at para 21.61, in a passage adopted by Lord Hodge in *In Re Joint Administrators of Rangers Football Club Plc* 2012 SLT 599, para 19: 'while the contractual aspects of a contract to assign corporeal moveables are governed by the law applicable to the contractual obligation, the final question of proprietary right must be determined by the *lex situs*.'

85. None of this, however, means that where a person assumes the liabilities of a trustee under an instrument governed by another law which recognises the concept, that instrument is void or cannot be enforced according to its terms. It remains effective to create personal rights against the trustee, who may be ordered to give

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<sup>61</sup> [1901] 1 QB 123

<sup>62</sup> [1945] Ch 78

<sup>63</sup> [2017] UKSC 6 - [2017] BPIR 263

effect to the trust, either by specifically performing it where that can be done, or making good his breach of duty financially. The law of Saudi Arabia will treat the trustee as the owner of the entire interest in the shares with all the rights that that entails, but equity will exercise its personal jurisdiction to compel him to deal with the shares in accordance with his trust. The same is true of equitable obligations in respect of property which are imposed by law, where the amenability of the defendant to the personal jurisdiction of the court has always been enough to justify the enforcement of his obligations.

- 5.7 Accordingly, although the trust property may be subject to its *lex situs*, the rights *in personam* against the trustee are enforceable in the DIFC in accordance with the provisions of the *Trust Law*. Outside the DIFC, it becomes a question of a foreign court:
- (i) recognising the DIFC court order; and
  - (ii) giving effect thereto.
- 5.8 The existing arrangements for cooperation between the Courts for enforcement of each other's judgments within the Emirate of Dubai, the wider UAE, and indeed countries the subject of the GCC and Riyadh Conventions are applicable to such a judgment subject to notions of public policy.
- 5.9 The possible application of these arrangements is discussed in the answer to Question 10.

## 6. Question 2

Whether having regard to the terms of Article 12(2) of the *Foundations Law*, a DIFC Foundation may hold property (other than property of the Foundation as defined in the *Foundations Law*) in trust under the *Trust Law*?

*Proposed answer: Yes*

### *Discussion*

6.1 Articles 12(1) and 12(2) of the *Foundations Law* allow the establishment of Foundations for a wide range of reasons provided that they are not unlawful or contrary to public policy in the DIFC.

6.2 The *Foundations Law* does not state expressly that a Foundation may act as trustee. Article 10 of the Law provides:

#### **Nature of a Foundation**

- (1) A Foundation is a body corporate with a legal personality separate from that of its Founder(s) and any other person.
- (2) A Foundation has the capacity, rights and privileges of a natural person. The validity of an act done by a Foundation shall not be called into question on the ground of lack of capacity by reason of anything in its Charter or By-Laws.
- (3) The property of a Foundation is not held by it upon trust for any other person.

6.3 The nature of the “property of a Foundation” is the subject of Part 4 of the *Foundations Law*. This provides, in part:

#### **27. Capital endowment**

- (1) The initial capital of a Foundation is the capital endowed upon the Foundation in order that the Foundation may be established.
- (2) The initial capital may comprise any property, and may be provided by way of gift or for valuable consideration.

- (3) Following the endowment of the initial capital, further property may be endowed upon the Foundation by any person if the Charter so permits.

...

## **28. Financial Resources**

The property of a Foundation shall consist of:

- (a) the initial capital of the Foundation;
- (b) any further amount endowed upon the Foundation and accepted by its Council;
- (c) the proceeds of investment of the capital of the Foundation; and
- (d) any other property acquired by its Council in accordance with the Law and Regulations.

6.4 That not all amounts which may be held by a Foundation are “property of a Foundation” is clear from the definition of “property” in the Schedule:

Property            any movable or immovable property, and includes rights and interests, whether present or future and whether vested or contingent and where it concerns the property of a Foundation, it shall include:

- (a) any property (including money, investments and other property) contributed to the Foundation;
- (b) any capitalised income added to the property so contributed; and
- (c) the money, investments and property from time to time representing those assets and capitalised income.

6.5 The reference in Article 10(3) to “property of a Foundation” therefore does not comprise amounts given to the Foundation by way of settlement which the Foundation may hold upon trust. Rather, Article 10(3) operates as part of Article 10 which makes it clear that a Foundation is not of its nature a trust. It does not prohibit a Foundation, which by Article 10(2) has all the powers of a natural person, from acting as a trustee.

6.6 It will be important, in the context of a DIFC Foundation, to clearly provide in the Charter that assets transferred to it to hold upon trust are not “property of the foundation”<sup>64</sup> and therefore not within the operation of Article 10(3) of the *DIFC Foundations Law*, and the Charter or By-laws must provide that such amounts are to be dealt with in accordance with the terms of any trust upon which they are held. Such a provision, once made, will be effective.

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<sup>64</sup> As to which see Article 28 of the *DIFC Foundations Law*

### Question 3

Whether the reference in Article 10 of the *Trust Law* to the common law of trusts and principles of equity –

- i. includes the common law of trusts and principles of equity as understood under the law of England and Wales;

*Proposed answer:*

*Yes*

- ii. is limited to the common law of trusts and principles of equity as understood under the law of England and Wales?

*Proposed answer:*

*No. Whilst the Court will place great weight on the jurisprudence of the Courts of England and Wales in determining the content of the common law of trusts and principles of equity, its approach to those issues will follow its approach to the application of common law generally, which permits the Court to also have regard to the jurisprudence of other significant common law jurisdictions.*

### ***Discussion***

7.1 Article 10 of the *Trust Law* provides:

#### **Common law and principles of equity**

- (1) The common law of trusts and principles of equity supplement this Law, except to the extent modified by this Law or any other DIFC law or by the Court.
- (2) The statute law of England and Wales applicable to trusts does not, except to the extent it is replicated in this Law, apply in the DIFC.

7.2 The corresponding provision to Article 10 in the UTC is UTC, s106. The commentary on that section states, in part,

‘The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as<sup>[1]</sup> the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.

- 7.3 This terminology makes it clear that despite its name the UTC was not intended to be construed as a Code in the sense discussed in *Bank of England v Vagliano Bros*<sup>65</sup>. The UTC is not a legislative instrument, but a drafting model for those jurisdictions within the United States which choose to adopt it. And it seeks to make provision for only “those portions of the law of express trusts that are most amenable to codification”
- 7.4 The circumstances of the DIFC were entirely different to those of the United States common law jurisdictions. The drafting of the *Trust Law* follows the legislative standards of the DIFC in the sense that it seems to deal comprehensively with its subject matter but in doing so does not seek to operate as a code which excludes the common law. Rather, the issue for the draftsman was how to import the common law into a jurisdiction where trusts had not previously been recognised.
- 7.5 The establishment of the DIFC meant that common law principles were implanted for the first time into the jurisprudence of the UAE. At the time, this was a unique endeavour. Decisions of Courts outside the DIFC can assist, but do not bind, the DIFC Courts in their application of the law of the DIFC. A useful summary of the process, in the context of the preservation (as opposed to implantation) of English law in Hong Kong after it became a Special Autonomous Region of the People’s Republic of China is to be found in the reasons for judgment of Li CJ in *A Solicitor v. Law Society of Hong*

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<sup>65</sup> [1891] AC 107, [1891-4] All ER Rep 93



*Kong*<sup>66</sup>, with whose reasons the other members of the Court of Final Appeal concurred:

[8] The Basic Law enshrines the theme of continuity of the legal system. Article 8 of the Basic Law provides that the laws previously in force in Hong Kong shall be maintained except for any that contravene the Basic Law and subject to any amendment by the legislature. This is reinforced by Article 18(1). By virtue of these articles, the body of jurisprudence represented by Privy Council decisions on appeal from Hong Kong continues to be binding in Hong Kong after the Basic Law came into effect on 1 July 1997.

