

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

IN THE MATTER OF ARTICLE 5(B)(1)(b) OF THE JUDICIAL AUTHORITY LAW

AND IN THE MATTER OF AN APPLICATION RELATING TO THE INTERPRETATION
OF THE DIFC TRUST LAW AND THE DIFC FOUNDATIONS LAW

ON THE APPLICATION OF

THE DUBAI INTERNATIONAL FINANCIAL CENTRE AUTHORITY

Applicant

SUBMISSIONS ON BEHALF OF AL TAMIMI & COMPANY

A. Preliminary

1. These submissions are filed by and on behalf of Al Tamimi & Company (“**ATCO**”) under and in accordance with the Amended Directions of the DIFC Court of Appeal (also “**the Court**” or “**this Court**”) made on 12 February 2020 in this consultative reference (the “**Reference**”). The Reference has been brought by the Dubai International Financial Centre Authority (“**DIFCA**”) seeking the Court’s ruling as a matter of binding interpretation on certain provisions of the DIFC Trust Law, Law No.4 of 2018 (the “**Trust Law**”) and the DIFC Foundations Law, Law No.3 of 2018 (the “**Foundations Law**”).
2. In these submissions ATCO addresses each of the 13 questions set out in the Schedule to the Submissions by the DIFCA in support of the Reference, being the same questions referred to this Court by the Chief Justice. In relation to each such question ATCO has stated whether and, if so, the extent to which it agrees with the answers proposed by DIFCA in those submissions (the “**DIFCA proposed answers**”). Where ATCO has differed from DIFCA in the answer to be given, it has sought to assist the Court by succinctly setting out its explanation and analysis of the law and, where appropriate, of the proper limits of the Court’s consultative jurisdiction.
3. In drafting these submissions, ATCO has had the benefit of reviewing the following documents filed in respect to the Reference:
 - a. Claim Form CFI-008-2020 issued by the DIFC Courts on 30 January 2020.
 - b. Directions of the Deputy Registrar dated 12 February 2020.

- c. First Witness Statement of Jacques Visser dated 10 February 2020 with Exhibit JJV1.
- d. Second Witness Statement of Jacques Visser dated 10 March 2020 with Exhibit JJV2.
- e. Submissions filed by David Russell QC for and on behalf of the Dubai International Financial Centre Authority dated 10 March 2020.
- f. Submissions filed by Fadi Hammadeh for and on behalf of Family Business Council-Gulf (“FBCG”) dated 9 March 2020.
- g. Submissions filed by Trowers & Hamlins for and on behalf of the Society of Trust and Estate Practitioners (Arabia) NPIO (“STEP”) dated 9 March 2020.
- h. Index to the bundle for the hearing before the DIFC Court of Appeal on 22 March 2020 including many of the exhibits therein.

B. ATCO's interest in this Reference

- 4. ATCO is the largest law firm in the Middle East with 17 offices across nine countries. A full-service law firm, we have a large family business and private client practice based out of our office in the DIFC. As a firm, we recognise the importance to our clients and, as the FBCG point out, to the UAE and the Arab Gulf of the economic activities of family businesses and high net-worth individuals.
- 5. The clients we serve, whether natural or legal persons, often have complicated, cross-border financial arrangements which need flexible and appropriate legal solutions for their affairs. In this respect, we agree with STEP and the FBCG, that a higher degree of legal certainty in the Trusts and Foundation Laws would be very welcome to this firm's clients, both existing and prospective, given the newness of these laws, not just in the jurisdiction of the DIFC but also the wider UAE and GCC.
- 6. This firm has had close dealings with the DIFCA in respect of the Trusts and Foundation Laws; two partners, Izabella Szadkowska and Gary Watts (who is now retired), were on the Wealth Management Working Group that reported to the DIFCA in December 2016. We generally support the questions posed by the DIFCA in their Reference, and the proposed answers, but with some reservations and respectful differences in opinion, as we set out below.

C. The Court's Consultative Jurisdiction

- 7. We agree that the jurisdiction of this Court under Article 5(B)(1)(b) of the Judicial Authority Law and Article 27 of the DIFC Court Law 2004 can be informed by the approach of other jurisdictions to statutory powers to provide binding rulings of general application upon a consultative reference. In particular, it appears right that the duty of the Court to assist in the interpretation of any law must be balanced in every case against the potential pitfalls of providing a binding answer for all future cases in the absence of specific facts and a specific

contest, *per* Lord Haldane in *Attorney-General of British Columbia v. the Attorney-General of Canada* [1914] AC 153, as approved in *In Re the Regulation and Control of Aeronautics in Canada* [1932] 1 DLR 58.

