

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

FURTHER SUBMISSIONS OF APPLICANT

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Introduction

1. The Applicant seeks leave to rely upon these Further Submissions at the hearing of this Application.
2. The submissions of Al Tamimi & Co (ATCO) in these proceedings made reference to a decision of H.E. Justice Shamlan Al Sawalehi dated 20 June 2019 in ARB-004-2018, indicating that the reasons for judgment were to be anonymised and to be filed subsequently. The Applicant's Submissions in Response accordingly did not deal with those reasons, which have recently been made available by the Court and reported as *Loralia Group LLC v. Landen Saudi Company*¹.
3. Those reasons deal, amongst other things, with the content of public policy in the DIFC.
4. That matter was addressed in the Applicant's Initial Submissions², the ATCO Submissions³ and the Applicant's Submissions in Response⁴.

Public Policy in the *Trust Law and Foundations Law*

5. The *Trust Law* and *Foundations Law* refer to public policy in the following provisions:

Subject	<i>Trust Law</i> Article	<i>Foundations Law</i> Article
Contracting out	9(2)(c)	
Trust Purposes	35(1)	12(1)(b)
Validity	37(2)(d)	
Failure of charitable purpose	38(3)	
Non-charitable Purpose trust	39(2)(b)	
Foreign Trust enforceability in DIFC	86(2)(b)	

¹ [DIFC] 2018 ARB 004

² in paragraphs 5.8, 6.1, 10.2, 12.6, 15.2, 15.3, 17.3 and 17.4

³ in paragraphs 68, 70, 71, 73, 75, 81, 82 and 83

⁴ in paragraph 35

6. In each case the expression used is “not contrary to public policy *in the DIFC*”, and it is used in connection with the word “lawful” (or, in Article 39(2)(b), “unlawful”) and it relates to the purpose of the trust (or, in the case of a foundation, its objects). It does not presuppose that there is a public policy *of the DIFC*.
7. The provisions give effect, in the context of DIFC Trusts and Foundations, to the doctrine that although generally the common law recognises the rights of individuals to freely enter into binding contracts⁵, in certain circumstances the Courts will not enforce a contract even though the making of the contract does not contravene a legal prohibition and the performance of the contract is not a criminal offence⁶.
8. The *Trust Law* provisions reflect comparable provisions in the *Uniform Trust Code* from which the *Trust Law* draws much of its inspiration – specifically Section 105(b)(3) corresponding with Article 9(2)(c), and Section 404 corresponding with Article 35. The discussion on Section 105 of the *Uniform Trust Code* notes that Section 105(b)(3) (added in 2001) “clarifies that the settlor (of a trust) may not waive this common law requirement, which is codified ... at section 404”. In the context of the *Uniform Trust Code*, the provision was explicitly intended simply to reflect the common law position.
9. It is submitted that in the DIFC context the *Trust Law* provisions add nothing to the position which would otherwise obtain, in their absence, under the common law of trusts which is incorporated in the *Trust Law* by Article 10(1). Their intended effect, in DIFCA’s respectful submission, is (as with the Uniform Trust Code) simply to preclude an argument that

⁵ See Article 8 of the *DIFC Contract Law 2004*

⁶ For useful summaries, see Winfield, P.H. *Public Policy in the English Common Law* (1928) 42 Harv. L. Rev. 76; Friedman, D.A. *Bringing Order to Contracts Against Public Policy* (2012) Florida State University Law Review 564; Ghodoosi, F. *The Concept of Public Policy in Law* (2016) 94 Nebraska Law Review 686; Macauley, A *Contracts Against Public Policy: Contracts of Meretricious Sexual Services* [2018] SydLawRw 21 and Menon, S (Chief Justice of Singapore) *Taming the Unruly Horse: The Treatment of Public Policy Arguments in the Courts* July [2019] JMJ 7

because the *Trust Law* provides a statutory basis for the existence of trusts, in the absence of such a provision public policy limitations do not obtain. In the context of the *Foundations Law*, Article 12(1)(b) provides a basis for refusal to register a Foundation, an appropriate provision because the registration of a Foundation brings it into existence as a matter of law and in its absence a Foundation with objects contrary to public policy could nonetheless be established.

