EXHIBIT JJV1

On behalf of: DIFCA (Applicant)
Witness: Jacques Visser
1st Statement
Exhibit: JJV1
Date: 10 February 2020

Claim No: CA-002-2020

IN THE COURTS OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE

COURT OF APPEAL

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 5(B)(1)(B) OF *DUBAI LAW 12 OF 2004 IN RESPECT OF THE JUDICIAL AUTHORITY AT DUBAI INTERNATIONAL FINANCIAL CENTRE (AS AMENDED)*

THE DUBAI INTERNATIONAL FINANCIAL CENTRE AUTHORITY

Applicant

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DIFC WEALTH MANAGEMENT WORKING GROUP
TERMS OF REFERENCE

BACKGROUND

The Governor of the Dubai International Financial Centre ("**DIFC**"), His Excellency Essa Kazim, is in the process of constituting a specialised committee to be known as the "DIFC Strategy & Policy Committee" (the "**Committee**") pursuant to the provisions of Article 5 bis (3)(b) of Law 9 of 2004 (the "**DIFC Law**").

The primary purpose of the Committee under the DIFC Law is to formulate and propose strategies, policies and objectives relating to the DIFC and submit them to the DIFC Higher Board for adoption and to follow up on their implementation with the DIFC Authority ("**DIFCA**"), the Dubai Financial Services Authority ("**DFSA**") and the Dispute Resolution Authority ("**DRA**") (collectively referred to as the "**Centre Bodies**"), without prejudice to the independence of each of the Centre Bodies pursuant to the provisions of applicable DIFC laws and regulations.

Article 5 bis (3)(b) of the DIFC Law also provides for working teams to be established for providing the necessary consultancy for the realization of the DIFC's objectives ("**Working Groups**").

Pursuant to the aforegoing, the Governor wishes to establish a Working Group to consider the present status of the wealth management industry, as well as the legislation and regulation in the DIFC relating thereto (the "**Wealth Management Working Group**") and to propose, by way of a white paper, strategies and policies relevant to the wealth management industry going forward in the DIFC to the Committee for consideration (the "**White Paper**").

WORKING GROUP OBJECTIVES

The primary objectives and proposed outcomes of the Wealth Management Working Group can be described in two phases:

<u>Phase 1 – Producing a White Paper</u>

The Wealth Management Working Group will be required to produce a White Paper considering the question whether the DIFC can improve its offering to the wealth management industry.

1. The focus of this assessment should be specifically directed at:

   (a) the needs of local and regional families requiring sophisticated wealth management and succession planning arrangements in relation to their business and commercial interests that operate and are located across multiple jurisdictions; and

   (b) the question whether there is room to expand and deepen its core offering to the regional and global wealth management industry with special focus on providing wealth management solutions and platforms to high net worth individuals and family offices in the countries targeted in the DIFC's 2024 strategy.

2. The review should consider benchmarking the DIFC's current wealth management regime against best practice at legislative, administrative and curial levels in the wealth management area and to ascertain whether there are any aspects of DIFC law and practice which have not, over time, kept up with these.

3. The review should also involve both a review of existing arrangements (for example, the DIFC's Single Family Office regulations) and other arrangements not presently available within the DIFC but available elsewhere (for example, foundations). Of particular interest to the Committee will be:

   (a) the interaction of these provisions with Shari'a requirements;

   (b) the interface between the DIFC law and other legal regimes (inclusive of Dubai law and its Shari'a courts) to ensure proper wealth and succession planning within the DIFC in a legally certain manner that provide residents of the Emirate of Dubai access to capabilities and techniques of the DIFC community which are potentially useful to them, but also to ensure that where appropriate this occurs in a Shari'a compliant manner, opening the way for the DIFC offer to be expanded within the region both by offering Shari'a compliant solutions and by providing access to the various memoranda and treaties which exist for the reciprocal enforcement of judgments; and

   (c) eliminating unnecessary requirements, procedures and costs.

4. The review will be required to be conducted at both horizontal (i.e., review of particular arrangements) and vertical (i.e. testing for compliance with matters such as the principles of Shari'a and current developments in financial technology) levels.

5. The key outcomes of the review will be for the Wealth Management Working Group to:

   (a) provide a summary of its findings to the Committee in the above regard;

   (b) present a comprehensive DIFC wealth management strategy and proposed policies to the Committee going forward; and

   (c) provide specific recommendations to the Committee how such a strategy and policies should be executed and achieved going forward in the DIFC, inclusive of headline details of what new or amended legislation and regulation should be considered by the relevant Centre Bodies.

<u>Phase 2 – Overseeing the Implementation of any Recommendations Adopted by the Committee and the Higher Board</u>

6. Members of The Wealth Management Working Group will also be required to liaise with the DIFC Legal Group in overseeing and following up on the implementation of any of their proposals without prejudice to the independence of each of the Centre Bodies pursuant to the provisions of applicable DIFC laws and regulations and in accordance with the guidelines provided by the Committee from time-to-time.

REPORT OF THE WEALTH MANAGEMENT WORKING GROUP

Dubai International Financial Centre

JJV1(4)

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EXECUTIVE SUMMARY

"The active participation and support of the world's leading financial institutions will help Dubai become the regional gateway for the flow of capital and investment into and out of the region and will create growth for the benefit of the UAE and the wider region."

- H H Sheikh Mohammed bin Rashid al Maktoum
  Deputy Prime Minister of the United Arab Emirates
  and Ruler of Dubai

Speaking at a staff meeting attended by the senior officers of the Dubai International Financial Centre ("DIFC") in 2003 His Highness also observed, "This initiative (i.e. the DIFC) will become the major catalyst for growth within the UAE enabling globally recognised financial services to flourish regionally." He also challenged the DIFC to become a thought leader.

Some thirteen years on, we have seen His Highness' vision mature into a reality – not merely the reality of the imaginative buildings and outstanding facilities in which the DIFC is housed, underpinned by financial and related services provided by commercial and professional firms renowned throughout the world, supported by a world class regulatory framework whose rigour and probity match the highest standards, but also – and perhaps most importantly – an overarching legal framework which offers the freedom and capacity for innovation associated with the common law to those within the Emirate of Dubai and the wider region who wish to avail themselves of it.

None of this – not the buildings, nor the personnel, nor the legal framework – came about by accident, but by careful planning, accompanied by a search for excellence and a preparedness to support innovation, which reflect the underlying spirit of the Emirate of Dubai and the wider United Arab Emirates. As we note in our Report, the starting point for the Centre's legal framework is an express provision in the constitution of the Union.

Time does not stand still for any society. Particularly that is so for the rapidly developing environment of Dubai, and the world's financial system. This Review seeks to address a specific need – the addition to the Centre's laws and institutions of the appropriate framework for the management of private (and especially family) wealth. We have reviewed the Centre's offering in this area, against the background of changes elsewhere and best practice as it has developed.

Specifically, we recommend:

Streamlining and simplification of the registration process, including a more precise targeting of the Centre's anti-money laundering processes (recommendations 1-2, 22 and 45);

Maintenance of confidentiality for family wealth vehicles registered in the DIFC (recommendations 3, 33);

Alteration of the monetary qualification for registration (recommendation 4)

Modernization of the existing *DIFC Trust Law* so as to

- Apply the Hague Convention within the DIFC (recommendation 5)
- Update the private international law provisions (recommendations 6 and 7)
- Confer additional jurisdiction on the Court to resolve difficulties in trust administration (recommendations 8, 10-12, 16-18, 26 and 42)
- Clarify the duty of a trustee of a purpose trust (recommendation 9)
- Facilitate confidential arbitration of trust disputes (recommendations 13 and 14)
- Correct errors and misconceptions (recommendations 19 and 21)
- Provide enforcement mechanisms for enforcement of a purpose trust (recommendation 20)
- Provide for appointment of advisory and custodian trustees (recommendation 25);

Addressing the perceived lack of judicial authority and procedure as to the operation of the *DIFC Trust Law* particularly in a Shari'a context (recommendations 23 and 24)

Enactment of a new Foundations Law, taking into account the most recent developments overseas in the legal arrangements for such bodies (recommendations (recommendations 27 to 29)

Permission of virtual offices within the DIFC in limited circumstances (recommendation 30) and no offices for some SFOs (recommendation 44)

Enhancement and simplification of the application process and greater transparency in relation to same (recommendations 31-32, 34, 38, 42 and 43)

Modernisation of company law requirements in relations to share ownership, dividend payments, and single shareholder/director companies (recommendations 36-37, 47)

Permitting bodies corporate to be in the ownership chain of SFOs (recommendation 46)

Addressing lack of knowledge of the status of DIFC entities outside the DIFC but within the UAE, and possibly creating a new class of entities to address any unresolved concerns (recommendations 39-40)

Exempting SFOs from the requirement to file accounts (recommendation 41)

Access to residency sponsorship for large SFOs (recommendation 45)

Seeking legislative clarification that Article 361 of the *Personal Status Law* does not inhibit business reorganisations (recommendation 49)

Application of the Hague Convention at national and Emirate level (recommendations 51-52)

Consultation with the Free Zone Council as to ways in which the application of civil and commercial laws within the Free Zones might be rationalised (recommendation 53)

More clearly defined mechanisms whereby the Centre's structures can be used with confidence that Shari'a obligations will be respected and given effect to (recommendations 24 and 50); and

The adoption of measures to make the opportunities arising from the Centre's offering more widely known and understood (recommendations 54-56).

These measures, if adopted, taken together with the modernisation of the *DIFC Companies Law* currently in train, will

- place the DIFC in the forefront of jurisdictions which provide modern and flexible structures in the form of companies, trusts and foundations;
- provide a world's best framework to establish sound family governance structures;
- simplify the DIFC's current administrative arrangements and costs, without compromising its existing standards; and
- make the DIFC a much more attractive venue for local families to structure the business and succession planning arrangements, particularly if complemented by the national and Emirate measures we suggest the DIFC should progress with the appropriate authorities.

The importance of the last of these outcomes cannot be overstated. It is estimated that $US 1 trillion of assets will be transferred from second generation business families to the third generation over the coming decade[1]. As noted by the Family Business Council – Gulf, these transfers can be problematic[2] and provision of a suitable framework within which appropriate business governance models can operate will serve an important national and regional interest.

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1 World Economic Forum on the Middle East and North Africa, 2013, quoted in *The GCC Governance Code*, Family Business Council – Gulf (2016)

2 The same work notes some estimates which suggest that only 30% of all family businesses make it to the second generation

CHAPTER 2

Terms of Reference

This Report stems from the Wealth Management Working Group's Terms of Reference provided by the Governor's Office, which for present purposes stated the following:

> The Governor of the Dubai International Financial Centre ("**DIFC**"), His Excellency Essa Kazim, is in the process of constituting a specialised committee to be known as the "DIFC Strategy & Policy Committee" (the "**Committee**") pursuant to the provisions of Article 5 bis (3)(b) of Law 9 of 2004 (the "**DIFC Law**").
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> The primary purpose of the Committee under the DIFC Law is to formulate and propose strategies, policies and objectives relating to the DIFC and submit them to the DIFC Higher Board for adoption and to follow up on their implementation with the DIFC Authority ("**DIFCA**"), the Dubai Financial Services Authority ("**DFSA**") and the Dispute Resolution Authority ("**DRA**") (collectively referred to as the "**Centre Bodies**"), without prejudice to the independence of each of the Centre Bodies pursuant to the provisions of applicable DIFC laws and regulations.
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> Article 5 bis (3)(b) of the DIFC Law also provides for working teams to be established for providing the necessary consultancy for the realization of the DIFC's objectives ("**Working Groups**").
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core offering to the regional and global wealth management industry with special focus on providing wealth management solutions and platforms to high net worth individuals and family offices in the countries targeted in the DIFC's 2024 strategy.

2. The review should consider benchmarking the DIFC's current wealth management regime against best practice at legislative, administrative and curial levels in the wealth management area and to ascertain whether there are any aspects of DIFC law and practice which have not, over time, kept up with these.

3. The review should also involve both a review of existing arrangements (for example, the DIFC's Single Family Office regulations) and other arrangements not presently available within the DIFC but available elsewhere (for example, foundations). Of particular interest to the Committee will be:

   (a) the interaction of these provisions with Shari'a requirements;

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   (c) eliminating unnecessary requirements, procedures and costs.

4. The review will be required to be conducted at both horizontal (i.e., review of particular arrangements) and vertical (i.e. testing for compliance with matters such as the principles of Shari'a and current developments in financial technology) levels.

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   (a) provide a summary of its findings to the Committee in the above regard;

(b) present a comprehensive DIFC wealth management strategy and proposed policies to the Committee going forward; and

(c) provide specific recommendations to the Committee how such a strategy and policies should be executed and achieved going forward in the DIFC, inclusive of headline details of what new or amended legislation and regulation should be considered by the relevant Centre Bodies.

Phase 2 of the terms of reference related to implementation of such of our recommendations as might be approved by the relevant Centre Bodies and is accordingly not reproduced here.

This Report gives effect to Phase 1 of these Terms of Reference

Objectives of the Review

This Report explores options for the DIFC to enhance its current operating and regulatory environment to facilitate the growth and sustainability of private wealth management and particularly the family wealth management business in the DIFC under an operational and regulatory regime that takes into account the objectives and needs, and the nature and scale of such business. To this end, this Report sets out a range of options and recommendations, which are designed:

a. upon good practice and regulatory regimes in comparable jurisdictions;

b. to ensure the ease of doing business in the DIFC;

c. to promote Shari'a compliance in an effective way to provide a higher degree of assurance to participants in the DIFC about the Shari'a compliant nature of their wealth management arrangements; and

d. to foster the development of the DIFC as an internationally respected financial Centre.

The DIFC was formally established in 2004 with the objectives of:

a. establishing a Financial Centre in the Emirates, based on principles of efficiency, transparency and integrity with a view to making an effective contribution to the international financial services industry;

b. promoting the position of the Emirates as a leading international financial centre; and

c. developing the economy of the Emirate of Dubai.[3]

The operation of the DIFC since that time has seen some evolution in the overall legal structure, but has not seen a comprehensive review of all of the elements which make up the total DIFC offering: such reviews that have occurred have tended to be of particular legal issues, rather than a "whole of Centre" review.

In more recent times, the question has arisen as to whether the Centre is adequately providing the type of advanced wealth management capabilities which exist elsewhere as part of its offering. Whilst provision exists for a trusts jurisdiction (modelled largely on the United States *Uniform Trust Code*) and a Single Family Office regime, views have been expressed that more thought should be given to how these offerings might advance local interests, particularly for families with a need for sophisticated wealth management arrangements that operate across multiple jurisdictions.

Quite apart from the legal structure, the institutions of the DIFC have matured and their operations and functions enhanced by the outcomes of periodic reviews. With perhaps the exception of the 2011 expansion of the jurisdiction of the DIFC Courts, change has been incremental rather than dramatic and not always viewed against the wider framework of the overall DIFC offering and how that can be enhanced at four levels:

- within the DIFC itself from the perspective of existing operators;
- within the Emirate of Dubai,
- within its surrounding regions (be they viewed as the UAE, GCC, or Islamic world); or
- the wider world including in particular the countries falling within the south-south corridor targeted by the DIFC's 2024 Strategic Plan and the Central Asian Republics of the former Soviet Union for which the UAE (and Dubai in particular) has become an economic hub.

The purpose of the Review is to identify best practice at legislative, administrative and curial levels in the wealth management area and to ascertain whether there are any aspects of DIFC law and practice which have not, over time, kept up with these. It has involved both a review of existing arrangements (for example, the single family office regulations) and arrangements not presently available within the DIFC but available elsewhere (for example, foundations).

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[3] See Article 4 Law No 9 of 2004, establishing the DIFC.

As indicated in the Terms of Reference, of particular interest is the interaction of these provisions with Shari'a requirements. The interface between the DIFC law and Dubai law provides an important opportunity, not only to ensure that the Emirate has available for all of its citizens access to those capabilities and techniques of the DIFC community which are potentially useful to them, but also to ensure that where appropriate this occurs in a Shari'a compliant way, opening the way for the DIFC offering to be expanded within the region. It can do this both by offering compliance solutions and by access to the various memoranda and treaties which exist for the reciprocal enforcement of judgments.

In a sense, the review has been conducted at both a horizontal (i.e., review of particular arrangements) and a vertical (i.e., testing for compliance with matters such as Shari'a and the developments in the fintech area) level. It necessarily recognised that there is no future in defective or inadequate regulation of matters which ought to be the subject of regulation, nor in the encouragement of activity which is not based on commercial substance whilst recognising that the nature of commercial activity is, within proper bounds, a matter for the participants themselves rather than for regulators. And we have sought to identify potential changes which maintain the prudential standards of the DIFC regulatory scheme whilst eliminating unnecessary costs for both regulators and market participants.

We note that the Terms of Reference acknowledge the independence of each of the Centre Bodies pursuant to the provisions of applicable DIFC laws and regulations and that the changes we have recommended necessary will be progressed through the policy deliberation process and legislative and other frameworks of the respective Centre Bodies as they may consider appropriate.

Within these parameters, the review is seen as providing an opportunity for the DIFC offering to meet the requirements of world's best practice, full Shari'a compliance where appropriate, and a further demonstration of the capacity for innovation and enterprise which underlie the establishment of the DIFC.

CHAPTER 3
The Current regulatory regime

The proposal to establish a Single Family Office ("SFO") regime in 2008 came as part of the desire to encourage 'super wealth bracket families' to manage and administer their wealth in or from the DIFC under an appropriate regulatory environment. Catering properly for family wealth management can be lucrative business for financial centres - not just in terms of the potential wealth that it steers in their direction - but also in the ecosystem that it creates in drawing high quality services providers to a financial centre. Traditionally, family wealth management was serviced from places like London and Geneva but lately centres such as Singapore have made great strides in capturing market share, also in markets falling within the DIFC catchment area for providing financial services.

Under the current regulatory arrangements, the Dubai International Financial Centre Authority ("DIFCA") and the Dubai Financial Services Authority ("DFSA") share the responsibility for regulating activities that constitute private wealth management. The key features of the current regulatory regime include the following:

- The DIFC is a common law jurisdiction, in that it has its own civil and commercial laws, administered by the DIFC Courts;

- The DIFCA is the Centre's authority, and has the responsibility for providing and administering the regime which provides the infrastructure for the operations within the DIFC. For this purpose, it administers a range of legislation, which include the *DIFC Companies Law*;

- The DFSA is the financial services regulator of the financial services and related activities in the DIFC. Any activity which falls within one or more definitions of a 'financial service' under the General (GEN) Module of the DFSA's Rulebook requires a DFSA licence. For the purposes of administering the financial services and related activities in the DIFC, the DFSA has wide administration powers, which stem from the DIFC Laws it administers, including the *Regulatory Law* 2004[4];

There are three distinct features of the DIFC wealth management regime which are relevant to our Report from a regulatory perspective.

First, there is a bespoke regime for regulating Single Family Offices ("SFOs"),[5] under which the SFO can operate in the DIFC with a licence granted by DIFCA. The DFSA does not regulate SFO activities or their operators, by providing them express carve-outs from its financial services licensing regime. However, SFOs are required to register under the DFSA's Designated Non-Financial Businesses and Professions

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4 DIFC Law 1 of 2004

5 As at today's date, there are currently 31 SFO licence holders in the DIFC.

("DNFBP") regime[6] and this makes them currently subject to the DFSA administered Anti-Money Laundering ("AML") regime.

Second, any third party who provides wealth management services to one or more SFOs, which qualify under the General Module of the DFSA's Rulebook as a financial service, is subject to the DFSA regime. This is on the basis that only self-managed SFOs are excluded from the DFSA regime, not third party management of other person's wealth. In this sense, a distinction is drawn between managing or advising in respect of other peoples' money, as opposed to doing so in respect of a family's own funds. That is not to say that internal relationships in such a context cannot be problematic which makes the definition of an SFO an issue of some significance.

Third, there are a number of structures which can be used for family wealth management, whether that be on a self-managed basis or through third-party management/ advisory services, giving flexibility and choice. The structures currently available in the DIFC include common law trusts, partnerships and corporate vehicles.

The four key findings from the Working Group in respect of the DIFC's current regulatory environment concerning SFOs were that:

a. the DNFBP regime being made applicable to SFO's is perceived by some to be a deterrent to establishing in the DIFC[7];

b. provided that the self-management principle is being adhered to, regulatory involvement with SFOs and their management/ advisory/enforcement structures should be kept at a minimum;

c. privacy of information remains a key concern and the DIFC's public register is not conducive to SFOs setting up entities in the DIFC as part of their family wealth management structures; and

d. the minimum qualifying amount of assets to qualify as an SFO in the DIFC should be reconsidered.

Recommendations:

1. The automatic DNFBP registration requirements for SFOs be replaced with a regime where DIFCA, during the assessment of the SFOs application for establishment in the DIFC, will make an assessment of whether the SFO should register with the DFSA as a DNFBP. DIFCA and

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6 Subparagraph (1)(g) of the definition of DNFBP in the table in Rule 3.2.1 in the AML module

7 We note this concern is primarily driven by SFO's who do not see why their private family wealth, in almost all cases already held with regulated custodians, banks and service providers, to be made subject to another layer of compliance.

the DFSA should agree on the risk assessment guidelines to be applied in this regard. Such guidelines should be published on DIFCA's website.