8. In ATCO's respectful submission, the consideration that the Court's interpretation under Article 5(B)(1)(b) "*shall have the same authority as the interpreted legislation*" means that the Court should be all the more vigilant than a court in a purely advisory context, and if necessary should even be sparing in the exercise of its exceptional consultative jurisdiction.
9. In the present case, ATCO believes that the balance of risk weighs against providing an answer to the Foundations Law element of Question 6. In this regard we believe that the dangers of a general answer for all purposes to the Foundation-related questions cannot be overcome with comfort by qualifying the Court's answer. Accordingly, we respectfully submit that the Court's discretion should be exercised so as to decline to answer Question 6 insofar as it relates to the Foundations Law.
10. ATCO also wishes to draw attention to the language of Article 5(B)(1)(b), as reflected in Article 27 of the Court Law, whereby the Court is empowered to determine the interpretation "*of any article*" of any DIFC law or regulation, such that the jurisdiction is expressly confined to questions of statutory interpretation of specific provisions of DIFC law.
11. In the present case, ATCO believes that the question asked at Question 8 - as presently drafted - goes beyond the proper scope of the Court's jurisdiction under Article 5(B)(1)(b) of the Judicial Authority Law. Specifically, as framed, it concerns and relates to matters of foreign law as might be applied by a foreign court. At the same time, ATCO recognizes the underlying question that in practice is often raised, as to whether the trusts regime established by the DIFC Trust Law is, as a matter of DIFC law (and therefore for other jurisdictions, including civil law jurisdictions not party to Convention on the Law Applicable to Trusts and on their Recognition ("**The Hague Trusts Convention**") called upon to recognize them), are exclusively relevant and operate exclusively within the DIFC. Therefore, ATCO has re-framed the question along these lines and given an answer to the re-framed Question 8 that hopefully will assist trust practitioners in the wider Middle East region and elsewhere.
12. Furthermore, ATCO considers, in a number of cases, that the questions posed could be answered with the highest legal certainty if the DIFCA or another appropriate authority in the DIFC (such as the Courts themselves) sought agreements with authorities and court systems outside the DIFC over the enforcement of DIFC Court judgments, orders and decisions relating to trusts and Foundations (as defined). The general rule is that the law that practically governs trust or Foundation property is that of the jurisdiction in which the property is physically located. To avoid tricky conflicts of law situations and conflicts between different legal systems (akin to those which triggered Decree 19 of 2016 and the creation of the Joint Judicial Committee to decide on conflicts between these Courts and the Dubai Courts), a UAE-wide, harmonised set of rules should be developed.

D. 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?

DIFCA Proposed answer: Yes

ATCO Position: Agree

13. ATCO agrees with the DIFCA's submission and the answer proposed by it in relation to Question 1. At common law it is possible to have a trust over property (including real property and shares) located in a jurisdiction that does not have or does not recognise the concept of a trust, *Akers and Others v Samba Financial Group* [2017] AC 424; cf., also the majority judgment and the judgment of Lord Mance (dissenting in part) in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd; Rawlinson & Hunter Trustees SA v Investec Trust (Guernsey) Ltd* (Privy Council) [2019] AC 271 at [59], [200 to 201] and [227 to 231].
14. In addition, as noted for example in Dicey, Morris & Collins on the Conflict of Laws (15th Ed, Fifth Supplement) at 22-048, one of the purposes of the Hague Trusts Convention, to which the UK, Australia and Canada are party and to which the US is a signatory, is to facilitate the recognition of trusts in countries which do not have such a concept in their domestic law, see generally Gaillard & Trautman, *Trusts in Non-Trust Countries: Conflict of laws and the Hague Convention on Trusts* (1987) 35 Am J Comp L 307.
15. Under Article 11(d) of The Hague Trusts Convention, the rights and obligations of any third party holder of trust assets remains subject to the law determined by the choice of law rules of the forum. Further, under Article 15, the mandatory effect of the rules of the law designated by the conflicts of laws rules for matters other than trusts is preserved, notwithstanding the creation of a trust which purports to override rights created by virtue of those rules. Article 15 provides:

Article 15

The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters -

- a) the protection of minors and incapable parties;*
- b) the personal and proprietary effects of marriage;*
- c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;*
- d) the transfer of title to property and security interests in property;*
- e) the protection of creditors in matters of insolvency;*
- f) the protection, in other respects, of third parties acting in good faith.*

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

16. Thus, Article 15 allows a court to apply the law identified by its own choice of law rules to govern such matters, instead of the proper law of the trust, which governs trust questions in the place

where the trust property is located. It is however only mandatory rules which are preserved, that is, such provisions as cannot be derogated from by voluntary act. So, for example, forced heirship rules are in this category notwithstanding that the heirs entitled can waive their benefit, because viewed from the perspective of the settlor or donor the rules are mandatory, see *Explanatory Report on the 1985 Hague Trusts Convention*, paragraph 137; also *Lewin on Trusts* (19th Ed.) paragraph 11-238).

