THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

BEFORE CHIEF JUSTICE ZAKI AZMI, JUSTICE ROBERT FRENCH AND H.E JUSTICE ALI AL MADHANI

PURSUANT TO A REQUEST FOR INTERPRETATION BY CHIEF JUSTICE ZAKI AZMI UPON AN APPLICATION SUBMITTED TO HIM BY THE DUBAI INTERNATIONAL FINANCIAL CENTRE AURHORITY, AND REFERRED TO THE COURT OF APPEAL IN ACCORDANCE WITH ARTICLE 5(B)(1)(b) OF THE JUDICIAL AUTHORITY LAW BEING DUBAI LAW 12 OF 2004 (AS AMENDED)

THE DUBAI INTERNATIONAL FINANCIAL CENTRE AUTHORITY

Appellant

JUDGMENT

Hearing : **5 August 2020**

Counsel : Mr. David Russell QC on behalf of the Applicant
Mr. Alistair Glover representing the Society of Trust and Estate Practitioners
Mr. Patrick Dillon-Malone representing Al Tamimi & Co
Mr. Fadi Hammadeh on behalf of the Family Business Council - Gulf

Judgment : **13 January 2021**

INTRODUCTION -THE APPLICATION TO THE CHIEF JUSTICE

1. On 2 January 2020, the Chief Legal Officer of the Dubai International Financial Centre Authority (**"DIFCA"**) of the Dubai International Financial Centre (**"DIFC"**) wrote to the Chief Justice of the DIFC Courts. He submitted to the Chief Justice an application asking that he request the Court of Appeal of the DIFC Courts to provide interpretations of provisions of two laws of the DIFC. They are the DIFC Trust Law, Law No 4 of 2018, and the DIFC Foundations Law, Law No 3 of 2018. The request was made pursuant to Article 5 of Dubai Law No 12 of 2004 known as the Judicial Authority Law. Relevantly that Article 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."

2. DIFCA sought answers from the Court of Appeal to 13 questions.

3. This is the first time the Court has been called upon to exercise its jurisdiction under Article 5(B)(1)(b). It is an exceptional jurisdiction and one to be approached with circumspection. It is a jurisdiction in which the Court is asked to respond to interpretive questions in a factual vacuum and without the focus that a real dispute between parties ordinarily provides to such questions.

4. As appears below, the Court has declined to answer seven of the thirteen questions. It has done so either because the questions lay beyond the Court's jurisdiction or because any interpretation would cover too great a variety of unimagined cases which might give rise to different interpretive perspectives.

THE PURPOSE OF THE APPLICATION

5. The background to the application by DIFCA was explained in the letter. One of the objectives of the DIFC from its inception has been to provide a platform, comparable to other financial international centres, from which family wealth can be administered, protected and transmitted. Family wealth was said to be a significant part of the United Arab Emirates (**"UAE"**) and Gulf economies. In 2016, His Excellency the Governor of the DIFC appointed a working group entitled the "Wealth Management Working Group" (the **"Working Group"**) to consider, among other things, the status of the wealth management industry in the DIFC and to propose strategy and policies relevant to the wealth management industry. The Working Group was established with a view to making the DIFC an attractive venue for local and regional families to structure their business and succession planning arrangements.

6. The Working Group considered the absence of any precedents from the DIFC Courts relating to the application and operation of the 2005 Trust Law. One of the options proposed by the Group to overcome that absence was an application to the Chief Justice to submit questions for interpretation of the Trust Law to the Court of Appeal.

7. The application letter from DIFCA also referred to the DIFC Foundations Law, Law No. 3 of 2018. DIFCA observed that, in addition to the problems arising from the absence of precedent decisions from the DIFC Courts relating to the Trust Law, there were problems arising from the absence of precedents in relation to the Foundations Law. DIFCA had therefore decided to expand the ambit of its application to cover the Foundations Law.

8. The purpose of the Working Group's recommendation in relation to the Trust Law was to obtain authoritative statements to give greater confidence to the DIFC community and its legal profession which, by the very nature of private wealth management and succession planning, is usually very conservative in its approach. The letter attached a schedule setting out thirteen questions on which DIFCA sought the Court's answers.

THE PROCEDURE FOLLOWING THE APPLICATION

9. The application was formalised in a Claim Form of the kind used to initiate proceedings in the Court of First Instance. It was received on 30 January 2020. Given the special nature of these proceedings, which do not invoke any jurisdiction of the Court of First Instance, it is appropriate that a form of application to the Chief Justice, for a request of interpretation by the Court of Appeal, should be devised to reflect its true nature as a sui generis application to the Chief Justice.

10. The Chief Justice made a referral in writing to the Court of Appeal on 27 January 2020. The referral may be regarded as a request for the purposes of Article 5(B)(1)(b) of the Judicial Authority Law. The Registrar then made orders for copies of the application and the referral letter to be placed on DIFCA's website. DIFCA was directed to communicate by email with each firm listed on Part 1 of the DIFC Court's Register of Practitioners and each person registered with the DIFC as a designated non-financial business or profession not included on the Register of Practitioners. DIFCA was also directed to communicate with the Society of Trust and Estate Practitioners and the Family Business Council - Gulf (**"FBCG"**).

11. Persons or entities receiving such notifications were required to notify the Court in writing of their desire to make a submission and to be heard by the Court. Any interested person providing such notification would become a party to the proceedings. Interested persons could file submissions in the Court and serve them on DIFCA.

12. In the event, submissions were filed by the Society of Trusts and Estate Practitioners (Arabia), by the FBCG and by Al Tamimi and Company (**"ATCO"**) in support of the application for a request for interpretation. The principal submissions were those filed by DIFCA and by ATCO. There were three sets of submissions from DIFCA. The first was dated 10 March 2020 entitled "Submissions by the Dubai International Financial Centre Authority". A second set, undated, was filed in response to specific submissions by ATCO, entitled "Submissions in Response". A third set, dated 21 June 2020, focussed on the content of public policy in the DIFC and was also in response to the submissions of ATCO. It was entitled "Further Submissions of Applicant". A late Supplementary Submission concerning a proposed Federal Trust Law was also received from DIFCA. The Court of Appeal sat to hear argument from all of the parties in relation to the questions posed by DIFCA on 5 August 2020. The Court reserved its decision on the questions.

CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

The United Arab Emirates Constitution 1971

13. The request for interpretation of aspects of the Trust Law and the Foundations Law is made in the context of the larger legal framework within which the DIFC operates.

14. The United Arab Emirates Constitution of 1971 provides in Article 1 that the United Arab Emirates "is an independent, sovereign, federal state and is referred to hereafter in this Constitution as the Union". The Union consists of a number of Emirates including Abu Dhabi and Dubai. Article 2 provides that the Union shall exercise sovereignty in matters assigned to it in accordance with the Constitution over all territory and territorial waters lying within the international boundaries of the member Emirates. Article 3 provides:

> "The member Emirates shall exercise sovereignty over their own territories and territorial waters in all matters which are not within the jurisdiction of the Union as assigned in this Constitution."

15. Article 7 provides:

> "Islam is the official religion of the Union. The Islamic Shari'a shall be a main source of legislation in the Union. The official language of the Union shall be Arabic."

16. Article 11 provides:

> "1. The Emirates of the Union shall form an economic and customs entity. Union Laws shall regulate the progressive stages appropriate to the achievement of this Entity.
>
> 2. The free movement of all capital and goods between the Emirates of the Union is guaranteed and may not be restricted except by a Union law.
>
> 3. All taxes, fees, duties and tolls imposed on the movement of goods from one member Emirate to the other shall be abolished."

17. The Supreme Council of the Union comprising the Rulers of all of the Emirates making up the Union is the highest authority in the Union (Article 46). Its responsibilities, set out in Article 47, include:

> "2. Sanction of various Union laws before their promulgation, including the Laws of the Annual General Budget and the Final Accounts.
>
> .

4. Ratification of treaties and international agreements. Such ratification shall be accomplished by decree.

.

7. Supreme Control over the affairs of the Union in general.

8. Any other relevant matters stipulated in this Constitution or in the Union laws."

18. The laws, decrees and decisions of the Union which have been ratified by the Supreme Council are promulgated by the President of the Union. (Article 54(4))

19. There is a National Assembly of the Union established under Chapter IV of the Constitution with representation from each of the member Emirates. Its powers include consideration of draft Union Laws before their submission to the President of the Union for presentation to the Supreme Council for ratification (Article 89).

20. Chapter V establishes the judiciary in the Union and the Emirates. It creates a Supreme Court of the Union and Union Courts at first instance (Article 95). Chapter VII sets out the exclusive legislative and executive jurisdiction of the Union (Articles 120 and 121). The Emirates have jurisdiction in all matters not assigned to the exclusive jurisdiction of the Union (Article 122).

Financial Free Zones - Federal Law No 8 of 2004

21. Federal Law No 8 of 2004 provides for the creation of Financial Free Zones. It is a Union Law. Article 2 provides that:

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

22. Financial Free Zones and banking activities and services, insurance and reinsurance, financial markets and supporting activities licensed to be carried out in them, are subject to all Federal Laws "with the exception of Federal civil and commercial laws". (Article 3(2)). Article 5 of Federal Law No 8 provides that:

> "The Financial Free Zone shall not do anything which may lead to contravention of any international agreements to which the State is or shall be a party."

23. The DIFC was established by Federal Decree No 35 of 2004 as a Financial Free Zone in Dubai. The decree was made on 27 June 2004.

The Law of the DIFC - Dubai Law No 9 of 2004

24. Dubai Law No 9 of 2004 entitled "The Law of the Dubai International Financial Centre No 9 of 2004" was enacted by His Highness, the Ruler of Dubai. It provided, among other things, that the Financial Free Zone, known as the DIFC, should have financial and administrative independence and "shall be attached to the Government". A number of bodies were established within the Centre including:

(a) the Dubai International Financial Centre Authority to be known as DIFCA; and

(b) the Dubai International Financial Centre Financial Services Authority to be known as DFSA; and

(c) the Dubai International Financial Centre Judicial Authority.

25. The objectives of the DIFC were set out in Article (4):

> "1. To be a financial centre in the Emirate, based on principles of efficiency, transparency and integrity with a view to making an effective contribution to the international financial services industry;
>
> 2. To promote the position of the Emirate as a leading international financial centre; and
>
> 3. To develop the economy of the Emirate."

26. The President of the Centre has powers and functions set out in Article (5), which includes submission of proposed Centre laws to the Ruler for enactment.

27. Article (8) (as amended by Dubai Law No. 7 of 2014) provides for the Centre's Courts and includes the following provisions:

> **"Second: The Centre's Courts**
>
> 1. The Centre's Courts shall have separate legal personality and may sue and be sued in this capacity.
>
> 2. The Centre's Courts shall have an independent budget and the Government shall allocate to the Centre's Courts the funds required to enable them [sic] to exercise their [sic] duties and powers independently from the Centre's Bodies.
>
> 3. The Centre's Courts shall have a Chief Justice.. appointed by a decree issued by the Ruler.
>
> 4. The functions of the Centre's Courts shall be determined in accordance with the Centre's Law, and they [sic] shall carry out their duties and powers pursuant to the Centre's Laws and Centre's Regulations.

.

7. The Centre's Courts shall have exclusive jurisdiction to interpret the Centre's Laws and the Centre's Regulations."

28. Article (21) provides that the Law of the Dubai International Financial Centre No (9) of 2004 should replace Law No 3 of 2002 establishing the Dubai International Financial Centre.