Public Policy in the enforcement of foreign judgments and awards

10. Public policy issues also arise in the DIFC in the context of the enforcement of foreign arbitration awards. The *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention), to which the UAE is a party, provides, in Article V(2), that

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) ...
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.
11. Corresponding provision is made in Article 44(1)(b)(vii) of the *DIFC Arbitration Law* 2008. A similar provision (in relation to setting aside of awards made in the Seat of the DIFC) is to be found in Article 41(2)(b)(iii) of the *Arbitration Law*.

Public policy in the UAE or the DIFC?

12. The question arises whether the difference in terminology between the *Arbitration Law* on the one hand and the *Trust Law* and the *Foundations Law* on the other lends credence to the view that “public policy in the DIFC” in these two Laws is distinct from wider UAE public policy. A proper analysis of the nature of public policy leads to the conclusion that it is not.

13. In its analysis of the application of public policy, the High Court of Singapore in *UKM v. Attorney-General*⁷ identified two sources of public policy (judge-made and statutory law) and two types of public policy (socio-economic and legal), resulting in four categories of cases⁸.
14. A slightly different analysis is required in the context of a federation, whose constituent parts may have differing laws, including in some cases both civil law and common law (in the United States Louisiana and in Canada Quebec⁹ being the civil law jurisdictions). But this has not precluded the application of public policy in federal jurisdictions pursuant to national laws even if, within those jurisdictions, the application of public policy leads to outcomes which vary within the constituent parts of the jurisdiction¹⁰. It is the respect for those differing contexts, and the allowance of variable outcomes, which is reflected in provisions such as the full faith and credit clauses in the Constitutions of federations such as the United States¹¹ and Australia¹². The same objective of respect for differing contexts, allowing for variable outcomes, explains the difference between the approaches to recognition of judicial decisions in Article 221 of the *Civil Procedure Law*, on the one hand, and provisions such as Article 2A of the GCC Convention and Article XXg of the Judicial Co-operation Treaty with India which make enforcement of judgments from a different jurisdiction subject to a public order test in the jurisdiction in which enforcement is sought, on the other.
15. A useful example comes from India in the Supreme Court case of *Murlidhar Agarwal and Anr v. State of Uttar Pradesh and Ors*¹³. The Uttar Pradesh (*Temporary*) *Control of Rent and Eviction Act 1947* (a state

⁷ [2018] SGHCF 18

⁸ at [111]

⁹ the comparable civil law concept, public order, is recognised in Articles 1411 and 1413 of the Civil Code of Quebec. For the UAE definition, see Article 3 of the UAE *Civil Code*

¹⁰ see, e.g., Kain, B. and Yoshida, D.T. *The Doctrine of Public Policy in Canadian Contract Law Annual Review of Civil Litigation* (2007) 1

¹¹ Article IV section 1

¹² section 118

¹³ 1975 SCR (1) 575

law) prohibited certain evictions. The contract between the parties provided that no party could rely upon the terms of the provisions of the Act. Section 23 of the *Indian Contract Act 1872* (a Union law) provided, inter alia, that:

The consideration or object of an agreement is lawful unless ... the Court regards it as ... opposed to public policy.

16. The Supreme Court had no difficulty in concluding that even though it was a state law whose provisions were relied upon, it was capable of providing the basis for determining the content of public policy within the meaning of the *Contract Act* as applicable in Uttar Pradesh.
17. The nature of public policy in the DIFC, as previously noted, was considered in this Court by H.E. Justice Al Sawalehi in *Loralia Group LLC v. Landen Saudi Company*. As its citation indicates, that was an arbitration case. The relevant section of the reasons for judgment¹⁴ reads:

Both parties accept that public policy may differ between the DIFC and onshore-Dubai in circumstances where arguments are based upon legal provisions that explicitly do not apply in the DIFC, such as the UAE Civil Procedure Code. However, I would reframe this statement to say that the uniform UAE public policy allows for differing outcomes in certain circumstances where matters are rightfully brought before the DIFC Courts rather than other UAE courts. While the outcomes may differ, the public policy applied is actually the same. Public policy of the UAE encompasses the constitutional and legislative creation of the DIFC and thus incorporates the intended differences legally allowed within the DIFC.
18. The constitutional and legislative provisions creating the DIFC have been set out in paragraphs 13.2 to 13.5 of the Applicant's Initial Submissions and will not be repeated here. Analogous constitutional and legislative provisions to those creating the DIFC have been more recently been enacted in connection with the establishment of the Abu Dhabi Global Market (ADGM)¹⁵ with the result that the constitutional structure of the

¹⁴ at [37]

¹⁵ Federal Decree No. (15) of 2013 regarding the incorporation of a financial free zone in the Emirate of Abu Dhabi, Abu Dhabi Law No. 4/2013 on the Abu Dhabi Global Marketplace,

DIFC must be regarded as a conscious act of legislative policy at the highest possible level.