...

[16] After 1 July 1997, in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts, such as the European Court of Human Rights. Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them. This is underlined in the Basic Law itself. Article 84 expressly provides that the courts in Hong Kong may refer to precedents of other common law jurisdictions.

[17] After 1 July 1997, as the Privy Council is no longer Hong Kong's final appellate court, the realistic considerations relating to decisions of the Privy Council and the House of Lords, which prevailed before that date as discussed above (see paras.14 and 15), are no longer relevant. Bearing in mind that historically, Hong Kong's legal system originated from the British legal system, decisions of the Privy Council and the House of Lords should of course be treated with great respect. Their persuasive effect would depend on all relevant circumstances, including in particular, the nature of the issue and the similarity of any relevant statutory or constitutional provision. At the end of the day, the courts in Hong Kong must decide for themselves what is appropriate for our own jurisdiction.

- 7.6 In the context of the DIFC, there was no 'existing body of law' which might be continued following the end of a previous sovereignty. Rather, the common law was introduced in those areas in which the DIFC had legislative competence by virtue of national and Dubai emirate laws by the enactment of the Laws of the DIFC, and provision that the default law in the absence of specific provision to the contrary is the law of England and Wales by reason of Article 8(2)(e) of the *Law on the Application of Civil and Commercial Laws in*

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<sup>66</sup> (2008) 11 HKCFAR 117

*the DIFC*. It is appropriate that its application in the circumstances of any case involving the *Trust Law* should follow an approach similar to that outlined by Chief Justice Li.

- 7.7 The area of equity is the paradigm case in which the decisions of English Courts will continue to be of assistance to the DIFC Courts particularly where they reflect fundamental principles which have stood for many years in the common law world generally. In cases where provisions of the *Trust Law* are similar to provisions in jurisdictions outside England and have no English counterparts, the decisions of the Courts of those jurisdictions will provide useful assistance to the DIFC Courts. More generally, as Professor Lee has noted in the extract below, the *Trust Law* reflects principles and concepts common to the conception of the trust throughout the common law world and there is no reason to expect that its approach to those issues as they arise will depart from the general body of jurisprudence in relation to trusts.
- 7.8 Of particular significance in that regard is the approach which the Court will take to its supervisory role in relation to trusts.
- 7.9 Notwithstanding the seeming clarity of Article 18(2) of the *Trust Law* and the fact that the jurisdiction of the Court to intervene in the affairs of a trust arises only if there is a claim under the Law<sup>67</sup>, doubts have been expressed (in relation to the earlier version of the *Trust Law*) as to the way in which the jurisdiction of the Court would be exercised in relation to the administration of trusts<sup>68</sup>, removal of trustees<sup>69</sup> and variation of asset distributions<sup>70</sup>.
- 7.10 In a similar vein, doubts have been expressed as to the values of shares in private trust companies<sup>71</sup> which in principle, as the asset of the company is a legal interest in the trust property only, are valueless.

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<sup>67</sup> Judicial Authority Law Article 5A(1) – the jurisdiction of the Court is limited to “claims” and “actions”.

<sup>68</sup> Hammadeh, *op. cit.*, at pp. 115 and 120 – *Trust Law* Article 20(2)(a)(i)

<sup>69</sup> Hammadeh, *op. cit.*, at p.120 – *Trust Law* Article 20(2)(a)(ii)B

<sup>70</sup> Hammadeh, *op. cit.*, at p.121. – *Trust Law* Article 44(3)(c)

<sup>71</sup> Hammadeh, *op. cit.*, at p.122.

- 7.11 The circumstances in which the Court will exercise the power to remove a trustee are set out elsewhere in the *Trust Law*<sup>72</sup> which again reflects the common law<sup>73</sup>. Similarly the 2018 *Trust Law* sets out the identity of parties who can make applications, so as to protect the administration of trusts from vexatious intermeddlers<sup>74</sup>.
- 7.12 The observations of Professor W A Lee (a scholar writing in the context of the English and Australian common law) that

The DIFC Law Trust Law No 4 of 2018, a stupendous legal achievement, made available to investors the stability of the common law of trusts by an enactment that had as its inspiration the American Uniform Trusts Code (UTC), the Restatement of Trusts and the English law of trusts.

confirm that there will be few, if any, occasions where the either the drafting source of the Law or its general provisions require the Court to depart from the essential principles applicable to the role of courts of common law in connection with the administration of trusts and that, accordingly, the body of precedent which has developed in England and elsewhere as to the exercise of the jurisdiction of Courts of equity in relation to trusts can be expected to inform the exercise by the DIFC Courts of their jurisdiction under the *Trust Law*.

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<sup>72</sup> Article 54(2)

<sup>73</sup> as to which see *Letterstedt v. Broers* [1884] UKPC 1, (1884) 9 App Cas 371

<sup>74</sup> Articles 20(1), 28, 40(10), 41(4), 43(3), 44(3), and 54(1)

#### **Question 4:**

Whether, if a trust instrument or foundation charter contains an irrevocable provision of the type referred to in Article 40(11) of the *Trust Law* or Article 19(10) of the *Foundations Law*, it is possible for a person other than a national of the jurisdictions specified in the provision to have an interest in the trust or foundation property or derive any benefit under the trust or foundation?

*Proposed answer: No*

#### **Discussion**

8.1 Articles 40(11) and 40(12) of the *Trust Law* provide:

- (11) The terms of a trust may provide that if at any time the trust property includes any property which by reason of the law of the United Arab Emirates or any other specified jurisdiction may be held only by a national of that country the only persons who may be a trustee, protector or beneficiary under the trust are nationals of that jurisdiction at that time, and may further provide that such provision may not be varied or revoked.
- (12) If the terms of a trust contain an irrevocable provision of the type referred to in Article 40(11), notwithstanding any other provision of this Law (including Article 9(1)), that provision may not be varied or revoked.

8.2 Articles 19(10) and 19(11) of the *Foundations Law* provide:

- (10) The Charter may provide that if at any time the property of the Foundation includes any property which by reason of the law of the United Arab Emirates or any other specified jurisdiction may be held only by a national of that country the only persons who may be officers of the Foundation or Qualified Recipients under the Foundation are nationals of that jurisdiction at that time, and may further provide that such provision may not be amended or revoked.
- (11) If the Charter contains an irrevocable provision of the type referred to in Article 19(10) then notwithstanding any other provision of this Law, that provision may not be amended or revoked.

8.3 These provisions are expressed to be paramount over the other provisions of the law, and make any form of variation – by parties who might otherwise have power to make changes to the terms of the trust or a Foundation Charter or By-laws, or by the Court – impermissible whilst ownership of the trust or Foundation property is subject to such restrictions.

**Question 5:**

Whether, if one or more suitably qualified expert(s) in Shari'a law has or have been appointed an advisory trustee or trustees pursuant to Article 57 of the *Trust Law*, the responsible trustee may subject to Article 57(3)(c) rely and act upon the advice of the advisory trustee(s) in respect of any matter related to Shari'a compliance which is relevant to the administration of the trust or the exercise of any discretion vested in the responsible trustee?