Judicial Authority Law - Law No 12 of 2004 (as amended by Law No. 16 of 2011)

29. Dubai Law No 12 of 2004 (as amended) established the Judicial Authority at Dubai International Financial Centre. Article 3 created the Courts of the Dubai International Financial Centre comprising the Court of First Instance and the Court of Appeal. Article 5(B), defining the jurisdiction of the Court of Appeal, has already been set out in the Introduction to this Judgment.

DIFC Court Law - Law No 10 of 2004

30. The DIFC Court Law is a Law of the DIFC (being DIFC Law No 10 of 2004). It also deals with the jurisdiction of the Court of Appeal and in Article 26(1) refers to the jurisdiction conferred on it by Article 5(B) of the Judicial Authority Law "to hear and determine appeals filed against judgments and awards made by the Court of First Instance". Article 27 provides:

"27. References

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

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

(b) any of the Centre's Bodies; or

(c) any of the Centre's Establishments with leave of the Court of Appeal."

31. The jurisdiction referred to in Article 27 of the DIFC Court Law is "jurisdiction, pursuant to Article 5(B) of the Judicial Authority Law" and is to be read subject to the requirements in Article 5(B)(1)(b).

32. Under the heading in Part 6 "Matters Relating to Jurisdiction", Article 30 deals with the governing law of the DIFC Court as follows:

"30. Governing Law

(1) In exercising its powers and functions, the DIFC Court shall apply:

(a) the Judicial Authority Law;

(b) DIFC Law or any legislation made under it;

(c) the Rules of Court; or

(d) such law as is agreed by the parties.

(2) The DIFC Court may, in determining a matter or proceeding, consider decisions made in other jurisdictions for the purpose of making its decision."

33. The Rules of Evidence applicable in proceedings instituted in a DIFC Court are dealt with in Chapter 2, which also deals, in Article 52, with evidence on appeal but does not extend to imposing any requirements in relation to the rules of evidence on a request for interpretation under s 5(B)(1)(b).

34. The Constitution, together with the Federal, Dubai and DIFC Laws referred to in this section provide the framework within which the Court of Appeal exercises the interpretive jurisdiction conferred on it by the Judicial Authority Law.

THE JURISDICTION OF THE COURT OF APPEAL

35. The jurisdiction of the Court of Appeal under Article 5(B)(1)(b) of the Judicial Authority Law is enlivened by a request for interpretation made by the Chief Justice to the Court of Appeal upon an application submitted to him from any DIFC Body, DIFC Establishment or Licensed DIFC Establishment. DIFC Bodies are defined in Article 2 of the Judicial Authority Law as "bodies established pursuant to Article (3) of the aforementioned Law No 9 of 2004 and any other body established pursuant to DIFC Laws or pursuant to approval of the President." DIFCA falls within the first category, established by Article (3) 3.a. of Law No 9 of 2004.

36. The jurisdiction of a court is its authority to decide. That authority may be determined by reference to subject matter and geography. The jurisdiction conferred by s 5(B)(1)(b) on the Court of Appeal is authority to interpret "any Article of the DIFC Laws and DIFC Regulations". The term "DIFC Laws" is defined in Article 2 of the Judicial Authority Law as "[a]ny laws issued by the Ruler in relation to DIFC". The term "DIFC Regulations" is defined as "[a]ny rules, regulations, bylaws or orders relating to DIFC issued by the President or by DIFC Bodies". The authority of the Court is thus limited to the interpretation of Articles of laws issued by the Ruler in relation to DIFC and rules, regulations, bylaws or orders relating to DIFC issued by the President of the DIFC or by DIFC Bodies.

37. The jurisdiction conferred by Article 5(B)(1)(b) is advisory. It does not involve the resolution of a dispute. It does not involve the determination of the rights and liabilities of parties appearing before the Court. It does not involve the resolution of contested questions of fact. It is not a

necessary condition of the exercise of the jurisdiction that the question of interpretation is disputed.

38. DIFCA made some helpful submissions on advisory jurisdictions generally. As it correctly pointed out, common law courts have traditionally preferred cases to be resolved by contested proceedings. In some jurisdictions the judicial power is confined, eg to "cases and controversies" or "matters", so that the legislature cannot confer on courts jurisdiction to issue advisory opinions.[1]

39. Where an advisory jurisdiction is validly conferred upon a court, it is, of course, the court's duty to exercise it. Nevertheless, as Lord Haldane said of the advisory jurisdiction of the Supreme Court of Canada in Attorney-General of British Columbia v Attorney-General of Canada:

> ". under this procedure, questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them and have found it advisable to limit and guard their replies."[2]

40. That passage was quoted with approval by the Privy Council in *Attorney-General of Canada v Attorney-General of Ontario*[3].

1. Muskrat v United States 219 US 346 (1911); DaimlerChrysler Corp v Cuno 547 US 332 (2006); Re Judi-ciary and Navigation Acts (1921) 29 CLR 256, 265.
2. [1914] AC 153, 162.
3. [1932] 1 DLR 58, 61 and 62.

41. It is not for this Court to question the wisdom of Article 5(B)(1)(b). As DIFCA pointed out in its submissions, the power of the Chief Justice to forward a request for interpretation to the Court of Appeal is discretionary. Moreover, the Court has the capacity to qualify the answers it gives to any question in the way indicated by the Privy Council in *Attorney-General of British Columbia v Attorney-General of Canada.*

42. Article 5(B)(1)(b) does not define the content of a "request of interpretation". There are many questions of interpretation which might be asked about a written law. But the questions of interpretation which can be put before the Court are not at large. The apparent purpose of the jurisdiction is to provide a mechanism for answering questions of interpretation which are of significance to a DIFC Body, Establishment or Licensed DIFC Establishment. They must be interpretations of Articles, not general statements about the law. The practical purpose of the jurisdiction is reflected in the arguments that the DIFC made in its application to the Chief Justice for a request for interpretation. Those arguments referred to uncertainty and lack of precedents affecting the practical administration of the Laws.

43. The Court must be satisfied, with respect to each question posed, that the question is within its jurisdiction. Secondly, it must be satisfied that the question posed serves a legitimate practical purpose in the administration of the law. Even when satisfied of those things, the Court has a discretion not to answer a question where the answer might affect a large range of factual situations and cases which might be better left for determination on a case-by-case basis.

44. The Court can, as it did in this case, give public notice of the proposed hearing of a question of interpretation so that interested parties may intervene. The Court is not required to make its decision solely on the basis of submissions put by the DIFC Body requesting an interpretation. The Court can receive diverse and perhaps conflicting views on the question. In that way the Court is given guidance that might not otherwise be provided when only the requesting authority is heard.

45. ATCO pointed to the provision of Article 5(B)(1)(b) that the Court's interpretation "shall have the same authority as the interpreted legislation". For that reason it was said that the Court should be all the more vigilant than a court acting in a purely advisory context and if necessary should even be sparing in the exercise of its exceptional jurisdiction. As to that, when an apex court interprets a law, its interpretation has legislative authority. That is because the law becomes the law as interpreted by the court. The outcome to which ATCO referred reflects the outcome of the interpretive process undertaken by many courts. There is a question, which this Court need not resolve in this case, whether it may in a subsequent case depart from an interpretation given in the exercise of its advisory jurisdiction. Final courts of appeal can revisit their earlier decisions in later cases where the earlier decisions are shown to have been wrong. Because of the value which the law places on predictability, that is a course which is rarely taken. Whether or not the authority conferred on the Court's interpretation under Article 5(B)(1)(b) imposes any constraint on its ability to revisit an interpretation in a later case, does not arise for determination here. Nevertheless, it suggests a cautious approach to the exercise of the advisory jurisdiction.

46. Interpretation of a written law means determining the meaning of the law. The written law may present more than one possible meaning. The meaning chosen by a court in interpreting the law must be one that is open on the words of the law. Interpretation does not extend to making up for the deficiencies of the law or filling gaps where it is silent. A conventional approach to interpretation involves first reading the text of the law, identifying constructional choices that may be open on that text, and considering them having regard to the context of the law and its purpose.

47. The general purpose of the request for interpretation in this case has already been set out and appears to fall within the kind of purpose for which the jurisdiction was created.

48. The particular Laws with which the Court is concerned in this case are the Trust Law and the Foundations Law, relevant provisions of which are referred to in the next sections.

THE TRUST LAW

49. The Trust Law, DIFC Law No 4 of 2018, repealed and replaced the Trust Law 2005. It is a DIFC Law made by the Ruler and applicable in the jurisdiction of the DIFC.

50. Part 1 contains general provisions (Articles 1 to 10). The application of the Law is set out in Article 3, which provides "[t]his law applies in the jurisdiction of the Dubai International Financial Centre." The scope of the Law is set out in Article 4, which provides:

"4. Scope of the Law

This Law applies to all DIFC trusts, other than trusts created under the Investment Trust Law (DIFC Law No. 5 of 2006), and to foreign trusts in respect of all acts, omission or transaction occurring in the DIFC, whenever the trust was created, provided that all questions arising from acts or omissions occurring prior to the commencement of this Law shall be determined in accordance with the Previous Law."

51. Article 7 refers to Schedule 1 to the Law which contains rules of interpretation applying to the Law. These are in fairly standard form. There is also a list of defined terms set out in that Schedule. The term "trust" is defined thus:

"is a right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title and includes a charitable trust, a purpose trust and a foreign trust."

52. The term "trust property" means "the property for the time being held in trust". The term "property" is defined as:

"any moveable or immoveable property, and includes rights and interests, whether present or future and whether vested or contingent."

53. The term "DIFC trust" is defined as "a trust whose governing law is DIFC law".

54. Article 9 sets out default and mandatory rules including:

"9. Default and mandatory rules

(1) Except as otherwise provided in the terms of the trust, this Law governs the duties and powers of a trustee, relations among trustees and the rights and interests of a beneficiary.

(2) The terms of a trust prevail over any provision of this Law, except:

(a) the requirements for creating a trust;

(b) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;

(c) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy in the DIFC, and possible to achieve;

(d) the power of the Court to modify or terminate a trust in accordance with this Law;

.

(j) the power of the Court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

(k) the jurisdiction and powers of the Court under Articles 19 and 20."

55. The application of the common law and principles of equity is set out in Article 10, which is the subject of Question 3:

"10. Common law and principles of equity

(1) The common law of trusts and principles of equity supplement this Law, except to the extent modified by this Law or any other DIFC law or by the Court.

(2) The statute law of England and Wales applicable to trusts does not, except to the extent it is replicated in this Law, apply in the DIFC."

56. Part 2 deals with the choice of governing law and the place of administration: governing law (Article 11), change of the governing law (Article 12), matters determined by governing law (Article 13), limitations in foreign law (Article 14), Heirship rights (Article 14), foreign judgments (Article 16), and place of administration (Article 17).

57. Part 3 deals with judicial and non-judicial proceedings governing the role of the Court in the administration of trusts, its jurisdiction and its powers (Articles 18 to 32).

58. Reference should be made to Articles 24 and 25 which are the subject of Question 12. They provide:

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

(1) In this Article, "person exercising a power" means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor.

(2) The Court may on the application of any person specified in Article 28(1), and in the circumstances set out in Article 24(3), declare that a transfer or other disposition of property to a trust:

(a) by a settlor acting in person (whether alone or with any other settlor); or

(b) through a person exercising a power, is voidable and:

(c) has such effect as the Court may determine; or

(d) is of no effect from the time of its exercise.