17. In the submission of ATCO, the dividing line in The Hague Trusts Convention on the applicable law status of mandatory foreign laws that conflict with or restrain trust property transactions in third countries reflects the position at common law, and therefore the position in DIFC law, cf., Lord Justice Briggs, *Does England Need a Trusts Act?* (2019) 34 BJB&FL 359-362; Stuckey-Clarke, *The International Trust Litigation Committee report for jurisdictions other than the USA* (2019) 25 T&T 156-159. In consequence, the DIFC Courts may be called upon to apply a mandatory provision of foreign law that may impact upon the scope or administration of a DIFC trust, but this will not result in the invalidity of the trust. Further, if and to the extent that a foreign mandatory law made impossible the achievement of the trust's objectives, that would be a question of fact to be determined by the DIFC Courts, it would not result *de jure* in the invalidity of the trust.
18. That is not to say, however, that transactions in trust assets may not be impacted by such a foreign law, as for example in the case of forced inheritance rights under the foreign law. In *Akers v Samba Financial Group* [2017] AC 424, the Supreme Court held *obiter* (at [40]) that where a settlor had purported to declare himself trustee of shares located in Saudi Arabia pursuant to certain Cayman Islands law trusts and then transferred those shares to a party in Saudi Arabia, Saudi law would determine whether the effect of the transfer was to defeat the beneficiary's trust rights. Similarly, in *Clark and Whitehouse (Joint Administrators of Rangers Football Club plc), Re Directions* [2012] SLT 599. Lord Hodge held that, under Scottish law, proprietary rights are governed by the *lex situs* rather than the law governing the trust, see also for example *Lambton (Earl of Durham) v Lady Lambton* [2013] EWHC 3566 (Ch.) at [64].
19. In conclusion on Question 1, and with reference finally to the enforcement aspect mentioned by the DIFCA in its response, ATCO does not believe that the procedural mechanisms for enforcing in another jurisdiction a DIFC Court order relating to a DIFC trust (including any enforcement protocols in place between the DIFC Courts and the courts of that country) provide assistance on the answer to Question 1. In our view, it is not so much the enforcement mechanisms, as the respect for applicable laws in accordance with (increasingly convergent) rules of private international law, that will best avoid conflict and facilitate harmony in this context.
20. In particular, by having regard in appropriate cases to inescapably mandatory provisions of foreign law impacting on DIFC trusts, and seeking to achieve the objects of the trust in an alternative way, DIFC trustees and the DIFC Courts can assist in resolving the conflict arising between the foreign law and the trust instrument. Where there is no such conflict, it is equally

to be hoped that foreign courts will apply the proper law of the trust and otherwise give effect to trust provisions in the foreign jurisdiction.

21. Ultimately, if a DIFC trust holds property in the UAE outside the DIFC, for instance, then, on any application for enforcement of an order of the DIFC Courts relating to the trust, the appropriate Execution or Enforcement Court should enforce the DIFC Court order without examining its merits. If, however, the appropriate Personal Status Court becomes involved, perhaps because of a claim over the trust property by a non-beneficiary under the trust, then the DIFC Court order may conflict with the onshore proceedings.
22. We would therefore recommend that, insofar as the DIFCA is able to assess which other jurisdictions outside the DIFC are the location of property held by DIFC trusts, the DIFCA and the DIFC Courts make a concerted effort to reach agreement on the enforcement of DIFC Court trusts orders and for the disposal of claims outside the DIFC which conflict with their enforcement. This may be through the means of a memorandum of understanding with appropriate departments and Courts, at both the Federal level and in each of the Emirates. It may also extend to other foreign jurisdictions, particularly those, like the UAE, which are not parties to The Hague Trusts Convention.

E. 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?

DIFCA proposed answer: *Yes*

ATCO position:

Agree to the extent that the question relates to purpose trusts. More generally, this is a matter that calls for legislative clarification.

23. In approaching this question, ATCO respectfully submits that a good starting point is to bear in mind that the prohibition in Article 10(3) of the Foundations Law on Foundations holding property in trust for any other person does not apply to purpose trusts. Therefore, in principle and in keeping with the statutory scheme, a Foundation is permitted to hold property in trust for a purpose.
24. To that extent the answer to Question 2 can and should be answered in the affirmative.
25. However, if and to the extent that the focus of Question 2 is on the capacity of Foundations to receive and hold gifts as trustees of trustee property for their own benefit, ATCO disagrees with the analysis and with the DIFCA's conclusion on the substance of the question asked in Question 2.