*Proposed answer: Yes*

***Discussion***

9.1 Article 57 of the *Trust Law* relevantly provides:

**Advisory trustees**

- (1) In the administration of any trust property any trustee may act, to the extent provided in this Article, with an advisory trustee or advisory trustees.
- (2) An advisory trustee or advisory trustees may be appointed in respect of all or any part of the trust property:
  - (a) by the testator, settlor or other creator of the trust, in the instrument creating the trust;
  - (b) by order of the Court made on the application of any beneficiary or trustee or of any person on whose application the Court would have power to appoint a new trustee; or
  - (c) by any person having power to appoint a new trustee.
- (3) Where a trustee acts with an advisory trustee or advisory trustees, the trust property shall be vested in the first mentioned trustee (in this Article referred to as the responsible trustee), who shall have the sole management and administration of the estate and its trusts as fully and effectually as if he were the sole trustee, and in any such case:

- (a) the responsible trustee may consult the advisory trustee on any matter relating to the trusts or the estate;
- (b) the advisory trustee may advise the responsible trustee on any matter relating to the trusts or the estate, but shall not be trustee in respect of the trust;
- (c) where any advice or direction is tendered or given by the advisory trustee, the responsible trustee may follow and act on that advice or direction without being liable for anything done or omitted to be done by him by reason of his following that advice or direction unless the trustee knew or ought to have known that the advice was unlawful, contrary to the terms of the trust or trustees' duties, or advice that no reasonable advisory trustee would have given;

9.2 The desire of a Muslim settlor to have issues of administration (including Shari'a compliant investment strategies) and distribution amongst family members upon the settlor's passing settled in accordance with Shari'a principles potentially raises issues for trustees (including trust and corporate service providers) with no personal knowledge of Shari'a obligations if, as is usually the case for trustees, they are required to act personally – reliance on outside advice could be challenged as a delegation of the trustee's duty.

9.3 In the context of the DIFC Courts, the nature of Shari'a requirements is, where necessary, established by expert evidence in the conventional way<sup>75</sup>. In the absence of an application to the Court for its opinion, advice and direction under Article 20(1), a trustee needing to make decisions to comply with Shari'a requirements would, in the absence of a provision such as Article 57, be at risk of becoming liable for either making an incorrect decision or delegating his responsibility.

9.4 The appointment of appropriately qualified advisers therefore serves a particularly useful purpose in the context of a trust jurisdiction established in the Islamic world.

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<sup>75</sup> Registrar's Direction 3 of 2017

- 9.5 In other jurisdictions – specifically New Zealand<sup>76</sup> and Western Australia<sup>77</sup> - provisions have been enacted which are almost identical to Article 57.
- 9.6 The role of advisory trustees was considered by the New Zealand Law Commission’s Review of the Law of Trusts<sup>78</sup> in 2011, whose Issues Paper specifically recognised the utility of the position in the context of Maori land trusts<sup>79</sup>. In much the same way the appointment of a suitable advisor to a trustee in relation to matters regulated by Shari’s provides confidence to a Muslim settlor that the conduct of the affairs of the trust will be Shari’s compliant even if the services of a professional trustee company without particular Shari’s scholarship capabilities are engaged.

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<sup>76</sup> *Trustee Act* 1956, section 49 (now repealed), *Trusts Act* 2019 (which uses the term “special trust adviser” in the place of “advisory trustee”)

<sup>77</sup> *Trustees Act* 1962, section 14

<sup>78</sup> <https://www.lawcom.govt.nz/our-projects/law-trusts?id=726>,  
<http://ip31.publications.lawcom.govt.nz/Chapter+7+-+Custodian+and+advisory+trustees/Advisory+trustees>

<sup>79</sup> at paragraph 7.31



**Question 6:**

Can a *waqf* which has been validly constituted according to the law of the place of its establishment, subject to compliance with the formalities of the *Trust Law* or *Foundations Law* as applicable -

- (a) be recognised as a trust under Article 17 of the *Law Relating to the Application of DIFC Laws 2004*;

*Proposed answer:*

*If the waqf has legal personality in its place of establishment, no. In all other cases, yes;*

- (b) be recognised as a foundation under Article 62 of the *Foundations Law*;

*Proposed answer:*

*If the waqf has legal personality in its place of establishment, yes. In all other cases, no;*

- (c) be continued as a foundation under Article 56 of the *Foundations Law*?

*Proposed answer:*

*If the waqf has legal personality in its place of establishment and is permitted by the law of that place to change its corporate domicile to the DIFC, yes. In all other cases, no.*

***Discussion***

**(a) *Recognition of awqaf as trusts***

10.1 Article 17 of the *Law Relating to the Application of DIFC Laws 2004* provides:

**Recognition of trusts**

(1) A trust which is:

- (a) expressly constituted under the law of another jurisdiction; or

(b) created by the law of another jurisdiction.

shall be recognised as a trust.

- (2) The existence, validity and interpretation of a trust constituted in accordance with Article 17(1)(a) shall be determined by the law under which the trust is constituted.
- (3) For the purpose of this Article, the law under which a trust is constituted shall be:
  - (a) in the case of a trust recognised under Article 17(1)(a) the law set out in the instrument constituting the trust; and
  - (b) in the case of a trust recognised under Article 17(1)(b) the law of the jurisdiction by whose law the trust is created.

10.2 The *Trust Law* provides for the recognition of “foreign trusts” in Article 86. It provides:

**86. Enforceability of a foreign trust**

- (1) Subject to Article 86(2), a foreign trust shall be regarded as being governed by, and shall be interpreted in accordance with, its governing law.
- (2) A foreign trust shall be unenforceable in the DIFC:
  - (a) to the extent that it purports:
    - (i) to do anything which is contrary to DIFC Law; or
    - (ii) to confer any right or power or impose any obligation the exercise of which is contrary to DIFC Law; or
  - (b) to the extent that the Court declares that the trust is immoral or contrary to public policy in the DIFC.but otherwise shall be enforceable in accordance with its terms and its governing law.

10.3 The term “foreign trust” is defined in Schedule 1 in the following terms:

foreign trust	is a trust whose governing law is the law of a jurisdiction other than DIFC, including any trust within the meaning of the Hague Convention.
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Hague Convention the Convention on the law applicable to trusts and on their recognition, done at The Hague on 1 July 1985.

10.4 The *Hague Convention on the Law Applicable to Trusts and on their Recognition* (“the Convention”) is a multilateral treaty developed by the Hague Conference on Private International Law on the Law Applicable to Trusts. It concluded on 1 July 1985. It entered into force on 1 January 1992, and was as of September 2018 ratified by 12 countries<sup>80</sup>. Because one of these was the United Kingdom, the Convention also applies in a number of present and former British Colonies and Crown dependencies, such as the Channel Islands. The *Convention* aims to harmonise not only the municipal law definitions of a trust, but also the private international law rules for resolving problems in the choice of the *lex causae*. The key provisions of the Convention are:

- each signatory recognises the existence and validity of trusts. However, the Convention only relates to trusts with a written trust instrument. It would not apply trusts which arise (usually in common law jurisdictions) without a written trust instrument.
- the Convention sets out the characteristics of a trust (even jurisdictions with considerable legal history relating to trusts find this difficult); and
- the Convention sets out clear rules for determining the governing law of trusts with a cross border element.