2. Private trust companies and management/ advisory/ service entities and enforcement/ protector mechanisms of such private trust companies, established for the sole purpose of overseeing or managing the affairs of an SFO not be subject to any form of financial services regulation by the DFSA and the DFSA's GEN Rule 2.23 (Providing Trust Services) be amended accordingly. It is furthermore suggested that DIFCA and DFSA agree to the guidelines in this regard to ensure that DIFCA properly assess whether such entities/ structures should be referred to the DFSA for a financial services license application. Such guidelines should be published on DIFCA's website.

3. The ownership details of SFOs and the private trust companies and/or management entities (insofar as they are incorporated entities) be held on a private register. However, such details shall remain disclosable to regulators and other authorities that may request such information under compulsion of law or any purpose permitted by the *DIFC Data Protection Law*[8].

4. The minimum qualifying amount to constitute an SFO in the DIFC be increased to US$[50] million but that illiquid assets may be included in calculating the amount.

8 DIFC Law 1 of 2007

Chapter 4

(a) Trusts

As noted by de la Rosa[9], the *DIFC Trust Law* is one part of the structure put in place to make the DIFC a major international financial centre. An indication of the DIFC's overall objective in promoting the Trust Law and other laws and regulations relating to the same general subject of family wealth management may be found in DIFC Consultation Paper No. 3 of 2008, which related to the DIFC's single family office initiative and was intended to be followed by DIFC private trust company legislation.

The thrust of the SFO initiative was to encourage ultra high wealth bracket families to adopt the DIFC as a centre of choice to establish a suitable SFO.

Clearly, there are enough families in the Gulf region who fall within that bracket to make it worthwhile for the DIFC's development of the trust concept to continue. However, to date the uptake of DIFC trust vehicles has been limited.

At the same time, two other jurisdictions in the region have adopted trust laws (the Qatar Financial Centre ("QFC") and the Abu Dhabi Global market ("ADGM")) and a draft trust law has been published by the Central Bank of Bahrain.

This Chapter seeks to identify updates and modifications to the Trust Law to keep it abreast of international developments, and to address perceived impediments to its attractiveness as a wealth management vehicle.

International developments and comparisons

The Working Group has had the benefit of a shortly to be published review of international trust law developments and possibilities[10] by Mr Justice Hayton[11]. This comprehensive work identifies a number of areas where international practice either has features not currently available in the DIFC, or thrown up problems which may need to be addressed. The article identifies the following issues to which we respond with our comments and suggestions:

1. The Hague Trusts Convention
2. Private International Law issues
3. Cayman Islands STAR Trusts
4. Self-settled spendthrift trusts
5. *Re Hastings-Bass* and subsequent developments

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9 De la Rosa, Andrew: *The Dubai International Financial Centre Trust Law* (2008) 14 Trusts & Trustees 480

10 Hayton, Mr Justice David: *Thoughts on Future Trust Law Developments* (2016) 22 Trusts & Trustees

11 Prior to being appointed to the Bench of the Caribbean Court of Justice, The Honourable Mr. Justice David Hayton was arguably the leading authority in the U.K. and Europe on the law of trusts. He has written or co-authored eight books in the areas of trusts, property, succession and tax, including the standard practitioner's text, Underhill and Hayton, *Law of Trusts and Trustees*, now in its 16th Edition.

6. Rectification
7. *Uniform Trust Code* section 416
8. Arbitration and Mediation
9. VISTA Trusts (BVI *Special Trusts Act*)
10. Approval of Transactions

1. The Hague Trusts Convention

The *Hague Convention on the Law applicable to Trusts and on their Recognition* ("the Hague Convention") came into existence thirty years in 1985 after signatures on behalf of Italy, Luxembourg and The Netherlands. The UK signed in 1986 and enacted the UK *Recognition of Trusts Act* 1987 to incorporate the Convention into domestic law. After ratifications by the UK, Italy and Australia the Convention came into force on 1 January 1991. Since then the Convention has become applicable also in Canada (but not in Ontario or Quebec) and the offshore trust jurisdictions, Bermuda, British Virgin Islands, Gibraltar, Guernsey, Isle of Man, Hong Kong, Jersey and the Turks and Caicos Islands, and in Italy, Liechtenstein, Luxembourg, The Netherlands, Malta, Monaco, San Marino and Switzerland. All but Malta in the last mentioned group of signatories are civil law countries.

The Hague Convention is an open convention: that is, it applies in a jurisdiction which has adopted it irrespective of whether the trust in respect of which recognition is sought has been established in a Convention jurisdiction. Thus a DIFC trust would be accorded recognition in England by force of the Convention and the UK *Recognition of Trusts Act* even if not otherwise entitled to recognition as a trust there.

It may be that the residual application of English law provided for in Article 8(2)(e) of the *Law on the Application of Civil and Commercial Laws in the DIFC* 2004 has the result that the Hague Convention applies within the DIFC, although subject to the paramount operation of the *DIFC Trust Law* by reason of Article 8(2)(a). The contrary view is that by virtue of Article 8(2)(a) of the *Law on the Application of Civil and Commercial Laws in the DIFC* and Article 11 of the *DIFC Trust Law* it is only "(t)he common law of trusts and principles of equity" which apply in the DIFC in addition to the *DIFC Trust Law* itself, and not English statutory modifications thereto. Care needs to be taken in assuming that every statutory *lacuna* in the DIFC is capable of resolution by reference to English law, as the DIFC Court has noted[12]. We recommend below that the *DIFC Trust Law* be amended to expressly adopt the second of these views, which, absent our recommendation in respect of the Hague Convention itself, would preclude its operation in the DIFC.

The Hague Convention seems readily adapted to support the recognition of *awqaf*, the Shari'a analogue of the common law trust[13].

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12 See *Re Forsyth Partners Global Distributors Limited and ors* (2008) CFI 5-7/2007 at [35] to [46]

13 See generally Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) Waqf Standard (2 July 2008)

The application of these provisions has been far-reaching.

For example, one highly relevant question in jurisdictions in which the rule against perpetuities applies[14] is whether the Hague Convention enables through specification of the applicable law for the perpetuity rules to be either ameliorated or entirely circumvented. The preponderant view is that it does have that effect. One particularly instructive analysis is that of Mr Justice Hayton[15]. Other useful discussions of the issue, in the context of the application of the Hague Convention to the UK, can be found in Graziadei et al[16] and Harris[17].

In Italy the Hague Convention has been held to give legal effect to dispositions of Italian property on trusts which are stated to be in accordance with foreign law – the so-called *trust interno*[18].

A DIFC Trust (in appropriate cases, one which satisfies Shari'a requirements) is clearly a suitable investment vehicle for cross border investments in Convention countries or common law countries.

One of the objectives of the Review is to enable redomiciliation of foreign structures to the DIFC. Whilst the *DIFC Trust Law* does contain provision for recognition of foreign trusts[19] its terms are somewhat narrower than the Hague Convention and might not, for example, recognize an Italian *trust interno*. We accordingly recommend adoption of the recognition rules in the Hague Convention.

Recommendation

Articles 11 and 69 of the *DIFC Trust Law* be amended to:

(a) confirm the recognition rules in the Hague Convention, subject to contrary provision in the *DIFC Trust Law*; and

(b) confirm that otherwise English statutory law in relation to trusts is inapplicable in the DIFC.

2. Private international law provisions

Articles 14 to 16 of the *DIFC Trust Law* address the question of trusts with a foreign element, and private international law issues which can arise in respect of them. The Cayman Islands was the first jurisdiction to deal with the issue on a statutory basis in 1987 when it enacted the *Trusts (Foreign Element) Law*, later consolidated with other parts of Cayman Islands' trusts statute to become Part VII of what is now

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14 These do not include the DIFC – see *DIFC Trust Law* Article 26

15 Hayton, David: A review of current trust law issues at pp.15-20

16 Graziadei, Michele, Mattei, Ugo and Smith, Lionel D: *Commercial Trusts In European Private Law* (2005) Cambridge University Press. at pp.410-412

17 Harris, Jonathan: *The Hague Trusts Convention* (2002) Hart Publishing at p.343

18 Lupoi, Maurizio: *Trusts in Italy as a living comparative law laboratory* (2012)

19 see Article 69

the *Trusts Law (2011 Revision)*. This has become known as the Cayman Islands' 'firewall legislation'.

In essence, the purpose of such legislation is to insulate trusts governed by local law from attack by forced heirs and those claiming against the trust assets by reason of a personal relationship with the settlor.

Other jurisdictions, such as Jersey and Guernsey, introduced their own firewall legislation in 2006 and 2008 respectively. More recently, Cyprus has done so. The relevant Cayman Island provision transposed to the DIFC would read:

> All questions arising in regard to a trust which is for *the time being* governed by the laws of the DIFC or in regard to any disposition of property upon the trusts thereof including questions as to:
>
> (a) the capacity of any settlor;
>
> (b) any aspect of the validity of the trust or disposition or the interpretation or effect thereof;
>
> (c) the administration of the trust, whether the administration be conducted in the DIFC or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal; or
>
> (d) the existence and extent of powers conferred or retained, including powers of variation or revocation of the trust and powers of appointment, and the validity of any exercise thereof,
>
> are to be determined according to the laws of the DIFC, *without reference to the laws of any other jurisdictions with which the trust or disposition may be connected.*

Recent cases have identified a number of improvements in such provisions which may be made, particularly in the context of personal relationships.

Recommendations

1. Article 14(1) of the *DIFC Trust Law* be amended in terms of recent Cayman Islands legislation.

2. The definition of "personal relationship" be amended to include reference to relationships between beneficiaries and generally updated to remove ambiguities.

3. Cayman STAR Trusts[20]

The Cayman Islands Special Trusts Alternative Regime or "STAR" is a creature of statute. It was introduced in the Cayman Islands by the *STAR Law* in 1997 but since then, has been incorporated in Part VIII of the Cayman Islands *Trusts Law*, appearing in the 2009 Revision at sections 95 to 109.

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[20] This summary is adopted from that provided by Mourant Ozannes: https://www.mourantozannes.com/media/455120/cayman_islands_star_trusts.pdf (accessed 26 August 2016)

What are STAR trusts?

STAR allows for the valid creation and enforcement of non-charitable purpose trusts. The common law rules relating to ordinary private trusts remain to the extent that they are not altered by the STAR provisions of the Cayman Islands *Trusts Law*.

Features and requirements

There are several reasons why STAR trusts have proved so popular. One of the primary reasons is their flexibility.

They can be indefinite in duration. The rule against perpetuities does not apply to a trust or power subject to the STAR regime. To address fears that this may result in the trust property being held in a structure which has fallen out of step with convention or public policy or developments in the law, there is a procedure set out in the *Trusts Law* for reforming the trust either in accordance with the terms of the trust or by application to court.

There is no need for named beneficiaries. STAR trusts can be validly established for the benefit of any number of persons or purposes (charitable or non-charitable) or a mix of both, subject only to legality and public policy considerations. This means they can be used in a commercial, philanthropic or family estate planning context or even in a mix of all three.

There is no reason why a STAR trust cannot have a protector, if that is what the settlor wishes.

A STAR trust must have an "Enforcer" who is chosen by the settlor. There can be one enforcer or there can be more than one. The enforcer can be a family or individual's trusted adviser or a council or committee of enforcers can be established.

Beneficiaries (if there are any) have no rights to enforce a STAR trust or to receive information about the STAR trust or its administration, nor do they have enforceable rights against the trustee or enforcer or to the trust property. The only person with the standing to enforce the trusts of a STAR trust is the enforcer and if for whatever reason, there is no enforcer or no enforcer who is able, willing and to undertake the task, the trustee must apply to court and the court will appoint one. The trustee is obliged to apply to court for the appointment of an enforcer within thirty days of it being advised of those circumstances arising and if the trustee knowingly fails to make that application, the court can impose a fine.

Subject to the terms of his appointment, in the event of a breach of trust, the enforcer has the same personal and proprietary remedies against a trustee and third parties in relation to the trust as a beneficiary of an ordinary private trust; an enforcer also has a right to be informed of the terms of the STAR trust and to receive information about the trust and its administration and to inspect and take copies of trust documents. Again, subject to the terms of his appointment, an enforcer can apply to the court for an opinion, advice or directions. He has the same rights as a trustee of an ordinary private trust to protection and indemnity in relation to the discharge of his duties and responsibilities and can apply to court for relief from liability.

Article 29 of the *DIFC Trust Law* effectively makes provision for STAR trusts. The only area in which the law might be improved is to provide clarity as to precisely what the trustee is required to do where Article 29(9) applies. It is suggested the appropriate action in such circumstances is an approach to the Court.

The *DIFC Trust Law* in Articles 27, 28 and 29 makes provision for conventional trusts, charitable trusts and purpose trusts. Seemingly a trust must fit exclusively within one of these categories[21]. Given that Islamic jurisprudence of *awqaf* proceeds on the basis that there needs to be no such strict separation (indeed, arguably that both charitable and family purposes must be present for a family *waqf*) the law should be amended to provide for a mixed trust comprising two or all three of these characteristics

Recommendations

1. Article 29 of the *DIFC Trust Law* be amended to provide that where article 29(9) applies, the trustee should make an approach to the Court for directions.

2. The *DIFC Trust Law* be amended to provide for a mixed trust comprising two or all three of the characteristics of conventional trusts, charitable trusts and purpose trusts.

4. Self-settled spendthrift trusts

We have reviewed the existing provisions of the DIFC Trust Law in relation to this issue, and conclude the existing provisions[22] adequately reflect a balanced approach to the issue.

5, 6 and 7: Correction of mistakes

This is an area in which the law in England has become extremely complex and controversial. A useful summary is contained in Mr Justice Hayton's previously referred to article, centering on the application of the so-called rule in *Hastings-Bass*[23].

Clarification is needed as to the parameters of the discretionary equitable remedy of rectification, especially when the Supreme Court relatively recently clarified the scope of the equitable discretionary remedy of rescinding a disposition for mistake - and rectification is a response to a mistake. Thus Lewison LJ in *Day v Day*[24] opined that in the case of voluntary dispositions rectification and rescission for mistake should be governed by the same principles.

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21 although the definition of "charitable trust" in item 3 of the Schedule arguably supports the contrary view

22 specifically sections 37 and 38

23 *In re Hastings-Bass* [1975] Ch 25

24 [2013] EWCA 280, [2014} Ch 114.

This, however, was before Lord Walker gave the judgment of the Supreme Court in *Pitt v Holt*[25].

The rule, which emerged from case law, has traditionally allowed trustees who have made a costly mistake to apply to a court to have their action voided. This allowed the adverse consequences – usually tax-related – to be nullified without the need for the trust beneficiaries to sue the trustees for negligence or breach of trust.
But the value of *Hastings-Bass* was seriously undermined by the UK Supreme Court in the recent *Pitt* and *Futter* decisions. These rulings declared that previous court decisions had been wrong in law and that the rule has a much narrower field of application than previously thought.

The jurisprudence in Canada and the United States have been less restrictive than recent English jurisprudence, and readily permits rectification to achieve a settlor's intent. In the context of a settlor who manifests an intent to have a Shari'a compliant trust, this could be a particularly useful power.

An amendment to Jersey's trust law came into force recently to incorporate the so-called *Hastings-Bass* rule into statute.

Jurisdictions with well-developed trust industries that have relied upon the rule have been considering how to react. Jersey – whose trust industry has GBP400 billion of assets under administration – was the first to enact a statutory amendment restoring *Hastings-Bass*'s potency. The *Trusts (Amendment No.6) (Jersey) Law* 2013 confirms the Jersey Royal Court's ability to provide discretionary relief where beneficiaries find themselves materially prejudiced by a trustee's decision. It is not necessary for the fiduciary to be shown to have been at fault. Moreover, the amendment has retrospective effect.

Recommendations

1. The Court's power to rectify an instrument (including the trust documentation) should be expressed so as to apply to motivational as well as meaning mistakes.

2. The Court's power to vary a trust pursuant to Article 30(6) of the *DIFC Trust Law* should be capable of exercise with retroactive effect.

3. The power of the Court to make an order under the principles outlined in *Re Hastings-Bass* should be confirmed along the lines of the Jersey legislation.

8. Mediation and Arbitration

Again we gratefully adopt the summary of the position given by Mr Justice Hayton:

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25 [2013] UKSC 26, [2013] 2 AC 108.

Earlier mention of the Convention on Human Rights, implemented by the *Human Rights Act* 1998, leads on to the surprising problems it creates for arbitration of trust disputes and differences, a process proving to be very successful for commercial disputes between persons of full capacity who can waive their Convention rights. Arbitration is also readily available for disputes between trustees and third parties. The problem, however, with family trusts is that internal disputes will normally involve minors and unborn or unascertained persons, who cannot waive their human rights and who have special protection in court disputes entitling them to proper representation and to have compromises approved if they are to be valid.

The English Trust Law Committee considered Article 6(1) of the Convention to create real difficulties. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and *public hearing* within a reasonable time by an independent and impartial *tribunal established by law***.** Judgment shall be pronounced publicly but the press and the public may be excluded from all or any part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Article 14(1) of the International Covenant on Civil and Political Rights, ratified by many countries outside the EU, is worded in very similar terms, though the USA's reservations "essentially render ineffective all Convention rights which would require any change in national law to ensure compliance with Covenant obligations."[26]

Much will depend upon how far the court is prepared to allow liberal "wriggle-room" in the exceptions from the need for a public hearing. If little wriggle-room is allowed then, for arbitration to become possible, court proceedings will need to be instituted so that persons may represent minor, unborn and as yet unascertained beneficiaries, and these representatives can then waive their beneficiaries' rights. The court can then stay proceedings to enable arbitrators to resolve the trust dispute and make an award which the court can then approve. Better still, legislation could confer on arbitrators of trust disputes all the powers of a judge if hearing such disputes - as in The Bahamas[27].

However, I do not see this happening in England for a considerable period. Perhaps this period would be shortened if lawyers had their settlors create trusts governed by a foreign law under which internal trust disputes could easily be resolved by arbitration, though this could lead to English lawyers losing potential business to foreign lawyers so why should such lawyers choose a foreign governing law? If, however, foreign lawyers were creating foreign trusts with the advantage of arbitration for trust disputes so that

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[26] See UN Human Rights Committee, General Comment No 24 (52) para. 12.

[27] Trustee Act 1998 s 91B, inserted by Trustee (Amendment) Act 2013.

English lawyers lost business from settlors, then there would be stimulus for changing English law. Nevertheless, the main stimulus ought to be pride in maintaining the law of England, the founder of trust law, at the fore of proper developments in the trusts sphere.

There is, however, a problem as to enforcement of arbitration awards under the New York Convention which applies to arbitrations based on agreements signed by the parties under Art II(2). Nevertheless, UNCITRAL has recommended that this should be a "non-exhaustive" definition so that there is scope for beneficiaries who attempt to enforce their rights under the trust to be regarded as manifesting their agreement to an arbitration clause in the trust instrument[28] and also scope for regarding beneficiaries as having received the benefit of a conditional transfer of property so as to be bound by the burden of the conditions. Art V (2)(a) of the Convention, however, empowers the courts, in a country where enforcement is sought, to refuse enforcement if the subject matter of the dispute is not capable of settlement by arbitration under the law of that country, quite apart from the fact that English public policy as to the fundamental human right to a public hearing might possibly also prevent enforcement.

Recommendations:

1. The Court be expressly empowered to refer any trust dispute which comes before it to confidential mediation or arbitration, and make orders for representation of beneficiaries not in existence or *sui juris*.

2. The *DIFC Trust Law* confer on arbitrators of trust disputes all the powers of a judge if hearing such disputes.

9. VISTA Trusts

Many large family enterprises choose to use a trust as a vehicle for business succession. Business succession by way of familial succession can offer a number of potential benefits for a business. It can continue the original vision of the founder; it can also help the founder maintain a close interest in, and indirect influence on, the workings of the organization. Family businesses, however, typically carry a significantly greater degree of financial risk than well-diversified investment portfolios, and trustees sometimes feel obliged to sell shares in a non-income producing company or in a company whose business is deemed economically risky. The trustee's duty to diversify may conflict with the settlor's wishes to continue the operations of the company.

A case in point is the Hershey Trust Company, an independent trust company founded by chocolate industrialist Milton S. Hershey in 1905. The Hershey Trust Company is the trustee of three entities: (1) the nonprofit Milton Hershey School, (2) the nonprofit M.S. Hershey Foundation, and (3) the Milton Hershey School Trust. In turn, the Milton Hershey School Trust owns 100% of the Hershey Trust Company,

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[28] *Rachal v Reitz* 403 SW3d 840 (Tex 2013), Texas Sup Ct overruling the full CA Bench; also see *Diaz v Bukey* 282 P3d 1217 (Cal 2012), California Sup Ct vacating CA decision.

31% (representing a 77% voting interest) of the Hershey Company (subsequently re-named the Hershey Food Corporation), 100% of Hershey Entertainment and Resorts, and voting interests in other various investments.

In the case of the Hershey Trust, it was clearly the intent of Milton Hershey to keep control of the Hershey Company with the Hershey School Trust and to provide a school, as well as employment and income, to the town and residents of Hershey, Pennsylvania. The trustees' goal (and obligation) of diversification through sale of the company most likely would defy the settlor's intent and frustrate the residents of the town of Hershey, the indirect beneficiaries of the trust. But how can a trust hold onto an unprofitable or economically risky business investment without violating the prudent investor rule?

In 2002, Hershey Trust Company CEO Michael Vowler sought to diversify the trust investments by causing the Milton Hershey School Trust to sell its 77% voting share of Hershey Food Corporation. The sale was blocked by the state Attorney General, and Vowler was ultimately replaced as CEO[29]. The issue of whether the trustees ignored the prudent investor rule was never addressed.