26. In particular, whilst it is true that a Foundation has all the powers of a natural person,¹ the prohibition in Article 10(3) of the DIFC Foundations Law applies to property of a Foundation held by it upon trust for any other person. Therefore, if a Foundation is gifted property for itself alone, it will hold that property as the legal and beneficial owner but not as a trustee because it is axiomatic that no trustee can hold property for itself alone. In such a posited case the legal and equitable interests would merge and no trust would come into existence.
27. Therefore, if in any case a Foundation were to be gifted property by way of settlement to hold in trust, the trust property by definition would have to be held for the benefit of the Foundation plus at least one other person. It follows in ATCO's respectful submission that if the Foundation is gifted property to hold on trust, by definition it would have to be for the benefit of itself and another beneficiary or beneficiaries, and the arrangement will fall foul of Article 10(3).
28. To the extent that the DIFCA has submitted that, generally, "*the property of a Foundation*" does not extend to trust property gifted to the Foundation, ATCO does not agree. Our conclusion is rather that the primary prohibition in Article 10(3), read together with the wide definition of "*the property of a Foundation*" in Article 28, leaves no room for Foundations to hold property on trust for the benefit of itself and others together.
29. This being a statutory constraint, it is ATCO's view that the expedient identified by the DIFCA, of providing in the Foundations Charter that assets transferred to it to hold upon trust are not '*the property of the Foundation*', will not be effective. In this regard, ATCO does not see how Article 12(2) of the DIFC Foundations Law could provide a basis for overcoming the Article 10(3) prohibition. In particular, whilst the exclusively charitable purpose of a Foundation, or its purpose to benefit persons by name, category or class, may be sufficiently reflected in the Foundation's Charter by a general *renvoi* to the Foundation's By-laws (under and in accordance with Articles 12(3) or 12(4) respectively of the Law), the By-laws themselves cannot contradict or qualify the statutory prohibition.
30. In so submitting ATCO does not suggest that in an appropriate case this Court as a court of equity would not give effect to the trust, and avoid any unjust enrichment, as would arise from a strict application of the Article 10(3) constraint on the powers of the Foundation. However, as a matter of *vires*, the possibility of exercising the Court's equitable jurisdiction in such cases does not overcome the legal difficulty arising.
31. ATCO understands that the legislator's intention may well have been different, as the DIFCA says Article 10(3) may have been intended to make it clear that a Foundation is not of its nature a trust. ATCO confirms that this is an important question in practice, particularly given that the characterization or treatment of a DIFC Foundation as a trust in other jurisdictions can have significant and unwanted tax consequences. Nonetheless, the language of Article 10(3) does not say that a DIFC Foundation is a distinct legal entity from a trust, either in terms or by

¹ DIFC Foundations Law, Article 10(2)

necessary implication. Rather, it provides unequivocally, in a manner that cannot be read otherwise by any canon or principle of statutory construction, that “[t]he property of a Foundation is not held by it upon trust for any other person.”

32. In the respectful submission of ATCO, it is not open to the Court to interpret Article 10(3) in a manner that allows a Foundation to hold property in trust for itself as beneficiary, as to do so will inevitably bring it into conflict with the prohibition on holding property on trust for any other person. Therefore, if and to the extent that the provision does not reflect the original statutory intention, it ought to be amended or replaced by legislation.
33. ATCO confirms in this regard that this provision has already given rise to questions in the firm’s advisory practice, and from the perspective of legal certainty ATCO would both welcome and recommend legislative clarification.
34. As with our response to Question 1, we would highlight the need in this context too for a framework of agreements with other jurisdictions regarding the enforcement of DIFC Court orders relating to Foundations. There is already a MOU between the Dubai Economic Department and the DIFCA but, for the sake of certainty and to avoid collateral claims which undermine the DIFC Courts’ jurisdiction over DIFC Foundations, we would recommend the development of a Federal, UAE-wide law that prohibited non-DIFC UAE Courts from re-opening the merits of any DIFC order relating to DIFC Foundations.

F. Question 3 (i)

Whether the reference in Article 10 of the Trust Law to the common law of trusts and principles of equity includes the common law of trusts and principles of equity as understood under the law of England and Wales;

DIFCA proposed answer: *Yes*

ATCO position: *Agree*

35. Under the waterfall provisions of Article 8(2)(e) of the *Law on the Application of Civil and Commercial Laws in the DIFC* the default law in the absence of specific provision to the contrary is the law of England and Wales. In the case of principles of equity - case law -
36. Article 10(2) of the DIFC Trust Law only carves out the statute law of England and Wales applicable to trusts, and by Article 10(1) provides in terms that the “common law of trusts and principles of equity” supplement the Law except to the extent modified by the Law or any other DIFC law or by the Court.
37. In ATCO’s submission the statutory language and the statutory intention is clear, and hardly requires clarification. The DIFC Courts are common law courts; the common law contains the principles of equity as broadly understood. The proposed answer to this question does not

restrict the DIFC Courts from applying in its jurisprudence principles of equity applied in common law jurisdictions outside England and Wales and, indeed, developing its own principles.

38. Nor does an affirmative answer to this question require the Courts to follow English equitable principles (see the decision of then-Justice Michael Hwang in *Forsyth Partners Global Distributors Limited, Forsyth Partners Group Holdings Limited and Forsyth Partners (Middle East) Limited* [2007] DIFC CFI 005/006/007, judgment of 30 January 2007. Notwithstanding, it is open to these Courts to consider and, if appropriate, apply English principles of equity. This coheres with the policy of the ADGM Courts, where English law is applied directly (including equity: see the Application of English Law Regulations 2015), but still allows space for the DIFC Courts to be persuaded by any differing approach from other common law jurisdictions as well as to develop its own jurisprudence.

G. Question 3 (ii)

Whether the reference in Article 10 of the Trust Law to the common law of trusts and principles of equity is limited to the common law of trusts and principles of equity as understood under the law of England and Wales?