19. That makes it necessary to identify the sources of public policy as applicable in the DIFC.

20. As noted in *UKM v. Attorney-General*¹⁶ the starting point in determining the relevant public policy is whether it is attributable to a constitutionally authoritative source – in the first instance the Constitution itself, and more usually the Legislature or the Executive acting within their constitutional limits, as principally but not exclusively evidenced in primary legislation¹⁷ and subsidiary legislation¹⁸. In a federal system such as the UAE, the constitutionally authoritative sources are somewhat more diverse, but the principle that delegated legislation, or legislation by governmental authorities within their constitutional limits, is a source of public policy still applies. As noted by Winfield¹⁹ (in the context of the United Kingdom where there are no constitutional constraints on the legislative power of Parliament):

... it (public policy) cannot conflict with existing Parliamentary legislation. It may be useful in resolving a doubtful point in the interpretation of an enactment. But there cannot be public policy leading to one conclusion when there is a statute directing a precisely opposite conclusion

21. A third source of public policy is the official acts of Cabinet Ministers²⁰. In the present context DIFC legislation is made by the Ruler, who is also Prime Minister of the UAE. Whilst the formal conventions of public unanimity and collective responsibility may not apply in the context of an act taken not as Prime Minister of the UAE but as Ruler of Dubai, it is hardly to be supposed that the Laws of the DIFC do not reflect an

ADGM *Application of English Law Regulations* 2015

¹⁶ at [138]

¹⁷ at [139]

¹⁸ at [140]

¹⁹ op. cit. at page 98

²⁰ at [141]

underlying national public policy supporting the common law jurisdictions in the financial free zones.

22. The final source of public policy is judicial decisions:
but only those which express long-held values which concern in some way a fundamental purpose for which the law exists and on which reasonable persons may be presumed to agree.²¹

Application of public policy

23. Insofar as the relevant public policy is to be found in the Laws of the DIFC, Article 8 of the *DIFC Contract Law 2005* reflects a fundamental aspect of public policy as it has been expressed in common law: as noted by McHugh and Gummow JJ. for the High Court of Australia in *Cattanach v. Melchior*²² -

'public policy' in relation to the common law of torts is not to be thought of as like that public policy which invalidates contracts and, one might add, certain trusts and conditions attached to voluntary dispositions by will or settlement. In those areas, the starting point has been the favour with which the law has looked upon the right of private contract and the performance of contracts, and upon the freedom of disposition of property, by dispositions *inter vivos* and testamentary.

or, as Jessel M.R. put it in *Printing & Numerical Registry Co. v. Sampson*²³:

[i]t must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. *Therefore, you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract. [italics supplied]*

²¹ at [143]

²² (2003) 215 C.L.R. 1 at para. 60

²³ (1875) L.R. 19 Eq. 462 at 465

24. The categories of contracts historically held to be unenforceable for public policy reasons in common law jurisdictions include:
- (a) contracts prejudicial to a jurisdiction's foreign affairs²⁴ or domestic affairs²⁵
 - (b) contracts injurious to the justice system (e.g. maintenance and champerty);
 - (c) contracts promoting immorality (including discrimination);
 - (d) contracts affecting marriage;
 - (e) contracts in restraint of trade²⁶; and
 - (f) contracts imposing serious restrictions on personal liberty²⁷.
25. The common law has proven reluctant to develop additional categories of contracts unenforceable on public policy grounds. In *Re Morris*²⁸ Jordan CJ of the New South Wales Supreme Court stated:

... the phrase 'public policy' appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest. 'The 'public policy' which a court is entitled to apply as a test of validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the courts of the country can therefore recognise and enforce. The court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists': *Wilkinson v Osborne*²⁹. ...