The *British Virgin Islands Special Trusts Act*, enacted in 2003 (VISTA 2003)[30], enables the creation of a special type of trust, known as a VISTA trust, that can be used to circumvent the conflicts between the settlor's desires and the trustee's duties.

The primary purpose of the VISTA trust, as defined in the legislation, "is to enable a trust of company shares to be established under which (i) the shares may be retained indefinitely (subject to the BVI 99-year Rule Against Perpetuities) and (ii) the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee." VISTA trusts are a carefully targeted response to what are characterized as the unintended and inappropriate consequences of the trustee's duty of prudent investment[31].

This legislation is aimed at avoiding risks, removing power from the trustee, and giving authority to the directors of the company. The act enables trustees to retain shares in BVI companies irrespective of the financial benefits of holding the shares. The legislation allows the complete removal of the trustee's monitoring and intervention obligations (unless the settlor requires otherwise), allows the settlor to direct the trustee to intervene to resolve specific problems, and allows trust instruments to set rules for the directors' appointment and removal. In addition, many of the negative aspects associated with the prudent investor rule (such as increased administration costs, the trustee's liability and exposure to claims, and strict limits on director control) are removed. Especially for closely held and family businesses, the elimination or modification of these rules will improve the chances that the settlor's wishes will be followed. VISTA 2003 enables special trusts to be established to cater to a settlor's intention for the company shares to be held for his children, rather than

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29 *In re Milton Hershey School Trust*, 807 A.2d324, 335 (Pa. Commw. Ct. 2002)

30 http://www.bvifsc.vg/Portals/2/Virgin Islands Special Trusts Act, 2003.pdf

31 See Christopher McKenzie & John Glasson, VISTA Trusts, available at www.bvibarassociation.com/articles/BVI-VistaTrusts.pdf

simply sold for a profit or to reduce risk.

There is an issue as to whether there should be a requirement that the trustee of such a trust be a registered trustee. In general, we see no benefit, and considerable inconvenience, in requiring trustees (or trusts) to be registered. We think that VISTA trusts, were they to be part of the DIFC trust framework, are a special case in which it may be appropriate to have such a requirement.

Recommendation

The *DIFC Trust Law* be amended to provide for trusts on the VISTA model.

10. Authorisation of transactions and trust restructuring.

Article 30(6) of the *DIFC Trust Law* contains a wide power of variation of the terms of a trust which comprehends all of the circumstances covered by its English equivalent, the *Variation of Trusts Act* 1958.

There is, however, no specific power to approve transactions which might otherwise be in breach of trust. Such provisions exist in most jurisdictions, of which perhaps the best known exemplar is section 57 of the United Kingdom *Trustee Act* 1925.

The most comprehensive of such provisions is section 47 of the Bermuda *Trusts Act* 1975.

Recommendations

1. Power to confer power to enter into transactions be added to the express powers of the court in relation to trusts.

2. Such jurisdiction may be exercised in respect of a prior transaction.

3. That power be expressed to be coextensive with the power contained in Article 30(6).

Other Technical issues requiring attention

1. Article 23(1)(c) of the DIFC Trust Law.

Article 23(1)(c) is somewhat odd for two reasons.

First, it provides for a declaration of trust *by the beneficial owner* that the legal owner holds identifiable property as trustee. It assumes that the beneficial ownership is separated from the legal ownership prior to the declaration of the trust, which cannot be true.

Second, it assumes that both the settlor and trustee cannot be the same person – which is not true either, as a legal owner can declare a trust where, upon declaration, it becomes the trustee.

The problem with Article 23(c) of the *DIFC Trust Law* is not that it makes provision

for declarations of trust - that is a perfectly legitimate way of establishing a trust when a person holds property which he wants to hold as trustee.

The intent of the provision is not that non-land trusts can be created orally - that is precluded by Article 23(2) - but rather to deal with the situation where the "settlor" already owns the property and will become the trustee - as opposed to a settlement where the trustee and settlor are different persons and the trustee acquires the property from the settlor for the purposes of the trust. The problem is that the drafter assumed that prior to the creation of the trust there are separate legal and beneficial interests.

That is wrong: see *DKLR Holding Co v. Commissioner of Stamp Duties (N.S.W.)* [32], particularly at paragraph 13 of the reasons of Mason J and paragraph 8 of the reasons of Brennan J. If the correctness of this reasoning is accepted, it would be preferable that paragraph (c) be reworded to read:

> (c) declaration by the owner of identifiable property that thereupon the owner will hold the property as trustee;

2. Enforcement of Charitable Trusts

Article 29 of the *DIFC Trust Law* provides that a purpose trust must have an enforcer. The corresponding role in the context of a charitable trust in common law jurisdictions is filled by the Attorney-General.

Article 28(5) of the *DIFC Trust Law* confers enforcement rights on the settlor during his lifetime, and the Court. This is not really a practical arrangement, as the Court, unless its attention is brought to some form of misconduct by a person with standing to do so, is unlikely to take any action on its own account.

It would seem appropriate to permit the heirs of the settlor to enforce the trust, and also an appropriate public authority. Just exactly who that might be is a matter for consideration but for the time being we suggest the DIFCA or that consideration be given in due course to establish an Attorney-General function for the DIFC.

3. Articles 8 and 9 of the DIFC Trust Law

The scope of the role of the DFSA as envisaged in Articles 8 and 9 of the *DIFC Trust Law* is unclear and in any event anomalous. As noted above the regulator of the behaviour of trustees absent any dealing with public money is properly the Court, and the Centre Body responsible for administering laws and regulations relating to the establishment of vehicles (as apposed to the conduct of persons providing financial services) is the DIFCA. Moreover it is unclear what rules the DFSA Board of Directors might make, given the limited scope of the power conferred upon it under Article 23 of the *Regulatory Law* 2004.

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[32] [1982] HCA 14; (1982) 149 CLR 431

These provisions should be omitted from the Law.

4. Private Trustee Company incorporation?

There is currently no specific provision for the incorporation of private trust companies. We see no need for changes in the current law. A company may be a trustee under the HoldCo regime – if it is we see no reason for a different approach to permitting incorporation. There is of course no reason why a company incorporated outside the DIFC cannot be a trustee of a DIFC trust and meet its own local incorporation standards. It is, however, suggested that the DIFC Registrar of Companies creates a category of licensed activity for private trust companies.

5. Absence of DIFC Court precedents

One issue which is repeatedly raised with us is the absence of precedents in the Trust area in the form of decisions of the DIFC Courts.

It would be appropriate to create a test case in which the opinion advice and direction of the Courts is sought under Article 21 of the *DIFC Trust Law* which would give the Court the opportunity to authoritatively outline the basis of its trust jurisprudence and possibly also deal with Shari'a issues.

An alternative approach, should the Chief justice agree, would be to submit questions for interpretation of the *DIFC Trust Law* to the Court of Appeal in accordance with Article 5(B)(1)(b) of the Dubai *Law in respect of The Judicial Authority at Dubai International Financial Centre* **(**No.12 of 2004**)** as amended – an uncommon provision but one which could be very helpful in the present context.

6. Custodian and Advisory Trustees

The appointment of custodian and advisory trustees will frequently assist in the proper administration of a trust. We recommend that provision be made for this, following the general approach in sections 14 and 15 of the *Trustees Act* 1962 of Western Australia.

Acting in either capacity should not of itself be regarded as "Providing Custody" under the DFSA's GEN Rule 2.13 or "Providing Trust Services" pursuant to the provisions of the DFSA's GEN Rule 2.23. If, however, it were done in the course of a business it would be a regulated activity.

8. Removal of Trustees

Section 42 of the DIFC Trust Law should be amended to make clear that the powers conferred in it are additional to those which are contained in the trust instrument. While we think this is probably the true position, the contrary argument (that section 42 operates as an exclusive power being a provision of the Trust Law contrary, on that view, to section 10 of the Law, is sufficiently plausible to warrant legislative clarification.

Chapter 4

(b) Foundations

The private foundation as a modern legal vehicle

The Hague Convention has now been ratified by a significant number of civil law jurisdictions including Italy, Luxembourg, Monaco, the Netherlands and Switzerland, reflecting the widespread use of trusts in international succession planning and in commercial transactions. However, at the same time as civilian legal systems are increasingly moving to recognise trusts, the merits of civilian foundation laws are being recognised by a number of common law jurisdictions. Although foundations have traditionally been identified with Liechtenstein, where a foundation regime has been available since 1926, they are a form of legal entity which is known in most continental European jurisdictions, though in most cases their use is limited to charitable purposes (with the notable exceptions of Austria, Liechtenstein and the Netherlands). In the offshore world, Panama was first to introduce a foundation law in 1995. The Bahamas, Mauritius, Anguilla, Nevis & St Kitts have all followed suit, as have Jersey, Guernsey and Cyprus. Luxembourg has not yet introduced the foundation in its laws, but a regime very similar to the Dutch foundation regime is at present under parliamentary discussion.

The foundation as a legal vehicle has some distinct advantages which mean that it can be useful in a number of contexts. Before considering the use of foundations in DIFC, and their essential characteristics, it is useful to draw a distinction between 'public' and 'private' foundations. In many countries (such as Switzerland) the use of private foundations was prohibited or greatly restricted following the French revolution, as foundations (like *fideicommissa*) were seen as vehicles for the perpetuation of landed estates. Most European jurisdictions retain in their civil codes provisions allowing for the creation of 'public' foundations, being institutions that exist to serve public, generally *charitable* purposes. This identification of foundations with selfless purposes may help explain why a number of charitable trusts throughout the common law world bear the name 'foundation'.

From a competitive perspective in the international wealth management market, it may be a significant advantage for DIFC to provide for a family foundation regime, combined with the already existing trust regime. Moreover, offering a non-EU based alternative foundation regime may be appealing to European (or at least non-GCC) families.

In addition, the main advantage of a private foundation regime in DIFC may arguably be the ability for local (UAE, GCC) families to structure their local assets (subject to foreign ownership restrictions) for succession planning purposes, in a Shari'a compliant manner if so desired.

Moreover, the foundation regime may be extended beyond family foundations only, and may include a public foundation regime facilitating for example (i) charities (ii) securitisation structures and (iii) anti-hostile take-over instruments.

The essential characteristics of a private foundation

Although there are differences amongst local foundation laws, the essence of private foundations is characterised by certain common features. As a general characteristic, a foundation is a legal entity which is created when a person (the 'founder') dedicates assets to a specific purpose observing certain formalities. Thus a foundation is immediately distinguishable from a trust in that it has *separate legal personality*; this form of entity, however, is also fundamentally different from a company in that a foundation is not owned by shareholders or members but is instead "self owned" (i.e. an "*orphan*") being administered in accordance with the principles laid out by the founder in the foundation statutes/articles of association.

The *governing body* of a foundation will be a board or "council" which can comprise individuals or companies. The powers of the board of a foundation will be governed by the constitutional documents of the foundation as well as the law.

The person or persons entrusted with the *administration* of the foundation owe duties to the foundation that are usually akin to fiduciary duties in the common law sense of the word and may be held accountable for their stewardship of the foundation. The beneficiaries of a foundation acquire a bundle of rights and/or expectations as to the administration of the foundation. As they act on behalf of the foundation, the members of the foundation board do not assume any personal obligations (unlike trustees), and the liability of the foundation itself is limited to the value of its assets (ring fenced).

The advantages of the foundation form

As a vehicle, foundations have a number of potentially useful characteristics:

- Perpetuity – foundations can be formed for an unlimited period of time and may continue until their objects have become fulfilled. In contrast, trusts under the laws of most trust jurisdictions exist subject to a perpetuity period and, in some cases, are subject to rules precluding the excessive accumulation of income. However, as an increasing number of jurisdictions (including the DIFC, Jersey and Guernsey) have abolished the perpetuity period, this feature alone may not help explain the difference between trusts and foundations.
- Legal personality - if the relative merits of the trust and the foundation need to be compared, the separate legal personality of a foundation must be acknowledged as a distinct benefit of the foundation. Not only does a foundation have limited liability status but also its council members sit behind the 'corporate veil'. Incidentally, this situation is relatively similar to that which exists in the context of private trust companies, but in the case of foundation there is no need to insert an intermediate company. Potential conflicts of interests that may typically arise between trustees, settlor and beneficiaries, causing disputes and court cases, could be avoided in foundation structures.
- Self-owning – a distinct advantage of the foundation is that it requires no owner, and so provision does not need to be made for the transmission of a

foundation in succession planning. Clearly, despite being an "orphan", a foundation may have (economic) beneficiaries.

- Independence and impenetrability – as a foundation is self-owned, there is no opportunity for outsiders to influence or alter the foundation's purposes. Further, under some foundation laws, the founder may limit the beneficiaries' access to information or their opportunity to challenge the manner in which a foundation is controlled and/or to ensure a level of discretion for the settlor/founder (member of family A) towards beneficiaries (including spouses belonging to families B-Z). However, it should be borne in mind that this could become a serious disadvantage in terms of accountability, which is why some foundation laws (e.g. Liechtenstein, Guernsey, Cyprus and Jersey) provide that in these circumstances there should be a guardian or enforcer or local representative. In the Dutch and Panama foundation regimes, no external board member or local representative is required, however, is not disallowed either; these regime provide for optimal flexibility which are welcomed by families that try to limit third party involvement.

- Recognition – private foundations are known under the laws of the Netherlands, Liechtenstein, Cyprus, Austria, some of the Channel Islands and – to a limited extent - Switzerland (which only allows for the creation of family foundations for the maintenance of support of family members) and a number of Caribbean jurisdictions. Where private foundations are not found within a jurisdiction's own legal system, the questions of whether or not they will be recognised and, if not, how they will be characterised must fall to be determined under private international law rules.

- 'Hybrid' vehicles – foundations can be structured to provide for the fulfilment of particular purposes and/or to benefit particular persons or classes of persons.

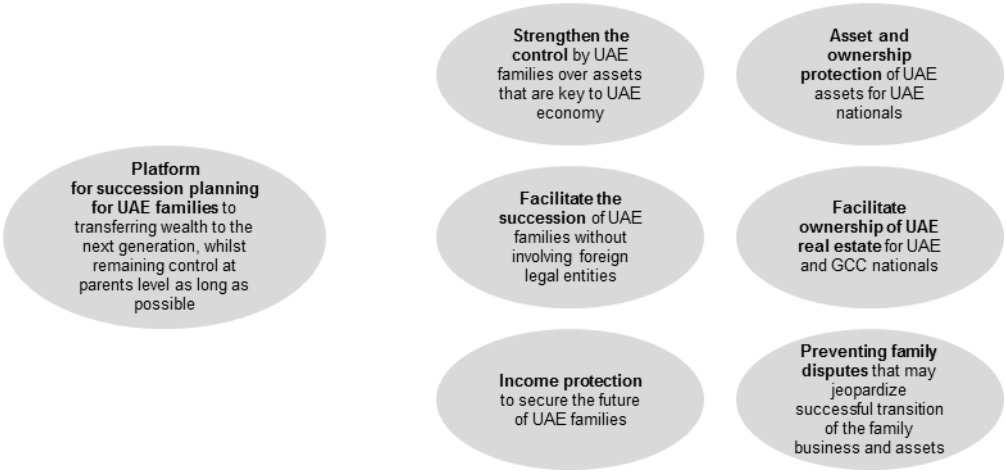
- Degree of control – one of the advantages of foundations is that the founder can maintain (full) control over the assets after he has created the foundation, and even beyond his death if so wished. Under the foundation law in Liechtenstein and the Netherlands, for example, the founder may reserve the right to revoke the foundation and/or to change its foundation's statutes. Again, the position is not too dissimilar to that which exists under many modern trust laws. Moreover, foundation regime may also provide for the statutes to be non-revocable/amendable by succeeding boards (after retirement of the initial board which often is the founder himself, e.g. upon his death)

- Flexibility – mechanisms can be built into a foundation allowing for its beneficial class to be changed. Further, foundations can, under some legal systems, be redomiciled in other jurisdictions, making them portable legal vehicles.

The use of foundations

The flexible characteristics of the private foundation mean that it can be the appropriate legal vehicle through which a range of processes can be effected:

- Vehicle for succession of family wealth – assets transferred to a foundation cease to be part of the estate ('*patrimony'*) of the founder, being assets of the foundation itself following transfer. Foundations can be useful in estate planning because they are not subject to perpetuity periods and because they can be created in different ways. Under Liechtenstein law, for example, a foundation can be created by deed, by Will or by 'inheritance contract'.
    - Platform for succession planning for GCC families

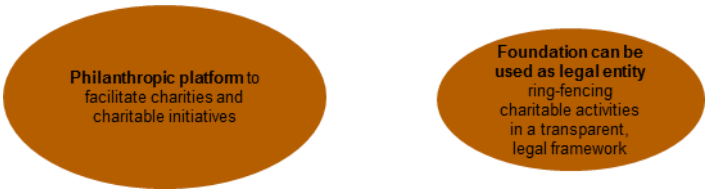


    - Platform for succession planning for international families

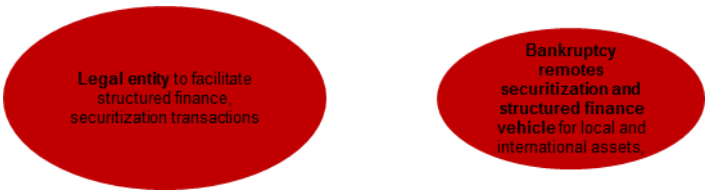
- For the long-term holding of businesses – foundations may be useful for holding a business and to protect against hostile takeovers; being self-owning, they offer a solution to the problem of succession. In the Netherlands, a foundation may even be used to conduct business activities, similar to regular limited liability companies (e.g. B.V.s). Further, as they can often exist for both purposes and beneficiaries, they provide a vehicle that can hold an asset long-term until such time as it is appropriate to pay value out to individual beneficiaries. Through the split of voting/control (over the assets owned by the foundation) from the economic entitlement to these assets, businesses may protect themselves against hostile takeovers: only the economic entitlement may be transferable (and even listed), whilst the control is kept with the board represented by the owning family of the business for example).

Examples of public foundations, subject to a (higher level of) regulatory regime, are charitable foundations and orphanage structures using foundations as bankruptcy remote vehicles that act as owners of certain assets. Again, the flexible characteristics of a foundation provide for a solution in this case as well.

- Charities – in order to ring-fence charitable activities in a separate legal entity, allowing for highest level of corporate governance and transparency and to disallow for any distributions to owning shareholders/members, an orphan foundation entity is ideal and generally used globally.
- Quasi-charitable vehicles – under English law, a trust for a non-charitable purpose will fail, but many socially useful purposes will not be considered charitable. A private foundation does not require charitable purposes and so can therefore be more flexible than a charitable trust. The Mauritius foundation regime provides even for both charitable and non-charitable activities to be conducted simultaneously within one single foundation.



- In commercial transactions – foundations can be used to hold funds in 'off balance sheet' arrangements or sums under guarantee in favour of creditors. They are also used as conduit vehicles for royalties and licence fee payments and could be used in some contexts as employee benefit vehicles and in securitization structures where they can act as bankruptcy remote orphan entities.



Some well known foundation regimes

(a) Liechtenstein

The Liechtenstein regime is the oldest foundation regime, dating back to the 1920s. It was estimated that that there were 51,000 foundations (or '*Stiftungen*') created under Liechtenstein law in existence as at 2001 making the Stiftung the form of Liechtenstein entity most commonly used by individuals resident outside the Principality. Liechtenstein's foundation law is presently contained in the Law on Persons and Companies of 20 January 1926. It has since been decided that the Liechtenstein foundation law required updating, after a review began in 2001, with the resulting decision made in 2004 to implement a new updated, foundation law.

The new law was passed by the Liechtenstein Parliament in June 2008 and came into force on 1 April 2009. From that date the Liechtenstein position became more complex, two foundation laws have since then applied in the Principality. Some new legislative provisions now apply to the 1926 law, along with existing foundations which continue to be subject to the law.

Liechtenstein law recognises a number of different forms of foundation. Private foundations can be formed under Liechtenstein law as 'family foundations' (if for the benefit of members of one or more families) or 'mixed foundations' (for the benefit of family members and also religious and other institutions).

Charitable foundations need to be registered on the public registry, along with those engaging in commercial activities, with the submission of a number of documents, such as their proof of foundation capital, before they acquire legal personality. However, Liechtenstein private foundations acquire personality when created, subject to a requirement to file ('*deposit*') the foundation deed (or other constitutive document creating them) with the public registry. Once deposited, this deed is not available for public inspection.

The objects of a Liechtenstein foundation can include the provision of economic benefits to particular persons. They may not engage in commercial activities, save for commercial activities which are additional to the main activities. Commonly, although not a legal requirement, the main constitutional document (known as 'statute' or 'charter') is supplemented by bye-laws. Indeed, there is no hierarchy of documents and the main reason for having separate bye-laws is privacy (as bye-laws need not be filed with the registrar). Typically, the beneficial class is set out in the bye-laws, whilst the main charter provides that the main object of the foundation is 'to benefit members of certain families'. Liechtenstein law allows the founder to reserve certain powers, including the power to amend the foundation's charter and/or to revoke the foundation.

Council members make up the foundation, and at least one member of the foundation board should have a place of residence in the Principality or in another member state of the European Economic Area ('EEA') along with being a qualified professional. There is not a minimum to the number of foundation council members. The constitutional documents set out the internal organisation of the foundation. They may for example provide for an advisory council structure or for a protector or supervisory board with a degree of supervision over the foundation council.

A minimum capital is required for a Liechtenstein foundation on which a duty is payable on creation. Liechtenstein private foundations are required to pay a capital tax of their capital value annually. To the extent that assets exceed a certain threshold, this charge is reduced.