(3) The circumstances referred to in Article 24(2) are where the settlor or person exercising a power:

(a) made a mistake in relation to the transfer or other disposition of property to a trust;

(b) would not have made that transfer or other disposition but for that mistake; and

(c) the mistake is of so serious a character as to render it just for the Court to make a declaration under this Article.

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

(1) In this Article, "person exercising a power" means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor and who owes a fiduciary duty to the settlor in relation to the exercise of his or her power.

(2) The Court may on the application of any person specified in Article 28(1), and in the circumstances set out in Article 25(3), declare that a transfer or other disposition of property to a trust by a settlor (whether alone or with any other settlor) through a person exercising a power, is voidable and:

(a) has such effect as the Court may determine; or

(b) is of no effect from the time of its exercise.

(3) The circumstances referred to in Article 25(2) are where, in relation to the exercise of his or her power, the person exercising a power:

(a) failed to take into account any relevant considerations or took into account irrelevant considerations; and

(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations or that taking into account of irrelevant considerations.

(4) This Article applies whether or not the circumstances set out in Article 25(3) occurred as a result of any lack of care or other fault on the part of the person exercising a power, or on the part of any person giving advice in relation to the exercise of the power."

59. Article 28 identifies the persons who may make applications under Articles 24 and 25. They are the settlor or any of his or her personal representatives or successors in title.

60. Articles 28(3) and 28(4) provide:

"(3) Without prejudice to Article 20 and subject to Article 28(4), the Court may, consequential upon a declaration made under any of Articles 24 to 27, make such order as it thinks fit.

(4) No order may be made under Article 28(3) which would prejudice any purchaser in good faith for value of any trust property without notice of the matters which render the transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property, voidable."

61. Part 4 deals with the creation, validity and modification of a DIFC Trust (Articles 33 to 44). Articles 33 and 34 provide:

"33. Creation of a trust

(1) A trust may be created by:

(a) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(b) the transfer of property from one (1) trust to another;

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

(d) exercise of a power of appointment in favour of a trustee.

(2) A trust shall come into existence by an instrument in writing including a will or codicil.

34. Requirements for creation

(1) A trust is created if:

(a) the settlor has the capacity to create a trust;

(b) the settlor indicates an intention to create the trust;

(c) the trust either:

(i) has a definite beneficiary;

(ii) is a charitable trust, as provided for in Article 38; or

(iii) is a non-charitable purpose trust, as provided for in Article 39;

(d) the trustee holds or has vested in him or it, property for the benefit of a beneficiary or for a purpose;

(e) the trustee has duties to perform; and

(f) the same person is not the sole trustee and sole beneficiary.

(2) A beneficiary is definite if the beneficiary can be ascertained now or in the future.

(3) A trust may have at the same time a definite beneficiary and a purpose."

62. Article 34(1)(d) is the subject of Question 1.

63. Other provisions of Part 4 deal with trust purposes, duration, validity and invalidity, charitable and non-charitable purpose trusts, variation and revocation of trusts and the power of the Court to authorise dealings with trust property. It also deals with failure or lapse of interests, termination of a trustee and distribution of property.

64. Variation and revocation of trusts are dealt with in Article 40. Article 40(8)(a), which is mentioned in the context of Question 12, provides:

"(8) The Court may vary the terms of a trust:

(a) even if unambiguous, to conform the terms to the settlor's intention if it is provided by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."

65. Article 40(11), which is the subject of Question 4, provides:

"(11) The terms of a trust may provide that if at any time the trust property includes any property which by reason of the law of the United Arab Emirates or any other specified jurisdiction may be held only by a national of that country the only persons who may be a trustee, protector or beneficiary under the trust are nationals of that jurisdiction at that time, and may further provide that such provision may not be varied or revoked.

(12) If the terms of a trust contain an irrevocable provision of the type referred to in Article 40(11), notwithstanding any other provision of this Law (including Article 9(1)), that provision may not be varied or revoked."

66. Part 5 deals with the beneficiaries of a DIFC Trust (Articles 45-48). Part 6 deals with protective trusts and creditors' claims (Articles 49-50).

67. Part 7 deals with the office of trustee (Articles 51-58). Article 57, which is the subject of Question 5, deals with advisory trustees and provides, among other things:

"57. Advisory trustees

(1) In the administration of any trust property any trustee may act, to the extent provided in this Article, with an advisory trustee or advisory trustees.

.

(3) Where a trustee acts with an advisory trustee or advisory trustees, the trust property shall be vested in the first mentioned trustee (in this Article referred to as the responsible trustee), who shall have the sole management and administration of the estate and its trusts as fully and effectually as if he were the sole trustee, and in any such case:

(a) the responsible trustee may consult the advisory trustee on any matter relating to the trusts or the estate;

(b) the advisory trustee may advise the responsible trustee on any matter relating to the trusts or the estate, but shall not be trustee in respect of the trust;

(c) where any advice or direction is tendered or given by the advisory trustee, the responsible trustee may follow and act on that advice or direction without being liable for anything done or omitted to be done by him by reason of his following that advice or direction unless the trustee knew or ought to have known that the advice was unlawful, contrary to the terms of the trust or trustees' duties, or advice that no reasonable advisory trustee would have given;

(d) where the responsible trustee is of the opinion that any advice or direction of an advisory trustee conflicts with the trusts or any rule of law, or exposes him to any liability, or is otherwise objectionable, he may apply to the Court for directions in the matter, and any decision and order therein shall be final and shall bind the responsible trustee and the advisory trustee, and the Court may make such order as to costs as appears proper; but nothing in this Article makes it necessary for the responsible trustee to apply to the Court for any such directions; and

(e) where there are two (2) or more advisory trustees who are not unanimous, and tender to the responsible trustee conflicting advice or directions, the responsible trustee may apply to the Court for directions in a like manner and with like effect as provided by Article 57(3)(d).

(4) A person dealing with the responsible trustee in relation to any trust property shall not be concerned to inquire as to the concurrence or otherwise of the advisory trustees or be affected by notice of the fact that the advisory trustees have not concurred.

(5) Subject to the provisions of the instrument (if any) creating the trust and to any order made by the Court, where remuneration is payable to the trustee of any trust property, remuneration or commission may be paid to both the responsible trustee and the advisory trustee, and subject as aforesaid the amount thereof shall be as may be determined by the responsible trustee (if he is entitled to fix his own remuneration) or by the Court."

68. Part 8 deals with the duties and powers of trustees covering Chapter 1 The Duties of Trustees (Articles 59-66) and Chapter 2 General Powers of Trustees (Articles 67-72). Relevantly to the position of advisory trustees, Article 70(1) provides that a trustee shall not delegate his powers unless permitted to do so by this Law or by the terms of the trust. Article 70(2) allows for delegation of "duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances".

69. Part 9 deals with the liabilities of the trustee (Articles 73-83) and Part 10 deals with reserved and restricted powers and interests (Articles 84-85). Part 11 sets out the law applicable to a foreign trust. The Trust Law provides for the recognition of "foreign trusts" in Article 86:

"86. Enforceability of a foreign trust

(1) Subject to Article 86(2), a foreign trust shall be regarded as being governed by, and shall be interpreted in accordance with, its governing law.

(2) A foreign trust shall be unenforceable in the DIFC:

(a) to the extent that it purports:

(i) to do anything which is contrary to DIFC Law; or

(ii) to confer any right or power or impose any obligation in the exercise of which is contrary to DIFC Law; or

(b) to the extent that the Court declares that the trust is immoral or contrary to public policy in the DIFC

but otherwise shall be enforceable in accordance with its terms and its governing law."

70. The term "foreign trust" is defined in Schedule 1:

"foreign trust is a trust whose governing law is the law of a jurisdiction other than DIFC, including any trust within the meaning of the Hague Convention."

71. The Hague Convention is the Convention on the Law Applicable to Trusts and on their Recognition done at The Hague on 1 July 1985. It is a multilateral treaty developed by the Hague Conference on Private International Law on the Law Applicable to Trusts. It entered into force on 1 January 1992 and had been ratified by 12 countries as at September 2018. The Convention aims to harmonise not only the municipal law definitions of a trust but also private international law rules for resolving problems in the choice of the lex causae.

72. The Convention supports the recognition of relationships which would not satisfy the common law requirements of a valid trust. It provides in Article 2 in Chapter 1:

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

A trust has the following characteristics -

a) the assets constitute a separate fund and are not a part of the trustee's own estate;

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

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

THE FOUNDATIONS LAW

73. The Foundations Law is a DIFC Law made by the Ruler and applicable in the jurisdiction of the DIFC.

74. The scope of the Law is set out in Article 4 which provides:

"4. Scope of the Law

This Law applies to:

(a) any Foundation established in accordance with this Law;

(b) any Recognised Foreign Foundation to the extent stated in Article 62; or

(c) any Foreign Foundation which is established in another jurisdiction which has transferred its registration to the DIFC in accordance with this Law."

75. Schedule 1 to the Law sets out rules of interpretation which are again in fairly standard terms. There is also a list of defined terms set out in the Schedule. However, the term `Foundation' is explained in Article 10, which provides:

"10. Nature of a Foundation

(1) A Foundation is a body corporate with a legal personality separate from that of its Founder(s) and any other person.

(2) A Foundation has the capacity, rights and privileges of a natural person. The validity of an act done by a Foundation shall not be called into question on the ground of lack of capacity by reason of anything in its Charter or By-Laws.

(3) The property of a Foundation is not held by it upon trust for any other person.

(4) A Founder has such rights (if any) in respect of a Foundation as provided for in its By-laws.

(5) A person specified in the By-laws (other than a Founder, a member of the Council, the Registered Agent and any Guardian) has such rights (if any) in respect of a Foundation as provided for in its By-laws.

(6) Any rights a person may have in respect of a Foundation may be assigned to some other person, if its By-laws so provide.

(7) If rights are assigned under Article 10(6), the person assigning the rights must within a period of thirty (30) days provide a copy of the assignment to the Registered Agent or, if there is no Registered Agent, to the Registrar. A person who fails to comply with this requirement is liable to a fine, as set out in Schedule 3."

76. Article 11 provides for the duration of a Foundation. In particular, Article 11(1):

"A Foundation may, but need not, be established for a fixed period or for a specified limited period, provided that it may be dissolved at an earlier time in accordance with the provisions of this Law."

77. Article 11(2) requires that if a Foundation is to be wound up and dissolved upon the happening of some event or the expiry of a fixed period of time, the details must be specified in its By-laws. So too must the details of any right that a person has to wind up or dissolve a Foundation.

78. Article 12 sets out the objects and categories of Foundations and is the subject of Question 2. It provides:

"12. Objects and categories of Foundations

(1) A Foundation's objects:

(a) must be certain, reasonable and possible; and

(b) must not be unlawful or contrary to public policy in the DIFC.



(2) A Foundation may be established for:

(a) objects which are exclusively charitable; or

(b) one or more of the following:

(i) objects which are not exclusively charitable; or

(ii) objects to benefit persons by name, category or class.

(3) It is sufficient, for purposes of Article 12(2)(b)(i), for the Charter to provide that a Foundation is to hold property selected in accordance with its By-laws.

(4) It is sufficient, for purposes of Article 12(2)(b)(ii), for the Charter to provide that a person or class of persons to receive benefits may be determined in accordance with the By-laws.