Public policy is not, however, fixed and stable. From generation to generation ideas change as to what is necessary or injurious, so that 'public policy is a variable thing. It must fluctuate with the circumstances of the time' ... New heads of public policy come into being, and old heads undergo modification. ... As a general rule, it may be said that any type of contract is treated as opposed to public

²⁴ *The Hoop* (1799) 1 C. Rob. 196, *Ralli Brothers v. Companion Naviera Sota y Aznar* [1920] 2 K.B. 287

²⁵ *Wilkinson v. Osborne* (1915) 21 C.L.R. 89

²⁶ *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co* [1894] AC 535

²⁷ *Horwood v. Millar's Timber & Trading Co. Ltd* [1917] 1 KB 305

²⁸ [1943] NSWStRp 43; (1943) 43 SR (NSW) 352

²⁹ (1915) [1915] HCA 92; 21 CLR 89, 97

policy if the practical result of enforcing a contract of that type would generally be regarded as injurious to the public interest: *Fender v St John-Mildmay*³⁰.

26. In *A v Hayden (No 2)*³¹ Mason J of the High Court of Australia (as he then was) observed –

The refusal of the courts to enforce contracts on grounds of public policy is a striking illustration of the subordination of private right to public interest. The problem is one of formulating with any degree of precision the criteria or the circumstances which will justify a court in refusing to enforce a contract on the ground that there is a countervailing public interest amounting to public policy. The difficulties in ascertaining the existence and strength of an identifiable public interest to which the courts should give effect by refusing to enforce a contract are so formidable as to require that they ‘should use extreme reserve in holding such a contract to be void as against public policy, and only do so when the contract is incontestably and on any view inimical to the public interest’, to use the words of Asquith LJ in *Monkland v Jack Barclay Ltd.*³²

27. A similar view was recently expressed by the Supreme Court of Mauritius in *State Trading Corporation v Betamax Ltd*³³, allowing an appeal from a successful application to enforce an international arbitration award in relation to a contract entered into in breach of the Mauritius *Public Procurement Act 2009*.

28. The Court noted that public policy as a ground for setting aside such an award has been generally limited to cases of clear violations of mandatory legal rules which are fundamental to the legal order of the State and that there is a high threshold to satisfy if the award is challenged on the grounds of public policy.

29. The Court observed:

³⁰ [1938] AC 1, 13–14, 18

³¹ [1984] HCA 67; (1984) 156 CLR 532, 558

³² [1951] 2 KB 252, 265

³³ 2019 SCJ 154

... The enforcement of an illegal contract of such magnitude, in flagrant and concrete breach of public procurement legislation enacted to secure the protection of good governance of public funds, would violate the fundamental legal order of Mauritius. Such a violation breaks through the ceiling of the high threshold which may be imposed by any restrictive notion of public policy.

We have absolutely no difficulty in holding that the public policy of Mauritius prohibits the recognition or enforcement of an award giving effect to such an illegal contract which shakes the very foundations of the public financial structure and administration of Mauritius in a manner which unquestionably violates the fundamental legal order of Mauritius.

For the given reasons we find that the Award is contrary to the public policy of Mauritius within the meaning of section 39(2)(b)(ii) of the (*International Arbitration Act*³⁴), and the Award is accordingly set aside.

30. The common thread of these decisions across a wide range of common law jurisdictions is that a curial decision to set aside a contract, a voluntary disposition or an arbitration award (itself the product of a contract), is not made lightly, but only in a clear case – one which violates “legal rules which are fundamental to the legal order of the state”³⁵, “is incontestably and on any view inimical to the public interest”³⁶ or is contrary to “long-held values which concern in some way a fundamental purpose for which the law exists and on which reasonable persons may be presumed to agree”.³⁷

Public Policy – the wider UAE context

31. In any federation, a level of differentiation between the laws of its component parts is inevitable given the legislative powers reserved to its

³⁴ corresponding with Article 44(1)(b)(vii) of the *DIFC Arbitration Law*

³⁵ *State Trading Corporation v Betamax Ltd*

³⁶ *A v Hayden (No 2)*, quoting *Monkland v Jack Barclay Ltd*

³⁷ *UKM v. Attorney-General* at [143]

constituent parts³⁸. This differentiation of laws among the Emirates is accordingly compatible with its overall public policy³⁹. The same is demonstrated by the companies legislation of the various free zones, whose separate application is recognised by Article 5 of the UAE *Commercial Companies Law 2015*.

