

“DIFC Court of Appeal gives pioneering advisory judgment on trusts and foundations regimes”

The Court of Appeal of the Dubai International Financial Centre has handed down a ground-breaking advisory judgment on the interpretation of the statutory regimes in the DIFC governing trusts and foundations.

Introduction

The Dubai International Financial Centre Authority [2020] DIFC CA 002 (13 January 2021) was decided by a panel of judges with experience of common law, civil law and Shari’a traditions: Justice Robert French (the former Chief Justice of Australia); Chief Justice Zaki Azmi (the former Chief Justice of Malaysia); and H.E. Justice Ali Al Madhani (a former Judge of the onshore Dubai Courts and a long-standing Judge of the DIFC Courts).

The judgment is a binding advisory judgment in response to 13 questions put to the Court by the DIFC Authority (the government body which manages the DIFC) pursuant to an interesting statutory jurisdiction for the DIFC Court of Appeal to provide binding interpretations of DIFC legislation at the request of the Chief Justice upon the application of: (i) the

governing bodies of the DIFC; or (ii) companies and other entities established or licensed in the DIFC.

The advisory jurisdiction does not require any dispute or controversy between parties to enliven it which, as the Court of Appeal noted, makes it relatively unusual in the common law world outside relatively narrow areas of constitutional and public law. The judgment will be relevant for private wealth practitioners in the region, all practitioners in the DIFC, and those interested in the interaction between common law-style trusts, civil law-style foundations and Islamic *waqf*.

DIFC Trust Law

The DIFC Trust Law (DIFC Law No 4 of 2018) is intended to be a near complete code for trust law in the DIFC, although the law expressly provides for the “*common law of trust and principles of equity*” to supplement the Trust Law.

Interestingly, although many of the common law practitioners in the DIFC are most familiar with English trust law or systems based on English trust law, the DIFC Trust Law is primarily based



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on the provisions of the US Uniform Trust Code (the **UTC**). The UTC has been adopted by approximately one third of US States although sometimes with modifications. As a result of this, the Court of Appeal noted that decisions from US State Courts on UTC-derived legislation could be relevant to the future interpretation and application of the DIFC Trust Law.

Although the DIFC Courts and DIFC law have been very successful since their inception in attracting international commercial and financial business, there was a perception that to make the DIFC more attractive to the private wealth management industry, greater certainty

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about the operation of the DIFC Trust Law, in the form of precedents from the DIFC Courts, would be helpful.

In particular, it appears from the questions posed to the Court by the DIFC Authority that local families and advisors may have wanted more certainty about the interaction between the DIFC Trust law and Shari'a, including the Islamic analogue of the common law trust, the *waqf*. The Court provided a brief history of the *waqf*, which existed for over 500 years before the first identified English trust, and involves the privatisation of the ownership of an asset and the

socialisation of its benefits. The Court of Appeal also described some of the key features of *waqf* (translated as "endowment") which can be used for charitable purposes or for the benefit of the settlor's family.

DIFC Foundations Law

The DIFC Foundations Law (DIFC Law No 3 of 2018) was designed to provide another vehicle for wealth management based on the concept of a Foundation, a legal entity known in most continental European jurisdictions although in most cases limited to charitable purposes.

Distinctive features of the DIFC Foundations Law, noted by the DIFC Authority in its submissions, are: (i) the power of the courts to set aside transactions for mistake; (ii) the ability to compulsorily settle intra-Foundation disputes by arbitration; (iii) redomiciliation of Foundations; (iv) recognition of foreign Foundations; and (v) conversion of DIFC private companies into Foundations.

The Questions

The questions put to the Court, and the Court's answers, were as follows:

#	<u>Question</u>	<u>Discussion in Judgment</u>	<u>Answer</u>
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] to [129]	Yes
2	Whether having regard to the terms of Article 12(2) of the Foundations Law, a DIFC Foundation may hold property (other than property of the Foundation as defined in the Foundations Law) in trust under the Trust Law?	[130] to [136]	Yes
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] to [143]	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	Discussion in Judgment	Answer
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] to [148]	Court declined to answer.
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] to [153]	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.
6	Can a <i>waqf</i> 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] to [163]	Court declined to answer.
7	Can a Foundation if approved by another jurisdiction for continuance as a <i>waqf</i> , transfer to that other jurisdiction from the DIFC under Articles 59, 60 and 61 of the Foundations Law?	[164] to [168]	Court declined to answer.
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] to [172]	Court declined to answer.
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] to [184]	Court declined to answer.