10.5 The Convention is readily adapted to support the recognition of relationships which would not satisfy the common law requirements of a valid trust. It provides, in Chapter 1:

#### Article 2

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<sup>80</sup> Australia, Canada (8 provinces only), China (Hong Kong only), Cyprus, Italy, Luxembourg, Liechtenstein, Malta, Monaco, the Netherlands (European territory only), Panama, San Marino, Switzerland and United Kingdom (including 12 dependent territories/crown dependencies) – see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59>

For the purposes of this Convention, the term "trust" refers to the legal relationships created - *inter vivos* or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics -

- a) the assets constitute a separate fund and are not a part of the trustee's own estate; <sup>[1]</sup><sub>[SEP]</sub>
- b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; <sup>[1]</sup><sub>[SEP]</sub>
- c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

### Article 3

The Convention applies only to trusts created voluntarily and evidenced in writing.

- 10.6 A valid trust under the law of its home jurisdiction would clearly be seen to be a trust within the meaning of Article 2. Indeed, Article 2 has been argued to apply to a “shapeless” trust:

“The term ‘shapeless’ trust is controversial, and it is precisely for this reason that I have proposed and support its use. By its excess of expression over meaning, and the profound contradiction of postulating a legal structure with no shape, it serves to establish that the Convention deals neither with the English-model trust nor with any other known structure, but with an open-ended series of fact-patterns which belong to both common law and civil law. The examination of article 2 [of the *Convention*] ... makes the statement that shapeless trusts exist in every legal system extremely plausible.”<sup>81</sup>

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<sup>81</sup> Lupoi Maurizio: **Trusts: A Comparative Study** (2000) Cambridge: Cambridge University Press, 339)

10.7 Islamic jurisprudence typically regarded awqaf as having legal personality. That approach is reflected in Article 92(d) of the United Arab Emirates Civil Code which provides that awqaf are juridical persons. Similar provision is made at UAE national level<sup>82</sup> and in Dubai<sup>83</sup> and Sharjah<sup>84</sup>.

10.8 This categorisation, given incorporation in their home jurisdiction, will be recognised in the DIFC: as Lord Wright observed in *Lazard Brothers & Co. v. Midland Bank Ltd*<sup>85</sup> -

“English courts have long since recognised as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations.”

10.9 For present purposes it is sufficient to note that a waqf which did not have juridical personality in its home jurisdiction would plainly fall within Article 2 of the Convention. A waqf with legal personality in its home jurisdiction would not, because in such a case there would not be a trustee holding property which comprises a separate fund to the trustee’s own property. Such a waqf would be recognised in the DIFC, if at all, as a Foundation – the next matter for consideration under this heading.

**(b) Recognition of incorporated awqaf as foundations**

10.10 Article 62 of the *Foundations Law* relevantly provides:

**Recognised Foreign Foundations**

(1) A Foreign Foundation which wishes to conduct operations within the DIFC may apply for a Licence to be a Recognised Foreign Foundation in the DIFC for the purposes of this Law, in accordance with Article 9 of the Operating Law.

10.11 A Foreign Foundation is defined in the Schedule to the Law as follows:

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<sup>82</sup> *Endowments Law* 2019, Article 10.1

<sup>83</sup> *Endowments Law* 2017, Article 16.B(1)

<sup>84</sup> *Endowments Law* 2011, Article 16

<sup>85</sup> [1933] AC 289, 297

Foreign Foundation            an entity that:  
   (a) is organised in a jurisdiction other than the DIFC; and  
   (b) has characteristics that would, if it were in the DIFC, enable it to be established as a Foundation under this Law,  
  
   but does not include a Foreign Foundation which has become a Foundation under Part 8 of this Law.

10.12 It follows from the preceding discussion that an incorporated waqf should, in the absence of any disentitling factors, fall within this definition and be eligible for recognition as such: it will be “organised” in a jurisdiction other than the DIFC, and its essential characteristics – the commitment of property to an incorporated body to be administered in accordance with a defined body of law are those of a DIFC Foundation.

10.13 Support for this view can be found in Article 52 of the Dubai *Endowments Law* which specifically recognises the DIFC’s “endowment provisions”.

(c)    ***Redomiciliation of incorporated awqaf***

10.14 Inward redomiciliation of Foundations is provided for in Articles 54 and 55 of the *Foundations Law*. These provide:

**54. Continuation of a Foreign Foundation in the DIFC**

- (1) A Foreign Foundation may, if not prohibited in terms of its founding Documents or under the laws of the jurisdiction under which it is organised, apply to the Registrar for a certificate of continuance under this Law.
- (2) An application made under Article 54(1) shall be in such form as may be prescribed by the Registrar and be accompanied by a Charter of Continuance, and, if the application does not propose the appointment of a Registered Agent, the By-laws (if any) that will apply to the Foreign Foundation upon its continuance as a Foundation under this Law.
- (3) A Charter of Continuance may, without so stating in the Document, effect any amendment to the organisational instruments of the Foreign Foundation that applies for continuance under this Article, if the

amendment:

- (a) is authorised in accordance with the law applicable to the Foreign Foundation before continuance under this Law; and
- (b) is an amendment that a Foundation is entitled to make under this Law.

#### **55. Charter of Continuance for Foreign Foundations**

- (1) The Charter of Continuance of a Foreign Foundation shall be written in the English language.
- (2) The Charter of Continuance of a Foreign Foundation shall:
  - (a) be signed by all of the members of the Council or substantially equivalent officers of the Foreign Foundation;
  - (b) state the name of the Foreign Foundation and the name under which it will be continued in the DIFC;
  - (c) state the jurisdiction under which it is established;
  - (d) state the date on which it was established; and
  - (e) comply with such other requirements under this Law as apply to the Charter.

10.15 These provisions reflect that as an incorporated body, inbound redomiciliation is permissible only if the jurisdiction from which the body seeking to redomicile is permitted to do so under the law presently applicable to it, and that as a precondition to redomiciliation it must adopt a Charter which complies with the *Foundations Law*.

10.16 The preceding conclusion that an incorporated waqf can be a foreign foundation results also in a conclusion that it can redomicile to the DIFC as opposed to merely being recognised should the requirements of the *Foundations Law* as to the permissibility of redomiciliation and changes in the constitutional documents in the Foundation's original jurisdiction be met.

**Question 7:**

Can a foundation, if approved by another jurisdiction for continuance as a waqf, transfer to that other jurisdiction from the DIFC under Articles 59, 60 and 61 of the *Foundations Law*?

*Proposed answer:*

*Yes*

***Discussion***

11.1 Articles 59, 60 and 61 of the *Foundations Law* are the counterparts of Articles 54 to 57 of the *Foundations Law*. They permit a Foundation to redomicile from the DIFC. The critical provision is Article 59. It provides:

**Foundation leaving the DIFC**

Subject to Article 60, a Foundation may:

- (a) if it is authorised by unanimous resolution of the members of its Council; and
- (b) if it is established to the satisfaction of the Registrar that the Foundation's proposed continuance in another jurisdiction will not adversely affect the Foundation's creditors,

apply to the appropriate official or public body of the other jurisdiction to be continued as an entity in the other jurisdiction as if it had been established under the laws of the other jurisdiction.

11.2 One of the conditions under which outward redomiciliation is permitted is the existence of approval from the authorities of the jurisdiction to which redomiciliation is proposed, and the existence of a suitable legal structure to accommodate the redomiciled foundation which is a matter for both the relevant authorities in the jurisdiction to which redomiciliation is proposed and the Registrar in the DIFC.

11.3 From the perspective of the law of the DIFC, it would be immaterial whether the new jurisdiction categorized the former foundation as a waqf or some other type of entity.



### Question 8:

Does any provision of the *Trust Law* prevent recognition of a DIFC trust under the laws of another jurisdiction for the purposes of those laws?