DIFCA proposed answer: *No*

ATCO position: *Agree*

39. In ATCO's submission there is nothing in the statutory scheme of the DIFC Trust Law to displace or qualify the established practice of the Court to have regard to comparative case law from any common law jurisdiction in identifying, as a matter of DIFC law, the common law principles and the principles of equity that apply to DIFC trusts.
40. In this last regard, it is probably more accurate, and we suggest preferable, to speak of the common law jurisprudence of England and other common law countries (as opposed to "*of England and other Commonwealth countries*") being of persuasive authority on the interpretation of DIFC laws that are based upon common law principles, as here in the case of the DIFC Trust Law, see for example the judgment of Justice Sir Anthony Coleman in *Ithmar Capital v. 8 Investments* CFI 8/2007 at paragraph 112; cf. Justice Hwang (as he then was) in *Dutch Equity Partners Limited v Daman Real Estate Capital Partners Limited* CFI 1/2006 paragraph 37.²
41. That the DIFC Courts themselves contribute to the development of the common law of trusts and the principles of equity, by reference where of assistance to the decisions and judgments of other common law courts, is itself anticipated in Article 10(1) of the DIFC Trust Law, in

² See generally Damian Brown QC & Edward Kemp, *Achieving Certainty in the Global Litigation Market* (Littleton Chambers, 2016)

providing that the common law of trusts and the principles of equity may be modified by the Court. In this regard, ATCO believes the following statement of Lord Justice Briggs, in his recent contribution *Does England Need a Trusts Act?* (2019) 34 BJB&FL 359, correctly reflects the position in DIFC law:

“I think that the common law best serves its users around the world when it is developed by different jurisdictions with due respect to each other’s jurisprudence, so that the body of international common law remains broadly integrated, save only where local societal and cultural differences require divergence The great strength of the common law lies in its ability to grow and adapt to changing circumstances, and the unique contribution of equity is that, where appropriate, it injects endlessly flexible but nonetheless principled notions of conscience into the necessarily hard-edged rules of the common law, nowhere more importantly than when regulating the conduct of those who we call trustees or fiduciaries, entrusted with the custody and administration of property belonging beneficially to others.”

H. 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?

DIFCA proposed answer: No

ATCO position: Agree

42. We agree that the terms of Article 40(12) of the Trusts Law and of Article 19(11) of the Foundations Law absolutely constrain the trustees or the Foundation as appropriate from varying an irrevocable trust or Charter provision of the type contemplated by Article 40(11) and Article 19(10) respectively of those Laws. Such irrevocable provisions are protected by statute from being varied/amended or revoked including in purported reliance on any other provisions of the Trusts Law or the Foundations Law, as applicable.
43. The language of Article 40(11) and of Article 19(10) respectively is also unequivocal in providing for the restriction to the designated nationals to apply where the trust property includes “**any property**” which by reason of the law of a country may be held only by a national of that country. Where such an irrevocable provision exists, therefore, it excludes the possibility of overcoming the prohibition by dividing unit trust property into different classes of units (to the extent that such classes do not give rise to a separate trust).
44. We therefore agree that any purported variation of such irrevocable provisions by any person 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 itself, would not be lawful and would be ineffective.

45. In practical terms, where non UAE nationals newly become beneficiaries within the class of beneficiaries of the trust by virtue of inheritance or otherwise, the relevant trust units will be cashed out and redeemed. In all cases, if the beneficiaries of the trust do not claim that non-DIFC law applies (which, given that they are beneficiaries under DIFC law, they are unlikely to do), then this point becomes a minor one.

I. Question 5:

Whether, if one or more suitably qualified expert(s) in Sharia 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 Sharia compliance which is relevant to the administration of the trust or the exercise of any discretion vested in the responsible trustee?

DIFCA proposed answer: *Yes*

ATCO position: *Agree*

46. We respectfully agree that the assessment and advice of an appointed advisory trustee expert in Sharia law as to whether any act or investment is or is not Sharia compliant is advice that the responsible trustee can rely upon within the protections and mechanisms provided by Article 57 of the Trusts Law.
47. ATCO observes in this regard that the Trusts Law does not define or limit the attributes or sphere of expertise of an advisory trustee, the sole requirement being that the responsible trustee act “*in the administration of any trust property*” with an advisory trustee or trustees. Given the real questions that arise in practice for the administration of trust property in the Middle East consistent with Sharia law, and the host of ways in which questions of Sharia may impact upon a trust (including the interpretation and application of many provisions of the DIFC Trusts Law itself), it must follow that a Sharia law advisory trustee is naturally and precisely within the type of advisory trustee contemplated by Article 57.
48. At the same time, notwithstanding any advice that the advisory trustee might give, the responsible trustee has an overarching duty to give effect to the trust. The principles of Shari’a as advised are no different than any other consideration in this regard, such that, subject only to matters falling within Article 9(2) of the Law, the terms of the trust will prevail over them. In the case of Sharia investment requirements directed in the trust instrument itself, however, this conflict is unlikely to arise.
49. Equally the trustee’s duties under Chapter 1 of Part 8 of the DIFC Trusts Law, including to preserve so far as is reasonably practical the value of trust property, will prevail over any conflicting principle of Sharia law as advised.

philanthropic purposes ATCO will tend to advise the adoption of trust structures rather than a *waqf*.