Not only can it be possible to redomicile a Liechtenstein foundation to another jurisdiction in some instances but also they can be 'transformed' into a Liechtenstein *Anstalt* or trust if their statutes provide for this. . In Liechtenstein law it is possible and a recognised course of action that a foundation can be challenged by the heirs of the foundation, in cases where they have not received their share under applicable forced heirship rules and also by the founder's creditors. Since 2009, it has been possible however to restrict claims against foundation assets based on infringement of foreign forced heirship rights. 'New' foundation boards (post 2009) require at least two members independent from each other. This is aimed at preventing abuses and strengthening governance within Liechtenstein's foundations. This is known as the

'four-eyes principle'. A family foundation is not required to register, however, its council is required to deliver a formal notice/opinion to the Office of Land and Public Registration for their review.

A corporate founder may not reserve a right to revoke or modify a foundation and in addition an individual founder's right to revoke or modify a foundation may not be assigned. Further, constitutional documents must disclose the establishment of a foundation by a nominee.

The new updated law in 2009 was introduced to modernise the Liechtenstein regime while maintaining the popularity of the foundation vehicle. The possibility to limit the incidence forced heirship rights is likely to appeal to founders from European and Shari'a law states, although it has no comprehensive anti-forced heirship legislation such as can be found in many modern trust laws (including Jersey and Guernsey).

The new law has brought about change for both existing and new foundations; it helps to determine rights of beneficiaries to obtain certain information regarding the foundation. Having a legal claim as a beneficiary could allow for receiving information on the foundations assets. If a beneficiary has a vested interest, (whether present or future) he could be entitled to inspect the foundation's statutes, as well as bye-laws and regulations. By contrast, such may not be the case in e.g. the Dutch foundation regime.

With regards to a discretionary beneficiary, their rights to information are more limited; the information must not be used in an improper manner or against the interests of the foundation. Within the new law, there is the possibility for the founder to restrict these information rights. This can be achieved by voluntarily placing the foundation under supervision by the Foundation Supervisory Authority, or by establishing an internal controlling body. Under the EU 4th Anti-Money Laundering Directive ("AMLD"), quasi-public registers of founders, settlors, protectors and beneficiaries may obviously drive the transparency agenda even further. The directive must be introduced in all EU Member States' legislation before April 2017.

(b) The Netherlands

Similarly to foundations in other jurisdictions, a Dutch foundation (*stichting*) is a separate legal entity, to be established by (notarial) deed, distinct from its board members or directors, governed by the principles of Dutch companies law. A foundation does not have *any* members or shareholders (orphan' legal entity). Historically, the foundation was created for charitable purposes. However, due to its flexible structure and ability to issue Certificates for shares (which results in a separation of the legal and beneficial ownership of shares), the foundation is nowadays also often (internationally) used as an anti-takeover measure, to safeguard continuity for family business and as an instrument for family estate planning (Family Foundations), for employee option plans as well as in securitization structures. With respect to Family Foundations, family members may be settlor, beneficiary, board member/board director and/or supervisory board members. Hence, the structure may completely avoid third party involvement and as a result, typical inherent conflicts of interest between settlor, trustee, protector and beneficiary that is so often inherent to irrevocable trust structures and foundations in offshore regimes,

which make these vulnerable to litigation between the stakeholders and stagnates the operation of trusts structures.

The board of the foundation has the full control over its assets. It is not acting as a fiduciary, but it is the representative of the full ownership of the assets, similar to a board of a (commercial) company. It has the authority to amend the articles of association of the foundation and can resolve to liquidate the foundation, unless the articles of association provide otherwise. In practice this means that for a foundation which has a single board member, such single board member can individually resolve to liquidate the foundation and in doing so revoke the structure. The articles of association of the foundation provide for the destination of the balance of the foundation after its winding up.

The board of the foundation may consist of the patriarch, or a group of family members, whilst it provides for the flexibility to introduce external individuals and corporate entities as well (not necessarily a Dutch one). In principle, there is an almost unlimited flexibility to introduce protectors, guardians or similar officers to a foundation and to grant specific board members with tailored authority and specific voting or monitoring duties. It is possible to implement a supervisory board if so wished, acting as supervisory family council for example.

The statutory seat of the foundation will always remain the Netherlands (that adopts the 'incorporation regime' rather than the 'siege reel' regime), but the place of establishment of the foundation may be anywhere, based on its effective place of management. A foundation must be registered with the Dutch Trade Register of the Dutch Chamber of Commerce. The registered address will be the place of establishment of the foundation. The board of directors must prepare financial statements and directors' report but the financial statements do not have to be published. Only Dutch foundations that conduct a business enterprise (in Dutch: *onderneming*), which is allowed under the Dutch foundation regime, having a certain net turnover must comply with, inter alia, the rules for auditing, format, adoption and publication of annual accounts, and tax return filing (and taxability) that apply to Dutch corporations.

The articles of association, the identity of the board and the name of the foundation will in principle be publicly available in the Trade Register. As mentioned earlier, the EU 4th AMLD may further increase the transparency, extending it to the (quasi) public registration of beneficiaries for example.

A Dutch foundation cannot make distributions to its managing director or its incorporators (other than reimbursement of expense); any distributions by a foundation to others must have a charitable or non-commercial purpose. These limitations do not prevent the foundation from entering into contracts (including contractual arrangements with its managing director or its incorporators, pursuant to which it needs to make payments), or with the beneficiaries, generally referred to as 'certificates', or 'depository receipts'): for Dutch family foundation structures, there are two main options that do allow for distributions by foundations to beneficiaries/ family members: (i) the foundation that qualifies for the Segregated Private Capital regime (*Afgescheiden doelvermogen*) may act similar to a discretionary trust and (ii) the foundation that qualifies as a so-called *Stichting Administratiekantoor*, or "STAK".

A STAK is a special type of foundation that is unique for the Netherlands (the proposed Luxembourg foundation regime seems to copy the Dutch regime by

adopting similar provisions in its foundation regime though) provides for a number of legal and asset protection features and generally provides for extreme legal flexibility for the parties involved. One of the key features of a STAK is the issuance of 'certificates' or 'depository receipts' in exchange for the contribution of assets into the foundation. The STAK will issue certificates representing the economic entitlement to the assets (only). Subsequently, these certificates may be (ir)revocably donated by the founder/contributor to, for example the next family generation, thereby splitting control from economic entitlement. Certificates are contracts/agreements issued by the foundation to the contributor (which is often the founder), representing the value of the underlying assets that it owns. This, effectively, results in a separation of the legal and beneficial ownership of the relevant shares and in effect in the creation of instruments which, to a certain extent, may be compared with non-voting shares with all the voting power accumulated in the STAK (i.e. the board of the foundation). Although the certificates are beneficially equal to the underlying assets of the foundation, they are certainly not the same, as they do not represent voting power. The rights conferred on certificate holders are determined by the provisions under which the certificates are issued. These provisions are called "trust conditions" *(administratievoorwaarden).* In principle, the certificates holder has no rights vis-a-vis a (holding) company, but only vis-a-vis the STAK. Certificates are to be seen as the embodiment of a contractual relationship by and between the original shareholder(s) and the STAK, containing their mutual rights and obligations.

Only very few provisions of the Dutch Civil Code mention certificates, no definition has been included. Contract law (and the principle of 'freedom of contract') applies rather than corporate law. Commonly, the certificates are issued on a one to one basis, for example one for each share in a (holding) company held by the STAK concerned. Certificates' holders have the right to share in a (holding) company's profits, The STAK has an obligation to immediately distribute any profits which it receives from a (holding) company to the certificate holders (which obligation is based on the objects of the STAK as well as the administrative provisions rather than pursuant to its articles of association) and therefore does not act as a 'pooling vehicle' for cash. In addition, certificates holders cannot be held liable for obligations of a (holding) company of which the STAK administers the shares. From the moment of the transfer of assets by the founder/contributor, the control over the assets is in the hands of their new legal owner, the STAK. The board of the STAK has full and exclusive control over the assets.

(c) Luxembourg

In summer 2013, the former Luxembourg government submitted to the Luxembourg Parliament a draft law on the '*Fondation Patrimoniale'*. Following the October 2013 elections, the approval process was delayed. The below therefore contains only the description of the draft law.

Evidently, it is clear that Luxembourg has intended to combine and copy 'Best practices' similar to Panama (in 1995), to deliver for a very competitive foundation regime. Included within the draft are elements of the '*Privatstiftung'* of Austria, the '*Familienstiftung'* of Liechtenstein and Germany, the '*stichting'* of Belgium and the Netherlands, and the 'STAK of the Netherlands. The Patrimonial Foundation, similar to the other foundation regimes, has legal personality and is to be established by

notarial deed (by any private individual or legal entity acting in the context of managing the private wealth of individuals), and is an orphan entity without stakeholders. A registration duty along with a minimum contribution of EUR50.000 is required for the incorporation.

The Luxembourg official gazette ('Memorial section C') along with the Trade and Companies Register will publish the notarial deed of incorporation. The publication will not disclose the identity of the Founder nor of the Beneficiaries in order to upkeep privacy, as well as the guidelines by the Financial Action Task Force (FATF) and the 4th AMLD also (expected to be) fully respected.

One or several private individuals or wealth management entities that administer assets of individuals can make up the founder of a Patrimonial Foundation. Wealth management companies such as the Luxembourg SPF (*société de gestion de patrimonie familial*) for example. The draft law also gives the option for the founder to reserve the (exclusive) right to amend the articles of incorporation of the Patrimonial Foundation, including its lifetime and liquidation, the designation of the Beneficiaries as well as change the articles/statuses/by-laws. There is the option to have multiple beneficiaries within the Patrimonial Foundation whereby giving the founder rights to determine the criteria for the selection of beneficiaries and appoint as well as revoke beneficial interests. . Copied from the Dutch STAK regime, it is possible for the Patrimonial Foundation to certify assets by issuing depository receipts. A certificate holder has the right to receive income deriving from the underlying foundation assets. Within the draft law the founder also has the right to change so-called *reglements extrastatuaires*: separate and confidential by-laws that may contain provisions on the beneficial interests.

The purpose of the Patrimonial Foundation must be wealth management for the benefit of its beneficiaries, or the ownership/holding of assets without interfering with the management of the assets. Non-profitable associations and charitable foundations require ministerial approval under the specific Luxembourg law of 21 April 1928. It should also be noted that the purpose of the Patrimonial Foundation must not be charitable. The board of directors should be the appointed governing body of the Luxembourg foundation, alternatively a supervisory board could be put in place. Moreover, this is mandatory in case their number of beneficiaries exceeds five or the foundation's assets exceed a value of Euro 20 million.

(d) Jersey (and some aspects of Guernsey)

As noted above, some of the Channel Islands along with several common law jurisdictions have recently adopted foundation laws. The States of Jersey have had a foundation law since 2009, the *Foundations (Jersey) Law* 2009 was registered by the Royal Court of Jersey on 19 June 2009 and came into force on 17 July 2009. Guernsey introduced its legislation in 2013 only.

It was recognised by Jersey that introducing the foundation would create a new means of business for its fiduciary services industry for clients in jurisdictions where trusts were not generally understood or particularly recognised and used and because, in some circumstances, trusts might not be considered to offer the degree of transparency required in a modern wealth holding arrangement nor the level of retained control desired.

In order to become an 'incorporated Jersey foundation, the application must be made by a 'Qualified Person' meaning someone who is registered with the Jersey Financial Services Commission ('JFSC') to continue trust business. A foundation is deemed 'incorporated' in Jersey on the submission of its foundation charter to the JFSC. This document must give detail of the objects of the foundation, and is available for public inspection. This must also include information on its dissolution and term and any provisions regarding the amendment of the charter.

Foundations in Jersey can include governing regulations which need not be filed with the JFSC, such as how its objects are effected. These regulations should cover the establishment of a council, and also cover the appointment and removal of its members. Further, they should outline what decisions need approval by a third party and how decisions are made by the council.

There is one aspect with respect to Jersey law which is different from that in Liechtenstein, the Netherlands and Panama. A Jersey foundation is required to have an (external party) '*guardian'* at all times. This Guardian is nominated to act in a similar way to the enforcer of a purpose trust: the idea is to ensure the foundation carries out its tasks.

In contrasts to this, the Guernsey foundation requires a local representative at which address the foundation will be registered, but there is no requirement for a guardian or enforcer. A Guernsey foundation will be made up of a board which consists only of family members. This differs to a Jersey foundation in the sense that it must always include a 'Qualified Member'. This individual will be a Jersey registered office and regulated in the JFSC.

On an annual basis, in order to reflect a true view of its financial position, a Jersey foundation will be required to prepare accounts to meet this requirement. So long as Jersey foundation objects provide a purpose of benefiting a person or class of persons, they may have beneficiaries to the foundation. It should be noted that however, no fiduciary duties are owed to such beneficiaries. Further to this, measures to protect a Jersey foundation from challenge are built into its law: not only does the Jersey Foundations Law provide that questions concerning the validity of a Jersey foundation must be considered only under Jersey law, but also that any question in regards to the capacity of the founder to fund and/or incorporate must also be considered only under Jersey law. It should be noted that the Guernsey foundation can apply discretions at various levels. This can apply to the foundation documentation, which may include clauses that withhold information from being shared with the beneficiaries. These features could result in beneficiaries misunderstanding their status within the foundation. This discretion may also be applied to specific persons whereby they are excluded from being/becoming beneficiaries.

(e) Qatar Financial Centre

In September 2016, the Qatar government issued foundation regulations under Regulation No 18 of 2016 in the QFC. It allows for the establishment of a foundation as a legal entity registered in QFC, governed under QFC Law. Incorporation of a QFC foundation can be initiated by a legal entity or individual, but requires a local Registered Representative. A license is required, issued by the QFC Authority, to act within the QFC. The QFC register will show the name of the foundation, the registered office address, the objects of the foundation as well as the names of the board (Council) members and the Registered Representative. The constitution must

be in line with QFC Law and further requirements prescribed by the QFC Authority; it will not be made available to the public (except under statutory obligations or on order to the QFC Court, or the QFC Authority). A copy of the constitution is not to be supplied to anyone, except for the board/council members, the Register Representative, the enforcer and the founder; not - amongst others - the beneficiaries. Interestingly, qualifying "Interested Persons" must be provided with copies of the financial statements, list of assets and the administration of the foundation "as soon as practicable". Interested Persons are defined as the founder, any contributor of assets, the board members, the enforcer, the Registered Representative, the beneficiaries and the QFC Authority and any person mentioned as such in the constitution, or identified and determined by the QFC Courts.

The objects of the foundation may be charitable, but may also be for the benefit of a (specific) person or group of persons, or to carry out a specific purpose, such as the ownership of specific assets. The object must be described in the constitution. Similar to many foundation regimes, the foundation must have a local representative appointed as a board (council) member, in case a so-called Registered Representative, which must be an auditing, accounting or legal services provider licensed in the QFC. The board (council) must consist of at least two members, and its function is described to be of a fiduciary nature. Subject to a fee, the Registered Representative may be substituted. In addition to a Registered Representative, the involvement of an Enforcer, mentioned in the constitution, is mandatory as well. The Enforcer may not be a member of the board (council); its function is to ensure that the board (council) carries out its functions and acts in the best interest of the foundation (not necessarily the beneficiaries).

Upon incorporation, no assets need to be contributed to the foundation: however, if assets are transferred to the foundation upon incorporation, these have to be detailed in the constitution. Transfers must be governed by QFC Law, not foreign law. Subsequent contributions (in due course) must also be specified in the constitution. Contributions may be made by others than the founder and will not vest a specific right in the founder. Upon winding up of the foundation, the assets may not be distributed to the contributors and/or founder without QFC Authority approval. The foundation is to be dissolved upon a happening or upon the expiration of a fixed period of time, specified in the constitution. The regulations specifically mentions that inheritance rights under foreign laws (i.e. non-QFC Law) will not apply to inheritance rights in relation to Qatar property owned by a living person or any movable asset owned by the foundation. Court judgements outside QFC will not be recognised or enforced.

The regulations allow the foundation to make payments to persons appointed under the constitution in return for services rendered for the foundation (no limit is mentioned), in addition to regular reimbursement of expenses for functions carried out in respect of the foundation. The founder only has a right in respect of any assets owned by the foundation if it is explicitly described in the constitution. Similarly, beneficiaries must be mentioned in the constitution. A beneficiary may only claim for the foundation to provide the benefits for a period of 3 years as from the moment the beneficiary became aware of his/her entitlement.

Which lessons can be learnt and which features can be adopted to make the DIFC foundation a more attractive regime

It has become clear that the continued appeal of the trust will not be entirely supplanted by the use of private foundations in certain contexts. Private foundations, it must be acknowledged, can have a number of distinct advantages over trusts in some instances, and they are arrangements that many individuals (particularly those from civil law jurisdictions) may feel more comfortable with. The Liechtenstein *stiftung* should remain popular having established itself as a robust structure during the twentieth century while Panamanian foundations were popular in large part because of the flexibility offered by the 1995 law including its nominee structures. The Netherlands *stichting* regime may even be among the most robust, flexible and oldest (1954) regimes, used by both domestic and international families and corporates for decades. Its unique *STAK* regime is very popular, not only in international family succession structures, but also as anti-hostile take-over measure adopted by some of the largest multinationals in the world. Moreover, the Dutch foundation serves an important role, similar to that of trusts, in securitization structures.

The success of the Channel Islands' introduction of foundations clearly had a significant bearing on other (offshore) jurisdictions looking to add the foundation form to their legal systems - albeit that Guernsey foundation may serve similar function and may even be suitable for the use of discretionary foundations. A very interesting development, relevant for the GCC region in particular is the introduction of the foundation regime in QFC. Although not all the features of the QFC foundation may be very innovative, and there is a relatively high degree of third party involvement required (e.g. Registered Representatives, mandatory enforcer etc.), it may be assumed that the QFC foundation is considered a GCC entity, and therefore allowed to own foreign ownership restricted assets such as GCC property and shareholdings.

The following features may be adopted when drafting a DIFC foundation regime, bearing in mind the government's aim to improve the standing of the DIFC as a global wealth management centre of excellence. These are predominantly generated from the laws of the 'best in class' (tried and tested) where foundations are functioning as stand-alone family wealth and succession vehicles (hence, not as owners of PTCs): Liechtenstein and the Netherlands.

- Cost and capitalisation – keeping the annual government charge and capital requirements for incorporating and maintaining a foundation *de minimis* (if any).
- Composition of the foundation board – under Liechtenstein law, board members must include the EEA resident professional, Jersey requires a guardian, and QFC a Registered Representative and an enforcer: there are no such requirements in Guernsey (although it requires a local representative office) or the Netherlands, allowing for board to consist of the founder (and or family members) only. That said, some advisers might see the involvement of a local representative as advantageous, but a non-mandatory regime may be sufficient and more flexible: the board may (but is not required to) introduce external parties to the board, allowing them voting or non-voting powers. Local/GCC families generally prefer discretion and limitation of external parties that have any form of *control*. Some countries will require that

multiple individuals sit on the council (unless a corporate does so), in contrast to Liechtenstein and the Netherlands where presently there is no minimum number of board members, and board members may be both individual and corporate entities, from all jurisdictions (i.e. not necessarily domestic).

- Asset protection – it seems worth suggesting that the law provides that a foundation may not be affected by foreign forced heirship rights. Obviously, this may be a very complex international legal element that requires further research. In some jurisdictions, an individual's succession is governed by the law of his/her nationality, so that a foundation established by a civilian may be attacked and set aside. Some jurisdictions provide that any attack based on forced heirship needs to pass a double test: in addition to the law of the founder's nationality, a claim must satisfy the requirements of the law which governs the transfer of assets to the foundation. In either case, an attempt to limit claims might fail if the foundation's underlying assets are located in a jurisdiction where such claims will be recognised.
- Privacy – in the Netherlands no external party involvement is required and other than publication of the statutes, board and address, there is no public record of the foundation. In Liechtenstein, no information regarding a foundation can be obtained by a third party. Beneficiaries of Liechtenstein foundations may have certain information rights (subject to the opt-out provisions under the new law); in the Netherlands, this may even be further limited.
- Bookkeeping – the foundation board of a Liechtenstein foundation is required to prepare annual foundation statements; the same in the Netherlands, albeit that there is no publication requirement. .
- Distribution regimes – Liechtenstein and Guernsey use a system whereby the board may have full discretion to make gifts to a beneficiary, similar to discretionary trusts. Such is also possible in the Netherlands, but the Dutch STAK allows for a second option, through the issuance of depository receipts/certificates to beneficiaries, which allows for additional flexibility and control of the founder and additional (internal) transparency and family governance. Similar to Luxembourg, it may be recommended to adopt both options.

Based on the foregoing, the following recommendations are intended to create a foundation regime in DIFC that will be more competitive than the existing regimes in the various jurisdictions which are described above and would be appealing for both (i) local (GCC) and international families (family foundations), (ii) charitable organisations (charitable foundations) and (iii) the financial sector (orphan structures).

Recommendations

1. As referred to in the above paragraphs, the introduction of a foundation regime could consist of two different types of foundations: public (which will be regulated under supervision of the DFSA) and private (family) foundations that may remain unregulated to the extent that they function as Single Family Offices and are not involved in third party affairs (which

would typically be the case for Multi Family Offices). Both of these could be based on *one single new legal entity*: the DIFC foundation.