*Proposed answer:*

*No*

### *Discussion*

- 12.1 The *Hague Convention on the Law applicable to Trusts and on their Recognition* (the Convention) has been discussed in the answer to Question 6. Just as a trust recognised under the Convention will be a Foreign Trust for the purposes of the *Trust Law*, a DIFC Trust has the characteristics prescribed in Article 2 of the Convention<sup>86</sup>.
- 12.2 The Convention is an open convention: it applies in a jurisdiction which has adopted it irrespective of whether the trust in respect of which recognition is sought has been established in a Convention jurisdiction.
- 12.3 Since coming into force the Convention has become applicable also in most of Canada (but not in Ontario or Quebec) and the trust jurisdictions of Bermuda, British Virgin Islands, Gibraltar, Guernsey, Isle of Man, Hong Kong, Jersey and the Turks and Caicos Islands, in addition to in Italy, Liechtenstein, Luxembourg, the Netherlands, Malta, Monaco, San Marino and Switzerland. All the jurisdictions except for Malta in this last group of signatories are civil law countries.
- 12.4 Article 11 of the Convention provides:

Article 11

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<sup>86</sup> see paragraph 10.5 above

A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust.

Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.

In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular -

- a) that personal creditors of the trustee shall have no recourse against the trust assets;
- b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;
- c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;
- d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets.

However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

12.5 Therefore, a DIFC trust would be accorded recognition in any Convention country as well as any jurisdiction which as a matter of its private international law recognises foreign trusts. These include the ADGM<sup>87</sup>, Bahrain<sup>88</sup> and the QFC<sup>89</sup>.

12.6 Nothing in the *Trust Law* suggests that such recognition is contrary to public policy (which, if it were, might attract the operation of Article 35(1) of the Law with the result that the trust was not validly established), let alone prevented by it. To the contrary, the *Trust Law* provides for recognition of foreign trusts under the Convention, applies the common law of trusts (which recognises foreign trusts) and facilitates the inbound and outbound redomiciliation of trusts in Article 12 and changes of the place of

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<sup>87</sup> *Trusts (Special Provisions) Regulations*, section 6

<sup>88</sup> *Trust Law*, section 54

<sup>89</sup> *Trust Regulations*, Article 62

administration in Article 17(2).

### Question 9:

Will the transfer of property by a Muslim to a trustee to be held on trust or foundation necessarily attract the operation of Article 361 of the *Law of Personal Status* of the United Arab Emirates?

*Proposed answer: Nothing in the Trust Law or Foundations Law has the effect that such a transfer will necessarily attract the operation of that Article.*

### Discussion

- 13.1 As expressed, the question does not limit its subject to transfers of property within the UAE to be held upon trusts or to foundations established under the Laws of the DIFC. The jurisdiction of the Court is limited to the expression of opinions in relation to those Laws and the proposed answer to the question proceeds accordingly.
- 13.2 The legislative authority of the DIFC extends to civil and commercial laws. That arises under Article 121 of the UAE Federal Constitution<sup>90</sup> which provides:

Without prejudice to the provision of the previous article, the Federation shall solely be in charge of enacting laws on the following matters:

Work relation and social securities, real estate ownership and expropriation for public interest; handover of criminals; banking; insurance of all kinds; protection of fauna & flora; major legislations related to Penal Code, Civil & Commercial Transactions Code, Companies Law, Code of Procedures before the civil and penal courts; protection of moral, technical and industrial property rights; copyrights, printings and publication rights; import of weapons and ammunitions unless the same was for the use of the Armed Forces or Security Forces of any Emirate - other aviation affairs which are not within the Federation executive competencies; determination of territorial waters and organization of navigation overseas; *organization and method of establishing financial free zones and scope of excluding*

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<sup>90</sup>

The UAE Constitution is the paramount law un the UAE – see Article 151

*the same from the implementation of the Federal Legislations provisions. (italics supplied)*

- 13.3 The establishment of financial free zones is provided for by *Federal Law No.8 of 2004 Regarding the Financial Free Zones*. It provides, amongst other things:

(Article 2)

A Financial Free Zone shall be established by a Federal Decree. It shall have a body corporate and shall be represented by the President of its board. It and no one else shall be responsible for the obligations arising out of the conduct of its activities. The Cabinet will prescribe its area and location.

(Article 3)

(1) The Financial Free Zones and all the operations conducted therein shall be subject to the provisions of Federal Law No. 4 of 2002 Regarding Criminalisation Of Money Laundering.

(2) These Zones and Financial Activities shall also be subject to all Federal laws, with the exception of Federal civil and commercial laws.

(Article 7(3))

Subject to the provisions of Article 3, the concerned Emirate may, within the limits of the goals of establishing the Financial Free Zone, issue legislation necessary for the conduct of its activities.

The DIFC<sup>91</sup>.was established by Federal Decree Number 35 of 2004.

- 13.4 The Emirate of Dubai had made provision corresponding to Article 3(2) of Federal Law in respect of the civil and commercial laws of Dubai in *Law No. 9 of 2004 in respect of the Dubai International Financial Centre*. It provides, amongst other things:

(Article 5(1))

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<sup>91</sup> established by Federal Decree Number 35 of 2004

In addition to any other powers and functions described in this law, the President shall have the following powers, duties and functions:

....

(c) To submit proposed Centre's Laws to the Ruler for enactment;

(d) To issue Centre's Regulations;

...

(Article 6(7))

The Centre Authorities shall have a Legislature, which shall be responsible for drafting the Centre's Laws and the Centre's Regulations other than those relating to the regulation of financial services and related activities<sup>92</sup> or any matter over which any of the Centre's Bodies have exclusive jurisdiction, as provided by the Centre's Laws.

(Article 8)

(1) Unless otherwise provided by any other Centre's Laws, the Centre's Courts shall have exclusive jurisdiction to hear and determine any claims in which the Centre, the Centre Establishments or any of the Centre's Bodies is a party to and also to hear and determine any dispute, arising out of any transaction carried out in the Centre or an incident which took place therein. The President may also establish such juristic committees and arbitrations panels as are necessary.

(2) The Centre's Courts shall have exclusive competence to interpret this Law, the Centre's Laws and the Centre's Regulations.

(3) ....

(Article 13)

### **Applicable and excluded laws**

(1) The Centre's Bodies and the Centre Establishments shall carry on business in accordance with the Centre's Laws and the Centre's Regulations

(2) The Centre's Bodies and the Centre Establishments and their employees (for the purpose of the transactions carried out within the Centre and related thereto) shall not be subject to the rules or regulations of the Dubai Municipality, the Department of Economic

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This is reserved to the DFSA pursuant to Article 7(8)(a) of the Law.

Development, the Department of Tourism and Commercial marketing, the rent committee or the authorities of any of those departments.

- 13.5 This legislative scheme (and the corresponding provisions establishing the ADGM) necessarily proceeds on the basis that the *Trust Law* and *Foundations Law* (and their ADGM counterparts) are civil and commercial laws for the purposes of Article 3(2) of *Federal Law No.8 of 2004 Regarding the Financial Free Zones*.
- 13.6 The United Arab Emirates forced heirship provisions apply only to property owned by a deceased person who is either a UAE national or a Muslim at the date of death of the deceased or during any applicable “death illness”, a term broadly equivalent to the English concept of lacking testamentary capacity. One third of the estate is not subject to Shari’a forced heirship in any event<sup>93</sup>.
- 13.7 Subject to what follows, a Muslim can make a gift of any property during his or her lifetime, provided that it is an absolute gift. As a result, endowment of a foundation or trustees with assets by a healthy founder or settlor is permissible, as recognised in the national and Emirate laws discussed below.
- 13.8 Article 361 of the *Law of Personal Status* provides (in the English translation on the UAE Ministry of Justice website):

**Article 361**

Shall be considered void, every fraud to the provisions governing inheritance by way of sale, donation, testament or other dispositions.