32. One possible approach to the determination of the content of public policy applicable in the DIFC commences with Article 101 of the national *Constitution* which provides a hierarchy of national and Emirate laws and provides for the resolution of conflict between them in particular cases. It requires a judgment by the Supreme Court of the Union that an inconsistency exists followed by “the authority concerned ... (taking) the necessary steps to remove or rectify the constitutional inconsistency”. The effect of such a judgment is not the invalidity of the legislation in question, but a requirement that the matter be corrected by appropriate legislative action. This constitutional scheme reflects the primacy of national and local legislators in defining public policy.
33. To approach the identification of sources of public policy in that way would pay little, if any, regard to legislation in the UAE outside the DIFC other than the Federal laws whose application in the DIFC is confirmed by Article 3 of *Federal Law 8 of 2004* and the Dubai Laws applicable in accordance with Article (13) of *Dubai Law 9 of 2004*.
34. The actual issue between the parties in *Loralia Group LLC v. Landen Saudi Company* was whether contingency fees were contrary to public policy in the DIFC. That was considered by H.E. Justice Al Sawalehi in the following terms:
- [39] Therefore, I must move on to whether this alleged public policy against contingency fees can be said to apply within the DIFC. ...
- [40] Even if Law No. 23 does not specifically apply within the DIFC, it is still possible that Article 31 of Law No. 23, combined with

³⁸ see Articles 116 and 122 of the *Constitution* and, more generally, Chapter 7

³⁹ as is explicitly recognised in the concluding words of Article 1 of the UAE *Civil Code*

Resolution 666, support an overarching UAE public policy that outlaws contingency fees even within the DIFC. However, I find that the structure of legal instruments applicable within the DIFC as regards the conduct of lawyers supports the finding that while UAE public policy may outlaw contingency fees outside of the DIFC, it does not do so within the DIFC. Instead, the DIFC Courts' Mandatory COC does not mention contingency or success fees. While the DIFC Courts' Best Practice Code does specify that contingency fees were not considered best practice at the time of the guide's issuance in 2015, this guide does not have the status of law or mandatory regulation. It is of note that the DIFC Courts' Mandatory COC has been amended since the issuance of the DIFC Courts' Best Practice Code and no provisions regarding contingency fees have been added.

[41] While the Applicant argues that Part C-8(2) of the DIFC Courts' Mandatory COC prohibits the improper increase of fees, which may cover contingency fee agreements, I find that this provision does not prohibit all contingency fees. The specific identification of contingency fee arrangements would clearly have been mentioned should the DIFC Courts' Mandatory COC have been intended to outlaw all such arrangements. Failure to mention contingency fee arrangements implies that they are not de facto outlawed, however they may constitute a violation of Part C-8(2) if they improperly increase the fees payable.

[42] ...

[43] Based on the legal instruments in place in the DIFC and in onshore-Dubai, contingency fees for legal representatives may be de facto illegal onshore. However, they merit more case-by-case scrutiny in the DIFC. They may not be considered "best practice" in the DIFC but this label cannot be sufficient to create and support a public policy against contingency fees within the DIFC. Instead, the public policy followed in all of the UAE towards ensuring that reasonable fees are granted to legal representatives applies with slight differences within the DIFC. Within the DIFC, unreasonable fee arrangements may include contingency fee arrangements but not all contingency fee arrangements are automatically invalid. Instead, judges and arbiters are required to assess whether a fee arrangement is reasonable and proper, and this requirement speaks to the overall public policy as regards legal fees.

[44] In sum, unreasonable contingency fee arrangements are prohibited in the DIFC and may in fact violate the public policy of the UAE as it

applies within the DIFC. ...