(5) A Foundation may not carry out any commercial activities, except those necessary for, and ancillary or incidental to, its objects.

(6) The objects of a Foundation may only be amended:

(a) where there is an express power to do so in the Charter; or

(b) by order of the Court."

79. Article 12(7) provides that absent an express power to amend objects in the Foundation's Charter, an object may be amended by order of the Court on application made by or on behalf of a Founder, the Foundation or a Guardian. That is subject to Articles 12(1) and 12(2). The circumstances in which such an application may be made are set out in Article 12(7)(a) to (f).

80. An application to the Court pursuant to Article 12(7) may be brought by DIFCA or the Council of the Foundation or any other person with sufficient interest upon notice to the Founders (if still alive), the Guardian (if any), the Council and (if applicable) any other person with sufficient interest.

81. Under Article 13(1), and subject to Article 13(2), all matters arising in regard to a Foundation or in regard to disposition of property to or by a Foundation are to be determined in accordance with the laws of the DIFC. They are to be determined without reference to the laws of any other jurisdictions with which the Foundation or its disposition may be connected. Article 13(2) provides, among other things, that, subject to Articles 14, 15 and 16, Article 13(1) shall:

> "(a) not validate any disposition of property which is neither owned by a Founder or Contributor, nor is the subject of a power vested in a Founder or Contributor;
>
> (b) not validate any trust or disposition of immovable property situated in a jurisdiction other than DIFC in which such trust or disposition is invalid according to the laws of such jurisdiction;
>
> .
>
> (d) not affect the recognition of Foreign Laws in determining whether a Founder or Contributor is or was the owner of any property transferred to the Foundation or is or was the holder of a power to dispose of such property;
>
> (e) not affect the recognition of the laws of its place of incorporation in relation to the capacity of a corporation; and
>
> (f) not affect the recognition of Foreign Laws prescribing generally, without reference to the existence or the establishment of the Foundation, the formalities for the disposition of property within the jurisdiction of those Foreign Laws."

82. Article 14 limits the applications of Foreign Laws to invalidate the disposition of property to a Foundation which is valid under the laws of the DIFC. Articles 14(2) to 14(4) deal with the non-application of foreign statutes to avoid transfers of property to a Foundation where the Founder or Contributor is bankrupt or the Founder or Contributor is liquidated or there are claims made against the Founder or Contributor by any creditor. Under Article 14(3) the Court may declare a transfer of property void to the extent of a creditor's claim.

83. Part 3 of the Foundations Law provides for the establishment of the DIFC Foundations, for their creation under Article 17, their Constitution under Article 18, their Charter under Article 19, their By-laws under Article 20, a Default Recipient for the property of a Foundation under Article 21 and the Foundation Council under Article 22. Article 23 provides for a Foundation which has a charitable object, or a specified non-charitable object, to have a Guardian in relation to that object. The Foundation may have a Registered Agent under Article 24. Article 25 deals with the liability of Council Members and others and Article 26 with the reservation to the Founder of powers to amend, revoke, vary or terminate the Foundation.

84. Article 19(10) is the subject of Question 4. The relevant parts of Article 19 provide:

> **"19. Charter**
>
> (1) A Foundation must have a Charter which shall be in the English language.
>
> .
>
> (10) The Charter may provide that if at any time the property of the Foundation includes any property which by reason of the law of the United Arab Emirates or any other specified jurisdiction may be held only by a national of that country the only persons who may be officers of the Foundation or Qualified Recipients under the Foundation are nationals of that jurisdiction at that time, and may further provide that such provision may not be amended or revoked.
>
> (11) If the Charter contains an irrevocable provision of the type referred to in Article 19(10) then notwithstanding any other provision of this Law, that provision may not be amended or revoked."

85. It will be seen that Article 19(10) and Article 19(11) mirror in their form Articles 40(11) and 40(12) of the Trust Law.

86. Part 4 deals with the property of a Foundation and it is appropriate here to set out the provisions of Articles 27 to 29.

> **"27. Capital endowment**
>
> (1) The initial capital of a Foundation is the capital endowed upon the Foundation in order that the Foundation may be established.
>
> (2) The initial capital may comprise any property, and may be provided by way of gift or for valuable consideration.
>
> (3) Following the endowment of the initial capital, further property may be endowed upon the Foundation by any person if the Charter so permits.
>
> (4) A Founder does not have any interest in a Foundation by virtue only of endowing it with its initial capital or further property or otherwise by virtue of being a Founder thereof.
>
> (5) No person has any interest in a Foundation, or is a Founder of a Foundation, by virtue only of endowing it with further property in accordance with Article 27(3).
>
> **28. Financial Resources**
>
> The property of a Foundation shall consist of:
>
> (a) the initial capital of the Foundation;

(b) any further amount endowed upon the Foundation and accepted by its Council;

(c) the proceeds of investment of the capital of the Foundation; and

(d) any other property acquired by its Council in accordance with the Law and Regulations.

29. Qualified Recipients

(1) A Foundation's By-laws may provide for the distribution of property of the Foundation to Qualified Recipients.

(2) A Qualified Recipient shall be one or more of the following:

(a) a person holding an entitlement specified in, or pursuant to, the By-laws to a fixed share of the property and income of the Foundation when the Foundation distributes it;

(b) a person holding a depository receipt;

(c) a person who is a prospective recipient of a fixed, or discretionary, share of the property of the Foundation upon the happening of a future event specified in the By-Laws;

(d) a person who is nominated pursuant to the By-laws to be a recipient of a fixed, or discretionary, share of the property and income of the Foundation at a time following the establishment of the Foundation;

(e) a charity; and

(f) a default recipient.

(3) A Qualified Recipient has no right to or interest in the property of the Foundation other than a right to payment of amounts which arises by virtue of the terms of the By-laws or pursuant to the By-laws, or a contract with the Foundation, including a contract in relation to a depository receipt.

(4) If:

(a) a Qualified Recipient becomes entitled to receive an amount from a Foundation in accordance with the Charter or the By-laws; and

(b) the amount is not provided,

the Qualified Recipient, or a person acting on behalf of the Qualified Recipient, may seek an order of the Court ordering the Foundation to pay the amount.

(5) Except as provided by Article 29(6), a Qualified Recipient must seek an order pursuant to Article 29(4) within the period of three (3) years from the time when the Qualified Recipient became aware of the entitlement to receive the amount.

(6) If the Qualified Recipient has not attained the age of 18 years when he or she became aware of his or her entitlement to receive the amount, the period referred to in Article 29(5) begins to run on the day on which the Qualified Recipient attains that age."

87. In the Schedule to the Foundations Law the term "property" is defined:

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

(a) any property (including money, investments and other property) contributed to the Foundation;

(b) any capitalised income added to the property so contributed; and

(c) the money, investments and property from time to time representing those assets and capitalised income."

88. Part 5 deals with the administration of DIFC Foundations, Part 6 with the office of Registrar and Part 7 with judicial and non-judicial proceedings including, under Article 39, the role of the Court in the administration of Foundations. Articles 40 to 50 provide for powers of the Court in relation to Foundations and Articles 51 and 52 with the arbitration of Foundation disputes.

89. Part 8 concerns the continuation and recognition of the Foreign Foundations. The term `Foreign Foundation' is defined in Schedule 1 as follows:

"Foreign Foundation an entity that:

(a) is organised in a jurisdiction other than the DIFC; and

(b) has characteristics that would, if it were in the DIFC, enable it to be established as a Foundation under this Law,

but does not include a Foreign Foundation which has become a Foundation under Part 8 of this Law."

90. Article 54 provides for the continuation of Foreign Foundations in the DIFC and Article 55 for the Charter of Continuance of Foreign Foundations. Article 56 authorises the Registrar to issue a Certificate of Continuance in respect of a Foreign Foundation which shall also serve as

the Certificate of Establishment of the Foreign Foundation as a Foundation in the DIFC. It provides:

(1) Upon receipt of the Charter of Continuance and, if applicable, the proposed By-laws, the Registrar shall if he is satisfied that Articles 54 and 55 have been complied with, issue a certificate of continuance in respect of the Foreign Foundation which shall also serve as the certificate of establishment of the Foreign Foundation as a Foundation in the DIFC.

(2) On the date shown in the certificate of continuance:

(a) the Foreign Foundation shall become a Foundation in the DIFC to which this Law shall apply as if it had been established under this Law; and

(b) the Charter of Continuance shall become the Charter thereof."

The term "Charter of Continuance" is defined in Schedule 1 as:

"the charter of continuance of a Foreign Foundation or a company required under Article 55 or Article 64, whichever is applicable."

91. Article 57 provides, inter alia:

"57. Preservation of a Foundation

When a Foreign Foundation is continued as a Foundation in the DIFC under this Law:

(a) the property of the Foreign Foundation becomes the property of the Foundation;

(b) the Foundation continues to be liable for the obligations of the Foreign Foundation;

(c) an existing cause of action, claim or liability to prosecution is unaffected;

(d) a civil, criminal or administrative action or proceeding pending by or against the Foreign Foundation may be continued by or against the Foundation; and

(e) a conviction against, or ruling, order or judgment against or in favour of, the Foreign Foundation may be enforced against the Foundation."

92. Article 58 provides for cancellation of registration of a Foreign Foundation. Under Article 59, and subject to Article 60, a Foundation may, subject to the protection of the Foundation's creditors apply to be established under the laws of another jurisdiction. Article 60 specifies conditions applicable to a Foundation leaving the DIFC.

93. Article 59, which is the subject of Question 7, provides:

"59. Foundation leaving the DIFC

Subject to Article 60, a Foundation may:

(a) if it is authorised by unanimous resolution of the members of its Council; and

(b) if it is established to the satisfaction of the Registrar that the Foundation's proposed continuance in another jurisdiction will not adversely affect the Foundation's creditors,

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

94. Article 62, which is also the subject of one of the questions in this Reference, provides:

"62. Recognised Foreign Foundations

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

(2) An application made under Article 62(1) shall be in such form as may be prescribed by the Registrar and accompanied by the prescribed fee.

(3) A Recognised Foreign Foundation must appoint a Registered Agent, have a registered office in the DIFC and comply with the requirements of this Law and where applicable, Part 3 of the Operating Law, in respect to the conduct of its business in the DIFC.

(4) A Recognised Foreign Foundation may not carry out any commercial activities, except those necessary for, and ancillary or incidental to, its objects.

(5) Article 24 and Part 5 of this Law and Articles 133 to 139 of the Companies Law shall apply with all necessary modifications to a Recognised Foreign Foundation."

95. Articles 63 to 66 deal with the continuance under the Foundations Law of private companies incorporated under the Companies Law.

96. Part 9 deals with dissolution of Foundations and the distribution of their property. Part 10 deals with fines and fees.

GENERAL OBSERVATIONS ABOUT THE TRUST LAW AND THE FOUNDATIONS LAW

97. In light of that outline, it is appropriate to refer to some general observations offered by DIFCA about the Trust Law and the Foundations Law. The observations are not controversial and may be accepted.