2. The relevant clauses in the articles of association for this foundation regime would typically cover (but may not be limited to) topics such as (i) definitions and duration, (ii) purposes and allowed activities (iii) position of the founder, the beneficiaries, enforcers and protectors, (iv) constitutional documents, (v) incorporation, registration, liquidation, (vi) corporate governance and administration, (vii) issuance of certificates (viii) the council, (ix) redomiciliation, (xi) regulatory framework (xi) powers of the competent court and (xii) private international law. These provisions, covered in one single model, should cover all aspects related to both public and private foundations.

3. The regime is recommended to include the following elements:

   a) A foundation will not be required on a mandatory basis to have a fiduciary, guardian, local director, protector, or enforcer although these will be optional;

   b) The only mandatory body will be the board, which consists of one or more individuals (family member(s) and/or external parties) or a corporate legal entity. In case the foundation establishes itself as an SFO, the board may consist of one single board member who is a member of the family;

   c) Foundations acting as multi-family offices ("MFOs"), regulatory supervision will be mandatory which will not be the case for foundations which act as SFOs;

   d) Foundations will be required to prepare annual accounts. Whether these should be audited or not and/or filed with the ROC should follow the same guidelines as those applicable to companies in the DIFC, also bearing in mind transparency requirements of entities in the DIFC under the OECD's Common Reporting Standard. However, it is recommended that such accounts should not be available for public scrutiny.

   e) The DIFC will only keep a publicly available record of the foundation that shows (i) the name of the foundation, (ii) its address, (iii) (possibly) its articles of association and (iv) the identity of the board member(s). Information about the beneficiaries, founder, financial accounts and certificates (if any) will not be publicly available and may only be obtained by authorities if so required under domestic laws and/or international agreements of which the UAE is a party. Disclosure and/or exchange of this information will be subject to DIFC/DFSA approval and the board of the foundation will be informed upfront on the envisaged disclosure/exchange.

   f) Substance for foundations in DIFC should be capable of being satisfied in two ways, either by: (i) having its own presence within DIFC, or (ii) by appointing a corporate services provider (CSP) in the DIFC. The latter will require the operational and regulatory requirements of CSP's to be reconsidered to ensure proper oversight and control in this regard. However, foundations utilising a CSP to meet the physical presence

requirements in the DIFC are unlikely to be capable of obtaining a tax residency certificate;

g) There will be no limited perpetuity period requirements for DIFC foundations;

h) DIFC foundations will have the status of a corporate body under the DIFC companies law; hence providing a corporate veil capable of ring-fencing assets and liabilities. Only in certain cases of misconduct by board members will they be capable of being held personally liable;

i) DIFC foundations will have no minimum capital requirements. The founder will have to contribute at least one asset upon incorporation of a foundation. Further contributions may be made by the founder or other donors;

j) The beneficiaries of a DIFC foundation may consist of two different types: (i) owners of “depository receipts” or "certificates" issued by the foundation to the donor upon a contribution, representing the value of the contributed assets or (ii) discretionary appointment of beneficiaries by the board of the foundation (clearly, this latter category may only receive benefits to the extent these are not attached to certificates);

k) Certificates may be revocable against a repurchase of the certificate from the beneficiary at market value;

l) Redomiciliation of foundations established elsewhere to the DIFC will be permitted; provided that the jurisdiction of establishment permits redomiciliation of foundations;

m) DIFC foundations may in principle consist of (i) charitable activities, (ii) SFO activities and/or (iii) commercial activities (including but not limited to MFO activities), all subject to the relevant regulatory and legal requirements applicable to entities conducting similar activities in the DIFC;

n) Service providers to DIFC foundations (that only services a specific foundation related to an SFO) should not be regulated (i.e. the same as is being suggested for trusts) above; and

o) The Family Ownership Law promulgated for the Emirate of Dubai should also recognise foundations to be used for Shari’a compliant private wealth management vehicles in the DIFC, as well as for lifetime and succession planning purposes. Specific attention will be required to deal with the orphan nature of foundations and how the nationality of ownership will be established. It is recommended that this will be established through the nationality of the founder and the beneficiaries only without having any reference to the nationality of the board members of DIFC foundations.

CHAPTER 4

(c) Issues in respect establishment and ongoing maintenance in the DIFC

As mentioned above, part of the Working Group's review has consisted of a review of the operational and administrative arrangements associated with registration of entities within the DIFC. We recognise that the ease and cost of doing business is a major deciding point when SFO's or other applicants decide where to locate their operations. A number of issues have been raised by the industry in this regard. These being quite disparate, we set out the issues raised and our recommendations in an itemised form rather than the discursive format used elsewhere in our Report.

I. FACTORS INHIBITING POTENTIAL NEW CLIENTS

1. Office Space Lease Requirements

Current Status:

a. Under the current regime, applicants for a license in the DIFC are required to rent office space suitable for use in the operations of the company to be incorporated.

b. The requirement to rent office space applies to all license applicants other than (i) entities that share ownership control with an entity that already has a lease in the DIFC; (ii) so-called Intermediate Special Purpose Vehicles (presently in place pursuant to a DIFCA Board waiver in this regard) and (iii) Special Purpose Companies.

c. Typically, the minimum size of the office space to be rented by the applicant depends on the number of employees the applicant wishes to hire.

Findings**:**

Under the current framework prospective applicants face these difficulties:

a. Each applicant must take account of the on-going office space cost, when considering applying for DIFC license.

   Applicants appreciate the DIFC provides high quality office space facilities and access to prominent business partners, but in practice there is a deterrent effect for these reasons:

   (i) DIFC office rents are relatively high in the Dubai market;

(ii) Common law offshore jurisdictions (Cayman and BVI) usually don't require office leases; and

(iii) The ADGM does not require office leases in some instances.

Recommendation**s**

We recommend that DIFCA take the following steps in the above regard:

a. Consider making a *'virtual office'* solution available to applicants for a limited period of time in some instances where DIFCA may want to encourage growth in particular industries (e.g. fintech); and

b. clear guidance be published on the DIFC website as to the requirements for DIFC establishments sharing offices and the application process regarding obtaining a no-objection letter from DIFCA in this regard.

2. Requirements for a License for Non-Regulated Holding Entities

Current Status:

Under the current DIFCA/DIFC Registrar of Companies ("ROC") regime, the guidelines for the application process to establish or register vehicles in the DIFC is not always clear. Feedback received from Working Group members indicate that this process can be perceived as subjective and the application criteria as vague.

This process may deter decision makers when assessing whether a DIFC licence application is a viable path forward for their business legal structure purely due to the lack of understanding of the criteria upon which their licence application will be determined.

Furthermore, the requirement to submit a detailed business plan for licence applications in the DIFC was also identified as a potential source of frustration for Working Group members active in this area. It is not always entirely clear what purposes are being served by all the topics that are suggested to be addressed in such a business plan by the DIFC's Client Handbook.

Recommendation**s**:

We recommend that the ROC and DIFCA introduce more transparency and ease of doing business into the application process for establishment/ registration of entities in the DIFC by:

a. formulating a detailed set of criteria for application and license approvals the DIFC/ Committee to take into account when assessing any application and publishing them on the DIFCA website;

b. reconsidering all the requirements in the business plan and try to reduce the requirements thereof; and

c. permitting a single business plan to be utilised for more than one entity to be established in the DIFC.

II. ONGOING POST INCORPORATION ISSUES

1. Corporate Details: Public Domain

Current Status:

Currently, corporate information of companies is available on the DIFCA website under its *'Public Register'* tab.

It follows, anyone including a member of the public with no interest in the affairs of the entity other than curiosity is able to learn certain corporate details such as the names of the current and former shareholders, directors, company secretary of a given company, in particular, from DIFCA's website.

Findings:

Whilst in some cases the fact the Public Register is readily available and in public domain makes it a preferred scenario for US or European businesses/potential business partners to DIFC companies, local family businesses treat their business information as highly sensitive. The fact certain corporate information is in public domain has sometimes been deterrent for families considering setting up their business in the DIFC.

The significance of the right to privacy in the context of trust registers has recently been recognised by the French Constitutional Court[33].

Recommendation:

We recommend that the DIFC introduce a regime whereby license applicants can, on an exceptional basis apply to remove some information from the Public Register. It is also recommended that DIFCA and the ROC develop guidelines in this regard and publish it on the DIFCA website. (e.g. such an exemption would normally be available for entities associated with private families).

[33] Decision of the French Constitutional Court number 2016-591 QPC of 21 October 2016

2. Initial Articles of Association – Execution Mode

Current Status:

In order to execute the articles of association at the time of incorporating a company, the ROC currently requires the shareholders to attend in person to sign two sets of the articles before an officer at the DIFC Registries services department. If the shareholders are unable to attend in person, they may nominate an authorised person through a power of attorney to attend on their behalf. This power of attorney is required by the ROC to be duly stamped and notarised by a Court notary public in the UAE or by way of legalised and notarised documents from the jurisdiction where the shareholders are situated.

Findings:

It is not always possible in practice for shareholders to attend the signing of the Articles of Association in person before the DIFC Registries services department, particularly if the shareholders are based in jurisdictions outside the UAE. In this regard, the option to delegate the responsibility for executing the Articles of Association on a person located in the UAE through a shareholder resolution meets the requirement. However the ROC's views on the acceptable format for this delegation of authority are not clear. The ROC typically does not accept a shareholders resolution on its own and usually requires a power of attorney attested by the UAE Department of Foreign Affairs as well. Although this process is not unique to the DIFC, it can lead to a costly, protracted and inconvenient establishment process.

Recommendation:

It is recommended that the ROC utilises the provisions of the pending DIFC *Electronic Transactions Law* to have the articles of association of companies executed electronically. In addition, it is recommended that the ROC follow the Common Law principle of accepting documents in good faith, as opposed to acting as the verifier of documents which is more in line with practice in civil law jurisdictions.

3. Joint Ownership of Shares

Current Status:

Under common law principles, shares can be held jointly by more than one shareholder.

The DIFC Registrar of Companies has recognised the common law principle (referred to in the Companies Law) that shares may be held jointly in relation to existing DIFC companies. As far as the new businesses to be incorporated are concerned, the DIFC Registrar of Companies practice has been to allow sole shareholding of shares only with no joint shareholding being allowed.

The DIFC Portal, however, does not allow registration of jointly owned shares. Instead of, for example, allowing that 100 shares are jointly owned by A and B, the

register maintained by the DIFC and the DIFC Portal record that 50 shares be held by A solely and the remaining 50 be held by B solely.

Findings:

As a result of the Registry practice not to permit joint ownership of shares upon incorporation of a business and the DIFC Portal software limitation under which the joint ownership of shares cannot be reflected, shareholding structure details that the company or the public may wish to review may be inaccurate, as indicating sole (instead of joint) ownership of shares. Also, the restriction is inconsistent with the practice of every other significant common law jurisdiction and should be removed to bring the DIFC into alignment with the others.

Recommendation[34]:

In order to remedy the inconsistency resulting from the above, we recommend that the DIFC take the following steps:

a. recognise joint ownership of shares in a company at any time within its lifetime – from incorporation; and

b. upgrade DIFC Portal software to enable recording of joint ownership of shares.

4. Allotment of Authorised Shares

Current Status:

Currently it is unclear from the DIFC Companies Law as to whether the shareholders or the directors constitute the appropriate organ of the company empowered to allot shares within the authorised share capital.

Findings:

DIFC standard Articles provide that shares can be issued by ordinary resolution of the shareholders.

Recommendations[35]:

In our view the *DIFC Companies Law* should permit the boards of companies to allot and issue shares within the authorised capital by ordinary resolution, subject to any contrary provisions in the articles of association. This is absolutely appropriate to facilitate the issue of employee shares and the making of strategic placements and aligns with the UK law.

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[34] The Working Group does take cognizance of the fact the latest draft of a new Companies Law to be introduced into the DIFC will address this issue.

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5. Dividend Declaration

Current Status:

Usually in common law companies, an interim dividend may be declared by the directors and the final dividend is recommended to the shareholders by the board for the shareholders to resolve to declare. Common law gives companies (acting through the board) an implied power to distribute profits to shareholders.

Findings:

The current DIFC standard articles attached to the *DIFC Companies Regulations* reflect this position (subject to the suggested clarification mentioned below) but that is currently contradicted by the provisions in the DIFC Companies Law.

Recommendation:

Our recommendation is that the requirements for interim and final dividend declarations are clarified in the law (as it does not distinguish between interim and final dividend declarations) and that the standard DIFC articles are also amended to clarify the position as to whether both interim and final dividend may be declared by the Board (currently the shareholders can resolve to declare any dividend but the directors can declare an interim dividend)[36].

6. No Clarity on the Format of Documents Required

Current Status:

Under the DIFC Client Handbook, the requirements for providing documents or copies of documents of any kind to the ROC does not mention if the document in question needs to be translated into English by a sworn translator, legalised, attested, if a copy or an original is required.

The above status concerns the document requirements across the board for licence applications in the DIFC.

Finding:

The ROC deals with businesses from all around the world. Due to those cross-border elements, businesses need to know more about the format of a given document is required by the DIFC.

Recommendation:

We recommend the DIFC Client Handbook be updated to specifically advise what format of the documents is required, e.g. "ordinary photocopy of an executed

[36] The Working Group does take cognizance of the fact the latest draft of a new Companies Law to be introduced into the DIFC will address this issue.

document", "original executed resolution", etc. or as per the general guidance set out in the introductory chapter of the Client Handbook by, for instance, mentioning that unless otherwise specifically stated under the Handbook, the format of the documents required is a photo copy of an executed document (ordinary written form).

7. Recognition of DIFC Companies as Locally Owned

Current Status:

Cabinet Resolution No.28 of 2007 on the Implementing Regulations of Federal Law No. 8 of 2004 Concerning Financial Free Zones ("the Resolution") recognises DIFC companies to have UAE status provided that their shareholders fall within UAE on-shore ownership requirements to own shares and assets in the UAE outside the DIFC.

The Resolution has been issued by the Council of Ministers.

As such the Resolution is a federal piece of legislation.

It follows the Resolution is binding in each Emirate of the UAE, directly with no need for a specific implementation by authorities of the Emirates, individually.

Findings:

Despite the UAE nationality status of DIFC companies recognised in the Resolution, not all authorities in the UAE have afforded DIFC companies this recognition.

As a result, some wholly (or 51%) UAE/GCC owned DIFC companies are facing difficulties in acquiring title to shares/ assets, keeping labour cards for their employees, and the like once some of the shares in a locally established entity have been transferred to a UAE/GCC-owned DIFC company.

The issue becomes even more problematic if shares in an on-shore business or an on-shore asset are held by more than one layer of DIFC companies.

We note that ADGM incorporated entities potentially face similar problems and that the ADGM has addressed the existence of the Resolution in its published materials[37]

Recommendation:

We recommend that DIFCA arrange meetings/awareness presentations whereby they educate authorities in the UAE about the restriction and the DIFC Exemption.

We further recommend that consideration be given to a special class of vehicle in the DIFC (albeit a company, partnership, trust or a foundation) that may only be used by UAE or GCC residents (where applicable) to allay concerns of local authorities in the UAE and the rest of the Gulf as to the ownership of such DIFC vehicles.

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[37] See https://www.adgm.com/media/71360/Managing-Family-Wealth-in-Abu-Dhabi-Global-Market.pdf (accessed 27 November 2016)

8. Exemption from requirement to submit financial accounts

Current status:

We note that the UAE is a member of the global standard for automatic exchange of financial account information (referred to as the Common Reporting Standard ("CRS")), which has been developed by the OECD working with G20 countries and has indicated that it will execute the requisite treaties in this regard.

Under the CRS, jurisdictions obtain financial information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. Also, CRS consists of two components being: (a) the CRS, which includes the reporting and due diligence rules; and (b) the Model Competent Authority Agreement which includes the rules in respect of the exchange of information.

The CRS imposes an obligation to provide information to the UAE Ministry of Finance with respect to financial accounts held by non-resident individuals and entities. Accordingly, the CRS identifies the nature of the financial information which must be provided including, without limitation, account balances and dividends. We note that the UAE has committed to implement the CRS by the year 2018.

Findings:

We note that the UAE Ministry of Finance is the authority responsible for the information exchange under the CRS. Under Ministerial Resolution No. 17 of 2012, the UAE Ministry of Finance is entitled to request any UAE governmental authority to provide relevant information for the purpose of complying with the CRS provided it has entered into a memorandum of understanding with such UAE governmental departments. Given that the DIFC has entered into a memorandum of understanding with the UAE Ministry of Finance, the DIFC is under an obligation to provide any financial information being requested with respect to all companies established within its jurisdiction including family owned entities.

Under the *DIFC Companies Law*, the DIFC Registrar: (a) must assist the UAE in complying with its obligations under any international treaty or other agreement to which the UAE is a party through the exercise of his powers and functions; and (b) require any person incorporated or registered in the DIFC to give, or procure the giving of, such specified information or as otherwise may be considered by the Registrar to be necessary or desirable in connection with the performance of its powers and functions and such person shall comply with such request.

Under the *DIFC Companies Law*, all companies in the DIFC must keep accounting records which are sufficient to show and explain their transactions so as to disclose with reasonable accuracy the financial position of the company at any time and enable the directors to ensure that any accounts prepared by the company complies with the requirements of the *DIFC Companies Law*. Furthermore, the accounts must

be prepared in accordance with accounting principles or standards approved by the Registrar or prescribed in the DIFC Regulations and must show a true and fair view of the profit or loss of the company for the period and of the state of the company's affairs at the end of the period.

We note that the *DIFC Companies Law* includes an obligation to keep underlying documents, however, the type of such underlying documentation is not subject to any further details and requirements. As a result, this may create a certain level of inconsistency in the manner by which companies will comply with that obligation. We understand that an amendment to the definition of accounting records in the *DIFC Companies Law* will be introduced to clarify and provide further details which should be consistent with the current definition applicable to companies regulated by the DFSA.

Recommendation:

We recommend that SFO's be exempted from filing accounts with the ROC. However, such accounts and the underlying records and documents should be held available and be delivered to the ROC at its request, if and when required pursuant to the DIFC's obligations to the UAE Ministry of Finance under CRS.

9. License Renewal Submission

Current status:

When the existing entity's commercial license is up for renewal, under DIFC Portal submission form the entity is required to: (i) attach a copy of the renewed and registered, with the DIFC, copy of the lease contract; and (ii) to register the renewed lease contract, the entity is required to upload, under DIFC Portal, a renewed license.

Findings:

Due to the fact lack of a registered renewed lease contract prevents the entity from submitting an application for a new license, entities applying for a new license have been taking sometimes even weeks of discussing the difficulties with the ROC before they are in a position to successfully submit their license renewal application.

Recommendation:

The DIFC revise its procedures so that new lease contract can be registered without the need to submit a renewed license.

10. Classes of Shares Registration:

Current status:

When a company limited by shares wishes to register a new class of shares that the shareholders have resolved to establish, DIFC Portal does not allow that any other class be created than the one that already exists.

Particularly, contrary to DIFC law, DIFC Portal form on registration of share classes does not allow that the issued share capital had more than one class of shares.

Findings:

The DIFC Portal shortcoming results in a DIFC company limited by shares not being able to have more than one class of shares in its issued capital as DIFC Portal rejects the submission that references to more than one class of shares under the issued capital of a company limited by shares.

Recommendation:

The DIFC Portal form on share capital amendments be rectified to allow that issued capital shares be of more than one class, should this be the intention of the shareholders of a company limited by shares, in line with DIFC law.

11. Restructuring of DIFC's Legal framework

As noted above, we understand that the DIFC is currently envisaging a number of substantial changes to the corporate regime affecting companies established within its jurisdiction including family owned companies and entities. Accordingly, we set out below the key proposed changes which aim to improve the licensing and regulatory regime for families wishing to establish a presence within the DIFC.

Abolition of LLC regime

Under the revised legal framework, the limited liability company regime would be abolished and a transitional regime would be put in place to ensure such transition. This change appears to be in line with international practice, in particular, the United Kingdom, which made such change to its legislation back in 2006. Under the current DIFC Companies Law: (a) a LLC may be incorporated by one or more members whose obligation for the company's debts is limited to the amount of their subscribed membership; (b) a LLC is not entitled to offer any membership interest by way of a public offering; and (c) there are certain restrictions applicable to a transfer of membership interests in a LLC.

Holdco Regime

We understand that the process to incorporate a holding company will be streamlined through a simplified application form which should set out the proposed structure envisaged by the client. However, we note that a test of substance will still be required in order to maintain the standing and reputation of the DIFC.

We also understand that family special purpose vehicles and subsidiaries of a holding company established in the DIFC will be entitled to share the office space leased by the holding company. Also, such entities will be subject to a yearly licensing fee of USD 3,000, which is substantially less than the fees imposed by DIFC under the current legal framework.

Classification of companies

We understand that company limited by shares may be classified into two (2) separate categories depending on, among other things, the number of shareholders and the financial position of the company according to its balance sheet. As a result of such classification, the "smaller" companies should be under no obligation to audit and submit its financial accounts, however, such companies will be required to keep its accounts and records as this may be requested by the DIFC under the memorandum of understanding it has entered into with the UAE Ministry of Finance. With respect to companies that do not classify as "small" then there should be an obligation to audit their accounts but not to submit such accounts to the DIFC subject to the same comments made above.

Single family office

We understand that the single family office regime will be subject to a number of changes including a waiver of the liquidity test and introduction of a broader definition of the term. Currently, anti-money laundering of SFO's is under the jurisdiction of the DFSA. However, on the basis that services are being provided to a single family, the AML requirements should reflect the activity actually conducted and not apply automatically simply because a particular structure has been adopted.

In some cases, the business activity being conducted (or proposed to be conducted) would make compliance with the DIFC's AML requirements appropriate (for example, if the business is a financial services business). But in others, the same level of indirect supervision through the banking system as is applicable to comparable businesses outside the DIFC would be more appropriate.