- 13.9 Precisely how this Article (or more precisely its Arabic version) would be interpreted in a UAE Court outside the DIFC is not a matter within the scope of the present application

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<sup>93</sup>

as recognised by Article 5-1e of the national *Endowments Law*

13.10 “Fraud” in the common law context involves an element of dishonesty – in the context of Article 361, having a purpose of circumventing Shari’a inheritance entitlements<sup>94</sup>. This raises the questions whether Shari’a inheritance entitlements were in fact defeated, and whether or not that outcome was intended.

13.11 Amongst the membership of the DIFC’s Wealth Management Review Working Group<sup>95</sup> were a number of individuals familiar with Shari’a concepts. Based on its understanding of the relevant Shari’a principles and consultation with others, the members of the Working Group saw no necessary incompatibility between the use of modern wealth management tools and Shari’a obligations<sup>96</sup>. Specifically, if families, particularly those with significant wealth and specifically family businesses, do not undertake lifetime planning:

- (a) control of the business may not be left to people with the appropriate skills, experience and ability;
- (b) family members may fight over decisions, or the wealth generally;
- (c) the family’s wealth may not survive and may well dissipate in the hands of the second generation;
- (d) family owned businesses may not be run properly and in such cases may not survive the transition to the next generation but will either be the subject of disputes or run to a standstill;
- (e) such lack of planning will also impact the family relationships negatively; and
- (f) the failure of such family businesses will also have a negative impact on the local economy.

13.12 The Working Group was advised that wealth preservation for the family is one of the aims of the Shari’a generally (one of the typically agreed upon *Maqasid*

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<sup>94</sup> to use the expression in Article 5-1d of the national *Endowments Law*.

<sup>95</sup> See Exhibit JJV2 pp. 5 to 7

<sup>96</sup> Chapter 4 – Exhibit JJV1 pp. 59 to 62



*Al Shari'a*)<sup>97</sup>. As such, there are Shari'a opinions that provide that it is an obligation to carry out lifetime planning.

13.13 The Working Group also was advised that there are Shari'a based structures which enable succession to be managed appropriately with control left with the appropriate individuals yet still enabling broader family members to benefit economically, both inside the financial free zones and in the wider the UAE.

13.14 In that context the widespread use of incorporated entities confirms that the view has been taken that the transfer of business assets to a locally incorporated company does not attract the operation of Article 361, even though it has the effect that thereafter the underlying corporate assets are owned by the company and the Shari'a heirs will inherit not the respective direct interests in the underlying property but the company shares in their respective proportions.

13.15 Similarly, given the provisions of the Endowments Laws at UAE National level and in Sharjah and Dubai<sup>98</sup>, the legislatures concerned necessarily took the view that a transfer to a waqf under those laws during the lifetime of a waqif did not offend Shari'a principles unless the operation of Article 361 was engaged (which would not happen as a matter of course, but only in the circumstances to which that Article applied). There is no material distinction to be made between those provisions and those of the *Trust Law* or the *Foundations Law*, with the result that transfer under those Laws must also not attract the operation of the Article except in those limited circumstances. The Sharjah *Endowments Law* limits the proportion of the Endower's assets which may be endowed to one-third<sup>99</sup> but neither its National nor its UAE counterpart does so. Each of these *Endowments Laws* refers to compliance with inheritance provisions<sup>100</sup>, the Sharjah Law alone requiring prior judicial

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<sup>97</sup> Exhibit JJV1 p. 79

<sup>98</sup> as to which see paragraph 4.35 above

<sup>99</sup> Article 22

<sup>100</sup> National Article 5.1d, Dubai Article 11.4, Sharjah Article 7

certification.

- 13.16 In any event what is potentially open to be set aside is the allegedly fraudulent transaction. That would not include the subsequent acquisition of assets by the foundation or trustee from third parties, or accumulated profits of trading: these were never the property of the former owner of the original assets, and setting aside those transactions would be of no advantage to the Shari'a heirs.
- 13.17 If the provisions of the trust instrument or Charter or By-laws of a Foundation are such that resulting distributions are consistent with Shari'a entitlements the question simply does not arise even in the context of Article 361.
- 13.18 In the context of specific proposals to endow a Foundation or trustees with assets, the matter will require consideration within the specific context involved. That will require consideration as to the capacity of the Founder or settlor to make the disposition, the terms of the Foundation's Charter or the trust instrument (which might, for example, simply adopt the Shari'a proportions for future distributions), and the Founder's or settlor's intent. Consultation with an Islamic scholar may well be appropriate: if the Founder or settlor obtains appropriately qualified advice as to the applicable Shari'a obligations and acts on it, it is difficult to see how it could be said that the Founder's or settlor's intention was to avoid those obligations.

**Question 10:**

Whether an Order made in a proceeding in the Court under the *Trust Law* or the *Foundations Law* can be the subject of execution pursuant to Article 7 of Dubai Law No.12 of 2004 in respect of the Judicial Authority Law?

*Proposed answer: There is no distinction between Orders of the Court pursuant to the Trust Law or the Foundations Law and any other Orders of the Court for the purposes of Article 7 of the Judicial Authority Law and the Court will follow the procedures set out in that Article in respect of any such Orders.*

**Discussion**

14.1 Article 7 of the Judicial Authority Law materially provides:

**Execution**

- (1) The execution judge assigned pursuant to Paragraph (D) of Article (5) of this Law shall have jurisdiction over execution of the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts if the subject matter of execution is situated within DIFC, and such execution shall be in accordance with the Rules of the Courts.
- (2) Where the subject matter of execution is situated outside the DIFC, the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside DIFC in accordance with the procedure and rules adopted by such entities in this regard, as well as with any agreements or memoranda of understanding between the Courts and these entities. Such execution shall be subject to the following conditions:
  - (a) The judgment, decision, order or ratified Arbitral Award to be executed is final and executory;
  - (b) The judgment, decision, order or ratified Arbitral Award is translated into the official language of the entity through which execution is carried out;
  - (c) The Courts affix the executory formula on the judgment, decision, order or ratified Arbitral Award.
- (3) In addition to Paragraphs (a), (b) and (c) of Clause (2) of this Article, when executing the judgments, decisions and orders issued by the Courts or Arbitral Awards ratified by the Courts through Dubai Courts,

the following must be observed:

- (a) the Courts shall issue an execution letter to the Chief Justice of the Court of First Instance of Dubai Courts stating the procedure to be carried out;
- (b) the person requesting execution shall submit to the execution judge of Dubai Courts an application accompanied by a copy of the judgment, decision or order, legal translation of the same, and the execution letter;
- (c) the execution judge of Dubai Courts shall apply the execution procedure and rules stipulated in the aforementioned Federal Civil Procedure Code, including any objections to the execution; the execution judge may not reconsider the merits of the judgment, decision or order;
- (d) Dubai Courts shall collect the execution fees for each execution request submitted to them in accordance with the aforementioned Dubai Courts Fees Law.

14.2 The reference in Article 7 to “judgments, decisions and orders rendered by the Courts” makes no distinction between judgments, decisions and orders under the *Trust Law* or the *Foundations Law* and other judgments decisions and orders. Nor does either the *Trust Law* or the *Foundations Law* suggest that judgments decisions and orders made pursuant to them bear any different character to other judgments, decisions and orders.