98. The DIFC Trust Law 2018 replaced the DIFC Trust Law 2005. It covers the whole topic with which it seeks to deal unlike statute laws relating to trusts which are based on the English model. Such laws deal with part of the topic but leave much to the common law and its judicial elucidation and development on a case-by-case basis. Specific provision is made in the Trust Law for matters that are left in many common law jurisdictions to be regulated by the general law of trusts. The majority of the basic provisions of the Trust Law are drawn from the Uniform Trust Code (**UTC**) of the United States which was created by a National Conference of Commissioners on Uniform State Laws project. It is not a legislative instrument in itself but can be adopted by State legislatures. The Code is also strongly influenced by the Restatement of Trusts (2nd and 3rd) of the American Law Institute and the 1986 California Trust Statute, which is Division 9 of the California Probate Code. The UTC has been adopted by approximately one third of the States of the USA, although not always in the same terms as the Model Code. DIFCA observed that there is and will continue to be in the future a body of US State law decisions which may be relevant to the interpretation and application of the Trust Law.

99. DIFCA described the Law as an unusual hybrid formed in a common law jurisdiction carved out of a Shari'a law, Emirate and Federal Union. In matters of personal status such as succession, the Shari'a remains paramount while the Trust Law itself is largely based on an American model to be applied by a judiciary in the common law tradition developed in England and British Commonwealth jurisdictions. DIFCA submitted that the terms of Article 9 have the effect that Articles in the Trust Law comprise a set of "default" rules governing trusts which are subject to the Trust Law "except as otherwise provided in the terms of the trust". So it was submitted the Trust Law governs the duties and powers of and relations among trustees and the "rights and interests of a beneficiary" which term is widely defined in Schedule 1 of the Trust Law.

100. DIFCA discussed the scope of the trustee's obligations and the extent to which they can be varied by the terms of a trust[4]. It quoted Lord Justice Millett's discussion of the nature of the trustee's obligations in Armitage v Nurse in which his Lordship referred to ".an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts."[5]

4. See Armitage v Nurse [1998] Ch 241.
5. Armitage v Nurse [1998] Ch 241, 253.

101. The Trust Law 2005 was the first comprehensive trust legislation in the region and was followed by the Qatar Financial Centre Trust Regulations 2007. The Abu Dhabi Global Market (**ADGM**) has adopted the Law of Trusts applicable in England with modifications as to perpetuities and conflicts of law corresponding to those provisions of the DIFC Trust Law. Bahrain has also enacted a comprehensive Trust Law 2016.

102. The concept of the Foundation has traditionally been associated with Liechtenstein since 1926. It is a form of legal entity known in most continental European jurisdictions though in most cases limited to charitable purposes. In March 2018, the DIFC followed the Qatar Financial Centre (**QFC**) and the ADGM in enacting legislation for the establishment of Foundations, although their models are not identical. In 2020, the Ras Al Khaimah International Commercial Centre (**RAKICC**) also enacted Foundations Regulations which were largely based on the DIFC Foundations Law. The DIFC legislation and its RAKICC equivalent also drew upon European sources. In terms of governance arrangements there is little to distinguish between the alternative models. The role of the courts under the DIFC Foundations Law is more extensively defined in order to facilitate particular transactions such as mergers and divisions.

103. DIFCA drew particular attention to the following features of the Foundations Law which have no counterparts in either the QFC or the ADGM:

(a) the power of the courts to set aside transactions for mistake;

(b) the capacity to compulsorily settle intra-Foundation disputes by arbitration;

(c) redomiciliation of Foundations, available also in the ADGM but not in the QFC;

(d) recognition of Foreign Foundations;

(e) conversion of DIFC private companies to Foundations available to any company whose domestic law permits its redomiciliation to the DIFC as a preliminary step permitted by the DIFC Companies Law; and

(f) provision for depositary certificates modelled on the Netherlands STAK (Stichting Administratiekantoor).

104. STAK structures are generally set up in order to separate control over certain assets from the financial interest attributable to those assets. That is done by transferring assets to the STAK in return for which the STAK issues depositary receipts in respect of those assets to the transferor. The STAK then becomes the legal owner of the assets but under a contractual relationship it will hold those assets for the risk and account of the holders of the depositary receipts rather than for its own risk and account. The depositary receipt holders will have the economic benefit of the assets through the depository receipts while, from a legal perspective, the STAK (as legal owner) will have full control over the assets.

105. This separation of control and financial interests is used for purposes including private wealth planning, employer participation and privacy protection.

The DIFC Operating Regulations

106. DIFCA drew attention to the provisions of the DIFC Operating Regulations which apply to all entities established under DIFC Law and thus, it was said, to both trusts and Foundations established under DIFC Law. Regulation 8 empowers the DIFC Registrar of Companies, upon application, to place a trust on a special register established for that purpose, and to make statements about its status and the character, nature and effect of DIFC Laws for the purposes of the laws of other jurisdictions.

107. DIFCA in its submission described this provision as unique to the DIFC and answering a significant need for DIFC entities and trusts which seek to acquire property or engage in transactions outside the DIFC in jurisdictions which require certainty as to such matters. It may be noted however, that the reference to a trust as an "entity" is strictly not correct having regard to its definition under the Trust Law which is in terms of a "right". The understanding of a trust at common law is of a relationship under which a beneficiary has rights in relation to the property held by the trustee and the trustee has obligations to the beneficiary.

The concept of the waqf

108. The Islamic analogue of the common law trust is the waqf, a concept explained by DIFCA in its submission to this Court.

109. Waqf existed for over 500 years before the first identified English trust and, according to some commentators, may have provided a model for it. Its contemporary relevance is demonstrated by the existence of Accounting Standards promulgated by The Accounting and Auditing Organisation for Islamic Financial Institutions which was established in Bahrain in 1991. The Standards provide a summary of the key features of a waqf.

110. A useful definition of the *waqf* appears in *Family Business Continuity in the Middle East and Muslim World*[6] by Fadi Hammadeh who filed a submission in support of the Request for Interpretation on behalf of the Family Business Council - Gulf. The author describes the waqf, which translates as "endowment", as a theoretical concept in Islamic Shari'a which involves the privatisation of the ownership of an asset and the socialisation of its benefits. It stems from Sunnah representing the Prophet of Islam's wisdom as quoted by contemporaneous followers. Sunnah is Islam's second major source of legislation after the words of Allah delivered by the Prophet of Islam and contained in the Holy Book, Quran, which is Islam's primary source of legislation.

111. In a Hadith, a saying of the Prophet of Islam, it was confirmed that Muslims would continue to be rewarded for their good deeds on earth even after death. The Prophet is said to have advised one of his wealthy followers to withhold the title of his land and donate its benefits. That advice encouraged Muslims across the globe to dedicate their assets as charitable waqfs to benefit others. The first waqf in Islam was the endowment of the original mosque in Medina[7].

6. Fadi Hammadeh, Family Business Continuity in the Middle East & Muslim World: Betting Against the Odds (1st ed, BookBaby, 2018).
7. Ibid 148.

112. Mr Hammadeh described three types of waqf. The oldest and most common form is the charity waqf. Assets under such a waqf may include mosques, shops annexed to mosques, commercial or residential buildings, schools, health clinics, farms, orphanages, drinkable water springs, hospitals catering for the poor and needy or any other worthy cause that may benefit the public. Modern age charitable waqfs in the Middle East include Sheikh Zayed Waqf (in the United Arab Emirates) and Sulaiamn Abdulaziz Al Rajihi Waqf (in KSA). There is a World Waqf Foundation established by the Islamic Development Bank in 2001.

113. A second type of waqf, which Mr Hammadeh describes as Waqf Mushtraq includes two categories of beneficiaries, the family of the settlor and the public at large. The object of this hybrid waqf is more expansive than that of the charitable waqf. Mr Hammadeh observes that, for a family business, the hybrid waqf can be most useful if the settlor desires to ensure the continuity of his family business or assets while at the same time leaving part of the proceeds of his business to charity.

114. A third form of waqf, which is described as an offshoot of the charity waqf, is the family waqf which is guided by the principles of continued good deeds and the notion that relatives are worthier of charity than outsiders. The establishment of a family waqf is said to be one way for its Founder to ensure that his offspring benefit from the fruits of his assets while simultaneously allowing him to protect those assets from potential unscrupulous behaviour.

115. DIFCA in its submissions identified some of the similarities between waqf structures and trusts and Foundations. Those similarities may be summarised briefly as follows:

(a) Parties - the founder of a waqf, referred to as the waqif, typically appoints himself or another person to be the first administrator.

(b) The waqf may have a wide degree of discretion when determining the succession of beneficiaries. Nevertheless under some systems of law a waqf is not permitted to exclude their own son or daughter from having a benefit in the estate.

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

116. A Mutawalli is the manager of a waqf and deals with the administration of waqf property. He or she is appointed by the waqif. The first duty of the Mutawalli is to preserve the waqf property. There is also a duty to maximise the revenue for the benefit of the beneficiaries.

117. There are statutory provisions governing waqfs in the Emirates of Sharjah and Dubai and at the UAE National level. They provide a legal framework for what is generically called Awqaf, translated in English versions of those laws as "endowment". The Dubai Law is Endowments Law 2017.

118. DIFCA's submissions also referred to the interaction between Awqaf and the common law. It submitted that to the extent that the terms of a trust provide a means of distribution of assets and for their administration, there is no reason why Shari'a obligations could not be complied with even though that compliance is not a pre-requisite for a valid trust. That submission is relevant to the question of trustee advisors in Question 5.

119. DIFCA submitted that Islamic jurisprudence typically regarded the waqf as having legal personality, an approach reflected in Article 92(d) of the United Arab Emirates Civil Code, which provides that waqf are juridical persons. Similar provision is made at UAE National level[8] and in Dubai[9] and in Sharjah[10]. DIFCA submitted that a waqf which did not have juridical personality in its home jurisdiction would fall within Article 2 of the Hague Convention. A waqf with legal personality in its home jurisdiction would not because in such a case there would not be a trustee holding property which comprises a separate fund to the trustee's own property. Such a waqf would be recognised in the DIFC, if at all, as a Foundation. Against that general background it is now necessary to turn to the questions put by DIFCA.

8. Endowments Law 2019 Article 10.1.
9. Endowments Law 2017 Article 16.B(1).
10. Endowments Law 2011 Article 16.

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

120. The purpose of Article 34 is to define the conditions for the creation of a trust. One of those conditions is that set out in Article 34(1)(d): "[t]he trustee holds or has vested in him or it, property for the benefit of a beneficiary or for a purpose." This means that a trust cannot subsist unless the trustee has title to the property or otherwise holds the property. Article 34(1)(d) says nothing about where the property is located. On its face it imposes no restriction on the location of the property. Nor is there any restriction by reference to whether the jurisdiction in which the property is located does or does not recognise trusts.

121. The definition of the term "property" in Schedule 1 is: "any movable or immovable property, and includes rights and interests, whether present or future and whether vested or contingent." That definition imposes no limitation by reference to whether the property is to be found in a jurisdiction which recognises trusts. Nor does the definition of the term "trust property" which means "the property for the time being held in trust".

122. The definition of "trust" imposes no such restriction. It is defined as:

> "a right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title and includes a charitable trust, a purpose trust and a foreign trust."

123. The inclusion of "a foreign trust" in the definition of "trust" does not impinge on the question whether trust property is limited to property located in jurisdictions which recognise trusts. It means that a foreign trust will be treated as a "trust" for the purposes of the Trust Law. Article 4 applies the Law to foreign trusts "in respect of all acts, omissions or transactions occurring in the DIFC".

124. Importantly, the common law of trusts and principles of equity supplement the Trust Law by virtue of Article 10 except to the extent modified by the Law or by any other DIFC Law or by the Court. Under the common law the trustee is the legal owner of the trust property and is under a personal obligation to deal with that trust property for the benefit of the beneficiaries. That obligation must be annexed to the trust property.