We also recommend the following to attract large regional SFOs to the DIFC:

a. That SFOs of a particular size be exempted from having an office lease in the DIFC, if (i) they already have a substantive presence in the UAE; and (ii) they appoint a corporate service provider in the DIFC; and

b. That the family members of SFOs of a particular size be granted residency sponsorship in the UAE for family members in the SFO without reference to (i) whether such individuals are employed by the SFO or its subsidiaries; or (ii) the space being occupied by the SFO in the DIFC.

Private Trust Companies

We understand that a private trust company will be entitled to serve as trustee of other trusts and that the details of the relevant members of the trust arrangement will remain private although the relevant information will be required to be provided to the DIFC.

SFO Ownership

Currently only natural persons can be shareholders of the DIFC SFO (i.e. a DIFC SFO cannot be owned by body corporate). We recommend changing this to allow a body corporate to own an SFO. To ensure that the DIFC SFO is owned at any point of time by family members, as defined in the SFO regulation, the ROC might require the following:

- At the time of the SFO formation, a letter from a regulated law firm or audit firm to confirm that the owners/beneficiaries of the SFO are members of the same family (this is a current registration requirement which SFO applicants have to submit);
- Also, at the time of the registration, an undertaking letter form the applicants confirming that they will not change the ownership of the SFO prior to taking consent from ROC (to ensure family ownership); and
- As part of the filing of the annual return with ROC, the SFO confirm that the ownership of the company did not change throughout the year.

Intermediate SPVs

Under current DIFC policy if the shareholder of an Intermediate Special Purpose Vehicle ("ISPV") is a holding company, proprietary investment company or SFO, the shareholder has to be a DIFC registered entity. More clarification is needed for the following cases:

Does the shareholder need to own the ISPV 100%? Or is it sufficient to be the majority shareholder? We think majority ownership should be sufficient, as this will help family business to consolidate their activities in DIFC.

Where a family business has established a holding company, proprietary investment company or SFO in the DIFC and now wants to establish another holding company which will not be owned directly by the previously established enity, can they apply for its registration as an ISPV or Intermediate Holding Company? As the ROC will have ownership records of all the incorporated entities, again we think this should be permitted.

Company Law modernisation

We have noted that the DIFC currently has in train a project for modernisation of its *Companies Law*. Necessarily we are not aware of the changes proposed. In recent times companies law internationally has moved away from original concepts in areas such as restricting the requirement of corporate benefit, abolishing financial assistance in relation to dealings with company shares, removing restrictions relating to a share capital of company shares when declaring dividends, increasing the number of types of entities that can be formed, improving the registration process of security interests, introducing statutory minority shareholder protections, and removing the requirement of having a stated corporate object, thereby obviating a number of difficulties relating to the rules of *ultra vires* and director's duties.

Of particular interest, now that company law frequently now permits single owner and single director companies, are measures which provide for the appointment of a replacement director, that being potentially a cause of difficulty when a sole director and shareholder dies. We note that this issue has been addressed elsewhere: section 113(7) of the BVI *Business Companies Act* 2004 provides:

> Where a company has only one member who is an individual and that member is also the sole director of the company, notwithstanding anything contained in the memorandum or articles, that sole member/director may, by instrument in writing, nominate a person who is not disqualified from being a director of the company under section 111(1) as a reserve director of the company to act in the place of the sole director in the event of his death.

Recommendation

We recommend that:

(a) the proposed changes described above to the legal framework be implemented;

(b) the modernisation options listed be considered in the context of the review of the *DIFC Companies Law*; and

(c) the need for obligations relating to anti-money laundering rules and regulations for single family offices should be assessed at the point of registration by the Registrar of Companies under an agreed protocol with the DFSA and upon assessment imposed by conditions on the registration.

CHAPTER 4

(d) Shari'a compliance

The Shari'a context

One of the reasons currently given for reluctance to adopt a DIFC trust or other structure as a vehicle for asset holding is the possibility that it might be regarded as not Shari'a compliant, on one of two bases. The first is that the settlor or transferor is genuinely concerned to comply in all respects with his or her Shari'a obligations, and seeks personal assurance that he or she has done so. The second is that if the structure is found not to be Shari'a compliant in some way, transfers of assets to it may be liable to attack at a later time on the grounds of non-compliance.

Whilst we are not Shari'a scholars, we have had the benefit of consultations with some scholars. Based on our understanding of the relevant Shari'a principles we see no necessary incompatibility between the use of modern wealth management tools and Shari'a. Specifically, if families, particularly those with significant wealth and specifically family businesses, do not undertake lifetime planning:

(a) control of the business may not be left to people with the appropriate skills, experience and ability;

(b) family members may fight over decisions, or the wealth generally;

(c) the family's wealth may not survive and may well dissipate in the hands of the second generation;

(d) family owned businesses may not be run properly and in such cases may not survive the transition to the next generation but will either be the subject of disputes or run to a standstill;

(e) such lack of planning will also impact the family relationships negatively; and

(f) the failure of such family businesses will also have a negative impact on the local economy.

We understand that wealth preservation for the family is one of the aims of the Shari'a generally (one of the typically agreed upon Maqasid Al Shari'a). As such, there are Shari'a opinions that provide that it is an obligation to carry out lifetime planning

There are Shari'a based tools for providing succession is managed appropriately and control is left with the appropriate individuals yet still enabling broader family members to benefit economically. The question for this aspect of our Review is how the DIFC can assist families who wish to avail themselves of these tools.

The DIFC and DFSA have already addressed Shari'a compliance issues in the context of Islamic Banking and Collective Investment Vehicles in the *DIFC Law on Islamic Financial Institutions* and the DFSA *Islamic Finance Rules*. In this context compliance with Shari'a is, in general, achieved by requiring internal monitoring of

market participants. The DFSA does not itself seek to determine whether or not particular activities are Shari'a compliant: its approach, reflecting the Law and Rulebook Module, is that it is a Shari'a Systems Regulator, not a Shari'a Regulator. Its approach is explained in its published materials on Islamic Finance Regulation in the DFSA.

This has the obvious advantage that Shari'a related issues are referred to persons qualified to deal with them, which financial services regulators will not necessarily be. In this context we recognize that there are various schools of Shari'a scholarship (with the *Maliki* school being the predominant one throughout the UAE and, specifically, Dubai) and any implementation of our recommendations will need to recognize that.

Our concern is principally with private wealth structuring, which currently (and in our view appropriately) is largely outside the purview of the DFSA. However elements of the existing provisions for Islamic Banking and Collective Investment Vehicles[38] might usefully be adapted to the private wealth area. There, essentially, the "regulator" will be the Court on those occasions where its intervention is sought by interested parties. Assurance can be given to persons wishing to structure wealth management vehicles in the DIFC that their arrangements will be Shari'a compliant by putting in place a process whereby there is appropriate Shari'a input to Court processes so that the Court can make fully informed decisions, particularly in those cases where there is no formal process within structures for determination of Shari'a issues even though it is clear that Shari'a compliance was the intention of those who established the structure.

This could be achieved by a Practice Direction from the DIFC Courts dealing with these issues, as opposed to legislative solutions. Such a Practice Direction might identify either by name or reference to membership of an official body comprising appropriately qualified Shari'a scholars whose opinions the Court would take into account when exercising its functions in those cases where Shari'a compliance is required of a trustee.

The conventional processes whereby a trustee can apply to the Court for its opinion, advice and direction[39] could extend, in the context of an appropriately drafted trust, to the making of a declaration as to the validity of a trust[40].

Trust administration and Shari'a compliance

The trust is, of course, a very flexible instrument[41]. To the extent that the terms of a trust provides a means of distribution of assets, or indeed their administration, there is no reason why Shari'a obligations cannot be complied with even though that is not a prerequisite for a valid trust.

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38 *DIFC Law Regulating Islamic Financial Business* 2004, DFSA *Islamic Finance Rules*

39 *DIFC Trust Law* Article 21

40 ibid. Article 21(2)(b)

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

Common law jurisdiction Courts have dealt with cases involving *awqaf* – the Privy Council Reports note some 28 decisions. They have tended not to concern themselves with administration, but rather whether a *waqf* was validly established, and then applied Shari'a after statute provided for their validity if valid according to Shari'a. Thus in *Chaudhri Mahbub Singh and others v Haji Abdul Aziz Khan*[42] the Privy Council was prepared to make a finding as to whether the deceased had converted to Islam, this being a necessity to the validity of a *waqf*. But, as in *Dajani and others v Mustafa El Khaldi since deceased and another*[43] the question as to validity of the *waqf* itself was either left to the Sharia Court or agreed as between the parties.

The desire of a Muslim settlor to have issues of administration (including Shari'a compliant investment strategies) settled in accordance with Shari'a can readily be addressed by allowing the Trustee to act on the advice of a suitably qualified authority in that area, with a discharge if the trustee does so. Our recommendation above in relation to advisory trustees will assist in that regard. Protective clauses to ensure that occurs could also be included, although the exclusion of the jurisdiction of ordinary Courts will not be possible.

We have previously referred, in the context of the discussion of VISTA trusts, to the so-called prudent investor rule. Its most notable expression in England is to be found in the case of *Cowan v Scargill*[44]. It is unlikely that the principles in that case (which did not involve any relevant direction in the trust instrument) would be breached by requiring Shari'a compliant investments. That case in any event makes it clear that unless the consequence is a reduction in fund income, there is no breach even in the context of a pension fund whose only objective is to maximize members' returns.

Shari'a based challenges to family wealth vehicles

The area of particular concern as giving rise to challenges to the valid establishment of a family wealth structure arises from the terms of Article 361 of the *UAE Personal Status Law, which* provides:

> Any circumvention of the provisions of inheritance by sale, donation, bequest or other disposals shall be null and void.

The precise scope for operation of this provision, in a context where irrevocable lifetime gifts are valid, is not clear and in any event is more properly a matter for Shari'a scholars than us. But it is difficult to see how a transmutation of assets to a different form (such as sale of property to a wholly owned company or unit trust in return for shares or units which will then be equally subject to inheritance laws) could on any reasonable interpretation of the word be said to be a circumvention of the inheritance rules.

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42 [1938] UKPC 66

43 [1946] UKPC 21

44 [1985] Ch 270

The more the structure is established in a way which departs from that model, the greater the possibility for challenge. However adoption of a procedure whereby a trustee seeks a declaration of validity of a trust and is supported by evidence from each of the potential heirs that the structure has his or her support, coupled with a contemporaneous opinion from Shari'a scholars that in their opinion the proposal is unobjectionable, must create a very strong position from which a future challenge could be defended.

The intention of parties carrying out such planning is important and needs to be documented and ideally discussed with broader family members in order to make any planning as robust as possible against any future challenge or concern about the planning undertaken.

Quite separately from this, the suggestion has been made that Article 361 may enable an attack on asset restructuring as, for example, in a case where an owner of property transfers it to some other ownership structure without change in beneficial ownership – for example, transfer of real property to a company in exchange for shares held in the same proportion as the original ownership in the real property.

Adoption of a more commercially appropriate ownership structure (for example, to obtain the benefit of limited liability) seems to us to not involve any conflict with Shari'a – indeed, it conforms with the Shari'a injunction that wealth should be responsibly and prudently managed, and in any event is commercially unavoidable if assets are to be acquired in much of the world, and the Shari'a inheritance obligations will apply to the replacement asset. Nonetheless, there appears to be sufficient uncertainly about this issue to warrant legislative clarification at national level.

Recommendations:

The DIFC seek clarification of Article 361 of the *Personal Status Law* and, in particular, confirmation that it does not apply to business reorganisations which do not change underlying beneficial ownership.

The DIFC give consideration to a process to enable families to have confidence in the Shari'a acceptability of any planning put in place such as identifying Shari'a specialists who would be recognised by the relevant Courts and from whom Opinions could be provided.

CHAPTER 4

(e) DIFC entities and structures outside the DIFC

The operation of different legal systems within a single jurisdiction such as a federation can raise complex issues where transactions occur which involve elements of both systems.

One approach to such cases is to treat the rules of private international law as applying to the recognition and enforcement of laws of other parts of the jurisdictions. That approach typically is applied in the United States of America[45] and formerly applied in Australia[46]. But such a view cannot be supported in Dubai.

The starting point is Article 121 of the UAE Federal Constitution[47] which provides that laws may be made which exclude the operation of national laws in the Financial Free Zones, of which the DIFC is one. Article 3 of the *Federal Law No.8 of 2004 Regarding the Financial Free Zones* provides that national civil and commercial laws shall not apply in Financial Free Zones. Article 13(2) of *Law No. 9 of 2004 in respect of the Dubai International Financial Centre* excludes the operation of some Dubai laws in the DIFC and Article 5(1) makes provision for the laws of the DIFC to be made by the Ruler.

Viewed from a matter of principle, therefore, national laws other than civil and commercial laws apply in the DIFC. So do many Dubai laws – the exclusions are fairly narrow. Perhaps more significantly, the laws of the DIFC are made by the Ruler, as are the laws of the remainder of the Emirate of Dubai.

The laws of the DIFC are therefore not the laws of a foreign country so far as the remainder of Dubai is concerned. Neither the DIFC Courts nor Dubai authorities view the matter in that way. As noted in the Memorandum of Understanding between the DIFC Courts and the English Commercial Courts "The DIFC Courts form part of the legal system of the United Arab Emirates…". And, in the words of the Dubai Supreme Legislation Committee, " … the DIFC Courts is an institution that is considered to be an integral part of Dubai's Court system" [48].

In a similar vein, DIFC Court of Appeal has observed that " … where at the moment of contracting the parties select the Laws of Dubai as the governing law they intend to select either Civil Law Dubai Law, as applied in the non-DIFC Courts, or Common Law Dubai Law, as applied in the DIFC Courts." [49]

At national level, *Federal Implementing Regulation No 28 of 2008 regarding Law No 8 of 2004* reinforces the point that a DIFC incorporated company is a local company for the purposes of characterisation of DIFC entities in the wider UAE context.

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45 see, e.g., *City of Detroit v. Proctor* (1948) 61 A 2d 412, at p 416

46 *Breavington v. Godleman and Others* [1988] HCA 40; (1988) 169 CLR 41

47 The UAE Constitution is the paramount law in the UAE – see Article 151

48 12 July 2015

49 in *National Bonds Corporation v. Taaleem* CA 001/2011 at [38]

Subject to the application of valid national laws, it is for the laws of the DIFC and the non-DIFC parts of the Emirate of Dubai to determine what effect, if any, effect the laws applicable in the DIFC apply to transactions entered into within the DIFC.

The issue which is potentially the most difficult is that of trusts.

It is perhaps not surprising that the conventional English trust is not familiar to legal practitioners of a civil law system such as that of the UAE, although it needs to be appreciated that the Islamic analogue of the trust, the *waqf*, existed for over five hundred years before the first identified English trust and, at least in the view of some commentators, provided a model for it.[50] A useful summary of the commonalities of, and differences between, the two and their respective histories can be found in a paper given to the International Academy of Estate and Trust Law[51] and we have already referred to the AAOFI Standard which provides a useful summary of the key features of a *waqf*. Care should, however, be taken not to too readily assume commonality between the two: as one leading commentator[52] has observed:

> However even a short synopsis of the characteristics of the *waqf* reveals significantly more differences than similarities between it and the modern common-law family settlement. In a number of respects it is closer to the civil law family or philanthropic foundation than the trust.

A number of the perceived problems associated with the establishment and operation of DIFC trusts are more apparent then real once the key characteristics of the trust are understood.

First, and perhaps most importantly, a trust is not a legal entity. It is a relationship between a person who owns property and a person who for one reason or another has a claim on that person to deal with it in a particular way. Whilst trusts usually come into existence by reason of an express grant by the owner of property (either by transfer or by declaration of trust) they can arise by operation of law ("resulting trust") or as a judicial remedy ("constructive trust").

It follows from this that the owner of property, in the legal sense, is the trustee. For the purposes of registration of ownership, it is the trustee, and not a hypothetical entity called "the trust" which seeks to be registered. To the extent that there are restrictions on an entity owning property by reason of its shareholding or residence (e.g., in local ownership laws) those requirements must be satisfied by the trustee. If the trustee is not qualified to be a proprietor of land, for example, it is not to the point that the only people to whom it is accountable as beneficiaries are all qualified to be owners. So much applies in common law jurisdictions such as England. The position is necessarily even clearer in the context of a civil law system

Similarly, if the requirement is a qualification to carry on a business, the business is carried on by the trustee, not by the beneficiaries and still less a notional entity called a "trust".

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50 Gaudiosi, Monica: *The influence of the Islamic law of waqf on the development of the trust in England: the case of Merton College* University of Pennsylvania Law Review volume 136 pages 1231-1261

51 Stibbard, Paul et al.: *Understanding the Waqf in the World of the Trust* (2012) 18 Trusts & Trustees 785

52 De la Rosa, Andrew: *A précis of Shari'a Succession Rules, and their impact on Trusts, Foundations and Waqf* (2015) unpublished

The precise terms of local ownership or registration laws will always need to be considered where a trustee owns real property or carries on a business, as they may be directed to issues beyond the question of who is the legal owner of property. In such a case the potential operation of any anti-abuse provisions if a trust arrangement were sought to be used to circumvent those laws will also need to be considered. But there is no reason why the terms of a trust cannot be crafted so as to ensure that local ownership requirements are met – for example, by excluding non-nationals from benefits at any time at which the trustee owns property restricted in this way.

The second important principle is that, to quote the legal maxim, equity acts *in personam*. Put another way, the means whereby a trust is enforced is by personal orders made by a Court against a trustee requiring the trustee to carry out the terms of the trust or, in an extreme case, removing the trustee and appointing a new trustee who has undertaken to faithfully carry out the terms of the trust. The trustee of a DIFC trust will necessarily be subject to the jurisdiction of the DIFC Courts, and amenable to orders for contempt of court if the trustee does not comply with those orders.

Control of the trustee by the DIFC Courts can be achieved by the simple mechanism of the Court having power to appoint the Registrar to do anything which the trustee could do (e.g. transfer the property to a new trustee). To the extent the existing enforcement agreement between the DIFC Courts and other national Courts are inadequate to deal with the matter, it may need to be enhanced.

As a result, there is nothing particularly surprising about the notion that the trust property of an English trust may include property in a jurisdiction outside England which does not recognise trusts. The trustee will still be amenable to the jurisdiction of the Court. While laws should perhaps not be drafted on the basis that people who voluntarily undertake obligations will deliberately flout them, the ultimate question from a perspective of ensuring that the trust is properly administered is that the trustee can be removed and another trustee appointed. Typically, the Court would proceed by way of ordering the existing trustee to transfer the property, making a vesting order, and, where necessary for the purposes of registration, authorising a Court officer (such as the Registrar) to sign any necessary transfer documents on behalf of the former trustee. In the local context, the question then becomes whether or not such an order would be recognised if it related to a transfer of property outside the DIFC which necessarily would have to be made to an otherwise qualified person to hold the property since only such a person could be appointed trustee of a trust the property subject to which included such assets. The existing arrangements for cooperation between the Courts for enforcement of each other's judgments within the emirate of Dubai, the wider UAE, and indeed countries the subject of the GCC and Riyadh Conventions would seem to be applicable to such a judgment subject to notions of public policy.

A further issue arises from the absence of any concept of a separate estate for the trust assets so that they are not subject to the personal liabilities of the trustee, or (in the case of a natural person) subject to inheritance rules. These issues, however, will not arise in any practical sense in the context of a corporate trustee which is a special purpose vehicle which acts only in the capacity of trustee of a single trust.

Although it follows that we think the problems more apparent than real, confidence in the use of trusts would be enhanced if the National government were to adopt the Hague Convention either generally or on a restricted basis so that recognition was granted only to trusts established within the GCC. In the absence of its doing so, we

see no reason why it should not be adopted as part of the domestic law of the Emirate of Dubai, applicable either to DIFC trusts or, possibly, on a reciprocal basis to ADGM trusts as well if DIFC trusts are recognised in that Emirate. As noted above, many civil law jurisdictions have done so[53] and it provides a much simpler way of introducing trusts than attempting to frame a new trust law.

More generally the proliferation of laws in the free zones is likely over time to be more productive of confusion than is desirable for no appreciable benefit. It is not clear, for example, where the authority to incorporate companies under laws other than the national companies law comes in the case of Free Zones other than the Financial Free Zones which clearly have power to do it. Nor is it clear that in the free zones generally the national insolvency law is more appropriate to the entities involved as opposed to more usual international models such as to be found in the DIFC.

We recommend that the DIFC raise these matters with the Free Zone Council with a view to addressing the problems on an Emirate and nationwide basis.

Recommendations:

1. That the DIFC recommend to the national government that it consider adoption of the Hague Convention either generally or in respect of trusts created within the GCC.
2. That the DIFC recommend to the Dubai government that it consider adoption of the Hague Convention either in respect of DIFC trusts or in respect of DIFC and ASDGM trusts if reciprocity can be agreed with the Emirate of Abu Dhabi.
3. That the DIFC seek the consideration of the Free Zone Council to the rationalisation of civil and commercial laws within the Free Zones.