34. To the extent that determination of public policy in the DIFC in the sense referred to by H.E. Justice Al Sawalehi requires a consideration of sources of public policy outside the DIFC, there being none arising from the terms of either DIFC Law considered on its own or public policy drawn from the conventional common law sources – specifically other UAE laws – the analysis, while different, has the same outcome.
35. For that purpose it is necessary to consider whether the provisions of the *Trust Law* and *Foundations Law* or the conduct for which they make provision significantly depart from comparable aspects of *Endowment Laws* at federal level and Emirate level (in Dubai and Sharjah). The existence of Trust Regulations in the ADGM⁴⁰ and Foundations Laws in the ADGM⁴¹ and Ras Al Khaimah International Commercial Centre (RAKICC)⁴² is also material.
36. This issue was addressed in paragraph 4.39 and Schedule 3 of the Applicant’s Initial Submissions. For present purposes it is relevant that each of the *Endowment Laws* the subject of the Schedule permits the dedication of assets by an endower (in the case of the Sharjah Law limited to one-third of the endower’s estate) and provides for the endower to transfer property to a third party to be held on specified terms which may include the provision of benefits to family members, and promotion of purposes which may be either charitable or non-charitable. The endower may reserve powers to vary the terms of the endowment, and the conduct by the administrator /custodian of the affairs of the endowment is subject to external accountability. Each of these Laws describes the status of the administrator/custodian as a “trustee”⁴³.

⁴⁰ ADGM *Trust (Special Provisions) Regulations* 2016

⁴¹ ADGM *Foundations Regulations* 2017

⁴² RAKICC *Foundations Regulations* 2019

⁴³ Federal *Endowments Law* Article 16.1, Dubai *Endowments Law* Articles 21, 28B, Sharjah *Endowments Law* Article 38

37. Despite the ancestry of awqaf in Islamic jurisprudence, it is not necessary for an endower to be a Muslim⁴⁴.
38. In addition to their similarities, the differences (particularly the Sharjah limitation of the subject property to one-third of the endower's estate without the consent of the heirs⁴⁵, the requirement for Court certification of a family endowment⁴⁶ and the requirement that the Administrator be a Muslim⁴⁷) are significant because they demonstrate the acceptability, from a public policy perspective, of differing legal provisions within the constituent parts of the one jurisdiction.
39. Also relevant is Article 52 of the Dubai *Endowments Law*, which provides:

Endowment at DIFC

Article (52)

The provisions hereof shall not prejudice the applicable endowment provisions of Dubai International Financial Center or the jurisdiction of DIFC Courts on the endowments registered therein⁴⁸.

40. Nor is there anything in UAE private international law which suggests that use of DIFC structures which produces different outcomes to that which would arise under laws applicable in other parts of the UAE is inconsistent with UAE public policy or its civil law equivalent, public order.
41. The UAE *Civil Code*⁴⁹ recognises that trusts can exist in limited circumstances⁵⁰. The UAE *Civil Code* also recognises –

⁴⁴ Federal *Endowments Law*, Definition of “Endower”, Dubai *Endowments Law* Article (4)

⁴⁵ Article 22.1. The Federal *Endowment Law* contains a similar limitation during the endower's death illness (Article 5.1e)

⁴⁶ Article 7.1

⁴⁷ Article 37.1

⁴⁸ although registration of a DIFC trust is not required, it is available under Regulation 8 of the *DIFC Operating Regulations*

⁴⁹ The provisions of the *Civil Code* as set out in these Submissions are not an official translation, but taken from Volume III of *Business Laws of the United Arab Emirates* (Graham & Trotman, London 1987)

⁵⁰ Articles 235, 309, 566, 776, 966, 981, 983, 1002 and 1233

- (a) freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based⁵¹;
 - (b) the validity of gifts⁵²;
 - (c) the application of *lex situs* to dispositions of real property and the law of location of the property to dispositions of movable property⁵³, and the law of location of the property to determine its categorisation for these purposes⁵⁴; and
 - (d) where contracting parties are resident of different states, the right of the parties to choose the law applicable to their contract⁵⁵ except in cases involving real property to which the *lex situs* applies⁵⁶.
42. Even if it were correct to view the DIFC as a foreign country for the purposes of these provisions⁵⁷, the result would be that there is no public policy in the UAE which would prevent the application of DIFC law to transactions relating to real property or movable property in the DIFC.
43. In particular Article 27 of the UAE *Civil Code* would have no application. It provides:
- It shall not be permissible to apply the provisions of a law specified by the preceding Articles if such provisions are contrary to Islamic Shari'a, public order, or morals in the State of the United Arab Emirates.
44. "Public order" is defined in Article 3 of the UAE *Civil Code*. It provides:
- Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the

⁵¹ Article 3

⁵² Articles 276 to 279

⁵³ Article 18(1)

⁵⁴ Article 18(2);

⁵⁵ Article 19(1)

⁵⁶ Article 19(2)

⁵⁷ Which is not the position: for a recent example of recognition that the DIFC and ADGM legal systems are an integral part of the UAE legal system, see the *Gazette* Notice issued by the government of India following advice from the UAE Government pursuant to Article 44A of the Indian *Civil Procedure Code*

definitive provisions and fundamental principles of the Islamic Shari'a.