52. It is ATCO's experience that both UAE and foreign *waqf* endowment structures overwhelmingly tend to have orphan legal personality in their places of establishment. This being so, there is no trustee element whereby a trustee holds property as a separate fund to the trustee's own property, and such structures are therefore not trusts and cannot be recognised as foreign trusts.
53. For these reasons, notwithstanding the theoretical and technical nexus that might exist between trust and *waqf* principles, in practical terms it would only be where a *waqf* had no legal personality, and where by definition there would be a bifurcation of the legal and beneficial interest, that a *waqf* could be recognised as a trust.
54. Having said that, ATCO respectfully submits that this Court should be hesitant to lay down a rule in the abstract on the general compliance of structures governed by Islamic jurisprudence with DIFC law. As reflected in Registrar's Direction No. 3 of 2017, where the requirements of Sharia law are relevant to a matter before the DIFC Courts, these are required to be established as a matter of expert evidence. The Practice Direction anticipates that the expert evidence on Sharia law applicable to the matters in issue, including in terms as they might impact upon any matter concerning a trust, will be adduced in every concrete and even uncontested case under and in accordance with RDC Part 31.
55. As regards Foundations, to qualify as a DIFC Foundation, a *waqf* endowment structure would have to be overtly established and deliberately constituted as a DIFC Foundation under the Foundations Law.
56. If a *waqf* were established as a legal entity elsewhere, as they usually are, then depending on the case it might seek to be a Recognised Foreign Foundation or it might seek a Certificate of Continuance as a DIFC Foundation under the licensing and application procedures of Part 8 of the DIFC Foundations Law. These formal licensing matters require in every case to be carefully addressed by the applicants and their lawyers, including by reference to the laws of the place of incorporation. The applications will then be carefully considered on a case by case basis by the DIFC authorities, and ought not to be answered in the abstract.
57. For these reasons ATCO respectfully submits that this Court should decline to answer Question 6(b) and Question 6(c).

K. 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?

DIFCA proposed answer: Yes

ATCO position:

Agreed, provided that the statutory criteria under Articles 60 and 61 are met and so decided upon in an application made under Article 59 of the Foundations Law.

58. Question 7 anticipates applications made by DIFC Foundations wishing to migrate to other jurisdictions under Article 59 of the DIFC Foundations Law, which in each case will be considered by reference to matters of foreign procedural and foreign substantive law as set out in Articles 60 and 61 of the Foundations Law.

59. It follows in ATCO's view that Question 7 can be answered in the affirmative, provided in any concrete case that the statutory criteria under Articles 60 and 61 are met and so decided upon in an application made under Article 59 of the Foundations Law.

L. 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?

DIFCA proposed answer: No

ATCO position: Question 8 should be re-framed as follows:

Is a trust established under the DIFC Trust Law *sui generis* such that, as a matter of DIFC law (and therefore for other jurisdictions, including civil law jurisdictions not party to The Hague Trusts Convention, called upon to recognize them), it can only create interests and only operate within the DIFC?

Proposed ATCO answer:

DIFC trusts are part of the family of common law jurisdiction trusts designed to operate across the world and to be recognised as creating instruments and interests that can be readily recognised and given effect to by common law and civil jurisdictions alike.

60. Question 8 as framed concerns how the laws of other jurisdictions, and therefore such laws as might be authoritatively interpreted by a foreign court, might treat a DIFC trust. In ATCO's submission this is not a point of interpretation of any provision of any DIFC law.

61. Whilst it is conceivable that in a concrete case the DIFC Courts might be called upon to consider whether any difficulty might arise under foreign law, having regard to the provisions of a DIFC trust instrument or to any provisions of the DIFC Trust Law, this would still be a question of foreign law.

62. Whilst ATCO recognises the relevance and force in this context of how The Hague Trusts Convention might potentially influence the interpretation of foreign law, it is respectfully submitted that this is not a consideration that is capable of bringing Question 8 within the sphere of Article 5(B)(1)(b) of the Judicial Authority Law.
63. At the same time, ATCO recognizes what seems to be the underlying question that in practice is often raised, as to whether a trust established under the (regionally novel) DIFC Trust Law is *sui generis* such that, as a matter of DIFC law (and therefore for other jurisdictions, including civil law jurisdictions not party to The Hague Trusts Convention, called upon to recognize them), it can only create interests and only operate within the DIFC.
64. The answer to this re-framed question, which is connected to the question raised in Question 1, is emphatically that DIFC trusts are part of the family of common law jurisdiction trusts designed to operate across the world and to be recognised as creating instruments and interests that can be readily recognised and given effect to by common law and civil jurisdictions alike.

M. Question 9:

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

DIFCA 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.

ATCO position: Agreed subject to proposed narrowing of the scope of the answer to specific provisions of each law as suggested below

65. As the DIFCA has recognised, precisely how Article 361 of the UAE Law of Personal Status would be interpreted in a UAE Court outside the DIFC is not a matter within the scope of the present application. ATCO understands this to mean, in effect, that the question asked takes as its starting point that any inescapable breach of Sharia inheritance rules that comes about as an inevitable consequence of the operation of either DIFC Law will in fact be void.
66. To that extent, ATCO believes that Question 9 can be approached as one of DIFC law. Of course, it does not seek an interpretation of any specific provision of either Law, but asks rather whether anything in the DIFC Trust Law or the DIFC Foundations law is inimical to Sharia inheritance rules, this being an important point that arises from time to time in practice when advising Muslim clients on the establishment of DIFC trusts or Foundations.