14.3 Whilst differences of opinion arose as to whether orders of the DIFC Courts in their probate jurisdiction were of a civil or commercial nature, resulting in clarification of Dubai laws to resolve the issue, both the *Trust Law* and the *Foundations Law* are, for the reasons previously given, civil and/or commercial laws so that question does not arise in the present context.

14.4 Although Article 7(3) of the Judicial Authority Law deals with execution within Dubai, Article 7(2) deals with execution elsewhere as well and attracts the operation of other enforcement mechanisms<sup>101</sup> including:

- (a) Enforcement in other Emirates under Article 221 of the Federal *Civil Procedures Law*

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<sup>101</sup> see the DIFC Courts Enforcement Guide - [https://www.difccourts.ae/wp-content/uploads/2019/08/Enforcement\\_Guide\\_2019.pdf](https://www.difccourts.ae/wp-content/uploads/2019/08/Enforcement_Guide_2019.pdf)

- (b) The *GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications*<sup>102</sup>
- (c) The *Riyadh Arab Agreement for Judicial Cooperation*<sup>103</sup>
- (d) the *UAE India Judicial Co-operation Agreement*<sup>104</sup>; and
- (e) the nine Memoranda of Guidance on enforcement of money judgments with common law jurisdictions.

14.5 Again, nothing in the *Trust Law* or the *Foundations Law* distinguishes between judgments, decisions and orders made under those Laws for the purposes of these mechanisms.

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<sup>102</sup> [http://arbitrationlaw.com/files/free\\_pdfs/GCC%20Convention.pdf](http://arbitrationlaw.com/files/free_pdfs/GCC%20Convention.pdf)

<sup>103</sup> <https://www.refworld.org/docid/3ae6b38d8.html>

<sup>104</sup> <http://legalaffairs.gov.in/agreement-between-republic-india-and-uae-0>

### Question 11:

Whether any provision of the *Trust Law* prevents a settlor of a trust from being a shareholder or a director of a company which is trustee of the trust?

*Proposed answer: There is no provision of the Trust Law which prevents a settlor of a trust from being a shareholder or a director of a company which is trustee of the trust.*

### *Discussion*

- 15.1 The essence of the question is whether or not private trustee companies are permitted under the *Trust Law*. These typically take the form of companies in which the settlor is either a director, or shareholder, or both.
- 15.2 There is no restriction in the *Trust Law* as to who may be a trustee although legal capacity necessarily is a requirement. Article 9(2) of the *Trust Law* does not limit the power of a settlor to include such a provision in a trust instrument if thought necessary. Any limitation could arise only from necessary implication on the basis that its purposes were contrary to public policy in the DIFC<sup>105</sup>.
- 15.3 There is nothing as a matter of public policy which would require a settlor to not be involved in the administration of a trust. Such not only is necessarily the case in the context of a trust created by declaration of trust<sup>106</sup> but sanctioned in other provisions of the *Trust Law*, as the permissibility of indirect involvement is expressly recognised by Article 84 of the *Trust Law*.
- 15.4 In a similar vein the *Foundations Law* expressly permits the Founder of a Foundation to serve as a member of its Council<sup>107</sup>, and the Endowments Laws

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<sup>105</sup> Articles 9(2)(c) and 35(1)

<sup>106</sup> Article 33(1)(c)

<sup>107</sup> Article 22(3)

previously referred to permit the waqif to be involved in the administration of the waqf.

## Question 12:

Whether, if a Muslim settlor expressly desires to establish a trust which is Shari'a compliant, but inadvertently includes in the trust instrument a provision which is not Shari'a compliant, the Court can:

- i. pursuant to Articles 24(2)(c) and 25(2)(a) of the *Trust Law* determine that the disposition shall have effect on terms which are Shari'a compliant?
- ii. pursuant to Article 40(8)(a) of the *Trust Law* vary the terms of the trust so that they are Shari'a compliant?

*Original Proposed answer: The Court has power in appropriate circumstances to make such Orders.*

*Revised Proposed answer: Under Articles 24(2)(c) and 25(2)(a) of the Trust Law the Court can on the application of the settlor or his personal representatives set aside the disposition but cannot vary it. Under Article 40(8)(a) of the Trust Law the Court can vary the terms of the trust so that it is Shari'a compliant.*

## **Discussion**

16.1 Articles 24 and 25 of the *Trust Law* provide:

### **24. Power to set aside a transfer or disposition of property to a trust due to mistake**

- (1) In this Article, "person exercising a power" means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor.
- (2) The Court may on the application of any person specified in Article 28(1), and in the circumstances set out in Article 24(3), declare that a transfer or other disposition of property to a trust:
  - (a) by a settlor acting in person (whether alone or with any other settlor); or
  - (b) through a person exercising a power,

is voidable and:



- (c) has such effect as the Court may determine; or
  - (d) is of no effect from the time of its exercise.
- (3) The circumstances referred to in Article 24(2) are where the settlor or person exercising a power:
- (a) made a mistake in relation to the transfer or other disposition of property to a trust;
  - (b) would not have made that transfer or other disposition but for that mistake; and
  - (c) the mistake is of so serious a character as to render it just for the Court to make a declaration under this Article.

**25. Power to set aside a transfer or disposition of property to a trust exercised by fiduciary power**

- (1) In this Article, “person exercising a power” means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor and who owes a fiduciary duty to the settlor in relation to the exercise of his or her power.
- (2) The Court may on the application of any person specified in Article 28(1), and in the circumstances set out in Article 25(3), declare that a transfer or other disposition of property to a trust by a settlor (whether alone or with any other settlor) through a person exercising a power, is voidable and:
- (a) has such effect as the Court may determine; or
  - (b) is of no effect from the time of its exercise.
- (3) The circumstances referred to in Article 25(2) are where, in relation to the exercise of his or her power, the person exercising a power:
- (a) failed to take into account any relevant considerations or took into account irrelevant considerations; and
  - (b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations or that taking into account of irrelevant considerations.
- (4) This Article applies whether or not the circumstances set out in Article 25(3) occurred as a result of any lack of care or other fault on the part of the person exercising a power, or on the part of any person giving advice in relation to the exercise of the power.

16.2 Article 40(8)(a) of the *Trust Law* provides:

- (8) The Court may vary the terms of a trust:
- (a) even if unambiguous, to conform the terms to the settlor's intention if it is provided by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement;

16.3 Articles 24 and 25 of the *Trust Law* are modelled<sup>108</sup> on corresponding provisions in Jersey<sup>109</sup>, Guernsey<sup>110</sup> and the Isle of Man<sup>111</sup> which seek to overcome the effect of the decision of the United Kingdom Supreme Court in *Pitt v. Holt*<sup>112</sup> and replace it with the approach adopted by Plowman J in *In re Hastings-Bass*<sup>113</sup>.

16.4 Article 40(8) is modeled on section 415 of the Uniform Trust Code.

16.5 The procedures in the provisions are alternatives – under the first and second, the disposition can be set aside at the instance of the settlor, whereas under the third it can be rectified or, to use the UTC expression, reformed. For present purposes it is immaterial whether there are distinctions between the approaches: the law itself sets out the basis on which the Court can act.

16.6 The result is that a Muslim settlor desiring to make a Shari'a compliant disposition to trustees can have confidence that if by inadvertence in drafting the necessary documentation the disposition would not be Shari'a compliant it can be either rectified or revoked.