45. Article 1 of the UAE *Civil Code* in turn gives primacy to the legislative provisions which directly apply to the circumstances of the case, prohibiting “innovative reasoning” in such cases⁵⁸.
46. Article 27 of the UAE *Civil Code* requires a judgment to be made as to whether “the provisions of a law” which is sought to be applied “are contrary to Islamic Shari'a, public order, or morals”, as opposed to actions which may lawfully be taken under it by a party to whom it would otherwise apply. In addition to the matters noted in paragraphs 20 and 31 to 35, the existence of –
- (a) corresponding trust legislation in the ADGM⁵⁹, Bahrain⁶⁰ and the Qatar Financial Centre (QFC)⁶¹ (the second and third of these applying generally in Bahrain and Qatar respectively and all of which recognise the validity of DIFC Trusts within their respective jurisdictions) whose provisions are detailed in Schedule 4; and
 - (b) foundations legislation in the ADGM⁶², QFC⁶³ and RAKICC⁶⁴ whose provisions are detailed in Schedule 5
- tells against the likelihood that the provisions of the Laws here in question are contrary to public policy (or, in the civil law sense, public order) or inconsistent with Islamic Shari'a or morals in the UAE.
47. The only area of difference between permitted conduct under the laws applicable within the UAE outside the DIFC, ADGM and RAKICC and permitted conduct within those jurisdictions is in the area of inheritance,

⁵⁸ An approach remarkably similar to that formulated by Winfield noted in paragraph 20 above.

⁵⁹ *Application of English Law Regulations 2015* (Article 4); *Trusts (Special Provisions) Regulations 2016*

⁶⁰ *Trusts Law* (Legislative Decree No. 23 of 2016)

⁶¹ *QFC Trust Regulations 2017*

⁶² *Foundations Regulations 2017*

⁶³ *Foundation Regulations 2016*

⁶⁴ *RAKICC Foundations Regulations 2019*

Testamentary gifts present no difficulty because both the *Trust Law* and the *Foundations Law* provide that the validity of testamentary gifts is determined by the law of the testator's last domicile⁶⁵. As discussed above, lifetime gifts of the whole of a person's property (apart from the period of death illness) under the national and Dubai Endowment Laws are not subject to restrictions on grounds related to inheritance. They are however subject to compliance with Article 361 of the *Law of Personal Status* which is indirectly referred to in each of the *Endowments Laws* referred to in Schedule 3⁶⁶ but is not referred to in either the *Trust Law* or the *Foundations Law*. Article 361 provides:

Article 361

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

48. The terminology of Article 361 raises three questions of present relevance:
- (a) what characteristics bring the impugned transaction within its ambit?
 - (b) what are the consequences of its application? and
 - (c) is it a source of UAE public policy applicable in the DIFC?
49. Characterisation of a transaction, particularly one involving a person who is deceased, requires a judgment to be made as to its effects. As noted by the Privy Council in *Newton v. Federal Commissioner of Taxation*⁶⁷, a case involving the operation of a provision of the Australian *Income Tax Assessment Act 1936* which made a contract void if it had certain tax consequences, this involves a review of the transaction itself:

⁶⁵ Article 13(2)(c) of each Law. The potential operation of Article 14(1)(b) of each Law can be disregarded because, in relation to property outside the DIFC, the property will not be transferred to a trustee or foundation, and in respect of property inside the DIFC, a Muslim cannot utilise the DIFC Wills Registry so the transfer will be dependent on a Court Order obtained outside the DIFC

⁶⁶ Federal *Endowment Law* Article 5.1d, Dubai *Endowment Law* Article (11)4, Sharjah *Endowment Law* Article 7.1

⁶⁷ [1958] UKPCHCA 1; (1958) 98 CLR 1

... the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every "contract, agreement or arrangement" (which their Lordships will henceforward refer to compendiously as "arrangement") which has the purpose or effect of avoiding tax. In applying the section you must, by the very words of it, look at the arrangement itself and see which is its effect - which it does - irrespective of the motives of the persons who made it. Williams J. put it well when he said "The purpose of a contract, agreement or arrangement must be what it is intended to effect and that intention must be ascertained from its terms. These terms may be oral or written or may have to be inferred from the circumstances but, when they have been ascertained, their purpose must be what they effect" In order to bring the arrangement within the section you must be able to predicate - by looking at the overt acts by which it was implemented - that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section.