67. Notwithstanding the breadth of the question, for the reasons that follow ATCO believes that an answer can and should be given to the question, although ATCO respectfully submits that the answer should not and need not say “Nothing in the Trusts Law of Foundations Law” but should be focused on the particular provisions identified by the Court as relevant to the issue (as recommended below).
68. ATCO respectfully submits that, insofar as this question impacts on or relates to the enforcement of DIFC Court judgments, decisions and orders, there is an overarching jurisdictional limitation on how Article 361 can come into play, because it will be the Execution Courts and not the Personal Status Courts of the UAE that will be called upon to enforce DIFC Court orders in onshore Dubai and the other Emirates. In principle, the Execution Courts ought not to raise or entertain an objection to enforcement onshore by reference to Article 361, as in ATCO’s respectful submission the Execution Courts (as opposed to the Personal Status Courts) have no power to do so unless such enforcement were to raise an issue of public policy.
69. Allied to this point is the observation, which ATCO believes to be true in practice, that unless there is a dispute in the sense of an adversarial contest the question of how a DIFC trust may or may not conflict with Article 361 will not arise.
70. Beyond these overarching practical observations, ATCO submits that a good starting point for Question 9 is Article 9(2) of the Trusts Law, whereby the terms of a trust prevail over any provision of the Law save those formal and fundamental matters enumerated at Article 9(2)(a) to 9(2)(k). Of those, mention can be made in this context of the requirement in Article 9(2)(c) and Article 35(1) that a trust and its terms or purposes cannot be contrary to “*public policy in the DIFC*”, which of course does not overlap with or reflect Sharia law rules of inheritance.³
71. No similar provision is contained in the Foundations Law, no doubt because for Foundations their legal basis is explicitly and necessarily founded on the Law itself. Nonetheless, Article 12(1)(b) similarly provides that a Foundation’s objects must not be contrary to DIFC public policy; and, of greater relevance, Articles 13 to 16 of the Foundations Law carefully distinguish between heirship rights in relation to the property of a living person and inheritance rights upon death.
72. In this last regard, Article 13(2)(c) provides in terms that the application of DIFC law in regard to a Foundation or in regard to any disposition of property to or by a Foundation shall not validate any testamentary trust or disposition which is invalid according to the laws of the testator’s last domicile.

³ ARB-004-2018, judgement of HE Justice Shamlan Al Sawalehi dated 20 June 2019

73. In ATCO's respectful submission the following fundamental conclusions can be drawn from the respective statutory schemes:

- a. Sharia inheritance rules do not form part of the public policy of the DIFC within the meaning of the DIFC Trusts Law or the DIFC Foundations Law;
- b. Article 361 of the UAE Law of Personal Status does not form part of DIFC law
- c. In the case of a DIFC trust, the terms of the trust may or may not conflict with Sharia inheritance rules. Whether it does so will depend on the terms of the trust, and the Trusts Law is entirely neutral upon and has no impact on the question.
- d. A well advised settlor wishing to establish a trust that will respect Sharia inheritance rules in its operation will be able to do so. In principle, this compatibility can be protected by providing for a fixed trust in the sense that fixed interests in the trust will vest on death in a sufficiently certain way to ensure that the trustees will respect Sharia inheritance rules. This fixed character of the trust would not necessarily mean, however, that there could not be a discretionary element applying to the payment of income during the lifetime of the deceased.
- e. On the other hand, in ATCO's experience, a pure discretionary trust with wide and untrammelled powers vested in the trustees in relation to the distribution and vesting of assets is likely to be incompatible with Sharia inheritance rules.
- f. As regards the validity of prior dispositions to a trust during the lifetime of the deceased, no issue arises, see for example *Dajani v Mustafa El Khaldi* [1946] AC 383.
- g. As regards the validity of dispositions to a trust by inheritance, to the extent that such a disposition is contrary to Sharia inheritance rules it raises no issue of DIFC law. It may however raise an issue of foreign law where it is the applicable law governing the validity of the disposition and where such law includes Sharia law inheritance rules. In this regard we respectfully refer to and repeat our observations at paragraphs 9 to 11 of this Submission. In such cases any conflict will be avoided by the application of the applicable law in relation to the disposition without reference to DIFC law as the proper law of the trust.
- h. In the case of a DIFC Foundation, the question posed is confined in real terms to the validity of dispositions, in respect of which the same answer as f. and g. applies *mutatis mutandis*, having regard to Article 13(2)(c) of the Foundations Law which in terms provides that DIFC law shall not validate any testamentary trust or disposition which is invalid according to the laws of the testator's last domicile.

74. We should add finally, although it is not a matter of DIFC law, that it is ATCO's practice to approach the question of conflict with Article 361 of the UAE Personal Status Law on the basis

and understanding that, from the perspective of Sharia inheritance rules, each disposition requires to be examined on a case by case basis to establish whether, in essence, the transaction is or was meant to circumvent Sharia inheritance rules or not.⁴ Also, as indicated above, in practical terms an issue under Article 361 will only arise, in respect of an already established trust, as opposed to when advising on its establishment, if there is a contentious issue. In this regard, the paramount duty of the trustee or trustees is to give effect to the terms of the trust.