#	Question	Discussion in Judgment	Answer
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] to [188]	Court declined to answer.
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] to [197]	Court declined to answer.
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] to [205]	The Court has power in appropriate circumstances to make such orders so as to give effect to the settlor's true intentions.
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] to [209]	No.

Questions answered by the Court

The answers provided by the Court are unsurprising from an orthodox common law perspective and are conservatively drawn. As a result, the DIFC Courts have retained a lot of flexibility in applying the relevant provisions as and when they arise in an actual dispute. Two answers in particular deserve some comment.

In answer to question 3 (concerning the nature of the common law and equitable

principles that the DIFC Courts will have regard to when interpreting the DIFC Trust Law), the Court of Appeal confidently declared that whilst DIFC law will have regard to English law decisions where relevant, DIFC law can and will plough its own furrow and will not simply apply English law. The presence of the former Chief Justices of Australia and Malaysia on the panel of judges that heard this matter is surely not a coincidence.

In answer to question 5 (concerning the role of a

Shari'a law expert as advisory trustee), the Court of Appeal confirmed that a trustee could have regard to the opinion of the Shari'a law expert but, in an answer that seemed to be less definitive than sought by the DIFC Authority, the Court affirmed the orthodox common law position that the trustee could not delegate his or her discretion and must at all times have regard to the requirements of the DIFC Trust Law and relevant common law and equitable principles.

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Questions not answered by the Court

Perhaps as interesting as the answers given by the Court are the questions the Court declined to answer and its reasons for doing so. For example:

1. In response to question 9 (which concerned the potential interaction between DIFC law and a UAE federal law on personal status issues for Muslims where a Muslim has transferred property to a DIFC Trust or Foundation), the Court said that the DIFC Authority's question and proposed answer "*would take the Court well beyond the boundaries*" of its jurisdiction to provide interpretations of DIFC Laws and Regulations.
2. To similar effect, in answer to question 10 (which sought clarity about the enforceability of orders made under the DIFC Trust Law pursuant to a Dubai law allowing for execution of DIFC Court orders in onshore Dubai), the Court of Appeal said that the questions as posed "*does not involve the interpretation of any Article of a DIFC Law*" and that the Court therefore had no jurisdiction to answer it.
3. In response to question 11, which asked whether any provision of the DIFC Trust Law prevents a settlor of a trust from being a shareholder or a director of a company which is trustee of the trust, the

Court of Appeal said that the advisory jurisdiction "*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*".

Outstanding issues

In addition to those questions left open by the Court, further issues relevant to the DIFC Trust and Foundations Law that may arise for authoritative determination in future cases include:

1. Does the DIFC Trust Law allow for the mandatory arbitration of trust disputes under the DIFC Trust Law or can the Court refuse to order a stay in favour of arbitration on the basis that its supervisory jurisdiction over DIFC Trusts cannot be ousted?
2. To what extent will proceedings raising issues under the DIFC Trusts and Foundation Laws be heard in private and, if heard privately, will judgments in appropriately anonymised form be made public?
3. To what extent can and will the DIFC Courts decide issues of mental capacity (an unusual topic for what is primarily a commercial court) in the context of deciding disputes under the DIFC Trusts and Foundations Laws.

Outstanding questions relevant to the advisory jurisdiction exercised in this case include:

1. Whether the Chief Justice will exercise his discretion to refer questions to the Court of Appeal on the application of private parties established or licensed in the DIFC rather than on the application of the DIFC Authority or other public institution.
2. Whether and when equivalent advisory jurisdictions in the Abu Dhabi Global Market and the Astana International Financial Centre will be invoked.

Conclusion

The judgment provides some welcome clarifications for practitioners on aspects of the DIFC Trusts and Foundations Law and is a useful primer for those unfamiliar with the jurisdiction and its trusts and foundations regimes. However, those who were looking for clear answers to questions concerning the interaction between Shari'a law and the Trusts and Foundations Law may be disappointed.

The judgment is also at least as interesting as an illustration of the sorts of questions that the DIFC Court of Appeal will and will not answer pursuant to its advisory jurisdiction.

The judgment can be viewed [here](#).