125. The 8th edition of Jacob's Law of Trusts in Australia[11] describes the essential elements of a trust:

> (a) One or more trustees who together hold a legal or equitable interest in the trust property.
>
> (b) There must be property capable of being held on trust.
>
> (c) There must be a beneficiary. While the trustee may be one of the beneficiaries, he or she cannot be the sole beneficiary.
>
> (d) The trustee must be under a personal obligation to deal with the trust property for the benefit of the beneficiaries. It is an obligation which gives rise to correlative rights in the beneficiaries. The obligation must be annexed to the trust property. This is the equitable obligation proper. It arises from the very nature of a trust and from the origin of the trust in the separation of the common law and equitable jurisdiction in English legal history. The obligation attaches to the trustee in personam, but it also is annexed to the property, so that the equitable interest resembles a right in rem.

12. JD Heydon and MJ Leeming, Jacob's Law of Trusts in Australia (8th ed, LexisNexis Butterworths, 2016).

126. The preceding passage which appeared in the 3rd edition of Jacobs was approved in DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties[12] and in Secure Parking (WA) Pty Ltd v Wilson [13].

12. (1980) 1 NSWLR 510, 518-19.
13. (2008) 38 WAR 350, [99].

127. It may be that trust property is located in a foreign jurisdiction which does not recognise the obligations attaching to the property. That does not mean that the personal obligation of the trustee with respect to that property will not be given effect within the DIFC. The beneficiary's interest may not be recognised in the foreign jurisdiction, but the trustee amenable to DIFC Law may be compelled to deal with the foreign property in accordance with his personal obligations as trustee. That is consistent with the definition of "trust" in the Trust Law of the DIFC as a right enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title. The fact that the beneficiaries' rights against the trustee cannot be enforced in a foreign jurisdiction does not prevent them from being enforced in the DIFC.

128. In coming to its conclusion the Court acknowledges, as is acknowledged in DIFCA's submissions and those put by ATCO that foreign law and the decisions of foreign courts in relation to trust property within their jurisdiction may impact upon the application of the DIFC Trust Law in relation to such property and the enforcement of court orders in relation to such property. That is not a matter which requires exploration in the answer to Question 1. Question 1 is simply concerned with whether, for the purposes of Article 34(1)(d) of the Trust Law, trust property can include property located in a foreign jurisdiction which does not recognise trusts.

129. Answer: The answer to Question 1 is "Yes".

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

130. DIFCA submitted that the nature of the "property of a Foundation" is dealt with in Articles 27 and 28 and that not all property held by a Foundation is "property of a Foundation". That was said to be clear from the definition of "property" in the Schedule. The reference in Article 10(3) to "property of a Foundation" did not therefore cover amounts given to the Foundation by way of settlement which the Foundation may hold upon trust. Rather, it was said, Article 10(3) operates as part of Article 10 and makes clear that a Foundation is not, of its nature, a trust. It does not prohibit a Foundation, which by Article 10(2) has all the powers of a natural person, from acting as a trustee. It was said to be important that a DIFC Foundation clearly provide in its Charter that assets transferred to it to hold upon trust are not "property of the Foundation" and therefore not within the operation of Article 10(3) of the DIFC Foundations Law. The Charter or By-laws must provide that such amounts are to be dealt with in accordance with the terms of any trust upon which they are held. On that basis, DIFCA's proposed answer to the question was "yes".

131. ATCO agreed with that answer but only in relation to purpose trusts. ATCO based their submissions on the premise that Article 10(3) of the Foundations Law prohibits Foundations from holding property in trust for any other person. ATCO's elaboration of its argument against a general affirmative answer to Question 2 continued on that premise.

132. As to DIFCA's submission that Article 10(3) was intended to make it clear that a Foundation is not of its nature a trust, ATCO acknowledged that that was an important question in practice particularly given that the characterisation or treatment of a DIFC Foundation as a trust in other jurisdictions could have significant and unwanted tax consequences.

133. ATCO submitted that it was not open to the Court to interpret Article 10(3) in a manner that would allow a Foundation to hold property in trust for itself as beneficiary as to do so would inevitably bring it into conflict with the prohibition on holding property on trust for any other person. So, if and to the extent that the provision did not reflect the original statutory interpretation, it ought to be amended or replaced by legislation.

134. DIFCA, in its submissions in reply, argued that the need for Article 10(3) arose from disputes in other jurisdictions particularly in relation to the tax treatment of Foundations. Article 10(2) made it clear that although the property of a Foundation was not held in trust for anyone, the Foundation had the powers of a natural person (which, as the ATCO submission accepted, included the power to be a trustee, at least of a purpose trust). DIFCA accepted the ATCO submission that a Foundation could not receive and hold gifts as trustee of trust property for its own benefit. In such case the legal and beneficial interests would merge.

135. In the opinion of the Court, Article 10(3) is declaratory. It is not a prohibition. Property held on trust is not the property of a Foundation within the meaning of Article 28 because the Foundation does not have beneficial ownership of such property. The obligations of the Foundation with respect to property of the Foundation derive from the Law, by-laws and contract and relate to Qualified Recipients. Qualified Recipients are not beneficiaries. They have no rights or interests in the property. They have a right to payment of amounts which arise by virtue of the terms of the By-laws or pursuant to the By-laws or a contract with the Foundation, including a contract in relation to a depositary receipt[14].

14. See Foundations Law Article 29.

136. Answer: The answer to Question 2 is "Yes".

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

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

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

137. DIFCA submitted that, to the extent that the common law was introduced into those areas in which the DIFC had legislative competence, that introduction was effected by DIFC law. DIFCA relied upon Article 8(2)(e) of the Law on the Application of Civil and Commercial Laws in the DIFC, which is DIFC Law No 3 of 2004. It is a Law made by the Ruler of Dubai (Article 2) and applies in the jurisdiction of the Dubai International Financial Centre (Article 3). Article 8 provides:

"Application

(1) Since by virtue of Article 3 of Federal Law No 8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).

(2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:

(a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,

(b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,

(c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,

(d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,

(e) the laws of England and Wales."

138. Article 9 provides:

"Submission to jurisdiction

(1) The Court shall determine any matter before it in accordance with the laws that may apply by virtue of Article 8."

139. DIFCA correctly pointed out that the establishment of the DIFC meant that common law principles were implanted for the first time into the jurisprudence of the UAE. An analogy was drawn with the preservation (as opposed to implantation) of the common law in Hong Kong after it became a special autonomous region of the Peoples' Republic of China[15]. The area of equity was said to be the paradigm case in which the decision of English courts would continue to be of assistance to DIFC courts, especially where they reflected fundamental principles which have stood for many years in the common law world generally. In those cases where provisions of the Trust Law are similar to provisions in jurisdictions outside England and have no English counterparts, the decisions of the courts of those jurisdictions would provide useful assistance to the DIFC courts.

15. A Solicitor v Law Society of Hong Kong (2008) 11 HKCFAR 117.

140. DIFCA's proposed answer to Question 3(i) was "yes". Its proposed answer to Question 3(ii) was:

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

141. Article 8(2)(e) of the Law on the Application of Civil and Commercial Laws in the DIFC must be read in light of Article 10 of the Trust Law which itself is a law of the DIFC and thus takes priority under Article 8(2)(a) over the direct application of the laws of England and Wales under Article 8(2)(e). Article 10 applies the common law of trust and principles of equity as a supplement to the Trust Law "except to the extent modified by this Law or any other DIFC law or by the Court". The Court itself therefore has the authority to develop the common law of trusts and principles of equity in the same way that other common law courts might do on a case-by-case basis. It is not confined to the application of the common law of trusts and principles of equity as understood under the law of England and Wales.

142. The common law of trusts and principles of equity are therefore as determined by the DIFC Courts from time to time. The common law of trusts and principles of equity of England and Wales do not apply directly to the DIFC but may be taken into account and thereby applied by the Courts. Strictly speaking, the answer to both Questions 3(i) and 3(ii) is "No". A more useful answer is set out below.

143. Answer to Question 3 - the common law of trusts and principles of equity referred to in Article 10 of the Trust Law is the common law of trusts and principles of equity as determined by the Courts of the DIFC from time to time drawing upon the common law of England and Wales and other common law jurisdictions as they see fit.

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

144. In its submissions on Question 4, DIFCA referred to Articles 40(11) and 40(12) of the Trust Law and Articles 19(10) and 19(11) of the Foundations Law, which have been set out earlier. DIFCA submitted that those provisions are expressed to be paramount over the other provisions of the Law. They make any form of variation impermissible while ownership of the Trust or Foundation property is subject to such restrictions.

145. DIFCA proposed that the answer to Question 4 should be "No". ATCO in its submissions agreed with that proposed answer. They agreed that the terms of Articles 40(12) of the Trust Law and Article 19(11) of the Foundations Law absolutely constrain the trustees or the Foundation as appropriate from varying an irrecoverable trust or Charter provision of the type contemplated by those provisions. Such irrevocable provisions, they submitted, are protected by statute from being varied/amended or revoked including in purported reliance on any other provisions of the Trust Law or the Foundations Law.

146. They observed that in practical terms where non-UAE Nationals newly become beneficiaries within the class of beneficiaries of the trust by virtue of inheritance or otherwise, the relevant trust units would be cashed out and redeemed. In all cases, if the beneficiaries of the trust did not claim that non-DIFC law applied (given that they are beneficiaries under DIFC Law, they would be unlikely to do) then the point would become a minor one.

147. The general application of these provisions is clear. There is, however, a variety of ways in which a non-national might be able to assert an interest in the assets of a trust by reason of another DIFC Law or the common law without necessarily having to invoke a variation of the provision in order to assert that interest. For example, there might be dealings by a trustee or a Foundation in contract or otherwise which could give rise to an enforceable right or interest in the property of the trust. The trustee or a Foundation might engage in a dealing which gave rise to equitable obligations to a third party. The question of interpretation which could arise in that context would be whether such a right or interest is precluded where the claimant is not a national. A distinction might be drawn between a right or interest in the trust property which is not itself a right or interest subject to the trust resulting, as it does, from dealings with the trustee on the one hand, and rights or interests which are subject to the trust and perhaps caught by the constraints of Article 40(11) of the Trust Law and Article 19(10) of the Foundations Law. There are too many circumstances in which a person may assert a right or interest in trust property or Foundation property to make it appropriate to provide a global answer to the question as formulated.

148. Answer: The Court declines to answer Question 4.

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

149. DIFCA submitted that a Muslim settlor might wish to have issues of administration (including Shari'a compliant investment strategies) and distribution among family members upon the settlor's passing settled in accordance with Shari'a principles. This may raise issues for trustees who have no personal knowledge of Shari'a obligations. If, as is usually the case for trustees they are required to act personally, reliance upon outside advice could be challenged as a delegation of the trustee's duty.

150. In the DIFC Courts the nature of Shari'a requirements can be, where necessary, established by expert evidence. In the absence of a provision such as Article 57, a trustee who, under the terms of the Trust Deed, has to comply with Shari'a requirements, would be at risk of liability for making an incorrect decision or delegating responsibility. DIFCA submitted that the appointment of appropriately qualified advisors serves a particularly useful purpose.