N. Question 10:

Whether an Order made in 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 at Dubai International Financial Centre (“the Judicial Authority Law”)?

DIFCA 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.

ATCO position: Agree

75. ATCO confines its submissions on Question 10 to the following points:

- a. In implementation of Article 7 JAL, the provisions of RDC 45.18 to 45.24 apply to all judgments, decisions and orders of the DIFC Court without distinction;
- b. In ATCO’s submission the law on this point is clear and free from doubt, and ought to be well known in all courts of the UAE and by all competent practitioners and advisors in the UAE legal community;
- c. Any enforcement of DIFC Court orders onshore should be dealt with by the Execution Courts and not the Personal Status Courts, and any enforcement action will be subject to UAE public policy which can be raised as a defence to enforcement in the Execution Courts on a case-by-case basis.

O. 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?

⁴ ATCO will wish to make submissions on the Arabic meaning of this provision in its further responsive submissions or at the hearing.

DIFCA 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.

ATCO position: Agree, subject to qualification in part for any company constituting a special purpose vehicle under the Prescribed Company Regulations

76. As a matter of DIFC law the capacity of a company to act as private trustee, as a special purpose vehicle under Article 132 of the Companies Law No. 5 of 2018 and the Prescribed Company Regulations, is not permitted. These Regulations repealed and replaced the DIFC Special Purpose Company Regulations with effect from 31 October 2019. Regulation 3.2.2 of the Prescribed Company Regulations provides:

“A Prescribed Company shall not be used to be the Fund Manager, the Trustee or the General Partner of a Fund or as the Fund itself.”

A “Fund” is defined as a collective investment scheme that is either (a) a Domestic Fund; or (b) a Foreign Fund domiciled in a Recognised Jurisdiction.

A “Trustee” is defined as “a trustee of a Fund that is constituted as an investment trust.”

77. In effect, therefore, in respect of a collective investment scheme constituted as an investment trust (which may now include a family holding structure as a “Qualifying Purpose” under the Prescribed Company Regulations) Question 11 does not arise. This is because, in respect of such trusts, a company cannot be established or operate for the purposes of exercising the powers and duties of the trustees under the trust.

78. For any other trust, ATCO agrees that the general law of the DIFC including the DIFC Trusts Law allows a settlor to be a shareholder or director of a private trustee company, although it ought to be borne in mind that the provision of services by a dedicated trustee company is likely to attract the duties attaching to the provision of financial services in or from the DIFC under the Regulatory Law and the Rulebook, notably those constituting the “Provision of Trust Services”,⁵ and will be subject to the usual rules on conflicts of interest.

⁵ See generally Al Tamimi & Company, *Setting Up in the DIFC* (5th Ed, 2017)

P. Question 12:

Whether, if a Muslim settlor expressly desires to establish a trust which is Sharia compliant, but inadvertently includes in the trust instrument a provision which is not Sharia 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 Sharia compliant?
- ii. pursuant to Article 40(8)(a) of the *Trust Law* vary the terms of the trust so that they are Sharia compliant?

DIFCA 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 Sharia compliant.

ATCO position: Agreed (we would omit the words "but cannot vary it") but this answer should be qualified to avoid any suggestion that DIFC law acts to correct a conflict with Sharia law as opposed to giving effect to the settlor's intentions

79. The above mentioned provisions of the Trust Law set out the basis on which the Court can act, and it is clear that in every case the power to set aside or vary the trust terms, as appropriate, will depend upon establishing the settlor's true intentions and the mistake that operated to the requisite standard of proof.

80. ATCO believes and respectfully submits that the answer to Question 12, as proposed by the DIFCA, should be qualified to avoid any suggestion that DIFC law acts to correct a conflict with Sharia law as opposed to giving effect to the settlor's intentions (whereby the DIFC Courts should have the power to amend or vary the trust instrument to make the instrument Sharia compliant in accordance with those expressed intentions).

Q. 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 Sharia compliant?

DIFCA proposed answer: No

ATCO position:

Agreed, the public policy of the DIFC does not require trusts established under DIFC law to be Sharia compliant

81. Sharia law does not form part of DIFC law, and in the context of trusts it is manifest that DIFC law does not incorporate Sharia law inheritance principles. Further, if and to the extent that it were argued that the public policy of the DIFC must be coextensive with the public policy of the UAE in this context, it is not the public policy of the UAE to ensure that Sharia law is respected by all persons in the UAE for all purposes, see in this regard the Judgment of Justice Shamlan Al Sawalehi in ARB-004-2018, wherein it was affirmed by the DIFC Court of First Instance that the public policy of the UAE takes account of and reflects its DIFC law elements and, to that extent, tolerates differences of policy as applied in the DIFC and elsewhere.
82. That is not to say that in some contexts there may not be a common overlap between the public policy of the DIFC and Sharia law principles, but in such cases the question is always, what is the public policy of the DIFC, and not, what are the principles or rules of Sharia law binding in the DIFC.
83. In summary, therefore, the public policy of the DIFC does not require trusts established under DIFC law to be Sharia compliant.

Al Tamimi & Company

12 March 2020