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<sup>108</sup> See Wealth Management Review Working Group Report pp.19-20 Ex JJV1 pp. 22 to23

<sup>109</sup> *Trusts (Jersey) Law* 1984 Article 9

<sup>110</sup> *Trusts (Guernsey) Law* 2007 section 14

<sup>111</sup> *Trusts Act* 1995, sections 4 and 5

<sup>112</sup> [2013] UKSC 26, [2013] 2 AC 108

<sup>113</sup> [1975] Ch 25. See also Ashdown, Michael: *In defence of the rule in Re Hastings-Bass* (2010) *Trusts & Trustees*, Vol.16 pp. 826-848

16.7 The *Foundations Law* in Articles 47 to 49 makes equivalent provisions in connection with setting aside dispositions resulting from mistakes to those in Articles 24 and 25 of the *Trust Law* and while Article 41(4) of the *Foundations Law* is not as precisely formulated as Article 40(8)(a) of the *Trust Law* rectification at the request of the Founder is possible.

### Question 13:

Whether anything in public policy in the DIFC referred to in Article 9(2)(c) of the *Trust Law* precludes the establishment of a trust by a person who is not and has never been a Muslim notwithstanding that it may contain terms which would not, if the trust were established by a Muslim, be Shari'a compliant?

*Proposed answer: No.*

### *Discussion*

- 17.1 The UAE *Personal Status Law* recognises the right of non-Muslims who are not UAE nationals to make testamentary dispositions in accordance with their national laws. As noted above Article 361 could not apply to a transaction by a non-Muslim who is not a UAE national such as the settlement of a trust or the founding of a Foundation even if it affected inheritance rights.
- 17.2 The position is even clearer in relation to non-testamentary dispositions by non-Muslims who are not UAE nationals which are not subject to any restraints under UAE law.
- 17.3 Public policy in the DIFC is also reflected in the jurisdiction of the DIFC Courts Wills and Probate Registry<sup>114</sup> and Dubai Law which makes provision for non-Muslims to make wills in accordance with their national laws and for administration of those wills.
- 17.4 It follows that there are no public policy constraints of that nature.

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<sup>114</sup> Parts 55 and 57 of the Rules of the DIFC Courts

## **SCHEDULES**

1. Comparative Tables – 2550 and 2018 *Trust Laws*
2. Cross references – 2018 *Trust Law* and Uniform Trust Code
3. Comparative Table:
  - National Endowments Law
  - Dubai Endowments Law
  - Sharjah Endowments Law
  - DIFC Trust Law
  - DIFC Foundations Law

**David Russell QC**  
**Outer Temple Chambers**  
**10 March 2020**

**SCHEDULE 1 PART A:  
Conversion Table 2018 Law to 2005 Law**

1	1 (amended)
2	2
3	3
4	4 (amended)
5	5
6	6
7	7
8	8 (amended)
	9 (omitted)
9	10 (amended)
10	11
11	12 (amended)
12	13
13	14 (amended)
14	15 (amended)
15	16 (amended)
16	17
17	18
18	19
19	20
20	21 (amended)
21	22 (amended)
22	new
23	new
24	new
25	new
26	new
27	new
28	new
29	new
30	new
31	new
32	new
33	23 (amended)
34	24
35	25
36	26 (amended)
37	27 (amended)
38	28 (amended)
39	29 (amended)
40	30 (amended)
41	new
42	31
43	32
44	33
45	34

46	35
47	36
48	new
49	37
50	38
51	39 (amended)
52	40 (amended)
53	41 (amended)
54	42 (amended)
55	43
56	44
57	new
58	new
59	45
60	46 (amended)
61	47
62	48
63	49
64	50
65	51
66	52
67	53
68	54 (amended)
69	55
70	56
71	new
72	57
73	58
74	59
75	60
76	61
77	62
78	63
79	64 (amended)
80	65 (amended)
81	66
82	67
83	new
	68 (omitted)
84	new
85	new
86	69 (amended)

**SCHEDULE 1 PART B:  
Conversion Table 2005 Law to 2018 Law**

1	1
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8	8
9	omitted
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11	10
12	11
13	12
14	13
15	14
16	15
17	16
18	17
19	18
20	19
21	20
22	21
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new	58
45	59
46	60
47	61
48	62
49	63
50	64
51	65
52	66
53	67
54	68
55	69
56	70
new	71
57	72
58	73
59	74
60	75
61	76
62	77
63	78
64	79
65	80
66	81
67	82
new	83
68	omitted
new	84
new	85
69	86

**SCHEDULE 2**  
**Cross-references to Uniform Trust Code provisions**

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4	102
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9	105
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14	
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17	108
18	201
19	202
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21	1004
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24	
25	
26	
27	
28	
29	
30	
31	
32	
33	401
34	402
35	404
36	
37	406
38	405, 413
39	409 (amended)
40	412, 415, 602
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44	817
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49	501, 502, 503
50	504
51	701
52	704
53	705
54	706
55	707
56	708, 709
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59	801, 802, 804
60	802, 809, 810
61	703
62	803
63	805
64	811
65	812
66	813
67	815
68	816
69	
70	807
71	
72	57
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74	1001
75	1003
76	1004
77	1005
78	1006
79	1008
80	1009
81	1010
82	1012
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### Schedule 3

#### Comparative Table of Provisions: National, Dubai and Sharjah Endowments Laws, DIFC Trust Law and DIFC Foundations Law

Topic	National Endowments Law	Dubai Endowments Law	Sharjah Endowments Law	DIFC Trust Law	DIFC Foundations Law
Endower/Settlor/Founder	5	11	11	34	17
Endowment/Reservations	4				26
Endowed/Trust Property/Foundation Property	7	12	8		27, 28
Endowee/Beneficiary or Purpose/Qualified Recipient	6	8, 13	9	34, 35, Part 5	29
Endower's Condition	9.5		14		26
Endowment Certification	9.4	16		Operating Regs 8	17, Part 6
Administrator	12				22
Types of Endowment	4	6	2	38,39	12
Term of Endowment/Trust/Foundation	4	7	2-4, 15	36	11
Validity	5.1c to 5.1e, 5.2c to 5.2d, 8	5, 9	5, 13, 22	37	
Legal Personality	10.1	16.B1	16		10(1)
Endower/Settlor/Founder reserved powers	11	10, 14	7, 12, 17	40, 84	26
Administrator/Trustee/Council - eligibility	12, 13	17, 18	37		22
Administrator/Trustee/Council - powers	14	20	38	Part 8 Ch.2	32
Administrator/Trustee/Council - duties	15	19		Part 8 Ch.1	22
Administrator/Trustee/Council - liabilities	16	21, 25	50	Part 9	25
Supervision – Competent Authority/Court/Endower/Settlor/Founder	17	26	48, 53	Part 3, 84	26 , Parts 6 and 7

<b>Topic</b>	<b>National Endowments Law</b>	<b>Dubai Endowments Law</b>	<b>Sharjah Endowments Law</b>	<b>DIFC Trust Law</b>	<b>DIFC Foundations Law</b>
Delegation	18	23	40	70	
New Administrator/Trustee	19	27	39, 41	52	
Removal of Administrator/Trustee/Council	20	24	48, 49	54	26
Appointment of new Administrator/Trustee/Councillor	21		47, 48-2	54	
Investment of property	24	15, 22, 34	18, 19	68	22
Application of Revenues/Income	25				22
Improvident use of endowed/settled property	29	29			
Termination	30	36, 37	51, 52	43	Part 9
Family Companies endowment	32			84	
Jurisdiction of Court	35		53	Part 3, 40	Part 7
Absence of endowees/beneficiaries/Qualified Recipients		31, 32		42	21