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[53] in many ways the best analogy is Quebec which has a civil law system within an otherwise common law Canada – see Articles 3107 and 3108 of the Quebec Civil Code and Claxton, J.B: *Studies on the Quebec law of trust* (2005) Thomson Carswell, Toronto

CHAPTER 5

Communication of Review outcomes and existing arrangements

We have noted above some of the issues which may be thought to have resulted in take up of the opportunities offered by DIFC's legal and regulatory structure not being as advanced as it might otherwise have been. Part of those issues are, we think, matters of perception – either because the extent, and robustness of the offered structures is not understood, particularly by some professional advisers, or because government authorities outside the DIFC do not fully understand how the DIFC's structures interact with those of the Emirate and wider UAE. Some undoubtedly are matters of reality rather than perception and we have sought to identify remedies in relation to them.

Experience suggests, however, that even when the real (as opposed to perceived) impediments are addressed there will be a need to communicate the strengths of the DIFC structures to the wider community.

First, measures should be taken to better communicate the benefits of conducting wealth management operation in the DIFC within the Emirate of Dubai, the UAE more generally and to the wider international restructuring community. In particular, the DIFC's strong legal and regulatory framework (including the enhancements suggested by the Committee) and specialist professional services can be highlighted.

We see this as a task for the DIFC itself. The promotional efforts of other financial centres such as Singapore indicate just how important such an activity is.

Second, Dubai-based professionals, judges and academics have an important role to play in bridging the perception gap through available platforms, such as leading regional and international wealth management organisations (for example, the Family Business Council – Gulf, STEP (the Society for Trust and Estate Practitioners) and the International Academy of Estate and Trust Law, international law organisations such as the International Bar Association), conferences and seminars. Within the UAE, these might usefully include the International Fiscal Association, STEP, the Chartered Institute of Taxation (MENA branch) and the UAE Chapter of the International Section of the New York State Bar Association. Additionally, these efforts can be complemented by providing thought leadership through research on cutting-edge issues in cross-border wealth management. After all, the local profession has a substantial interest in progressing the development of the Centre and should regard itself as a partner in the Centre's progress.

In addition, we recommend that the DIFC consider a new business initiative which would promote the recommendations of this Review. We include below an Executive Summary of what we have called "DIFC Private".

We think the DIFC should recognise the opportunity that exists to enable local and regional families who often turn away from Private Banks, Trust Companies and Brokerage Firms for advice and prefer to seek peer advice and consolidate their banks. We have set out the principal advantages, the type of services required, the

market as we see it and the benefits to wealthy families and the DIFC. The DIFC is uniquely qualified and positioned to provide such a service which would give the Centre a competitive advantage over other regional and indeed international financial centres.

In practical terms once the raft of amendments to the SFO Rules and Trust and Foundation Laws have been approved, a new Unit would be set up with a small but highly experienced team (initially an individual) to roll out the services to target UHNW families. The unit would work in conjunction with participants in the Centre who are committed to its development and to work in partnership with it to that end.

No other financial centre has the scope and depth of internationally recognised professional advisors to work with Muslim and Non-Muslim families supported by appropriate legal and regulatory oversight.

The concept has arisen from studies and discussions with wealthy families that they require a professionally managed forum that can provide services over different levels. The working title for this business proposal is 'DIFC Private".

Wealthy families globally and regionally are discovering a new source of financial advice: each other. Effectively, organizations are being established to facilitate and enable wealthy families to meet other wealthy families tired of the hard sell from the wealth management firms and private banks to band together in formal peer groups to exchange ideas and advice. Those who join can get first hand recommendation on such things as finding hedge funds to hiring private jets and preparing their children for inheritance. They can also make investments together and obtain group discounts for money managers, banks, and other service providers. These groups are being established in major metropolitan centres like New York, Boston. London, Geneva, and soon Dubai. These groups charge significant sums in annual dues and require members to have several million dollars in liquid assets. Many of these groups meet on a regular basis and are now establishing their own internet networks that allow members to trade questions and answers.

1. Advantages

Wealthy families have traditionally turned to private banks, trust companies and brokerage firms for advice but with bank consolidation, the fallout from the global financial crisis. conflicts of interest, scandals on Wall Street, and more intense competition among wealth management advisors, families often fear that their interests no longer come first. Some do not trust the advice they are getting and they feel that they are simply not receiving the level of attention and advice that they should get.

Some of the principal advantages are peer counselling:

- Whereby wealthy families can share advice;
- Their interests come first, there are no worries that a private bank or brokerage firm is just pushing its products;
- Like minds, whether it is about aviation, alternative investments or the children's inheritance or possibly divorce issues and other family matters;

- Joint venture families can collaborate on investments or team up to get discounts.

Families in general have certain common concerns such as choice of jurisdiction, domicile, and suitable investment environment both in terms of regulation and supervision, and finally a 'can-do' environment.

2. Services Required

- Multi-Family Office (MFO) professional services
- Investment management (including investment advice and/or appointment and monitoring of external investment advisers)
- Fiduciary services (handing the provision of trustees, directors of prime trust companies and/or trust administration services)
- Compliance
- Tax returns
- Accounting
- Concierge services
- General coordination and strategic planning including obtaining appropriate professional advice
- Management coordination of philanthropic activities
- Asset management and administration (managing assets such as private planes and yachts and dealing with arrangements for holding and moving works of art and cars)
- Real property purchase and management
- Staff employment and management

3. The Market

There are estimated to be several thousand families with wealth over USD 30 million in the GCC, over 80 of which have already set up a private office company in the DlFC. This is a young market and most families in the region are still to arrange their private affairs, investments, and family strategies for long-term sustainability.

3.1 MFO Services

To provide expert advice for families on those issues that arise and specifically affect wealthy families, such as generational and succession planning, philanthropy, separating the family from the business or setting up family councils.

3.2 Keys to Success

- A base in the DIFC
- High quality premises
- A small but experienced team
- Introduction to DIFC Family office legislation
- Quality strategic partners and advisers to provide access to investment deals
- High quality professional service providers

- Restricted access to the investment club

3.3 The Existing DIFC Single Family Office (SFO) Market

Since the SFO regulation in 2008, some 31 SFOs have been established and remain operational in the DIFC. Additionally, there are a number of proprietary companies established by families which are effectively managing investments portfolios or real estate. These families (over 80) will have needs far beyond the scope or capacity of DIFC as now structured. Indeed, DIFC have taken a strategic decision not to provide extended or value add services which will impact existing families who will look elsewhere for these services and potentially move away from the DIFC.

Recommendations:

1. The DIFC seek to communicate the benefits of conducting wealth management in the DIFC to the wider regional and international wealth management community.
2. The DIFC encourage Dubai-based professionals, professional bodies, judges and academics to undertake similar efforts at international, conferences and seminars or by providing thought leadership through research.
3. The DIFC consider the establishment of a new business structure directed to promoting the benefits of families relocating their business and wealth management structures to the DIFC.

APPENDIX A:

RECOMMENDATIONS

3. The current regulatory regime

1. The automatic DNFBP registration requirements for SFOs be replaced with a regime where DIFCA, during the assessment of the SFOs application for establishment in the DIFC, will make an assessment of whether the SFO should register with the DFSA as a DNFBP. DIFCA and the DFSA should agree on the risk assessment guidelines to be applied in this regard. Such guidelines should be published on DIFCA's website.

2. Private trust companies and management/ advisory/ service entities and enforcement/ protector mechanisms of such private trust companies, established for the sole purpose of overseeing or managing the affairs of an SFO not be subject to any form of financial services regulation by the DFSA and the DFSA's GEN Rule 2.23 (Providing Trust Services) be amended accordingly. It is furthermore suggested that DIFCA and DFSA agree to the guidelines in this regard to ensure that DIFCA properly assess whether such entities/ structures should be referred to the DFSA for a financial services license application. Such guidelines should be published on DIFCA's website.

3. The ownership details of SFOs and the private trust companies and/or management entities (insofar as they are incorporated entities) be held on a private register. However, such details shall remain disclosable to regulators and other authorities that may request such information under compulsion of law or any purpose permitted by the *DIFC Data Protection Law*[54].

4. The minimum qualifying amount to constitute an SFO in the DIFC be increased to US$50 million but that illiquid assets may be included in calculating the amount.

4(a) Trusts

5. Article 11 of the *DIFC Trust Law* be amended to:

   (a) confirm the recognition rules in the Hague Convention, subject to contrary provision in the *DIFC Trust Law*; and

   (b) confirm that otherwise English statutory law in relation to trusts is inapplicable in the DIFC

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[54] DIFC Law 1 of 2007

6. Article 14(1) of the *DIFC Trust Law* be amended in terms of recent Cayman Islands legislation.

7. The definition of "personal relationship" be amended to include reference to relationships between beneficiaries and generally updated to remove ambiguities.

8. Article 29 of the *DIFC Trust Law* be amended to provide that where article 29(9) applies, the trustee should make an approach to the Court for directions.

9. The *DIFC Trust Law* be amended to provide for a mixed trust comprising two or all three of the characteristics of conventional trusts, charitable trusts and purpose trusts.

10. The Court's power to rectify an instrument (including the trust documentation) should be expressed so as to apply to motivational as well as meaning mistakes.

11. The Court's power to vary a trust pursuant to Article 30(6) of the *DIFC Trust Law* should be capable of exercise with retroactive effect.

12. The power of the Court to make an order under the principles outlined in *Re Hastings-Bass* should be confirmed along the lines of the *Trusts (Amendment No.6) (Jersey) Law* 2013

13. The Court be expressly empowered to refer any trust dispute which comes before it to mediation or arbitration, and make orders for representation of beneficiaries not in existence or *sui juris*.

14. The *DIFC Trust Law* confer on arbitrators of trust disputes all the powers of a judge if hearing such disputes.

15. The *DIFC Trust Law* be amended to provide for trusts on the VISTA model.

16. Power to confer power to enter into transactions be added to the express powers of the Court in relation to trusts.

17. Such jurisdiction may be exercised in respect of a prior transaction.

18. Such power be expressed to be coextensive with the power contained in Article 30 (6) of the *DIFC Trust Law*.

19. Article 23(1)(c) of the *DIFC Trust Law* be reworded to read:
"(c) declaration by the owner of identifiable property that thereupon the owner will hold the property as trustee;"

20. Article 29 of the *DIFC Trust Law* be amended to provide that the heirs of the settlor and the Board of the DIFC Authority may enforce a purpose trust.

21. Articles 8 and 9 of the *DIFC Trust Law* be omitted from the Law.

22. The ROC create a category of licensed activity for private trust companies.

23. Either a suitably structured test case in which the Opinion Advice and Direction of the Courts is sought under Article 21 of the *DIFC Trust Law* to enable the Court authoritatively outline the basis of its trust jurisprudence and possibly also deal with Shari'a issues *or* should the Chief justice agree, to submit questions for interpretation of the DIFC Trust Law to the Court of Appeal in accordance with Article 5(B) (1)(b) of the Dubai *Law in respect of The Judicial Authority at Dubai International Financial Centre* **(**No.12 of 2004) as amended.

24. The DIFC Courts be asked to deal with the question of evidence for the purposes of ascertaining the content of Shari'a in respect of a trust (or other body whose affairs come before the Court) where compliance with Shari'a is required, preferably by way of Practice Direction.

25. Provision be made for the appointment of advisory and custodian trustees along the lines of sections 14 and 15 of the *Trustees Act* 1962 (Western Australia) who, unless doing so in the course of a business, will not be regarded as providing financial services.

26. Section 42 of the *DIFC Trust Law* be amended to make clear that the powers conferred in it are additional to those which are contained in the trust instrument.

4(b) Foundations

27. The DIFC establish a foundation regime consisting of two different types of foundations (public and private), both of which could be based on *one single new legal entity*.

28. The DIFC Foundation regime be capable of being used for private family foundations, for charitable foundations and for securitizations and anti-takeover ring-fencing measures.

29. The regime is recommended to include the following elements:

a) A foundation will not be required on a mandatory basis to have a fiduciary, guardian, local director, protector, or enforcer although these will be optional;

b) The only mandatory body will be the board, which consists of one or more individuals (family member(s) and/or external parties) or a corporate legal entity. In case the foundation establishes itself as an SFO, the board may consist of one single board member who is a member of the family;

c) Foundations acting as multi-family offices ("MFOs"), regulatory supervision will be mandatory which will not be the case for foundations which act as SFOs;

d) Foundations will be required to prepare annual accounts. Whether these should be audited or not and/or filed with the ROC should follow the same guidelines as those applicable to companies in the DIFC, also bearing in mind transparency requirements of entities in the DIFC under the OECD's Common Reporting Standard. However, it is recommended that such accounts should not be available for public scrutiny.

e) The DIFC will only keep a publicly available record of the foundation that shows (i) the name of the foundation, (ii) its address, (iii) (possibly) its articles of association and (iv) the identity of the board member(s). Information about the beneficiaries, founder, financial accounts and certificates (if any) will not be publicly available and may only be obtained by authorities if so required under domestic laws and/or international agreements of which the UAE is a party. Disclosure and/or exchange of this information will be subject to DIFC/DFSA approval and the board of the foundation will be informed upfront on the envisaged disclosure/exchange.

f) Substance for foundations in DIFC should be capable of being satisfied in two ways, either by: (i) having its own presence within DIFC, or (ii) by appointing a corporate services provider (CSP) in the DIFC. The latter will require the operational and regulatory requirements of CSP's to be reconsidered to ensure proper oversight and control in this regard. However, foundations utilising a CSP to meet the physical presence requirements in the DIFC are unlikely to be capable of obtaining a tax residency certificate;

g) There will be no limited perpetuity period requirements for DIFC foundations;

h) DIFC foundations will have the status of a corporate body under the DIFC companies law; hence providing a corporate veil capable of ring-fencing assets and liabilities. Only in certain cases of misconduct by board members will they be capable of being held personally liable;

i) DIFC foundations will have no minimum capital requirements. The founder will have to contribute at least one asset upon incorporation of a foundation. Further contributions may be made by the founder or other donors;

j) The beneficiaries of a DIFC foundation may consist of two different types: (i) owners of "depository receipts" or "certificates" issued by the foundation to the donor upon a contribution, representing the value of the contributed assets or (ii) discretionary appointment of beneficiaries by the board of the foundation (clearly, this latter category may only receive benefits to the extent these are not attached to certificates);

k) Certificates may be revocable against a repurchase of the certificate from the beneficiary at market value;

l) Redomiciliation of foundations established elsewhere to the DIFC will be permitted; provided that the jurisdiction of establishment permits redomiciliation of foundations;

m) DIFC foundations may in principle consist of (i) charitable activities, (ii) SFO activities and/or (iii) commercial activities (including but not limited to MFO activities), all subject to the relevant regulatory and legal requirements applicable to entities conducting similar activities in the DIFC;

n) Service providers to DIFC foundations (that only services a specific foundation related to an SFO) should not be regulated (i.e. the same as is being suggested for trusts) above; and

o) The Family Ownership Law promulgated for the Emirate of Dubai should also recognise foundations to be used for Shari'a compliant private wealth management vehicles in the DIFC, as well as for lifetime and succession planning purposes. Specific attention will be required to deal with the orphan nature of foundations and how the nationality of ownership will be established. It is recommended that this will be established through the nationality of the founder and the beneficiaries only without having any reference to the nationality of the board members of DIFC foundations.

4(c) Issues in respect establishment and ongoing maintenance in the DIFC

30. DIFCA consider making a *'virtual office'* solution available to applicants for a limited period of time in instances where DIFCA may want to encourage growth in particular industries (e.g. fintech);

31. Clear guidance be published on the DIFC website as to the requirements for DIFC establishments sharing offices and the application process regarding obtaining a no-objection letter from DIFCA in this regard.

32. The ROC and DIFCA introduce more transparency and ease of doing business into the application process for establishment/ registration of entities in the DIFC by:

(a) formulating a detailed set of criteria for application and license approvals the DIFC/ Committee to take into account when assessing any application and publishing them on the DIFCA website;

(b) reconsidering all the requirements in the business plan and try to reduce the requirements thereof; and

(c) permitting a single business plan to be utilised for more than one entity to be established in the DIFC.

33. The DIFC introduce a regime whereby license applicants can, on an exceptional basis apply to remove some information from the Public Register. It is also recommended that DIFCA and the ROC develop guidelines in this regard and publish it on the DIFCA website. (e.g. such an exemption would normally be available for entities associated with private families).

34. The ROC utilise the provisions of the pending DIFC *Electronic Transactions Law* to have the articles of association of companies executed electronically. In addition, it is recommended that the ROC follow the Common Law principle of accepting documents in good faith, as opposed to acting as the verifier of documents which is more in line with practice in civil law jurisdictions.

35. The DIFC:
    (a) recognise joint ownership of shares in a company at any time within its lifetime – from incorporation; and

    (b) upgrade DIFC Portal software to enable recording of joint ownership of shares.

36. The *DIFC Companies Law* should permit boards of companies to allot and issue shares within the authorised capital by ordinary resolution, subject to any contrary provisions in the articles of association.

37. The requirements for interim and final dividend declarations are clarified in the law (as it does not distinguish between interim and final dividend declarations) and that the standard DIFC articles are also amended to clarify the position as to whether both interim and final dividend may be declared by the Board (currently the shareholders can resolve to declare any dividend but the directors can declare an interim dividend).

38. The DIFC Client Handbook be updated to specifically advise what format of the documents is required.

39. DIFCA arrange meetings/awareness presentations whereby they educate authorities in the UAE about the local ownership restriction and the DIFC entity's exemption from it.

40. Consideration be given to a special class of vehicle in the DIFC (whether a company, partnership, trust or foundation) that may only be used by UAE or GCC residents (where applicable) to allay concerns of local authorities in the UAE and the rest of the Gulf as to the ownership of such DIFC vehicles.

41. SFOs be exempted from filing accounts with the ROC. However, such accounts and the underlying records and documents should be held available and be delivered to the ROC at its request, if and when required pursuant to the DIFC's obligations to the UAE Ministry of Finance under CRS.

42. The DIFC revise its procedures so that new lease contract can be registered without the need to submit a renewed license.

43. The DIFC Portal form on share capital amendments be rectified to allow that issued capital shares be of more than one class, should this be the intention of the shareholders of a company limited by shares, in line with DIFC law.

44. SFOs of a particular size be exempted from having an office lease in the DIFC, if (i) they already have a substantive presence in the UAE; and (ii) they appoint a corporate service provider in the DIFC.

45. The family members of SFOs of a particular size be granted residency sponsorship in the UAE for family members in the SFO without reference to (i) whether such individuals are employed by the SFO or its subsidiaries; or (ii) the space being occupied by the SFO in the DIFC.

46. Bodies corporate with appropriate ownership should be allowed, in turn, to own an SFO or ISPV .

47. The review of the *DIFC Companies Law* specifically address the position of a single owner/director company and the appointment of replacement directors.

48. The need for obligations relating to anti-money laundering rules and regulations for single family offices be assessed at the point of registration by the Registrar of Companies under an agreed protocol with the DFSA and upon assessment imposed by conditions on the registration.

4(d) Shari'a compliance[55]

49. The DIFC seek clarification of Article 361 of the *Personal Status Law* and, in particular, confirmation that it does not apply to business reorganisations which do not change underlying beneficial ownership.

50. The DIFC give consideration to a process to enable families to have confidence in the Shari'a acceptability of any planning put in place such as identifying Shari'a specialists who would be recognised by the relevant Courts and from whom Opinions could be provided.

---

55 Note: Recommendations 23 and 24 also deal with Shari'a related issues and may be applicable in relation to other vehicles such as companies and foundations as well, and recommendations 55 and 56 address the need to make the benefits of DIFC structures better understood.

4(e) DIFC entities and structures outside the DIFC

51. The DIFC recommend to the national government that it consider adoption of the Hague Convention either generally or in respect of trusts created within the GCC.

52. The DIFC recommend to the Dubai government that it consider adoption of the Hague Convention either in respect of DIFC trusts or in respect of DIFC and ASDGM trusts if reciprocity can be agreed with the Emirate of Abu Dhabi.

53. The DIFC seek the consideration of the Free Zone Council to the rationalisation of civil and commercial laws within the Free Zones.

5. Communication of Review outcomes and existing arrangements

54. The DIFC seek to communicate the benefits of conducting wealth management in the DIFC within the Emirate of Dubai, the UAE more generally, and to the wider international wealth management community.

55. The DIFC encourage Dubai-based professionals, professional bodies, judges and academics to undertake similar efforts at international, conferences and seminars or by providing thought leadership through research.

56. The DIFC consider the establishment of a new business structure directed to promoting the benefits of families relocating their business and wealth management structures to the DIFC.

Appendix B: **Consultation**

Oliver Agha, General Counsel, Abdul Lateef Jameel

Chartered Institute of Taxation, MENA Branch

Joseph Field and Stacy Choong, Withers WorldWide

Daniel Frajman, Spiegel Sohmer Inc, (Montreal)

Yann Mrazek, M Advocates of Law and Chair, STEP Arabia

Suzanne Reisman, co-chair, STEP Philanthropy Special Interest Group

Adriana Rocchi, Chair, STEP Arabia Islamic Assets Legacy Planning Group

R.A. (Sandy) Shipton

Khaled Sifri, Chief Executive Officer, Emirates Investment Bank

STEP Arabia

Paul Stibbard, Rothschild Trust

Sheikh Haytham Tamim, Shariah Solutions Limited

Representatives from the DFSA's policy and legal teams were consulted on certain aspects of the report.