50. Whilst Article 361 of the *Law of Personal Status*⁶⁸ refers to a disposition being "void", it necessarily means "voidable"⁶⁹: the transaction in question once completed will have legal effect both inside and outside the DIFC unless and until it is successfully challenged in a court of competent jurisdiction. As a matter of DIFC Law the transaction cannot be challenged in the DIFC Courts by reference to Article 361⁷⁰. Nor will a foreign judgment based on such a claim be recognised in the DIFC⁷¹. But if the property transferred to the trustee of a DIFC trust or a DIFC foundation is locally situated outside the DIFC, the trustee's interest in the property will be potentially amenable to a judgment pronounced by the Court having jurisdiction in that locality.

⁶⁸ See paragraph 13.8 of Applicant's Initial Submissions for the text of this Article
⁶⁹ Whilst the terms "void" and "voidable" are used in the *Civil Code* (see Articles 210 and 212) the sense in which they are used is somewhat different to the common law concept: see DIFC *Contract Law* Article 8(3)
⁷⁰ Article 14(1)(b) of each of the Laws
⁷¹ Article 16 of each of the Laws

51. Even in the event of successful challenge to a disposition in favour of the trustee of a DIFC Trust or a DIFC Foundation, it would not follow that the Trust or Foundation was not properly established. Notwithstanding diminution of the property subject to the trust or belonging to the Foundation, a Foundation will exist, as a matter of law, until it is dissolved under either Article 67 or Article 71 of the *Foundations Law*, as will a Trust until the requirements of Article 43 of the *Trust Law* are satisfied. The result of a successful challenge will simply be to diminish the trust or Foundation property to the extent the disposition in favour of the trustee or Foundation will have been set aside.
52. Given that the consequence of the operation of Article 361 is that the disposition is liable to be declared void at the instance of an interested party in a court of competent jurisdiction, it has a limited additional role as a source of public policy. If as a result of proceedings in a court of competent jurisdiction it enables a disposition to be declared void (and possibly reversed), it has exhausted its operation and has no further role to play. And if it does not operate in relation to a transaction, then the transaction is not capable of being impugned on public policy grounds in the DIFC.
53. Furthermore, the limitations on Article 361 as a source of public policy are reflected in Article 1(2) of the *Law on Personal Status* which provides as follows:
- The provisions of this Law shall apply to citizens of the United Arab Emirates State unless non-Muslims among them have special provisions applicable to their community or confession. They shall equally apply to non-citizens unless one of them asks for the application of his law.

Conclusions on Public Policy

54. Viewed against the framework of the UAE constitutional position, of applicable DIFC Laws and of UAE sources of public policy, the conception of a national UAE public policy, as identified by H.E. Justice

Al Sawalehi, is expressly reflected in the statutory stipulation, in the context of trusts and Foundations, that the relevant public policy is public policy in the DIFC.

55. That public policy, as evidenced by the legislative framework, is entirely consistent with and supports the Proposed Answers subject to the amendments suggested in the Applicant's Submissions in Response.
56. DIFC Trusts and Foundations form part of the range of structuring options for family wealth available under National, Emirate, and Financial Free Zone Laws whose objectives and provisions are similar, and have counterparts in the laws of other GCC jurisdictions.
57. Public policy in the UAE supports and encourages responsible succession planning for family businesses and family wealth management. Subject to compliance with any applicable laws, the establishment of DIFC Trusts and Foundations serves an important national interest and promotes the public policy objectives of the applicable laws.
58. If the foregoing submissions find favour with the Court, the Court is invited to address the nature of public policy in the DIFC as part of its response to Question 9.

SCHEDULES

4. Comparative Table:

DIFC Trust Law 2018
ADGM Trust (Special Provisions) Regulations 2016
QFC Trust Regulations 2017
Trust Law 2016 (Bahrain)

5. Comparative Table:

DIFC Foundations Law 2018
ADGM Foundations Regulations 2017
QFC Foundations Regulations 2016
RAKICC Foundations Regulations 2019

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21 June 2020