151. ATCO agreed that the assessment and advice of an appointed advisor expert in Shari'a law as to whether any act or investment was or was not Shari'a compliant, is advice that a responsible trustee could rely upon within the protections and mechanisms provided by Article 57. As they pointed out however, whatever the advisory trustee might advise, the responsible trustee has an overarching duty to give effect to the trust. The principles of Shari'a as advised are no different from any other consideration in this regard. Subject only to matters falling within Article 9(2) of the Law, the terms of the trust would prevail over those principles.

152. The position is clear. If the trustee acts within the framework of the Trust Law and the common law he may shape his discretion by reference to the advice of an advisory trustee including a Shari'a advisor. He cannot act on advice which would take him outside the framework of the Trust Law, common law and principles of equity which are applicable. The question can be treated as an interpretive question although there may be room for debate about that.

153. Answer to Question 5 - Yes, but the trustee is not bound to act or rely upon such advice and must at all times act in accordance with the Trust Law, the common law and principles of equity applicable to the trust.

Question 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 the Foundations Law as applicable:

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

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

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

154. DIFCA in its submissions referred to Article 17 of the Law Relating to the Application of DIFC Laws (Amended and Restated), DIFC Law No 10 of 2005, which provides:

"17 Recognition of trusts

(1) A trust which is:

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

(b) created by the law of another jurisdiction shall be recognised as a trust.

(2) The existence, validity and interpretation of a trust constituted in accordance with Article 17(1)(a) shall be determined by the law under which the trust is constituted.

(3) For the purposes of this Article, the law under which a trust is constituted shall be:

(a) in the case of a trust recognised under Article 17(1)(a) the law set out in the instrument constituting the trust; and

(b) in the case of a trust recognised under Article 17(1)(b) the law of the jurisdiction by whose law the trust is created."

155. DIFCA then referred to Article 86 of the Trust Law providing for the recognition of foreign trusts and the definition of "foreign trust".

156. DIFCA submitted that the answer to Question 6 should be:

"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 provided that in each case the statutory criteria are met and in cases (b) and (c) so decided in an application made under Articles 62 and 56 of the Foundations Law."

157. ATCO agreed with the proposed answer as an answer to Question 6(a) but submitted that the Court should decline to answer Questions 6(b) and 6(c).

158. ATCO submitted that the Court should be hesitant to lay down a rule in the abstract on the general compliance of structures governed by Islamic jurisprudence with DIFC Law. Where the requirements of Shari'a law are relevant to a matter before the DIFC Courts, these are required to be established as a matter of expert evidence as reflected in Registrar's Direction No 3 of 2017. The Practice Direction anticipates that the expert evidence on Shari'a law applicable to the matters in issue, could be adduced in every concrete case and even uncontested cases under and in accordance with the Direction. To qualify as a DIFC Foundation a waqf endowment structure would have to be overtly established and deliberately constituted as a DIFC Foundation under the Foundations Law. If a waqf was established as a legal entity elsewhere then depending on the case it might seek to be a Recognised Foreign Foundation or might seek a Certificate of Continuance as a DIFC Foundation under the Licensing and Application Procedures of Part 8 of the Foundations Law.

159. In its submissions in response on Question 6(b) and 6(c), DIFCA argued that the Court should not decline to answer the questions. The position, it submitted, is identical with the proposed response to Question 7. There is no reason in principle why an incorporated orphan entity could not be recognised as a Recognised Foreign Foundation or be redomiciliated into the DIFC. Whether or not that could occur in a particular case would be dependent upon the circumstances of that case following careful review by the entity's legal advisors and the DIFC authorities. Applications would need to be carefully considered on a case-by-case basis.

160. DIFCA submitted that:

> (a) whatever the position may be in some jurisdictions the Court has before it the applicable legislation in relation to Awqaf regimes in the United Arabs Emirates. It is clear from those provisions that recognition of such Awqaf as Recognised Foreign Foundations presents no difficulty.
>
> (b) this was said to apply with particular force in respect of Awqaf established under the Dubai law which in Article 52 expressly recognises the "endowment provisions" of the DIFC. As a matter of comity the same recognition should be extended by the DIFC to Awqaf established under the Dubai Law.
>
> (c) more generally the Court's answer would address the concern expressed that DIFC's wealth management structures are somehow inconsistent with the Islamic values of the region and confirm that they reflect values which date back to the words and precepts of early Islamic scholars and indeed, the Prophet (PbuH) himself as detailed in the applicant's principal submissions.

161. The threshold issue is whether this issue should be answered at all. It does not in terms address the possibility of diversity among waqf. Some, without legal personality, can be recognised as trusts. Some with legal personality can be recognised as Foundations. As a matter of general principle it can be said that there are waqfs, and it may be most waqfs, that will be capable of recognition as a trust. Similarly, many with legal personality may be able to be recognised as Foundations. However, those questions should be left to be determined on a case-by-case basis.

162. The difficulty with an affirmative answer to this question is that it may be read as an intimation that all validly constituted waqfs can be recognised as trusts or recognised as Foundations and continued as Foundations in the DIFC. DIFCA's submission in response indicating the need for careful review in relation to a waqf seeking recognition as a Foreign Foundation, illustrates the potential for misapplication of a generally affirmative answer to Question 6. Although questions of interpretation and application often overlap the issue raised by Question 6 is primarily one of application of the Trust Law and the Foundations Law.

163. Answer: The Court declines to answer Question 6.

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

164. DIFCA submitted that the Court should answer this question as follows:

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

165. In its submissions on Question 7 DIFCA referred to Articles 59, 60 and 61 of the Foundations Law as the counterparts of Articles 54 to 57 of the Foundations Law. They permit a Foundation to redomicile from the DIFC. The critical provision is said to be Article 59. DIFCA submitted that one of the conditions under which outward redomiciliation is permitted under Article 59 is the existence of approval from the authorities of the jurisdiction to which the redomiciliation is proposed and the existence of a suitable legal structure to accommodate the redomiciled Foundation. That was said to be a matter for both the relevant authorities in the jurisdiction to which redomiciliation was proposed and the Registrar in the DIFC. From the perspective of the Law of the DIFC it would be immaterial whether the new jurisdiction categorised a former Foundation as a waqf or some other type of entity.

166. ATCO in their submission said that Question 7 anticipated applications made by DIFC Foundations wishing to migrate to other jurisdictions under Article 59 which, in each case, would be considered by reference to matters of foreign procedural and foreign substantive law as set out in Articles 60 and 61 of the Foundations Law. It followed in ATCO's view that Question 7 could be answered in the affirmative provided that, in any concrete case, the statutory criteria under Articles 60 and 61 were met in an application made under Article 59 of the Foundations Law. DIFCA regarded that proviso as unnecessary but had no objection to it being included should the Court think it desirable to do so.

167. This question raises a broad issue of application. There is nothing in the terms of Article 59 which would operate to prevent redomiciliation of a Foundation to another jurisdiction. This does not involve an interpretation of the text of Articles 59, 60 or 61. It suffices to say that there is nothing in those provisions which would lead to the conclusion that in no case could a Foundation, approved by another jurisdiction for continuance as a waqf, transfer to that other jurisdiction from the DIFC. However, as with Question 6, the diversity of waqf forms and of other laws would require an evaluative consideration by the Registrar that a Foundation's proposed continuance in the other jurisdiction would not adversely affect its creditors. There is a real issue as to whether this is in truth an interpretive question. It is best resolved on a case-by-case basis perhaps noting the Court's view that there is no general prohibition against the redomiciliation of a Foundation to another jurisdiction where the Foundation would continue as a waqf.

168. Answer: The Court declines to answer Question 7.

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

169. The proposed answer to this question is "no".

170. DIFCA in its submissions referred to the Hague Convention and submitted, by reference to its content, that a DIFC trust would be accorded

recognition in any Convention country as well as any jurisdiction which, as a matter of its private international law, recognises foreign trusts. Nothing in the Trust Law suggests that such recognition is contrary to public policy (which, if it were, might attract the operation of Article 35(1) of the Law with the result that the trust was not validly established let alone prevented by it).

171. There is a short answer to that question. That is, it does not involve a matter of interpretation of any Article of the Trust Law. No particular Article is identified. The answer to the question cannot be known because it would depend ultimately upon the laws of other jurisdictions.

172. Answer: The Court declines to answer Question 8.

Question 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?

173. The answer proposed to Question 9 by DIFCA is:

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

174. DIFCA acknowledged that the jurisdiction of the Court is limited to the interpretation of Articles of the Laws of the DIFC. Its proposed answer to the question was formulated to try to bring it within jurisdiction.

175. DIFCA referred to the legislative authority of the DIFC in relation to civil and commercial laws derived from Article 121 of the UAE Federal Constitution, the establishment of Financial Free Zones provided for by Federal Law No 8 of 2004 Regarding the Financial Free Zones, and Federal Decree No 35 of 2004 which established the DIFC. DIFCA also referred to Law No 9 of 2004 in respect of the DIFC providing for the President to submit proposed Centre laws to the Ruler for enactment and to issue Centre regulations. The legislative scheme for the law making power of the DIFC and corresponding provisions which established the ADGM were said necessarily to proceed on the basis that the Trust Law and the Foundations Law (and their ADGM counterparts) are civil and commercial laws for the purposes of Article 3(2) of Federal Law No 8 of 2004 Regarding the Financial Free Zones.

176. The UAE forced heirship provisions apply only to property owned by a deceased person who is either a UAE national or a Muslim at the date of death or during any applicable "death illness". That term is said to be broadly equivalent to the English concept of testamentary incapacity. One third of the estate is not subject to Shari'a forced heirship in any event. It was submitted by DIFCA that a Muslim can make a gift of any property during his or her lifetime provided that it is an absolute gift. As a result, endowment of a Foundation or trustees with assets by a healthy founder or settlor is permissible as recognised in National and Emirate laws.

177. Reference was then made in the submissions to Article 361 of the Law of Personal Status, which provides:

> **"Article 361**
>
> Shall be considered void, every fraud to the provisions governing inheritance by way of sale, donation, testament or other dispositions."

178. This is the English translation of Article 361 on the UAE Ministry of Justice website. DIFCA submitted that precisely how that Article (or its Arabic version) would be interpreted in a UAE court outside the DIFC, was not within the scope of the present application. ATCO acknowledged that Question 9 does not seek an interpretation of any specific provision of the Trust Law or the Foundations Law but asks rather whether anything in either of those laws is inimical to Shari'a inheritance rules. This was said to be an important point that arises from time to time in practice when advising Muslim clients on the establishment of DIFC trusts or foundations.

179. Despite the breadth of the question, ATCO submitted that an answer can and should be given but not an answer to the question posed. Effectively what ATCO then submitted was that the Court should reframe the question to bring it within jurisdiction. It submitted that the answer should not, and need not, say "nothing in the Trust Law or Foundations Law" but should be focussed on particular provisions identified by the Court as relevant to the issue.

180. It then made submissions that a good starting point for Question 9 would be Article 9(2) of the Trust Law, by which the terms of a trust prevail over any provision of the Law save those formal and fundamental matters enumerated at Article 9(2)(a) to 9(2)(k). Mention could be made in this context of the requirement in Article 9(2)(c) and Article 35(1) that a trust and its terms and purposes cannot be contrary to "public policy in the DIFC" which it was said, does not overlap with or reflect Shari'a law rules of inheritance.