Nalini Nair

Subject:	Trust Law Application
Location:	Level 14, The Gate Building, DIFC (Meeting Room 1)
Start:	Mon 5/13/2019 10:00 AM
End:	Mon 5/13/2019 12:00 PM
Recurrence:	(none)
Meeting Status:	Meeting organizer
Organizer:	Nalini Nair
Required Attendees:	r.catling@altamimi.com; G.Watts@tamimi.com; Murray North; Grant Folland; reshmi.manekporia@bclplaw.com; Ahmad Sergieh; Fadi.Hammadeh@alfuttaim.com; Diana Hamade; AGlover@trowers.com; Cynthia Trench; Jacques Visser; Tanuja Paramasivam
Optional Attendees:	David Russell QC; Grant Folland; Farzana Majid; Murray North

JJV1(80)

RESOLUTION

BOARD OF DIRECTORS OF THE DIFC AUTHORITY ("DIFCA BOARD")

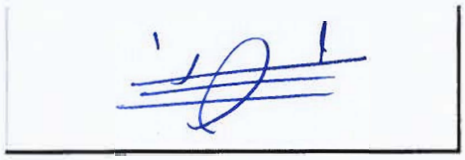
Trust Law and Foundations Law Application to the DIFC Courts

The DIFCA Board hereby **RESOLVES** to:

a. ***Approve the Dubai International Financial Centre Authority making an application to the Chief Justice of the DIFC Courts under Article 5(B)(1)(b) of Dubai Law 12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre in respect of the application and operation of the Trust Law, DIFC Law No. 4 of 2018 and the Foundations Law, DIFC Law No. 3 of 2018; and***

b. ***Approve Mr Visser's witness statement in support of the above application.***

This Resolution shall come into force from the date of signature.



Signed: Essa Kazim
Chairman
DIFCA Board

Dated: 12 November 2019

Dubai International Financial Centre

02 January 2020

The Honourable Tun Zaki Bin Azmi
Chief Justice of the DIFC Courts
DIFC Courts
Gate Precinct Building 4
Dubai International Financial Centre
DUBAI, UNITED ARAB EMIRATES

Dear Chief Justice,

DUBAI LAW 12 OF 2004 (AS AMENDED) IN RESPECT OF THE JUDICIAL AUTHORITY AT DUBAI INTERNATIONAL FINANCIAL CENTRE

The Dubai International Financial Centre Authority (**DIFCA**) hereby submits to Your Honour an application (the **Application**) that you request the Court of Appeal to provide its interpretation of two laws of the Dubai International Financial Centre. The laws, and the areas in which the interpretation of the Court of Appeal is sought, are set out in the attached Schedule together with DIFCA's suggested response to the questions posed[1].

The Statute

Article 5 of Dubai Law No. 12 of 2004 (as amended) in respect of the Judicial Authority at Dubai International Financial Centre (the **Judicial Authority Law**) relevantly provides:

> ***(B) The Court of Appeal:*** *(1) The Court of Appeal shall have exclusive jurisdiction to hear and determine:*
>
> *(a) appeals filed against judgments and decisions made by the Court of First Instance;*
>
> (b) *request of interpretation by the Chief Justice of the Courts of any article of the DIFC Laws and DIFC Regulations upon an application submitted to him from any DIFC Body, DIFC Establishment or Licensed DIFC Establishment; such interpretation shall have the same authority as the interpreted legislation.*

[1] The suggested responses in Schedule will be elucidated in more detail in my witness statement to be submitted to the Court of Appeal in further support of the Application, if this matter is permitted to proceed to the Court of Appeal.

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

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

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

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

The Wealth Management Review

By way of background to this request, I advise that:

1. One of the objectives of the Centre since its inception has been to provide a platform comparable to other international financial centres whereby family wealth can be administered, protected and transmitted. Family wealth is a significant part of the UAE and Gulf economies – far more so than in financial centres such as London and New York where institutional wealth (e.g. pension and insurance funds) makes a substantial contribution to the capital markets.

2. In 2016, His Excellency the Governor of the Dubai International Financial Centre (**DIFC**) pursuant to Article (5) bis (3)(b) of the Founding Law appointed a working group entitled the Wealth Management Working Group (the **Working Group**) to, amongst other things, consider the (then) present status of the wealth management industry in the DIFC and to propose strategies and policies relevant to the wealth management industry going forward for consideration by the Governor's strategy and policy committee prior to making recommendations in respect thereof to the DIFC Higher Board (the **Higher Board**). Membership of the Working Group included a representative of the Registry of the DIFC Courts.

3. The objective in establishing the Working Group was to make the DIFC an attractive venue for local and regional families to structure their business and succession planning arrangements.

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4. The importance of this objective cannot be overstated. It is estimated that *circa* US$ 1 trillion of family business assets will undergo a generational transfer over the coming decade. As noted by the Family Business Council – Gulf, these transfers can be problematic, and the provision of a suitable framework within which appropriate family business governance models can operate will serve an important national and regional interest.

5. Amongst the matters considered by the Working Group was the absence of precedents from the DIFC Courts as to the application and operation of the DIFC Trust Law, Law No. 11 of 2005 (the **2005 Trust Law**). That matter was addressed in recommendations 23 and 24 of its report submitted to the Governor (the **Report**), which provided:

   23. Either a suitably structured test case in which the Opinion Advice and Direction of the Courts is sought under Article 21 of the DIFC Trust Law to enable the Court authoritatively outline the basis of its trust jurisprudence and possibly also deal with Shari'a issues or should the Chief justice agree, to submit questions for interpretation of the DIFC Trust Law to the Court of Appeal in accordance with Article 5(B) (1)(b) of the Dubai Law in respect of The Judicial Authority at Dubai International Financial Centre (No.12 of 2004) as amended. [2] (**Recommendation 23**)

   24. The DIFC Courts be asked to deal with the question of evidence for the purposes of ascertaining the content of Shari'a in respect of a trust (or other body whose affairs come before the Court) where compliance with Shari'a is required, preferably by way of Practice Direction. (**Recommendation 24**)

6. A copy of the Report is attached for reference. The section on the 2005 Trust Law is to be found in Chapter 4, comprising pages 13 to 26 of the Report, which recommended extensive amendments to the 2005 Trust Law as well as recommending the proposed Application.

7. The Report was considered by the DIFC Higher Board in December 2016 chaired by His Highness the President of the DIFC, which endorsed the findings and recommendations of the Working Group (including Recommendation 23 and Recommendation 24) and tasked DIFCA to implement, where feasible, such recommendations.

8. Since receipt of the Report, the DIFCA have proceeded to implement its recommendations. This implementation included the reenactment (with

[2] The reference to *"Article 21 of the DIFC Trust Law"* in the text of Recommendation 23 refers to the 2005 Trust Law. The relevant Article is restated in Article 20(1) of the Trust Law 2018.

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amendments) of the 2005 Trust Law as the DIFC Trust Law, Law No. 4 of 2018 (the **Trust Law**) and the enactment of the DIFC Foundations Law, Law no. 3 of 2018 (the **Foundations Law**), as well as the proposal to replace the existing DIFC Single Family Office Regulations with new DIFC Family Office Regulations (which is currently in progress), as well as implementing many changes to the DIFC's administrative arrangements that were recommended in the Report. Most of the latter have since been included in the DIFC Operating Law, Law No. 7 of 2018 and the DIFC Operating Regulations that came into force on 12 November 2018.

9. As a result of the enactment of the Foundations Law, the problems arising from absence of precedent decisions from the DIFC Courts that were noted in the Report in the context of the Trust Law, necessarily also apply in the context of the Foundations Law. Hence the decision by DIFCA to expand the ambit of the Application to also include the Foundations Law.

10. Recommendation 24 of the Report has been addressed by the Court through the issue of Registrar's Direction No.3 of 2017.

11. In considering how Recommendation 23 might be implemented, DIFCA have given consideration to the following questions:

    (a) Whether the release of the Report might itself ameliorate some of the concerns which led to the making of the recommendations in the Report;

    (b) Which of the alternative procedures suggested in the Report would most satisfactorily address those concerns, to the extent they remained; and

    (c) Whether in addition to seeking clarification of issues associated with the Trust Law, the objectives sought by Recommendation 23 would be best advanced by also seeking clarification in relation to corresponding issues arising in relation to the Foundations Law?

12. The DIFCA have consulted widely, both formally and informally, in relation to these questions, including convening a meeting of senior legal practitioners in the DIFC and Dubai (including representatives of the Family Business Council – Gulf and the Society of Trusts and Estates Practitioners) to obtain their views as to the need for further clarification of the relevant laws in question, and the preferable process to be adopted. In the course of those consultations, further areas of the relevant laws requiring clarification have been identified.

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13. In relation to the alternative procedures outlined in Recommendation 23, the following considerations have led DIFCA to the conclusion that it would be preferable that it should make an Application under Article 5(B)(1)(b) of the Judicial Authority Law rather than seek to procure the making of an application for opinion, advice and direction under Article 20(1) of the Trust Law:

    (a) An application for opinion, advice and direction under the Trust Law could only be made by a trustee and only address specific issues which concerned the trustee in connection with the performance of the trustee's duties;

    (b) To the extent that issues arose under other legislation such as the Foundations Law it might not be possible to obtain similar relief from the DIFC Courts, as there is no equivalent to Article 20(1) of the Trust Law in the Foundations Law; and

    (c) As the purpose of Recommendation 23 was to obtain an authoritative statement of the position under DIFC law to give greater confidence to the DIFC community, and its legal profession in particular (which, by the very nature of private wealth management and succession planning, is usually very conservative in their approach), a decision of the Court of Appeal pursuant to Article 5(B)(1)(b) of the Judicial Authority Law was considered to be a more effective means to do so.

The jurisdiction of the Court to provide advisory Opinions

Although Article 5 of the Judicial Authority Law was substantially recast in the 2011 amending legislation, this particular provision dates back to the original version of the Law. DIFCA have been unable to locate contemporary materials available which shed light on the intent of the drafters of the provision. It can however be confidently said that the first Chief justice of the DIFC Courts, Sir Anthony Evans, would have been intimately involved in the drafting and that the provision reflects the desirability of obtaining legal certainty in relation to issues which have not come before the Courts in *inter partes* disputes.

It is respectfully submitted that this consideration is especially relevant in jurisdictions where common law is introduced from scratch within a wider civil law environment and the practical and commercial exigencies of the situation are such that one cannot always leave the development of common law in that jurisdiction (and the certainty obtained by legal precedent) entirely to the passing of time, which in other "original" common law jurisdictions may have taken hundreds of years to develop.

It is therefore not surprising that corresponding provisions are to be found in the laws establishing other financial centres that introduced a common law system in a broader civil law environment from scratch, including the following:

(A) The Abu Dhabi Global Market (ADGM): Article 13(8) of Abu Dhabi Law No. (4) of 2013 Concerning Abu Dhabi Global Market, which states:

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

(B) The Astana International Financial Centre (AIFC): Article 26(12) of AIFC Court Regulations, which states:

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

(a) the Court of First Instance concerning any matter before it;

(b) any of the AIFC Bodies; or

(c) any of the AIFC Participants with leave of the Court of Appeal.

It should be pointed out that there is currently no record of any application to the applicable Court under any of these provisions.

In making this application, DIFCA is also mindful that the provision of advisory opinions by the courts is not usual practice in traditional common law jurisdictions, although in Canada there is an extensive history thereof, including, prior to 1949, appeals from its exercise to the Privy Council. In Canada such referrals fall within the discretion of the Governor in Council under Section 53(1) of the Supreme Court Act 1985. Such discretion in the Judicial Authority Law is provided to Your Honour whether or not it is appropriate to enliven the jurisdiction of the Court of Appeal if so requested by a "*DIFC Body, DIFC Establishment or Licensed DIFC Establishment"* pursuant to the provisions of Article 5(B)(1)(b) .

In considering the Application in the above context, we respectfully submit that two questions may need further consideration:

- Whether it is proper for the issues raised for clarification in the Application to be submitted to the Court in this manner; and

- If so, what procedures are appropriate to enable the matter to properly be determined?

The considerations as to the former, so far as they have been taken into account by DIFCA, have been outlined above. DIFCA's proposed approach in this matter has also been endorsed by the relevant professionals and representative organisations that DIFCA consulted with pursuant to the publication of the Report. My understanding is that there are two particular reasons why they concur with DIFCA in this regard:

- They have expressed doubts as to the approach the DIFC Courts will take to foreign precedent in the application of the DIFC Trust Law, which is a question only the DIFC Courts can answer; and

- Unlike the position in Canada, where an advisory opinion is in the form of a judicial decision but is not legally binding, a decision of the DIFC Courts under Article 5(B)(1)(b) of the Judicial Authority Law "*shall have the same authority as the interpreted legislation*" (i.e. create binding precedent).

Moreover, the issues faced by Gulf families from a generational transfer of wealth perspective, and the role that the DIFC (as the leading financial centre in the region) must play to alleviate those issues as much as possible and create legal certainty in respect thereof in the DIFC, makes the Application a matter of public policy for DIFCA to properly address.

Any concerns as to potential inappropriate use of Article 5(B)(1)(b) of the Judicial Authority Law are addressed by the fact that the power of the Chief Justice is discretionary and the capacity of the DIFC Courts to qualify the answers it gives to any question, as observed by the Privy Council in *Attorney-General of British Columbia v. Attorney-General of Canada* [1914] AC 153.

The DIFCA accordingly submits that the Application is an appropriate case for the use of the provisions of Article 5(B)(1)(b) of the Judicial Authority Law.

As to the appropriate procedure to be adopted if the Application is permitted to proceed, the Canadian provisions afford some guidance.

Pursuant to this guidance, the DIFCA suggests the following:

(a) the request to the DIFC Court of Appeal (**Court of Appeal**) to provide its interpretation of the issues identified in the Schedule for clarification in the Trust Law and Foundations Law be set down for hearing by the Court of Appeal on a date to be fixed by the Registry, but not less than six weeks after the notification referred to in paragraph (b) below is given to the DIFCA;

(b) upon setting the request down for hearing, the Registry notify the DIFCA of the date set for the hearing;

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(c) within seven days of the DIFCA receiving such notification, it shall communicate by e-mail to:

(i) each firm listed on Part 1 of the DIFC Courts Register of Practitioners;

(ii) each person registered with the DIFC as a DNFPB not included in (i) above;

(iii) the Society of Trust and Estate Practitioners NPIO; and

(iv) the Family Business Council – Gulf,

and place on its website the following information:

(v) a copy of this Application;

(vi) a copy of the witness statement that will be submitted by the DIFCA to the Court of Appeal in further support of the Application (not including any Exhibit);

(vii) details of how to obtain an electronic copy of any Exhibit if required;

(d) Any person who receives such notification may within fourteen days notify the Court (with a copy to the DIFCA) of the person's desire to make submissions and be heard by the Court at the hearing of the request, shall provide an address for service and will become a party to the proceeding;

(e) Any further material upon which the DIFCA wishes to rely on at the hearing, including written submissions, must be provided to the Court of Appeal and to any party giving notice pursuant to (d) above, not less than fourteen days before the hearing; and

(f) Any material upon which any other party wishes to rely at the hearing, including written submissions, must be provided to the Court, and to the DIFCA, not less than fourteen days before the hearing.

It would be open to the Court of Appeal or, at this stage, Your Honour, to make such other directions as are considered appropriate to be made. DIFCA submits it is unlikely that if these procedures are adopted any person with a possible interest in the matter would not be made aware of its coming before the Court and the procedure for becoming involved with the result that the proposed procedures should provide confidence to the Court that any persons with relevant concerns as to the possible outcome of the proposed application will have the opportunity to articulate them before the Court.

DIFCA undertakes, should this Application to Your Honour be granted, to proceed as outlined above or in accordance with such other procedures as you think appropriate.

Should Your Honour think it appropriate for the issues in the attached Schedule to be further refined before being placed before the Court of Appeal, DIFCA will engage in such processes as you think appropriate to that end.

Yours sincerely,

Jacques Visser
Chief Legal Officer
DIFC Authority

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SCHEDULE

The issues which the DIFCA seeks to have determined by the Court of Appeal in respect 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**), and the answers which the DIFCA proposes should be given to the questions raised in respect of those issues, are as follows:

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

   Proposed answer: Yes

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

   Proposed answer: Yes

3. Whether the reference in Article 10 of the Trust Law to the common law of trusts and principles of equity:

   (a) includes the common law of trusts and principles of equity as understood under the law of England and Wales;

   Proposed answer: **Yes**

   (b) is limited to the common law of trusts and principles of equity as understood under the law of England and Wales?

   Proposed answer: No
   Whilst the Court will place great weight on the jurisprudence of the Courts of England and Wales in determining the content of the common law of trusts and principles of equity, its approach to

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those issues will follow its approach to the application of common law generally, which permits the Court to also have regard to the jurisprudence of other significant common law jurisdictions.

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

   Proposed answer: No

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

   Proposed answer: Yes

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

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

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

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

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

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

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

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

Proposed answer: Yes

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

Proposed answer: **No**

9. Will the transfer of property by a Muslim to a trust or foundation necessarily attract the operation of Article 361 of the Law of Personal Status of the United Arab Emirates?

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

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 the Judicial Authority Law?

Proposed answer: There is no distinction between Orders of the Court pursuant to the Trust Law or the **Foundations Law** ***and any other Orders***

***of the Court for the purposes of Article 7 of the* Judicial Authority Law *and the Court will follow the procedures set out in that Article in respect of any such Orders*.**

11. Whether a settlor of a trust may be a shareholder or a director of a company which is trustee of the trust?

Proposed answer: There is no legal reason why a settlor of a trust may not be a shareholder or a director of a company which is trustee of the trust.

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

    (a) pursuant to Articles 24(2)(c) and 25(2)(a) of the Trust Law determine that the disposition shall have effect on terms which are Shari'a compliant?

    (b) pursuant to Article 40(8)(a) of the Trust Law vary the terms of the trust so that they are Shari'a compliant?

    Proposed answer: In both (a) and (b) above, the Court has power in appropriate circumstances to make such Orders.

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

Proposed answer: No

Tanuja Paramasivam

From: Amna Al Owais <Amna.AlOwais@difccourts.ae>
Sent: Wednesday, January 8, 2020 11:08 AM
To: Jacques Visser; Nour Hineidi; David Russell QC
Cc: Tanuja Paramasivam; R-DIFC Courts Registry
Subject: RE: Court of Appeal Application

Dear Jacques,

The Chief Justice has decided to put the matter before the Court of Appeal. The date set for the hearing is the 25th of February 10am.

The Registry will be communicating with you early next week with regards to any further submissions and further requirements from the Appeal bench.

Kind Regards,

Amna Al Owais
Chief Registrar
DIFC Courts

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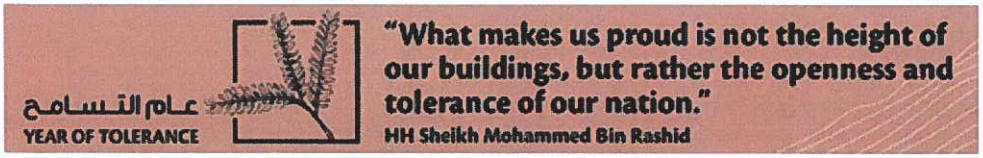

27 January 2020

To the Judges of the Court of Appeal

A request by the Chief Justice made under Article 5(B)(1)(b) of the Judicial Authority Law

I write to you regarding a letter that was sent to me on 2 January 2020 by the Chief Legal Officer of the DIFC Authority (the "**Authority**"), Jacques Visser, on behalf of the Authority. The letter is an application by the Authority, as a DIFC Body, to me, in my capacity as Chief Justice of the DIFC Courts (the "**Application**"), to request the Court of Appeal to provide interpretations of two DIFC Laws (the "**Interpretations**"), namely Law No. 4 of 2018 (the "**Trust Law**") and Law No. 3 of 2018 (the "**Foundations Law**"). The Interpretations that are sought by the Authority are appended to this letter in Schedule 1.

The Application was made pursuant to Article 5(B)(1)(b) of Dubai Law No. 12 of 2004 (as amended) (the "**Judicial Authority Law**") ("Article 5(B)(1)(b)"), which provides:

> *The Court of Appeal shall have exclusive jurisdiction to hear and determine:*
>
> ...
>
> *(b) request[s] of interpretation by the Chief Justice of the Courts of any article of the DIFC Laws and DIFC Regulations upon an application submitted to him from any DIFC Body, DIFC Establishment or Licensed DIFC Establishment; such interpretation shall have the same authority as the interpreted legislation.*

I have considered the Application and, under Article 5(B)(1)(b), I hereby formally request the Court of Appeal to provide the Interpretations. In making this request, the jurisdiction of the Court of Appeal to hear and determine the matter is accordingly enlivened.

Yours sincerely,

Chief Justice of the DIFC Courts
Zaki Azmi

SCHEDULE 1

The Requested Interpretations

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

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.

3. Whether the reference in Article 10 of the Trust Law to the common law of trusts and principles of equity:

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

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

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 jurisdiction specified in the provision to have an interest in the trust or foundation property or derive any benefit under the trust or foundation.

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

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

    a. be recognised as a trust under Article 17 of the Law Relating to the Application of the DIFC Laws 2004;

    b. be recognised as a foundation under Article 62 of the Foundations Law; and

    c. be continued as a foundation under Article 56 of the Foundations Law?

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?

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?

9. Will the transfer of property by a Muslim to a trust or foundation necessarily attract the operation of Article 361 of the Law of Personal Status of the United Arab Emirates?

10. Whether an order made in proceedings in the Court under the Trust Law or the Foundations Law can be the subject of execution pursuant to Article 7 of the Judicial Authority Law.

11. Whether a settlor of a trust may be a shareholder or a director of a company which is trustee of the trust.

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

    a. pursuant to Articles 24(2)(c) and 25(2)(a) of the Trust Law, determine that the disposition shall have effect on terms which are Shari'a compliant; and/or

    b. pursuant to Article 40(8)(a) of the Trust Law vary the terms of the trust so that they are Shari'a compliant.

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