181. No similar provision is contained in the Foundations Law because the legal basis for Foundations is necessarily founded on the Law itself. Nevertheless, Article 12(1)(b) also provides that a Foundation's objects must not be contrary to DIFC public policy. Of greater relevance Articles 13 to 16 of the Foundations Law were said to carefully distinguish between heirship rights in relation to the property of a living person and inheritance rights upon death. Article 13(2)(c) provides in terms that the application of DIFC Law in regard to a Foundation or in regard to any disposition of property to or by a Foundation shall not validate any testamentary trust or disposition which is invalid according to the laws of the testator's last domicile.

182. DIFCA in its submissions in response noted and agreed with ATCO's analysis of the practical issues raised by the interplay of the DIFC Laws, the subject of the question. The question is what further elucidation the Court should provide. DIFCA submitted that the issues raised in ATCO's submission would be best resolved by adding to its proposed answer the following:

> "In particular:
>
> a. Shari'a inheritance rules do not form part of the public policy of the DIFC within the meaning of the Trust Law or the Foundations Law;
>
> b. Article 361 of the UAE Law of Personal Status does not form part of DIFC Law.
>
> c. In the case of a DIFC trust, the terms of the trust may or may not conflict with Shari'a inheritance rules. Whether it does so will depend on

the terms of the trust, and the Trust Law has no impact on the question.

d. A settlor wishing to establish a trust that will respect Shari'a inheritance rules in its operation will be able to do so.

e. No issue arises as regards the validity of prior dispositions to a trustee to be held by the trustee on trust during the lifetime of the deceased (apart from any period of death illness); and

f. A testamentary disposition to trustees of a trust or a Foundation contrary to Shari'a inheritance rules raises no issue under the Trust Law or the Foundations Law. It may however raise an issue of foreign law (including the law of other parts of the United Arab Emirates) where that law is the applicable law governing the validity of the disposition and includes Shari'a inheritance rules because Article 13(2)(c) of each of the Trust Law and the Foundations Law provides that DIFC law shall not validate any testamentary trust or disposition which is invalid according to the laws of the testator's last domicile."

183. The nature of that proposed answer, with respect, throws up the problem in inviting the Court to make a general statement about the interaction between the Trust Law, the Foundations Law and the Law of Personal Status. The jurisdiction of the Court under Article 5(B)(1)(b) of the Judicial Authority Law is limited to the interpretation ". of any article of the DIFC Laws and DIFC Regulations .". The question is not framed to address that jurisdiction and the proposed answer, in its original form or as reformulated by DIFCA, would take the Court well beyond the boundaries of that jurisdiction.

184. Answer: The Court declines to answer Question 9.

Question 10: Whether an Order made in a proceeding in the Court under the Trust Law or the Foundations Law can be the subject of execution pursuant to Article 7 of Dubai Law No 12 of 2004 in respect of the Judiciary Authority Law?

185. DIFCA proposes the following answer to this question:

"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."

186. ATCO agreed with the proposed answer.

187. On its face there is no reason why the general provisions of Article 7 of the Judicial Authority Law should not apply to orders made in a proceeding in the Court under the Trust Law or the Foundations Law. The question as posed, however, does not involve the interpretation of any Article of a DIFC Law. The Court has no jurisdiction to answer this question.

188. Answer: The Court declines to answer Question 10.

Question 11: Whether any provision of the Trust Law prevents a settlor of a trust from being a shareholder or a director of a company which is trustee of the trust?

189. That question was the question the subject of the request to the Court of Appeal. The answer proposed by DIFCA to that question was:

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

190. A revised form of the question was provided to the Court of Appeal subsequently:

"Whether a settlor of a trust may be a shareholder or a director of a company which is trustee of the trust or which confers upon such a settlor an interest in the trust property?"

191. The proposed answer to the revised question was:

"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. In that capacity neither the company nor its shareholders have any interest in the trust property."

192. DIFCA submitted that the essence of the question was whether or not private trustee companies are permitted under the Trust Law. These typically take the form of companies in which the settlor is either a director or shareholder or both. It submitted that there is no restriction in the Trust Law as to who may be a trustee, although legal capacity is necessarily a requirement. Article 9(2) of the Trust Law does not limit the power of a settlor to include such a provision in a trust instrument if thought necessary. Any limitation, it was submitted, could arise only from necessary implication on the basis that its purposes were contrary to public policy in the DIFC.

193. There was said to be nothing as a matter of public policy which would require a settlor not to be involved in the administration of a trust. That is not only necessarily the case in the context of a trust created by a declaration of trust, but is sanctioned in other provisions of the Trust Law as the permissibility of indirect involvement is expressly recognised by Article 84 of the Trust Law.

194. DIFCA submitted in a similar vein that the Foundations Law expressly permits the Founder of a Foundation to serve as a member of its council and the endowments laws previously referred to permit the waqif to be involved in the administration of that waqf.

195. ATCO agreed with the answer initially proposed by DIFCA subject to the qualification in part for any company constituting a special purpose vehicle under the Prescribed Company Regulations.

196. This question of a general kind does not point to any Article for interpretation and potentially covers a wide range of factual circumstances.

This question appears not to fall within the jurisdiction of the Court. This is made clear by the form of the proposed answer. It is not expressed in terms of the interpretation of any Article but simply states "there is no legal reason .". If there were some provision of the Trust Law which it was thought might arguably have the effect of preventing a settlor of a trust from being a shareholder or a director of a company which is the trustee of the trust, that Article could have been identified and put to this Court for interpretation on that issue. That course has not been taken. As foreshadowed in the general discussion of this jurisdiction earlier in these reasons, it is not a jurisdiction to roam at large across the landscape of a DIFC Law and issue legislatively binding interpretations of the general effect of the law.

197. Answer: The Court declines to answer Question 11.

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

(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.?

198. DIFCA's proposed answer is:

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

199. ATCO agreed with the proposed answer but would omit the words "but cannot vary it" and would qualify the answer to avoid any suggestion that DIFC Law acts to correct a conflict with Shari'a law as opposed to giving effect to the settlor's intentions. In light of ATCO's submissions, DIFCA reformulated its proposed answer to read:

> "In both (a) and (b) above, the Court has power in appropriate circumstances to make such Orders so as to give effect to the Settlor's true intentions."

200. DIFCA submitted that the procedures in Articles 24 and 25 and in Article 40(8) are alternatives. Under Articles 24 and 25 a disposition can be set aside at the instance of the settlor. Under Article 40(8)(a) it can be rectified. DIFCA submitted that for present purposes it is immaterial whether there are distinctions between the approaches. The law sets out the basis on which the Court can act. DIFCA submitted that in the result a Muslim settlor desiring to make a Shari'a compliant disposition to trustees can have confidence that if, by inadvertence in drafting the necessary documentation, the disposition would not be Shari'a compliant, it could be either rectified or revoked.

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

202. ATCO agreed that the provisions of the Trust Law in Articles 24, 25 and 40 set out the basis on which the Court can act and that in every case the power to set aside or vary the trust terms as appropriate would depend upon establishing the settlor's true intentions and the mistake that operated to the requisite standard of proof. Nevertheless, ATCO submitted that the answer to Question 12 should be qualified to avoid any suggestion that DIFC Law acts to correct a conflict with Shari'a law as opposed to giving effect to the settlor's intentions - whereby the DIFC Courts should have the power to amend or vary the trust instrument to make the instrument Shari'a compliant in accordance with those expressed intentions.

203. The ATCO submission made an important point. The Trust Law does not of itself require that dispositions creating trusts or under trusts or the terms of trusts be Shari'a compliant. However, where a settlor, wishing to make a disposition that is Shari'a compliant, or to create a trust that is Shari'a compliant makes a mistake, then there is nothing in Articles 24, 25 and 40 that would preclude the Court from avoiding the disposition or varying the trust as the case may be to give effect to the settlor's true intentions.

204. It may be noted that the remedies under Articles 24 and 25 respectively provide some flexibility to the Court in determining the effect of a mistaken disposition or whether it had any effect at all. Article 28(3) allows the Court to make consequential orders upon declarations. It would be inappropriate for this Court to formulate the kinds of orders that might be made in the wide range of circumstances that could involve the application of Articles 24, 25 and 40(8)(a). The answer to the proposed question in the revised form suggested by DIFCA is therefore appropriate.

205. Answer: The Court has power in appropriate circumstances to make such orders so as to give effect to the settlor's true intentions.

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

206. DIFCA's proposed answer to that question is "No". ATCO agreed that the public policy of the DIFC does not require a trust established under the DIFC Law to be Shari'a complaint.

207. DIFCA submitted that the UAE Personal Status Law recognises the right of non-Muslims who are not UAE Nationals to make testamentary dispositions in accordance with their National Laws. Article 361, mentioned earlier in these Reasons, could not apply to a transaction by a non-Muslim who is not a UAE National, such as the settlement of a trust or the founding of a Foundation even if it affected inheritance rights. The position was said to be even clearer in relation to non-testamentary dispositions by non-Muslims who are not UAE Nationals which are not subject to any restraints under UAE Law. Public policy in the DIFC was also said to be reflected in the jurisdiction of the DIFC Courts Wills and Probate

Registry and Dubai Law which makes provision for non-Muslims to make wills in accordance with their national laws and for administration of those wills. It was said to follow that there are no public policy constraints of the nature covered by Question 13.

208. Article 9(2)(c) relevantly requires that ". the trust have a purpose that is lawful, not contrary to public policy in the DIFC, and possible to achieve". The public policy constraint is directed only to the question of the purpose of the trust. It does not go to the question of the establishment of a trust by a person who is not and has never been a Muslim.

209. Answer: The answer to Question 13 is "No".

THE ANSWERS TO THE QUESTIONS

210. For the preceding reasons the Court answers Questions 1 to 13 as follows:

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

211. Answer: Yes.

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

212. Answer: Yes.

Question 3: Whether the reference to Article 10 of the Trust Laws to the common law of trusts and principles of equity:

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

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

213. Answer: The common law of trusts and principles of equity referred to in Article 10 of the Trust Law is the common law of trusts and principles of equity as determined by the Courts of the DIFC from time to time drawing upon the common law of England and Wales and other common law jurisdictions as they see fit.

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

214. Answer: The Court declines to answer Question 4.

Question 5: Whether, if one or more suitably qualified expert(s) in Shari'a law has or have been appointed as 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?

215. Answer: Yes, but the trustee is not bound to act or rely upon such advice and must at all times act in accordance with the Trust Law, the common law and principles of equity applicable to the trust.

Question 6: Can 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 the Foundations Law as applicable:

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

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

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

216. Answer: The Court declines to answer Question 6.

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

217. Answer: The Court declines to answer Question 7.

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

218. Answer: The Court declines to answer Question 8.

Question 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?

219. Answer: The Court declines to answer Question 9.

Question 10: Whether an Order made in a proceeding in the Court under the Trust Law or the Foundations Law can be the subject of execution pursuant to Article 7 of Dubai Law No 12 of 2004 in respect of the Judiciary Authority Law?

220. Answer: The Court declines to answer Question 10.

Question 11: Whether any provision of the Trust Law prevents a settlor of a trust from being a shareholder or a director of a company which is trustee of the trust?

221. Answer: The Court declines to answer Question 11.

Question 12: Whether if a Muslim settlor expressly desires to establish a trust which is Shari'a complaint, 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 they are Shari'a compliant?

222. Answer: The Court has power in appropriate circumstances to make such orders so as to give effect to the settlor's true intentions.

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

223. Answer: The answer to Question 13 is "No".

Issued by:
Nour Hineidi
Registrar
Date of issue: 13 January 2021
Date of re-issue: 18 January 2021
At: 9am